Viva Asbestos: Will this Ever Be A Class Act?

Is There A Class Action Solution Practically Available To Asbestos Personal Injury Litigation?

A Walking Tour through *Amchem* and *Ortiz*

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Amchem Products, Inc. v. Windsor, 521 U.S. 591, 117 S. Ct. 2231 (1997), [Exhibit "A"], addressed the legitimacy of a Rule 23(b)(3) class-action certification sought to achieve global settlement of current and future asbestos-related claims. *Ortiz v. Fibreboard Corp.*, 119 S. Ct. 2295 (1999), [Exhibit "B"], addressed a Rule 23(b)(1)(B) "limited fund" class certification. Both efforts ultimately failed.

I. History Of Amchem

The *Amchem* putative class encompassed potentially hundreds of thousands or millions of individuals who were or potentially may have been adversely affected by exposure to asbestos containing products manufactured by the then CCR companies.[1] After settlement negotiations involving the MDL litigation failed to reach a national settlement that would provide an alternative resolution mechanism for asbestos claims, pending and future, the CCR approached plaintiffs' attorneys to accomplish a resolution that would address their concerns with respect to pending, ("inventory"), plaintiffs and "future" plaintiffs. According to *Amchem*:

> Once negotiations seemed likely to produce an agreement purporting to bind potential plaintiffs, CCR agreed to settle, through separate agreements, the claims of plaintiffs who had already filed asbestos-related lawsuits. In one such agreement, CCR defendants promised to pay more than $200 million to gain release of the claims of numerous inventory plaintiffs. After settling the inventory claims, CCR, together with the plaintiffs' lawyers CCR had approached, launched this case, exclusively involving persons outside the MDL Panel's province-plaintiffs without already pending lawsuits.

Amchem, at 601.

This was a "settlement class action" that was not intended to be litigated.[2] There were nine lead plaintiffs designating themselves and members of their families as representatives of a class comprising all persons who had not filed an asbestos-related lawsuit against a CCR member but who had either been exposed directly or indirectly to asbestos or asbestos-containing products placed in the stream of commerce by a CCR member, or was someone whose spouse or family member had been so exposed.[3] The Court noted that "[u]ntold numbers of individuals may fall within this description." It was also noted that more than half of the named plaintiffs alleged that they or their family members already suffered various injuries while others alleged that they had not yet manifested any asbestos-related condition, but there were no sub-classes. All named plaintiffs were designated as representatives of the class as a whole.

Eventually, a class was conditionally certified under Federal Rule of Civil Procedure 23(b)(3). It was certified as an all-encompassing opt-out class with no sub- classes. It included persons occupationally exposed to CCR's asbestos-containing products and members of their families who had not filed suit as of January 15, 1993.[4] Various class members raised objections to the settlement stipulation and were granted full rights to participate in subsequent proceedings. *Amchem*, at 605. The Court approved class notice provided a three-month opt out period.

The pertinent portions of Rule 23(a) and (b), [Exhibit "C" is a copy of Rule 23 with 1966 and later comments], state:[5]

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if

(1) the class is so numerous that joinder of all members is impracticable,

(2) there are questions of law or fact common to the class,

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:…

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

The district court determined that the class satisfied Rule 23(a)(1)'s numerosity requirement. And, while the Supreme Court initially notes that this aspect is not debated, it is later noted by the Supreme Court that no one has called to their attention a settlement class "as sprawling at this one"[6]. *Amchem*, at 607 and 624.

The district court further determined that the commonality and preponderance requirements of Rule 23(a)(2) and (b)(3) were met and that the representatives were "typical" of the class as a whole. Rule 23(a)(3). As demanded by Rule 23(b)(3), the class settlement was found "superior" to "other available methods for the fair and efficient adjudication of the controversy." Finally, the district court rejected objections asserted regarding the adequacy of representation and determined that sub-classes were unnecessary in light of the ability of class members to opt out and the added cost and confusion sub-classes could involve. Rule 23(a)(4) and (c).

On appeal, the U.S. Court of Appeals for the Third Circuit reversed. Certiorari was granted and the Supreme Court of the United States affirmed, agreeing that "[t]he class certification issues are dispositive,". *Amchem*, at 612.

II. Limitation Of Application Of Rule 23

The initial portion of the Supreme Court's decision reminds us that Rule 23's requirements must be interpreted in keeping with Article III constraints and with the Rules Enabling Act which provides that "[s]uch rules shall not abridge, enlarge or modify any substantive right"[7]. *Amchem*, at 613, 28 U.S.C. 2072(b), [Exhibit "D"]. The Court then proceeds to outline the characteristics of Federal Rule 23 class actions. The brief description of the characteristics provides a good general overview and some overall insight to our current Supreme Court's views with respect to the application of the Rule as it currently exists, particularly with respect to Rule 23(a) and (b).[8]

A. Settlement Role In Class Consideration

Because there was a division in the circuits as to what role, if any, settlement may play in determining the propriety of class certification, certiorari was granted. The third circuit had previously held that a class could not be certified for settlement if it could not also be certified for trial. *In re General Motors Corp. Pickup Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768 (C.A. 3), *cert. denied*, 516 U.S. 824, 116 S. Ct. 88, 133 L. Ed. 2d 45 (1995). Others had held that settlement eliminated or reduced the need to measure a proposed class action under the Rule 23 requirements. *In re Asbestos Litigation*, 90 F.3d, at 975 (C.A. 5); *White v. National Football League*, 41 F.3d 402, 408 (C.A. 8, 1994), *cert. denied*, 515 U.S. 1137, 115 S. Ct. 2569, 132 L. Ed. 2d 821 (1995); *In re A. H. Robins Co.*, 880 F.2d 709, 740 (C.A. 4), *cert. denied sub nom.*, *Anderson v. Aetna Casualty & Surety Co.*, 493 U.S. 959, 110 S. Ct 377, 107 L. Ed. 2d (1989); *Malchman v. Davis*, 761 F.2d 893, 900 (C.A.2, 1985), *cert. denied*, 475 U.S. 1143, 103 S. Ct 1798, 90 L. Ed. 2d 343 (1986).

The Supreme Court noted that the third circuit's reversal of *Amchem* had stated that the requirements of Rule 23(a) and (b)(3) "must be satisfied without taking into account the settlement", but it was also pointed out that the third circuit had in fact closely considered the terms of the settlement when examining aspects under the case under Rule 23. *Amchem*, at 609, 619-20. Thus, it was not a shock when the Supreme Court decided that a district court in addressing a request for a "settlement-only class" certification need not inquire whether the case, if tried, would present "intractable management problems", [Rule 23(b)(3)(D)], as the proposal, if accepted, eliminates a trial. However, the Court then stressed that the other specifications of the rule "demand undiluted, even heightened, attention in the settlement context". Those other specifications are designed to protect absentees by blocking unwanted or over-broad class definitions because the certifying court will lack the opportunity to adjust the class, (as it would when a case is litigated and the court becomes informed by the proceedings as they unfold.) *Amchem,* at 620.

B. Rule 23(e) "Fairness" And Rule 23(a) And (b) Criteria

Because the district court had hinged a large portion of the certification upon the fairness of the proposed settlement, the Supreme Court next addressed the obligations of Rule 23(e) and the safeguards provided by Rule 23(a) and (b) class-qualifying criteria. Declaring that Rule 23(e) was designed as an additional requirement, not a superceding direction, the Supreme Court emphasized that Rule 23(a) and (b) class-qualifying criteria must be met and cannot be overcome by a "fairness" determination under Rule 23(e). Stating that such would disarm both the court and class counsel. Class counsel would be confined to negotiations without the threat of litigation and the court could face a bargain proffered for its approval without benefit of an adversarial investigation. Furthermore, the Supreme Court concluded: "Federal courts, in any case, lack authority to substitute for Rule 23's certification criteria a standard never adopted—that if a settlement is 'fair,' then certification is proper." *Amchem*, at 622.

C. Predominating Questions Of Law Or Fact

Historically, two factors, according to the district court, satisfied the predominance requirement of Rule 23(b)(3):

1) The asbestos exposure of the class members, and
2) The members's common interest in obtaining prompt and fair compensation while minimizing risk and transaction costs.

The settling parties also contended that the settlement's fairness was a predominating common ques-

tion over the disparate legal issue that could be crucial in litigation but transform into irrelevance in a settlement. *Amchem*, at 622.

The Supreme Court held that the predominance requirement is not met by the factors relied upon by the district court saying that the benefits that the class members might gain from "the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration,… but it is not pertinent to the predominance inquiry." Rather, the Supreme Court ruled: "That inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that *preexist any settlement*." *Amchem*, at 622-23 [emphasis added.]

Thus, while Rule 23(e) protects unnamed class members "from unjust or unfair settlements affecting their rights when the representatives become faint hearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise" (quoting 7B Wright Miller & Kane § 1797 at 340-41); the Rule 23(b)(3) predominance inquiry test whether proposed classes are sufficiently *cohesive* to warrant adjudication by representation.[9]

After once again reminding us that a common interest in a "fair compromise" cannot overcome or satisfy the predominance requirement since such an interpretation would strip it of any meaning in the settlement context, the Court then addressed the district court's reliance upon the commonality that all had been exposed to CCR supplied asbestos-containing products. Pointing out that the predominance criteria is far more demanding than the "commonality" requirement, the Court determined that given the greater number of questions peculiar to the various categories of class members and to the individuals making up each category, as well as the significance of those uncommon questions, that any over-arching dispute about the health consequences of asbestos exposure *cannot* satisfy the Rule 23(b)(3) predominance standard. The third circuit's highlighting of the lack of cohesion in the class was then outlined:

1) Exposure to different asbestos-containing products by different class members.
2) Different exposures for different amounts of time.
3) Different ways of exposure to different products for different amounts of time.
4) Different exposures to different products for different amounts of time in different ways over different time frames.
5) Some suffer no physical injury at all.
6) Some have only asymptomatic pleural changes.
7) Some suffer from lung cancer, disabling asbestosis, or mesothelioma.
8) Each has a different cigarette smoking history.[10]
9) Exposure only plaintiffs particularly have little in common with each other or with presently injured class members.
10) It is unclear whether exposure only plaintiffs will contract any asbestos-related disease, or what that disease will be if they do.
11) Exposure only plaintiffs will incur different medical expenses as their surveillance and treatment will depend upon their particular circumstances and particular medical histories.
12) The differences in the applicable state law to different cases compounds these differences.

Ultimately, the Supreme Court concluded: "That certification cannot be upheld, for it rests on a conception of Rule 23(b)(3)'s predominance requirement irreconcilable with the rule's design." *Amchem*, at 624-25.

D. Meeting Rule 23(a)(4)'s Requirement–Named Parties "Will Fairly and Adequately Protect the Interests of the Class"

The Supreme Court pointed out that class representatives must have the same interests and suffer the same injury as the members of the class and that to some extent, the adequacy of representation requirement merges with the commonality and typicality requirement. In this case the named parties had a range of medical conditions and sought to act on behalf of a "single giant class rather than on behalf of discrete sub-classes." In the Supreme Court's view, the interests of those within the single class were not aligned, particularly the goals of the currently injured (immediate generous payments) and the goal of the exposure-only plaintiffs (inflation-protected fund for the future). This disparity coupled with the diversity within each category did not become insignificant by a finding of the district court that the CCR's assets were adequate to pay claims under the terms of the settlement.[11] Finally, the Supreme Court, quite tellingly, concluded that the third circuit was "on the mark" when it found no assurance that the plaintiffs operated under a proper understanding of their representational responsibilities was on the mark. *Amchem*, at 625-28.

E. Adequate Notice Requirement

The Supreme Court determined that they need not rule definitively on the notice given in the case because of the conclusion that the class could not satisfy the requirements of common issue predominance and adequacy of representation. But the Court raised constitutional reservations with respect to how persons who may not even know of an existing or potential claim could have the information or foresight needed to intelligently decide whether or not to opt out. Indeed, the Court noted that large numbers of people may not even be aware of or alerted to their class membership. For example, spouses and children, (not to mention actual workers), may not currently know anything of asbestos exposures. *Amchem*, at 628.

III. History: *Ortiz v. Fibreboard*

Unlike *Amchem*, *Ortiz* was a "limited fund" Rule 23(b)(1)(B) class action. Fibreboard Corporation had been a defendant in one of the first actions for asbestos personal injury filed in the United States District Court for the Eastern District of Texas, the birthplace of *Ortiz*. By the 1990's, Fibreboard was litigating on two fronts: with plaintiffs who were suing for personal injury claims and its insurers for indemnity. While the number of personal injury claims were climbing, Fibreboard's insurance indemnity dollars were depleting. During 1956 through March of 1959, Fibreboard had coverages with Continental Casualty Company and Pacific Indemnity Company that provided general liability limits of $1 million per occurrence, $500,000.00 per claim, and with no aggregate limit. By 1990, a California state trial court had ruled that Continental and Pacific were responsible to indemnify any claim by a claimant exposed to Fibreboard asbestos-containing products prior to their policies' respective expiration dates. The carriers were also required to pay the full costs of defense. The carriers appealed.

During the period of mounting numbers of claimants and coverage battles, Fibreboard had designed an innovative settlement method by which they would pay a plaintiff a portion of the settlement in current dollars and assign the balance against its carriers. Eventually, Fibreboard's situation was such that the complete settlement consisted of an assignment. Not surprisingly, plaintiffs demanded a premium for "possible dollars". Not surprisingly, Continental challenged Fibreboard's right to make these unilateral assignments. In 1992, a California state court ruled in Fibreboard's favor. Continental appealed. By December of 1992, settlement by assignment brought Fibreboard's deferred settlement obligations to more than $1.2 billion (Fibrebucks?), contingent upon prevailing on appeals in the coverage and assignment litigations. *Ortiz*, at 2304.

In early 1993, Continental joined the global settlement negotiations, having been motivated by its

losses at the trial court level that left them facing the possibility of unlimited exposure. Continental insisted that any settlement would have to involve "total peace" on all existing and future known and unknown liability. Obviously, a mandatory class action seemed a feasible solution. Eventually, to facilitate settlement, some 45,000 pending claims (including substantially all of those filed by one of the plaintiffs' firms) were settled, subject to either a global settlement or Fibreboard's success in the coverage litigation. The settlement amounts per claim for the "inventory" cases were higher than average. One-half was due on closing and the remainder when the contingency became operative. That agreement was the model for settling "inventory" claims of other firms. *Ortiz*, at 2304.

The consolidated coverage case appeal was to be heard on August 27, 1993. This motivated the parties to negotiate more vigorously and at about midnight before the argument, "in a coffee shop in Tyler, Texas" (clearly avoiding the traditional "lobster lunch"), a "Global Settlement Agreement" involving 1.535 billion dollars. Of this sum, Continental and Pacific would provide $1.525 billion, Fibreboard's other carriers would contribute $9.5 million and Fibreboard would provide $500,000.00. Additionally, certain unsettled present claims were to be identified and an amount set aside of the then unspecified funds was designated to address them with any residual sums to be transferred to the class trust fund. Finally, as a precaution against a failure of the Global Settlement Agreement, plaintiffs insisted Fibreboard, Continental, and Pacific settle the coverage dispute. Ultimately, the two carriers entered into the "Trilateral Settlement Agreement" agreeing to provide Fibreboard $2 billion to defend against asbestos claimants and to pay prevailing claimants should the Global Settlement Agreement fail.

The Global Settlement Agreement provided for the establishment of a trust to process and pay class members' claims. Claimants would be required to attempt settlement with the trust, if that initially failed they would proceed to mediation, arbitration, and then a mandatory settlement conference. If that failed, claimants could go to court, subject to a $500,000.00 per claim limit—punitive damages and pre-judgment interests were precluded. Judgments secured in this manner would be paid out over a five to ten year period, while claims resolved without litigation would be paid over three years. The trust also had a spendthrift provision and provided that more serious claims were to be paid first in a shortfall year.

The district court held a Rule 23(e) fairness hearing and approved the settlement as "fair, adequate, and reasonable". The district court certified the class under Rule 23(b)(1)(B), having also been satisfied that the requirements of Rule 23(a) were met. The mandatory class was certified citing the risk that Fibreboard could totally or partially lose on appeal of the coverage case or lose the assignment/settlement dispute thus leaving it without funds to pay all claims. The district court reasoned that allowing individual adjudications, (or opt-out), would destroy the insurance coverage dispute compromise that created the settlement fund. Thus, a non-mandatory class would expose the class members to the very risk that the settlement sought to address. Intervener/objectors contended that the absence of a "limited fund" precluded a mandatory class under Rule 23(b)(1)(B). The trial court ruled that in his view the rule was not so restricted but if it was the case would still qualify because it was a "limited fund" from a practical perspective. The pertinent portions of Rule 23 provide, (Rule 23 with 1966 and later comments is Exhibit "C"):

> Rule 23. Class Actions
>
> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if
>
> (1) the class is so numerous that joinder of all members is impracticable,
>
> (2) there are questions of law or fact common to the class,

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of…

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or…

(C) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions….

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

The Court of Appeals for the Fifth Circuit affirmed, finding that there was commonality in class members in the settlement funds, that the representative plaintiffs were sufficiently typical and that the class certification on a "limited fund" basis was appropriate based on the threat to "the ability of other members of the class to receive full payment for their injuries from Fibreboard's limited assets." *Ortiz,* at 2306. Following *Amchem*, the Supreme Court vacated the fifth circuit's judgment and remanded for further considerations in light of *Amchem*. Once again, the fifth circuit affirmed, distinguishing *Ortiz* from *Amchem* on the grounds that the *Ortiz* class was a Rule 23(b)(1)(B) class rather than (b)(3) class and because *Ortiz* did not allocate awards according to injury. The fifth circuit was also satisfied that the District Court's extensive findings supporting its Rule 23(a) determinations were adequate. *Ortiz*, at 2306-07.

A. Restraints On Rule 23 Certification

As in *Amchem*, the Court again reminds us of the limitations and constraints imposed by Article III, the Rules Enabling Act, and tradition. *Ortiz*, at 2307. Unlike *Amchem*, however, *Ortiz* reveals how strongly the Court feels that the Rule should not be broadened:

> The nub of our position is that we are bound to follow Rule 23 as we understood it upon its adoption, and that we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act. Although, as the dissent notes, post, at 2331, the revised text adopted in 1966 was understood (somewhat cautiously) to authorize the courts to provide for class treatment of mass tort litigation, it was also the Court's understanding that the Rule's growing edge for that purpose would be the opt-out class authorized by subdivision (b)(3), not the mandatory class under subdivision (b)(1)(B), see supra, at 2313. *While we have not ruled out the possibility under the present Rule of a mandatory class to deal with mass tort litigation on a limited fund rationale, we are not free to dispense with the safeguards that have protected mandatory class members under that theory traditionally.*[12]

Ortiz, at 2322 [emphasis added.]

Also, as in *Amchem*, the Court engages in a general discussion concerning commonality and typicality, sub-classes, fairness, and a mandatory "limited fund" class under Rule 23(b)(1)(B). As in *Amchem*, this general discussion provides a good overview and some general insight as to the current Supreme Court's views on these topics and sets the stage for their rulings. *Ortiz,* at 2308-11.

B. Limited Fund?

Among other things, the Court outlines "common characteristics" in the pedigree of limited fund class action proceedings. The first characteristic is that when the totals of the aggregated liquidated claims and the fund available to address them is set definitely at their respective maximums there is a demonstration of the inadequacy of the available funds to pay all claims. In other words, the insufficiency or inadequacy of the funds justified proportional spreading among those to be potentially affected rather than allowing early pursuers to feast while those who came later experience famine. Second, the entirety of the inadequate fund was to be devoted to the overwhelming claims and, third, the claimants, who all had a common theory of recovery, were treated equitably among themselves. The cases assume that the class will constitute everyone who could state a claim on a single or repeated set of facts with a common theory of recovery to be satisfied from a common source, the limited fund. It was anticipated that everyone would participate and equitably sustain the shortfall. In essence:

> …mandatory class treatment through representative actions on a limited fund theory was justified with reference to a "fund" with a definitely ascertained limit, all of which would be distributed to satisfy all those with liquidated claims based on a common theory of liability, by an equitable, pro rata distribution.

Ortiz, at 2311-12.

The Supreme Court acknowledges that a (b(1)(B) class would have the above characteristics to satisfy the limited fund rationale. After posing the question as to how far those characteristics are necessary for limited fund treatment, the Court notes that it cannot resolve all the details of a (b)(1)(B) limited fund in this case and, thus, cannot address the ultimate question of whether settlements of vast numbers of tort actions are amenable to mandatory class treatment. As pointed out above, the Court stays the prudent course that when a Rule 23(b)(1)(B) class is addressed, one should stay close to the historical model. This is consistent with the Advisory Committee's expressions and reduces the likelihood of a conflict with the Rule Enabling Act as well as avoiding serious constitutional concerns (Seventh Amendment, Due Process)[13], especially when a case seeks to address future liability in a settlement-only setting. The Court does not decide the ultimate question of whether Rule 23(b)(1)(B) may ever be used to aggregate individual tort claims. Nevertheless, the Court does point out the following: "But we do recognize that the Committee would have thought such an application of the Rule surprising, and take this as a good reason to limit any surprise by presuming that the Rule's historical antecedents identify requirements." *Ortiz*, at 1314.

As in *Amchem*, the Court in *Ortiz* points out that a fairness hearing under Rule 23(e) is no substitute for rigorous adherence and heightened attention to the provisions of the rule designed to protect absentees. Thus, the settlement agreement is not only to be reviewed, but evidence to ascertain the limit and sufficiency of the fund, "with support in findings of fact following a proceeding in which the evidence is subject to challenge". *Ortiz*, at 2316. And, while the Supreme Court deems it premature to decide the appropriate standard for determining whether a fund is indeed "limited", the Court points out two standards presently utilized (neither of which was met here):

1) The class proponents must demonstrate that adjudication of individual claims will inescapably

compromise the claims of absent class members. *In re Northern Dist. of California, Dalkon Shield IUD Product Liability Litigation*, 693 F.2d 847, 852 (C.A. 9 1982), *cert. denied sub nom.*

2) There is a substantial probability that if more damages are awarded, the claims of earlier litigants would exhaust the defendant's assets. *In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718, 726 (E.D.N.Y. 1983), *aff'd.* 818 F.2d 145 (C.A.2 1987), *cert. denied sub nom.*; *Fraticelli v. Dow Chemical Co.*, 484 U.S. 1004, 108 S. Ct. 695, 98 L. Ed. 2d 648 (1988). *Ortiz*, at 2316.

The Court is critical of the district court not undertaking a computation of the amount of the total claim(s) presented and for not requiring a demonstration that the upper limit of the fund itself was insufficient. Rather, the district court, (and the court of appeals), "simply accepted the $2 billion Trilateral Settlement Agreement figure as representing the maximum the insurance companies could be required to pay…" *Ortiz*, at 2316-18. The Court noted that while one can occasionally adopt the settlement value as the appropriate value where insurance coverage is disputed, it is not acceptable here. The Supreme Court further observed that such an assumption is probably not appropriate in any class action settlement with the potential for gigantic fees. *Ortiz*, at 2317. Focusing on this case, the Supreme Court pointed out that the plaintiffs' lawyers had also negotiated a separate settlement of some 45,000 claims whose full resolution was contingent upon a successful global settlement or resolution of the insurance coverage dispute. Thus, according to the Court, class counsel had a great incentive to reach a settlement that might survive Rule 23(e)'s muster rather than the best possible arrangement for the global settlement class. In settings such as this, objecting an unidentified class members alike are entitled to specific evidentiary findings independent of the agreement of defendants and conflicting class counsel. *Ortiz*, at 2318.

C. Fund Size

The Court noted that it was quite a departure from the limited fund pedigree that Fibreboard was allowed to retain virtually its entire net worth. Such an arrangement, on its face, seems irreconcilable with denying class members an opt out opportunity, denying or limiting jury trial rights, capping damages, and delaying payments. The Court states that in light of its other rulings it need not decide how close to insolvency a limited fund defendant must be to qualify, however, the Court points out that amendments to the Bankruptcy Code enable a debtor in Chapter 11, in certain circumstances, to establish a trust toward which the debtor may channel future asbestos-related liability. The Court also cautioned that allowing a limited fund certification with a diminimus contribution by a defendant could potentially allow defendants to reach settlements that would, in all likelihood, significantly undermine the protections for creditors built into the Bankruptcy Code. *Ortiz*, at 2321.

D. Equity Among Class Members

According to *Ortiz*, equity among class members raises two issues, the inclusiveness of a class and the fairness of the distributions to the members. On each of these, the Supreme Court found that the certification for settlement fell short. The Court observed that up to one-third of all of the Fibreboard claims may have been excluded by definition. And, while the Court pointed out that it is not resolved as to how far a class may be depleted by prior dispositions and still qualify as a mandatory limited class fund, there could be no question that such a settlement class would not quality when in the very negotiations aimed at class settlement, class counsel agree to exclude what could turn out to be as much a third of the claimants that negotiators initially thought might be involved, a substantial number of whom class counsel represented. The Court also noted that the "inventory" claims appeared to have obtained better settlement terms than the class members. *Ortiz*, at 2318 and 2319.

Concerning the second element of equity, fairness of distribution of the fund among class members, the Court noted that fair treatment in the pedigree cases was usually assured by pro rata distribution of the limited fund. While such simple equity and easy math may not be easily calculable in a settlement covering un-

proven present claims and potential future claims, such a settlement, according to the Court, must seek equity by providing for procedures to resolve difficult issues relating to differently situated claimants with fairness among themselves. Once again, as in *Amchem*, the Court points out the differences between various class members or groups ranging from present and future claims to exposure-only claims and pre-1959, (insurance covered), claims and post-1959, (uncovered), claims. Such circumstances require that there be divisions made of homogeneous sub-classes under Rule 23(c)(4)(B). Each of the sub-classes should have separate representation to eliminate conflicting interest of counsel during the negotiation process. *Ortiz*, at 2319-20.

E. Rule 23(a) And Rule 23(e)

Once again, as in *Amchem*, the Court views the proponents of the settlements as attempting to rewrite Rule 23 to ignore the fact that Rule 23(a) and (b) protects against inequity and potential inequity at the pre-certification stage independently of the post-certification fairness review under Rule 23(e) that a settlement is fair in an overriding sense. Once again, the Court makes its views clear that: "A fairness hearing under subdivision (e) can no more swallow the preceding protective requirements of Rule 23 in a subdivision (b)(1)(B) action than in one under subdivision (b)(3)." *Ortiz*, at 2320-21.

F. Can a Limited Fund Be Done?

Basically, the Supreme Court answers that question this way:

> In sum, the applicability of Rule 23(b)(1)(B) to a fund and plan purporting to liquidate actual and potential tort claims is subject to question, and its purported application in this case was in any event improper. The Advisory Committee did not envision mandatory class actions in cases like this one, and both the Rules Enabling Act and the policy of avoiding serious constitutional issues counsel against leniency in recognizing mandatory limited fund actions in circumstances markedly different from the traditional paradigm.

Ortiz, At 2324.

The Court, however, does go on to provide that if one does assume that a limited fund rationale could somehow be applied to a settlement class of tort claimants it would be:

1. Essential that the fund be shown to be limited independently of the agreement of the parties to the action, and
2. Equally essential under Rule 23(a) and (b)(1)(B) that the class include all those with claims unsatisfied at the time of the settlement negotiations, with inter-class conflicts addressed by recognizing independently represented classes.

Ortiz, at 2323.

Clearly, the *Ortiz* class certification met neither of these requirements.

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City of Dawson v. Columbia Ave. Saving Fund, 197 U.S. 178 (1905)

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Fed. R. Civ. P. 23(b)(2)
Fed. R. Civ. P. 23(b)(3)
Fed. R. Civ. P. 23(b)(3)(D)
Fed. R. Civ. P. 23(c)(2)
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Exhibit "A"

(Cite as: 521 U.S. 591, 117 S. Ct. 2231)

Amchem Products, Inc., Et Al., Petitioners,
V.
George Windsor Et Al.

No. 96-270.
Supreme Court of the United States
Argued Feb. 18, 1997.
Decided June 25, 1997.

Asbestos products manufacturers who were members of Center for Claims Resolution (CCR), and whose stipulation of proposed global settlement of claims by persons exposed to asbestos had been court-approved, moved to enjoin actions against them by individuals who failed to timely opt out of class. The United States District Court for the Eastern District of Pennsylvania, Lowell A. Reed, Jr., J., 878 F.Supp. 716, granted injunction under All-Writs Act and Anti- Injunction Act. Parties objecting to class certification appealed, and the Court of Appeals for the Third Circuit, 83 F.3d 610, vacated and remanded with directions to decertify class. Certiorari was granted, and the Supreme Court, Justice Ginsburg, held that: (1) district court faced with request for settlement-only class certification need not inquire whether case would present intractable problems of trial management, but other requirements for certification must still be satisfied, abrogating In re Asbestos Litigation, 90 F.3d 963, White v. National Football League, 41 F.3d 402, In re A.H. Robins Co., 880 F.2d 709, and Malchman v. Davis, 761 F.2d 893, and (2) requirements for class certification of commonality of issues of fact and law and adequacy of representation were not met.

Affirmed.

Justice Breyer filed an opinion concurring in part and dissenting in part in which Justice Stevens joined.

Justice O'Connor took no part in the consideration or decision of the case.

(Key numbers and synopsis have been deleted)
83 F.3d 610, affirmed.

GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. BREYER, J., filed an opinion concurring in part and dissenting in part, in which ***596** STEVENS, J., joined. O'CONNOR, J., took no part in the consideration or decision of the case.

Stephen M. Shapiro, for petitioners.

Laurence H. Tribe, Cambridge, MA, for respondents.

***597** Justice GINSBURG delivered the opinion of the Court.

This case concerns the legitimacy under Rule 23 of the Federal Rules of Civil Procedure of a class-action certification sought to achieve global settlement of current and future asbestos-related claims. The class proposed for certification potentially encompasses hundreds of thousands, perhaps millions, of individuals tied together by this commonality: each was, or some day may be, adversely affected by past exposure to asbestos products manufactured by one or more of 20 companies. Those companies, defendants in the lower courts, are petitioners here.

The United States District Court for the Eastern District of Pennsylvania certified the class for settlement only, finding that the proposed settlement was fair and that representation and notice had been adequate. That court enjoined class members from separately pursuing asbestos-related personal- injury suits in any court, federal or state, pending the issuance of a final order. The Court of Appeals for the Third Circuit vacated the District Court's orders, holding that the class certification failed to satisfy Rule 23's requirements in several critical respects. We affirm the Court of Appeals' judgment.

I
A

The settlement-class certification we confront evolved in response to an asbestos-litigation crisis. See Georgine v. Amchem Products, Inc., 83 F.3d 610, 618, and n. 2 (C.A.3 1996) (citing commentary). A United States Judicial Conference ***598** Ad Hoc Committee on Asbestos Litigation, appointed by THE CHIEF JUSTICE in September 1990, described facets of the problem in a 1991 report:

> "[This] is a tale of danger known in the 1930s, exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits beginning in the 1970s. On the basis of past and current filing data, and because of a latency period that may last as long as 40 years for some asbestos related diseases, a continuing stream of claims can be expected. The final toll of asbestos related injuries is unknown. Predictions have been made of 200,000 asbestos disease deaths before the year 2000 and as many as 265,000 by the year 2015.
> "The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state

courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction **2238 costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether." Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation 2-3 (Mar.1991).

Real reform, the report concluded, required federal legislation creating a national asbestos dispute-resolution scheme. See id., at 3, 27-35; see also id., at 42 (dissenting statement of Hogan, J.) (agreeing that "a national solution is the only answer" and suggesting "passage by Congress of an administrative claims procedure similar to the Black Lung legislation"). As recommended by the Ad Hoc Committee, the Judicial Conference of the United States urged Congress to act. See Report of the Proceedings of the Judicial Conference of the United States 33 (Mar. 12, 1991). To this date, no congressional response has emerged.

*599 In the face of legislative inaction, the federal courts—lacking authority to replace state tort systems with a national toxic tort compensation regime—endeavored to work with the procedural tools available to improve management of federal asbestos litigation. Eight federal judges, experienced in the superintendence of asbestos cases, urged the Judicial Panel on Multidistrict Litigation (MDL Panel), to consolidate in a single district all asbestos complaints then pending in federal courts. Accepting the recommendation, the MDL Panel transferred all asbestos cases then filed, but not yet on trial in federal courts to a single district, the United States District Court for the Eastern District of Pennsylvania; pursuant to the transfer order, the collected cases were consolidated for pretrial proceedings before Judge Weiner. See In re Asbestos Products Liability Litigation (No. VI), 771 F.Supp. 415, 422-424 (Jud.Pan.Mult.Lit. 1991). [FN1] The order aggregated pending cases only; no authority resides in the MDL Panel to license for consolidated proceedings claims not yet filed.

FN1. In a series of orders, the MDL Panel had previously denied other asbestos-case transfer requests. See In re Asbestos and Asbestos Insulation Material Products Liability Litigation, 431 F.Supp. 906, 910 (JPML 1977); In re Asbestos Products Liability Litigation (No. II), MDL-416 (JPML Mar. 13, 1980) (unpublished order); In re Asbestos School Products Liability Litigation, 606 F.Supp. 713, 714 (JPML 1985); In re Ship Asbestos Products Liability Litigation, MDL-676 (JPML Feb. 4, 1986) (unpublished order); In re Leon Blair Asbestos Products Liability Litigation, MDL-702 (JPML Feb. 6, 1987) (unpublished order).

B

After the consolidation, attorneys for plaintiffs and defendants formed separate steering committees and began settlement negotiations. Ronald L. Motley and Gene Locks—later appointed, along with Motley's law partner Joseph F. Rice, to represent the plaintiff class in this action—co-chaired the Plaintiffs' Steering Committee. Counsel for the Center for Claims Resolution (CCR), the consortium of *600 20 former asbestos manufacturers now before us as petitioners, participated in the Defendants' Steering Committee. [FN2] Although the MDL order collected, transferred, and consolidated only cases already commenced in federal courts, settlement negotiations included efforts to find a "means of resolving… future cases." Record, Doc. 3, p. 2 (Memorandum in Support of Joint Motion for Conditional Class Certification); see also Georgine v. Amchem Products, Inc., 157 F.R.D. 246, 266 (E.D.Pa.1994) ("primary purpose of the settlement talks in the consolidated MDL litigation was to craft a national settlement that would provide an alternative resolution mechanism for asbestos claims," including claims that might be filed in the future).

FN2. The CCR Companies are Amchem Products, Inc.; A.P. Green Industries, Inc.; Armstrong World Industries, Inc.; Asbestos Claims Management Corp.; Certainteed Corp.; C.E. Thurston & Sons, Inc.; Dana Corp.; Ferodo America, Inc.; Flexitallic, Inc.; GAF Building Materials, Inc.; I.U. North America, Inc.; Maremont Corp.; National Services Industries, Inc.; Nosroc Corp.; Pfizer Inc.; Quigley Co.; Shook & FletcherInsulation Co.; T & N, PLC; Union Carbide Corp.; and United States Gypsum Co. All of the CCR petitioners stopped manufacturing asbestos products around 1975.

In November 1991, the Defendants' Steering Committee made an offer designed to settle all pending and future asbestos cases by providing a fund for distribution by plaintiffs' **2239 counsel among asbestos-exposed individuals. The Plaintiffs' Steering Committee rejected this offer, and negotiations fell apart. CCR, however, continued to pursue "a workable administrative system for the handling of future claims." Id., at 270.

To that end, CCR counsel approached the lawyers who had headed the Plaintiffs' Steering Committee in the unsuccessful negotiations, and a new round of negotiations began; that round yielded the mass settlement agreement now in controversy. At the time, the former heads of the Plaintiffs' Steering Committee represented thousands of plaintiffs with then-pending asbestos- related claims—claimants the parties *601 to this suit call "inventory" plaintiffs. CCR indicated in these discussions that it would resist settlement of inventory cases absent "some kind of protection for the future." Id., at 294; see also id., at 295 (CCR communicated to the inventory plaintiffs' attorneys that once the CCR defendants saw a rational way to deal with claims expected to be filed in the future, those defendants would be prepared to address the settlement of pending cases).

Settlement talks thus concentrated on devising an administrative scheme for disposition of asbestos claims not yet in litigation. In these negotiations, counsel for masses of inventory plaintiffs endeavored to represent the interests of the anticipated future claimants, although those lawyers then had no attorney-client relationship with such claimants.

Once negotiations seemed likely to produce an agreement purporting to bind potential plaintiffs, CCR agreed to settle, through separate agreements, the claims of plaintiffs who had already filed asbestos-related lawsuits. In one such agreement, CCR defendants promised to pay more than $200 million to gain release of the claims of numerous inventory plaintiffs. After settling the inventory claims, CCR, together with the plaintiffs' lawyers CCR had approached, launched this case, exclusively involving persons outside the MDL Panel's province—plaintiffs without already pending lawsuits. [FN3]

> FN3. It is basic to comprehension of this proceeding to notice that no transferred case is included in the settlement at issue, and no case covered by the settlement existed as a civil action at the time of the MDL Panel transfer.

C

The class action thus instituted was not intended to be litigated. Rather, within the space of a single day, January 15, 1993, the settling parties—CCR defendants and the representatives of the plaintiff class described below— presented to the District Court a complaint, an answer, a proposed***602** settlement agreement, and a joint motion for conditional class certification. [FN4]

> FN4. Also on the same day, the CCR defendants filed a third-party action against their insurers, seeking a declaratory judgment holding the insurers liable for the costs of the settlement. The insurance litigation, upon which implementation of the settlement is conditioned, is still pending in the District Court. See, e.g., Georgine v. Amchem Prods., Inc., No. 93- 0215, 1994 WL 502475 (E.D.Pa., Sept.2, 1994) (denying motion of insurers to compel discovery).

The complaint identified nine lead plaintiffs, designating them and members of their families as representatives of a class comprising all persons who had not filed an asbestos-related lawsuit against a CCR defendant as of the date the class action commenced, but who (1) had been exposed—occupationally or through the occupational exposure of a spouse or household member—to asbestos or products containing asbestos attributable to a CCR defendant, or (2) whose spouse or family member had been so exposed. [FN5] Untold numbers of individuals ****2240** may fall within this description. All named plaintiffs alleged that they or a member of their family had been exposed to asbestos- containing products of ***603** CCR defendants. More than half of the named plaintiffs alleged that they or their family members had already suffered various physical injuries as a result of the exposure. The others alleged that they had not yet manifested any asbestos-related condition. The complaint delineated no subclasses; all named plaintiffs were designated as representatives of the class as a whole.

> FN5. The complaint defines the class as follows: "(a) All persons (or their legal representatives) who have been exposed in the United States or its territories (or while working aboard U.S. military, merchant, or passenger ships), either occupationally or through the occupational exposure of a spouse or household member, to asbestos or to asbestos-containing products for which one or more of the Defendants may bear legal liability and who, as of January 15, 1993, reside in the United States or its territories, and who have not, as of January 15, 1993, filed a lawsuit for asbestos-related personal injury, or damage, or death in any state or federal court against the Defendant(s) (or against entities for whose actions or omissions the Defendant(s) bear legal liability) "(b) All spouses, parents, children, and other relatives (or their legal representatives) of the class members described in paragraph (a) above who have not, as of January 15, 1993, filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) above in any state or federal court against the Defendant(s) (or against entities for whose actions or omissions the Defendant(s) bear legal liability)." 1 App. 13-14.

The complaint invoked the District Court's diversity jurisdiction and asserted various state-law claims for relief, including (1) negligent failure to warn, (2) strict liability, (3) breach of express and implied warranty, (4) negligent infliction of emotional distress, (5) enhanced risk of disease, (6) medical monitoring, and (7) civil conspiracy. Each plaintiff requested unspecified damages in excess of $100,000. CCR defendants' answer denied the principal allegations of the complaint and asserted 11 affirmative defenses.

A stipulation of settlement accompanied the pleadings; it proposed to settle, and to preclude nearly all class members from litigating against CCR companies, all claims not filed before January 15, 1993, involving compensation for present and future asbestos-related personal injury or death. An exhaustive document exceeding 100 pages, the stipulation presents in detail an administrative mechanism and a schedule of payments to compensate class members who meet defined asbestos-exposure and medical requirements. The stipulation describes four categories of com-

pensable disease: mesothelioma; lung cancer; certain "other cancers" (colon-rectal, laryngeal, esophageal, and stomach cancer); and "non-malignant conditions" (asbestosis and bilateral pleural thickening). Persons with "exceptional" medical claims—claims that do not fall within the four described diagnostic categories—may in some instances qualify for compensation, but the settlement caps the number of "exceptional" claims CCR must cover.

For each qualifying disease category, the stipulation specifies the range of damages CCR will pay to qualifying claimants. ***604** Payments under the settlement are not adjustable for inflation. Mesothelioma claimants—the most highly compensated category—are scheduled to receive between $20,000 and $200,000. The stipulation provides that CCR is to propose the level of compensation within the prescribed ranges; it also establishes procedures to resolve disputes over medical diagnoses and levels of compensation.

Compensation above the fixed ranges may be obtained for "extraordinary" claims. But the settlement places both numerical caps and dollar limits on such claims. [FN6] The settlement also imposes "case flow maximums," which cap the number of claims payable for each disease in a given year.

> FN6. Only three percent of the qualified mesothelioma, lung cancer, and "other cancer" claims, and only one percent of the total number of qualified "non-malignant condition" claims can be designated "extraordinary." Average expenditures are specified for claims found "extraordinary"; mesothelioma victims with compensable extraordinary claims, for example, receive, on average, $300,000.

Class members are to receive no compensation for certain kinds of claims, even if otherwise applicable state law recognizes such claims. Claims that garner no compensation under the settlement include claims by family members of asbestos-exposed individuals for loss of consortium, and claims by so-called "exposure-only" plaintiffs for increased risk of cancer, fear of future asbestos-related injury, and medical monitoring. "Pleural" claims, which might be asserted by persons with asbestos-related plaques on their lungs but no accompanying physical impairment, are also excluded. Although not entitled to present compensation, exposure-only claimants and pleural claimants may qualify for benefits when and if they develop a compensable disease and meet the relevant exposure and medical criteria. Defendants forgo defenses ****2241** to liability, including statute of limitations pleas.

Class members, in the main, are bound by the settlement in perpetuity, while CCR defendants may choose to withdraw ***605** from the settlement after ten years. A small number of class members—only a few per year—may reject the settlement and pursue their claims in court. Those permitted to exercise this option, however, may not assert any punitive damages claim or any claim for increased risk of cancer. Aspects of the administration of the settlement are to be monitored by the AFL-CIO and class counsel. Class counsel are to receive attorneys' fees in an amount to be approved by the District Court.

D

On January 29, 1993, as requested by the settling parties, the District Court conditionally certified, under Federal Rule of Civil Procedure 23(b)(3), an encompassing opt-out class. The certified class included persons occupationally exposed to defendants' asbestos products, and members of their families, who had not filed suit as of January 15. Judge Weiner appointed Locks, Motley, and Rice as class counsel, noting that "[t]he Court may in the future appoint additional counsel if it is deemed necessary and advisable." Record, Doc. 11, p. 3 (Class Certification Order). At no stage of the proceedings, however, were additional counsel in fact appointed. Nor was the class ever divided into subclasses. In a separate order, Judge Weiner assigned to Judge Reed, also of the Eastern District of Pennsylvania, "the task of conducting fairness proceedings and of determining whether the proposed settlement is fair to the class." See 157 F.R.D., at 258. Various class members raised objections to the settlement stipulation, and Judge Weiner granted the objectors full rights to participate in the subsequent proceedings. Ibid. [FN7]

> FN7. These objectors, now respondents before this Court, include three groups of individuals with overlapping interests, designated as the "Windsor Group," the New Jersey "White Lung Group," and the "Cargile Group." Margaret Balonis, an individual objector, is also a respondent before this Court. Balonis states that her husband, Casimir, was exposed to asbestos in the late 1940s and was diagnosed with mesothelioma in May 1994, after expiration of the opt-out period, see infra, at 2241, 2242. The Balonises sued CCR members in Maryland state court, but were charged with civil contempt for violating the federal District Court's anti-suit injunction. Casimir Balonis died in October 1996. See Brief for Balonis Respondents 9-11.

***606** In preliminary rulings, Judge Reed held that the District Court had subject-matter jurisdiction, see Carlough v. Amchem Products, Inc., 834 F.Supp. 1437, 1467-1468 (E.D.Pa.1993), and he approved the settling parties' elaborate plan for giving notice to the class, see Carlough v. Amchem Products, Inc., 158 F.R.D. 314, 336 (E.D.Pa.1993). The court-approved notice informed recipients that they could exclude themselves from the class, if they so chose, within a three-month opt-out period.

Objectors raised numerous challenges to the settlement. They urged that the settlement unfairly disadvantaged those without currently compensable conditions in that it failed to adjust for inflation or to account for changes, over time, in medical understanding. They maintained that compensation levels were intolerably low in comparison to awards available in tort litigation or payments received by the inventory plaintiffs. And they objected to the absence of any compensation for certain claims, for example, medical monitoring, compensable under the tort law of several States. Rejecting these and all other objections, Judge Reed concluded that the settlement terms were fair and had been negotiated without collusion. See 157 F.R.D., at 325, 331-332. He also found that adequate notice had been given to class members, see id., at 332-334, and that final class certification under Rule 23(b)(3) was appropriate, see id., at 315.

As to the specific prerequisites to certification, the District Court observed that the class satisfied Rule 23(a)(1)'s numerosity requirement, [FN8] see ibid., a matter no one debates. The ***607** Rule 23(a)(2) and (b)(3) requirements ****2242** of commonality [FN9] and preponderance [FN10] were also satisfied, the District Court held, in that

> FN8. Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable."
>
> FN9. Rule 23(a)(2) requires that there be "questions of law or fact common to the class."
>
> FN10. Rule 23(b)(3) requires that "the [common] questions of law or fact… predominate over any questions affecting only individual members."

> "[t]he members of the class have all been exposed to asbestos products supplied by the defendants and all share an interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system. Whether the proposed settlement satisfies this interest and is otherwise a fair, reasonable and adequate compromise of the claims of the class is a predominant issue for purposes of Rule 23(b)(3)." Id., at 316.

The District Court held next that the claims of the class representatives were "typical" of the class as a whole, a requirement of Rule 23(a)(3), [FN11] and that, as Rule 23(b)(3) demands, [FN12] the class settlement was "superior" to other methods of adjudication. See ibid.

> FN11. Rule 23(a)(3) states that "the claims… of the representative parties [must be] typical of the claims… of the class."
>
> FN12. Rule 23(b)(3) requires that "a class action [be] superior to other available methods for the fair and efficient adjudication of the controversy."

Strenuous objections had been asserted regarding the adequacy of representation, a Rule 23(a)(4) requirement. [FN13] Objectors maintained that class counsel and class representatives had disqualifying conflicts of interests. In particular, objectors urged, claimants whose injuries had become manifest and claimants without manifest injuries should not have common counsel and should not be aggregated in a single ***608** class. Furthermore, objectors argued, lawyers representing inventory plaintiffs should not represent the newly-formed class.

> FN13. Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class."

Satisfied that class counsel had ably negotiated the settlement in the best interests of all concerned, and that the named parties served as adequate representatives, the District Court rejected these objections. See id., at 317-319, 326-332. Subclasses were unnecessary, the District Court held, bearing in mind the added cost and confusion they would entail and the ability of class members to exclude themselves from the class during the three-month opt-out period. See id., at 318-319. Reasoning that the representative plaintiffs "have a strong interest that recovery for all of the medical categories be maximized because they may have claims in any, or several categories," the District Court found "no antagonism of interest between class members with various medical conditions, or between persons with and without currently manifest asbestos impairment." Id., at 318. Declaring class certification appropriate and the settlement fair, the District Court preliminarily enjoined all class members from commencing any asbestos-related suit against the CCR defendants in any state or federal court. See Georgine v. Amchem Products, Inc., 878 F.Supp. 716, 726-727 (E.D.Pa.1994).

The objectors appealed. The United States Court of Appeals for the Third Circuit vacated the certification, holding that the requirements of Rule 23 had not been satisfied. See Georgine v. Amchem Products, Inc., 83 F.3d 610 (1996).

E

The Court of Appeals, in a long, heavily detailed opinion by Judge Becker, first noted several challenges by objectors to justiciability, subject-matter jurisdiction, and adequacy of notice. These challenges, the court said, raised "serious concerns." Id., at 623. However, the court observed, "the jurisdictional issues in this case would not exist but for the [class action] certification." Ibid. Turning to the class-***609**

certification issues and finding them dispositive, the Third Circuit declined to decide other questions.

****2243** On class-action prerequisites, the Court of Appeals referred to an earlier Third Circuit decision, In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768 (C.A.3), cert. denied, 516 U.S. 824, 116 S.Ct. 88, 133 L.Ed.2d 45 (1995) (hereinafter GM Trucks), which held that although a class action may be certified for settlement purposes only, Rule 23(a)'s requirements must be satisfied as if the case were going to be litigated. 55 F.3d, at 799-800. The same rule should apply, the Third Circuit said, to class certification under Rule 23(b)(3). See 83 F.3d, at 625. But cf. In re Asbestos Litigation, 90 F.3d 963, 975-976, and n. 8 (C.A.5 1996), cert. pending, Nos. 96-1379, 96- 1394. While stating that the requirements of Rule 23(a) and (b)(3) must be met "without taking into account the settlement," 83 F.3d, at 626, the Court of Appeals in fact closely considered the terms of the settlement as it examined aspects of the case under Rule 23 criteria. See id., at 630- 634.

The Third Circuit recognized that Rule 23(a)(2)'s "commonality" requirement is subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class "predominate over" other questions. The court therefore trained its attention on the "predominance" inquiry. See id., at 627. The harmfulness of asbestos exposure was indeed a prime factor common to the class, the Third Circuit observed. See id., at 626, 630. But uncommon questions abounded.

In contrast to mass torts involving a single accident, class members in this case were exposed to different asbestos-containing products, in different ways, over different periods, and for different amounts of time; some suffered no physical injury, others suffered disabling or deadly diseases. See id., at 626, 628. "These factual differences," the Third Circuit explained, "translate [d] into significant legal differences." Id., at 627. State law governed and varied widely ***610** on such critical issues as "viability of [exposure- only] claims [and] availability of causes of action for medical monitoring, increased risk of cancer, and fear of future injury." Ibid. [FN14] "[T]he number of uncommon issues in this humongous class action," the Third Circuit concluded, ibid., barred a determination, under existing tort law, that common questions predominated, see id., at 630.

> FN14. Recoveries under the laws of different States spanned a wide range. Objectors assert, for example, that 15% of current mesothelioma claims arise in California, where the statewide average recovery is $419,674—or more than 209% above the $200,000 maximum specified in the settlement for mesothelioma claims not typed "extraordinary." See Brief for Respondents George Windsor et al. 5-6, n. 5 (citing 2 App. 461).

The Court of Appeals next found that "serious intra-class conflicts preclude[d] th[e] class from meeting the adequacy of representation requirement" of Rule 23(a)(4). Ibid. Adverting to, but not resolving charges of attorney conflict of interests, the Third Circuit addressed the question whether the named plaintiffs could adequately advance the interests of all class members. The Court of Appeals acknowledged that the District Court was certainly correct to this extent: " '[T]he members of the class are united in seeking the maximum possible recovery for their asbestos-related claims.' " Ibid. (quoting 157 F.R.D., at 317). "But the settlement does more than simply provide a general recovery fund," the Court of Appeals immediately added; "[r]ather, it makes important judgments on how recovery is to be allocated among different kinds of plaintiffs, decisions that necessarily favor some claimants over others." 83 F.3d, at 630.

In the Third Circuit's view, the "most salient" divergence of interests separated plaintiffs already afflicted with an asbestos-related disease from plaintiffs without manifest injury (exposure-only plaintiffs). The latter would rationally want protection against inflation for distant recoveries. See ibid. They would also seek sturdy back-end opt-out rights and "causation provisions that can keep pace with changing ***611** science and medicine, rather than freezing in place the science of 1993." Id., at 630- 631. Already injured parties, in contrast, would care little about such provisions and would rationally trade them for higher current payouts. See id., at 631. These and other adverse interests, the Court of Appeals carefully explained, strongly suggested that an undivided set of representatives ****2244** could not adequately protect the discrete interests of both currently afflicted and exposure-only claimants.

The Third Circuit next rejected the District Court's determination that the named plaintiffs were "typical" of the class, noting that this Rule 23(a)(3) inquiry overlaps the adequacy of representation question: "both look to the potential for conflicts in the class." Id., at 632. Evident conflict problems, the court said, led it to hold that "no set of representatives can be 'typical' of this class." Ibid.

The Court of Appeals similarly rejected the District Court's assessment of the superiority of the class action. The Third Circuit initially noted that a class action so large and complex "could not be tried." Ibid. The court elaborated most particularly, however, on the unfairness of binding exposure- only plaintiffs who might be unaware of the class action or lack sufficient information about their exposure to make a reasoned decision whether to stay in or opt out. See id., at 633. "A series of statewide or more narrowly defined adjudications, either through consolidation under Rule

42(a) or as class actions under Rule 23, would seem preferable," the Court of Appeals said. Id., at 634.

The Third Circuit, after intensive review, ultimately ordered decertification of the class and vacation of the District Court's anti-suit injunction. Id., at 635. Judge Wellford concurred, "fully subscrib[ing] to the decision of Judge Becker that the plaintiffs in this case ha[d] not met the requirements of Rule 23." Ibid. He added that in his view, named exposure-only plaintiffs had no standing to pursue the ***612** suit in federal court, for their depositions showed that "[t]hey claimed no damages and no present injury." Id., at 638.

We granted certiorari, 519 U.S. ——, 117 S.Ct. 379, 136 L.Ed.2d 297 (1996), and now affirm.

II

Objectors assert in this Court, as they did in the District Court and Court of Appeals, an array of jurisdictional barriers. Most fundamentally, they maintain that the settlement proceeding instituted by class counsel and CCR is not a justiciable case or controversy within the confines of Article III of the Federal Constitution. In the main, they say, the proceeding is a nonadversarial endeavor to impose on countless individuals without currently ripe claims an administrative compensation regime binding on those individuals if and when they manifest injuries.

Furthermore, objectors urge that exposure-only claimants lack standing to sue: Either they have not yet sustained any cognizable injury or, to the extent the complaint states claims and demands relief for emotional distress, enhanced risk of disease, and medical monitoring, the settlement provides no redress. Objectors also argue that exposure-only claimants did not meet the then-current amount-in-controversy requirement (in excess of $50,000) specified for federal-court jurisdiction based upon diversity of citizenship. See 28 U.S.C. § 1332(a).

[1] As earlier recounted, see supra, at 2242, the Third Circuit declined to reach these issues because they "would not exist but for the [class action] certification." 83 F.3d, at 623. We agree that "[t]he class certification issues are dispositive," ibid.; because their resolution here is logically antecedent to the existence of any Article III issues, it is appropriate to reach them first, cf. Arizonans for Official English v. Arizona, 520 U.S. 43, ——, 117 S.Ct. 1055, 1068, 137 L.Ed.2d 170 (1997) (declining to resolve definitively question whether petitioners had standing because mootness issue was dispositive of the case). We therefore follow the path taken by the Court of Appeals, mindful that ***613** Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure "shall not abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b). See also Fed. Rule Civ. Proc. 82 ("rules shall not be construed to extend… the [subject matter] jurisdiction of the United States district courts"). [FN15]

FN15. The opinion dissenting in part does not find the class certification issues dispositive—at least not yet, and would return the case to the Third Circuit for a second look. See post, at 2253, 2258. If certification issues were genuinely in doubt, however, the jurisdictional issues would loom larger. Concerning objectors' assertions that exposure- only claimants do not satisfy the $50,000 amount-in-controversy and may have no currently ripe claim, see Metro-North Commuter R. Co. v. Buckley, —- U.S. ——, ——, 117 S.Ct. 379, ——, 136 L.Ed.2d 297 (Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U.S.C. § 51 et seq., interpreted in light of common-law principles, does not permit "exposure-only" railworker to recover for negligent infliction of emotional distress or lump-sum damages for costs of medical monitoring).

****2245** III

To place this controversy in context, we briefly describe the characteristics of class actions for which the Federal Rules provide. Rule 23, governing federal-court class actions, stems from equity practice and gained its current shape in an innovative 1966 revision. See generally Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L.Rev. 356, 375-400 (1967) (hereinafter Kaplan, Continuing Work). Rule 23(a) states four threshold requirements applicable to all class actions: (1) numerosity (a "class [so large] that joinder of all members is impracticable"); (2) commonality ("questions of law or fact common to the class"); (3) typicality (named parties' claims or defenses "are typical… of the class"); and (4) adequacy of representation (representatives "will fairly and adequately protect the interests of the class").

[2] ***614** In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3). Rule 23(b)(1) covers cases in which separate actions by or against individual class members would risk establishing "incompatible standards of conduct for the party opposing the class," Fed. Rule Civ. Proc. 23(b)(1)(A), or would "as a practical matter be dispositive of the interests" of nonparty class members "or substantially impair or impede their ability to protect their interests," Fed. Rule Civ. Proc. 23(b)(1) (B). Rule 23(b)(1)(A) "takes in cases where the party is obliged by law to treat the members of the class alike (a utility acting toward customers; a government imposing a tax), or where the party must treat all alike as a matter of practical necessity (a riparian owner using water

as against downriver owners)." Kaplan, Continuing Work 388 (footnotes omitted). Rule 23(b)(1)(B) includes, for example, "limited fund" cases, instances in which numerous persons make claims against a fund insufficient to satisfy all claims. See Advisory Committee's Notes on Fed. Rule Civ. Proc. 23, 28 U.S.C.App., pp. 696-697 (hereinafter Adv. Comm. Notes).

Rule 23(b)(2) permits class actions for declaratory or injunctive relief where "the party opposing the class has acted or refused to act on grounds generally applicable to the class." Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples. Adv. Comm. Notes, 28 U.S.C.App., p. 697; see Kaplan, Continuing Work 389 (subdivision (b)(2) "build[s] on experience mainly, but not exclusively, in the civil rights field").

In the 1966 class-action amendments, Rule 23(b)(3), the category at issue here, was "the most adventuresome" innovation. See Kaplan, A Prefatory Note, 10 B.C. Ind. & Com. L.Rev. 497, 497 (1969) (hereinafter Kaplan, Prefatory Note). Rule 23(b)(3) added to the complex-litigation arsenal class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be ***615** excluded. See 7A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 1777, p. 517 (2d ed.1986) (hereinafter Wright, Miller, & Kane); see generally Kaplan, Continuing Work 379-400. Rule 23(b)(3) "opt out" class actions superseded the former "spurious" class action, so characterized because it generally functioned as a permissive joinder ("opt in") device. See 7A Wright, Miller, & Kane § 1753, at 28-31, 42-44; see also Adv. Comm. Notes, 28 U.S.C.App., p. 695.

Framed for situations in which "class-action treatment is not as clearly called for" as it is in Rule 23(b)(1) and (b)(2) situations, Rule 23(b)(3) permits certification where class suit "may nevertheless be convenient and desirable." Adv. Comm. Notes, 28 U.S.C.App., p. 697. To qualify for certification under Rule 23(b)(3), a class must meet ****2246** two requirements beyond the Rule 23(a) prerequisites: Common questions must "predominate over any questions affecting only individual members"; and class resolution must be "superior to other available methods for the fair and efficient adjudication of the controversy." In adding "predominance" and "superiority" to the qualification-for-certification list, the Advisory Committee sought to cover cases "in which a class action would achieve economies of time, effort, and expense, and promote… uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Ibid. Sensitive to the competing tugs of individual autonomy for those who might prefer to go it alone or in a smaller unit, on the one hand, and systemic efficiency on the other, the Reporter for the 1966 amendments cautioned: "The new provision invites a close look at the case before it is accepted as a class action…." Kaplan, Continuing Work 390.

Rule 23(b)(3) includes a nonexhaustive list of factors pertinent to a court's "close look" at the predominance and superiority criteria:

> ***616** "(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

In setting out these factors, the Advisory Committee for the 1966 reform anticipated that in each case, courts would "consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit." Adv. Comm. Notes, 28 U.S.C.App., p. 698. They elaborated:

> "The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical; the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable." Ibid.

See also Kaplan, Continuing Work 391 ("Th[e] interest [in individual control] can be high where the stake of each member bulks large and his will and ability to take care of himself are strong; the interest may be no more than theoretic where the individual stake is so small as to make a separate action impracticable.") (footnote omitted). As the Third Circuit observed in the instant case: "Each plaintiff [in an action involving claims for personal injury and death] has a significant interest in individually controlling the prosecution of [his case]"; each "ha[s] a substantial stake in making individual decisions on whether and when to settle." 83 F.3d, at 633.

[3][4] ***617** While the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." Kaplan, Prefatory Note 497. As concisely recalled in a recent Seventh Circuit opinion:

> "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's

(usually an attorney's) labor." Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (1997).

To alert class members to their right to "opt out" of a (b)(3) class, Rule 23 instructs the court to "direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. Rule Civ. Proc. 23(c)(2); see Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173-177, 94 S.Ct. 2140, 2150-****2247** 2152, 40 L.Ed.2d 732 (1974) (individual notice to class members identifiable through reasonable effort is mandatory in (b)(3) actions; requirement may not be relaxed based on high cost).

No class action may be "dismissed or compromised without [court] approval," preceded by notice to class members. Fed. Rule Civ. Proc. 23(e). The Advisory Committee's sole comment on this terse final provision of Rule 23 restates the rule's instruction without elaboration: "Subdivision (e) requires approval of the court, after notice, for the dismissal or compromise of any class action." Adv. Comm. Notes, 28 U.S.C.App., p. 699.

In the decades since the 1966 revision of Rule 23, class action practice has become ever more "adventuresome" as a means of coping with claims too numerous to secure their ***618** "just, speedy, and inexpensive determination" one by one. See Fed. Rule Civ. Proc. 1. The development reflects concerns about the efficient use of court resources and the conservation of funds to compensate claimants who do not line up early in a litigation queue. See generally J. Weinstein, Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolidations, and Other Multiparty Devices (1995); Schwarzer, Settlement of Mass Tort Class Actions: Order out of Chaos, 80 Cornell L.Rev. 837 (1995).

Among current applications of Rule 23(b)(3), the "settlement only" class has become a stock device. See, e.g., T. Willging, L. Hooper, & R. Niemic, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 61-62 (1996) (noting large number of such cases in districts studied). Although all Federal Circuits recognize the utility of Rule 23(b)(3) settlement classes, courts have divided on the extent to which a proffered settlement affects court surveillance under Rule 23's certification criteria.

In GM Trucks, 55 F.3d, at 799-800, and in the instant case, 83 F.3d, at 624-626, the Third Circuit held that a class cannot be certified for settlement when certification for trial would be unwarranted. Other courts have held that settlement obviates or reduces the need to measure a proposed class against the enumerated Rule 23 requirements. See, e.g., In re Asbestos Litigation, 90 F.3d, at 975(C.A.5) ("in settlement class context, common issues arise from the settlement itself") (citing H. Newberg & A. Conte, 2 Newberg on Class Actions § 11.28, at 11-58 (3d ed.1992)); White v. National Football League, 41 F.3d 402, 408 (C.A.8 1994) ("adequacy of class representation… is ultimately determined by the settlement itself"), cert. denied, 515 U.S. 1137, 115 S.Ct. 2569, 132 L.Ed.2d 821 (1995); In re A.H. Robins Co., 880 F.2d 709, 740(C.A.4) ("[i]f not a ground for certification per se, certainly settlement should be a factor, and an important factor, to be considered when determining certification"), cert. denied sub nom. Anderson ***619** v. Aetna Casualty & Surety Co., 493 U.S. 959, 110 S.Ct. 377, 107 L.Ed.2d 362 (1989); Malchman v. Davis, 761 F.2d 893, 900 (C.A.2 1985) (certification appropriate, in part, because "the interests of the members of the broadened class in the settlement agreement were commonly held"), cert. denied, 475 U.S. 1143, 106 S.Ct. 1798, 90 L.Ed.2d 343 (1986).

A proposed amendment to Rule 23 would expressly authorize settlement class certification, in conjunction with a motion by the settling parties for Rule 23(b)(3) certification, "even though the requirements of subdivision (b)(3) might not be met for purposes of trial." Proposed Amendment to Fed. Rule Civ. Proc. 23(b), 117 S.Ct. No. 1 CXIX, CLIV to CLV (Aug.1996) (Request for Comment). In response to the publication of this proposal, voluminous public comments—many of them opposed to, or skeptical of, the amendment—were received by the Judicial Conference Standing Committee on Rules of Practice and Procedure. See, e.g., Letter from Steering Committee to Oppose Proposed Rule 23, signed by 129 law professors (May 28, 1996); Letter from Paul D. Carrington (May 21, 1996). The Committee has not yet acted on the matter. We consider the certification at issue under the rule as it is currently framed.

IV

We granted review to decide the role settlement may play, under existing Rule 23, in determining the propriety of class certification. ****2248** The Third Circuit's opinion stated that each of the requirements of Rule 23(a) and (b)(3) "must be satisfied without taking into account the settlement." 83 F.3d, at 626 (quoting GM Trucks, 55 F.3d, at 799). That statement, petitioners urge, is incorrect.

[5] We agree with petitioners to this limited extent: settlement is relevant to a class certification. The Third Circuit's opinion bears modification in that respect. But, as we earlier observed, see supra, at ——, the Court of Appeals in fact did not ignore the settlement; instead, that court homed in on settlement terms in explaining why it found the absentees' ***620** interests inadequately represented. See 83 F.3d, at 630- 631. The Third Circuit's close inspection of the settlement in that regard was altogether proper.

[6] Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial. But other specifications of the rule— those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context. Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold. See Fed. Rule Civ. Proc. 23(c), (d). [FN16]

FN16. Portions of the opinion dissenting in part appear to assume that settlement counts only one way—in favor of certification. See post, at 2252-2253, 2258. But see post, at 2255. To the extent that is the dissent's meaning, we disagree. Settlement, though a relevant factor, does not inevitably signal that class action certification should be granted more readily than it would be were the case to be litigated. For reasons the Third Circuit aired, see 83 F.3d 610, 626-635 (1996), proposed settlement classes sometimes warrant more, not less caution on the question of certification.

[7] And, of overriding importance, courts must be mindful that the rule as now composed sets the requirements they are bound to enforce. Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress. See 28 U.S.C. §§ 2073, 2074. The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure "shall not abridge… any substantive right." § 2072(b).

[8][9] Rule 23(e), on settlement of class actions, reads in its entirety: "A class action shall not be dismissed or compromised ***621** without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." This prescription was designed to function as an additional requirement, not a superseding direction, for the "class action" to which Rule 23(e) refers is one qualified for certification under Rule 23(a) and (b). Cf. Eisen, 417 U.S., at 176-177, 94 S.Ct., at 2151-2152 (adequate representation does not eliminate additional requirement to provide notice). Subdivisions (a) and (b) focus court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives. That dominant concern persists when settlement, rather than trial, is proposed.

[10] The safeguards provided by the Rule 23(a) and (b) class-qualifying criteria, we emphasize, are not impractical impediments—checks shorn of utility—in the settlement class context. First, the standards set for the protection of absent class members serve to inhibit appraisals of the chancellor's foot kind—class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness.

Second, if a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23(a) and (b), and permitting class designation despite the impossibility of litigation, both class counsel and court would be disarmed. Class counsel confined to settlement negotiations could not use the threat of litigation ****2249** to press for a better offer, see Coffee, Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L.Rev. 1343, 1379-1380 (1995), and the court would face a bargain proffered for its approval without benefit of adversarial investigation, see, e.g., Kamilewicz v. Bank of Boston Corp., 100 F.3d 1348, 1352 (C.A.7 1996) (Easterbrook, J., dissenting from denial of rehearing en banc) (parties "may even put one over on the court, in a staged performance"), cert. denied, 520 U.S. —— , 117 S.Ct. 1569, 137 L.Ed.2d 714 (1997).

***622** Federal courts, in any case, lack authority to substitute for Rule 23's certification criteria a standard never adopted—that if a settlement is "fair," then certification is proper. Applying to this case criteria the rulemakers set, we conclude that the Third Circuit's appraisal is essentially correct. Although that court should have acknowledged that settlement is a factor in the calculus, a remand is not warranted on that account. The Court of Appeals' opinion amply demonstrates why—with or without a settlement on the table—the sprawling class the District Court certified does not satisfy Rule 23's requirements. [FN17]

FN17. We do not inspect and set aside for insufficient evidence district court findings of fact. Cf. post, at 2254, 2257-2258. Rather, we focus on the requirements of Rule 23, and endeavor to explain why those requirements cannot be met for a class so enormously diverse and problematic as the one the District Court certified.

A

[11] We address first the requirement of Rule 23(b)(3) that "[common] questions of law or fact… predominate over any questions affecting only individual members." The District Court concluded that predominance was satisfied based on two factors: class members' shared experience of asbestos exposure and their common "interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system." 157 F.R.D., at 316. The settling parties also contend that the settlement's fairness is a common question, pre-

dominating over disparate legal issues that might be pivotal in litigation but become irrelevant under the settlement.

The predominance requirement stated in Rule 23(b)(3), we hold, is not met by the factors on which the District Court relied. The benefits asbestos- exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration, see supra, ***623** at 2237-2238, but it is not pertinent to the predominance inquiry. That inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement. [FN18]

> FN18. In this respect, the predominance requirement of Rule 23(b)(3) is similar to the requirement of Rule 23(a)(3) that "claims or defenses" of the named representatives must be "typical of the claims or defenses of the class." The words "claims or defenses" in this context—just as in the context of Rule 24(b)(2) governing permissive intervention—"manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit." Diamond v. Charles, 476 U.S. 54, 76-77, 106 S.Ct. 1697, 1711, 90 L.Ed.2d 48 (1986) (O'CONNOR, J., concurring in part and concurring in judgment).

[12][13][14] The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. See 7A Wright, Miller, & Kane 518-519. [FN19] The inquiry appropriate under Rule 23(e), on the other hand, protects unnamed class members "from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise." See 7B Wright, Miller, & Kane § 1797, at 340-341. But it is not the mission of Rule 23(e) to assure the class cohesion that legitimizes representative action in the first place. If a common interest in a fair compromise could satisfy the predominance requirement of Rule 23(b)(3), that ****2250** vital prescription would be stripped of any meaning in the settlement context.

> FN19. This case, we note, involves no "limited fund" capable of supporting class treatment under Rule 23(b)(1)(B), which does not have a predominance requirement. See Georgine v. Amchem Products, Inc., 157 F.R.D. 246, 318 (E.D.Pa.1994); see also id., at 291, and n. 40. The settling parties sought to proceed exclusively under Rule 23(b)(3).

The District Court also relied upon this commonality: "The members of the class have all been exposed to asbestos products supplied by the defendants…." 157 F.R.D., at 316. Even if Rule 23(a)'s commonality requirement may be satisfied ***624** by that shared experience, the predominance criterion is far more demanding. See 83 F.3d, at 626-627. Given the greater number of questions peculiar to the several categories of class members, and to individuals within each category, and the significance of those uncommon questions, any overarching dispute about the health consequences of asbestos exposure cannot satisfy the Rule 23(b)(3) predominance standard.

The Third Circuit highlighted the disparate questions undermining class cohesion in this case:

> "Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma…. Each has a different history of cigarette smoking, a factor that complicates the causation inquiry.
>
> "The [exposure-only] plaintiffs especially share little in common, either with each other or with the presently injured class members. It is unclear whether they will contract asbestos-related disease and, if so, what disease each will suffer. They will also incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories." Id., at 626.

Differences in state law, the Court of Appeals observed, compound these disparities. See id., at 627 (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 823, 105 S.Ct. 2965, 2980, 86 L.Ed.2d 628 (1985)).

[15] No settlement class called to our attention is as sprawling as this one. Cf. In re Asbestos Litigation, 90 F.3d, at 976, n. 8 ("We would likely agree with the Third Circuit that a class action requesting individual damages for members of a global class of asbestos claimants would not satisfy [Rule 23] requirements due to the huge number of individuals and ***625** their varying medical expenses, smoking histories, and family situations."). Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws. See Adv. Comm. Notes, 28 U.S.C.App., p. 697; see also supra, at 2246. Even mass tort cases arising from a common cause or disaster may, depending upon the circumstances, satisfy the predominance requirement. The Advisory Committee for the 1966 revision of Rule 23, it is true, noted that "mass accident" cases are likely to present "significant questions, not only of damages but of liability and defenses of liability,… affecting the individuals in different ways." Ibid. And the Committee advised that such cases are "ordinarily not appropriate" for class treatment. Ibid. But the text of the rule does not categorically exclude mass tort cases from class certification, and district courts, since the late 1970s, have been certifying such cases in increasing number. See

Resnik, From "Cases" to "Litigation," 54 Law & Contemp.Prob. 5, 17-19 (Summer 1991) (describing trend). The Committee's warning, however, continues to call for caution when individual stakes are high and disparities among class members great. As the Third Circuit's opinion makes plain, the certification in this case does not follow the counsel of caution. That certification cannot be upheld, for it rests on a conception of Rule 23(b) (3)'s predominance requirement irreconcilable with the rule's design.

B

[16][17][18][19] Nor can the class approved by the District Court satisfy Rule 23(a)(4)'s requirement that the named parties "will fairly and adequately protect the interests of the class." The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. See General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 157-158, n. 13, 102 S.Ct. 2364, 2370-2371, n. 13, 72 L.Ed.2d 740 (1982). "[A] class representative ****2251** must be part of the class and 'possess ***626** the same interest and suffer the same injury' as the class members." East Tex. Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 403, 97 S.Ct. 1891, 1896, 52 L.Ed.2d 453 (1977) (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216, 94 S.Ct. 2925, 2930, 41 L.Ed.2d 706 (1974)). [FN20]

> FN20. The adequacy-of-representation requirement "tend[s] to merge" with the commonality and typicality criteria of Rule 23(a), which "serve as guideposts for determining whether… maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 157, n. 13, 102 S.Ct. 2364, 2370, n. 13, 72 L.Ed.2d 740 (1982). The adequacy heading also factors in competency and conflicts of class counsel. See id., at 157-158, n. 13, 102 S.Ct., at 2370-2371, n. 13. Like the Third Circuit, we decline to address adequacy- of-counsel issues discretely in light of our conclusions that common questions of law or fact do not predominate and that the named plaintiffs cannot adequately represent the interests of this enormous class.

As the Third Circuit pointed out, named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future. Cf. General Telephone Co. of Northwest v. EEOC, 446 U.S. 318, 331, 100 S.Ct. 1698, 1707, 64 L.Ed.2d 319 (1980) ("In employment discrimination litigation, conflicts might arise, for example, between employees and applicants who were denied employment and who will, if granted relief, compete with employees for fringe benefits or seniority. Under Rule 23, the same plaintiff could not represent these classes.").

The disparity between the currently injured and expossure-only categories of plaintiffs, and the diversity within each category are not made insignificant by the District Court's finding that petitioners' assets suffice to pay claims under the settlement. See 157 F.R.D., at 291. Although ***627** this is not a "limited fund" case certified under Rule 23(b)(1)(B), the terms of the settlement reflect essential allocation decisions designed to confine compensation and to limit defendants' liability. For example, as earlier described, see supra, at 2240-2241, the settlement includes no adjustment for inflation; only a few claimants per year can opt out at the back end; and loss-of-consortium claims are extinguished with no compensation.

The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected. Although the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency. In another asbestos class action, the Second Circuit spoke precisely to this point:

> "[W]here differences among members of a class are such that subclasses must be established, we know of no authority that permits a court to approve a settlement without creating subclasses on the basis of consents by members of a unitary class, some of whom happen to be members of the distinct subgroups. The class representatives may well have thought that the Settlement serves the aggregate interests of the entire class. But the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups." In re Joint Eastern and Southern Dist. Asbestos Litigation, 982 F.2d 721, 742-743 (C.A.2 1992), modified on reh'g sub nom. In re Findley, 993 F.2d 7 (C.A.2 1993).

The Third Circuit found no assurance here—either in the terms of the settlement or in the structure of the negotiations—that the named plaintiffs operated under a proper understanding of their representational responsibilities. See ***628** 83 F.3d, at 630-631. That assessment, we conclude, is on the mark.

****2252** C

Impediments to the provision of adequate notice, the Third Circuit emphasized, rendered highly problematic any endeavor to tie to a settlement class persons with no percep-

tible asbestos-related disease at the time of the settlement. Id., at 633; cf. In re Asbestos Litigation, 90 F.3d, at 999-1000 (Smith, J., dissenting). Many persons in the exposure-only category, the Court of Appeals stressed, may not even know of their exposure, or realize the extent of the harm they may incur. Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out.

Family members of asbestos-exposed individuals may themselves fall prey to disease or may ultimately have ripe claims for loss of consortium. Yet large numbers of people in this category—future spouses and children of asbestos victims—could not be alerted to their class membership. And current spouses and children of the occupationally exposed may know nothing of that exposure.

Because we have concluded that the class in this case cannot satisfy the requirements of common issue predominance and adequacy of representation, we need not rule, definitively, on the notice given here. In accord with the Third Circuit, however, see 83 F.3d, at 633-634, we recognize the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous.

V

The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos ***629** exposure. [FN21] Congress, however, has not adopted such a solution. And Rule 23, which must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view, cannot carry the large load CCR, class counsel, and the District Court heaped upon it. As this case exemplifies, the rulemakers' prescriptions for class actions may be endangered by "those who embrace [Rule 23] too enthusiastically just as [they are by] those who approach [the rule] with distaste." C. Wright, Law of Federal Courts 508 (5th ed.1994); cf. 83 F.3d, at 634 (suggesting resort to less bold aggregation techniques, including more narrowly defined class certifications).

FN21. The opinion dissenting in part is a forceful statement of that argument.

* * *

For the reasons stated, the judgment of the Court of Appeals for the Third Circuit is

Affirmed.

Justice O'CONNOR took no part in the consideration or decision of this case.

Justice BREYER, with whom Justice STEVENS joins, **concurring in part and dissenting in part**.

Although I agree with the Court's basic holding that "settlement is relevant to a class certification," ante, at 2248, I find several problems in its approach that lead me to a different conclusion. First, I believe that the need for settlement in this mass tort case, with hundreds of thousands of lawsuits, is greater than the Court's opinion suggests. Second, I would give more weight than would the majority to settlement-related issues for purposes of determining whether common issues predominate. Third, I am uncertain about the Court's determination of adequacy of representation, ***630** and do not believe it appropriate for this Court to second-guess the District Court on the matter without first having the Court of Appeals consider it. Fourth, I am uncertain about the tenor of an opinion that seems to suggest the settlement is unfair. And fifth, in the absence of further review by the Court of Appeals, I cannot accept the majority's suggestions that "notice" is inadequate.

These difficulties flow from the majority's review of what are highly fact-based, complex, and difficult matters, matters that are inappropriate for initial review before this Court. The law gives broad leeway to district courts in making class certification decisions, ****2253** and their judgments are to be reviewed by the Court of Appeals only for abuse of discretion. See Califano v. Yamasaki, 442 U.S. 682, 703, 99 S.Ct. 2545, 2558-2559, 61 L.Ed.2d 176 (1979). Indeed, the District Court's certification decision rests upon more than 300 findings of fact reached after five weeks of comprehensive hearings. Accordingly, I do not believe that we should in effect set aside the findings of the District Court. That court is far more familiar with the issues and litigants than is a court of appeals or are we, and therefore has "broad power and discretion… with respect to matters involving the certification" of class actions. Reiter v. Sonotone Corp., 442 U.S. 330, 345, 99 S.Ct. 2326, 2334, 60 L.Ed.2d 931 (1979); cf. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 402, 110 S.Ct. 2447, 2459, 110 L.Ed.2d 359 (1990) (district court better situated to make fact-dependent legal determinations in Rule 11 context).

I do not believe that we can rely upon the Court of Appeals' review of the District Court record, for that review, and its ultimate conclusions, are infected by a legal error. E.g., Georgine v. Amchem Products, Inc., 83 F.3d 610, 626 (C.A.3 1996) (holding that "considered as a litigation class," the class cannot meet Rule 23's requirements) (emphasis added). There is no evidence that the Court of Appeals at any point considered the settlement as something that would help the class meet Rule 23. I find, moreover, the fact-related issues presented here sufficiently ***631** close to

warrant further detailed appellate court review under the correct legal standard. Cf. Reno v. Bossier Parish School Bd., 520 U.S. 471, 117 S.Ct. 1491, 1501, 137 L.Ed.2d 730 (1997). And I shall briefly explain why this is so.

I

First, I believe the majority understates the importance of settlement in this case. Between 13 and 21 million workers have been exposed to asbestos in the workplace—over the past 40 or 50 years—but the most severe instances of such exposure probably occurred three or four decades ago. See Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation, pp. 6-7 (Mar.1991) (Judicial Conference Report); App. 781-782, 801; B. Castleman, Asbestos: Medical and Legal Aspects 787-788 (4th ed.1996). This exposure has led to several hundred thousand lawsuits, about 15% of which involved claims for cancer and about 30% for asbestosis. See In re Joint Eastern and Southern Dist. Asbestos Litigation, 129 B.R. 710, 936-937 (E. and S.D.N.Y.1991) (Joint Litigation). About half of the suits have involved claims for pleural thickening and plaques—the harmfulness of which is apparently controversial. (One expert below testified that they "don't transform into cancer" and are not "predictor[s] of future disease," App. 781.) Some of those who suffer from the most serious injuries, however, have received little or no compensation. In re School Asbestos Litigation, 789 F.2d 996, 1000 (C.A.3 1986); see also Edley & Weiler, Asbestos: A Multi- Billion-Dollar Crisis, 30 Harv. J. Legis. 383, 384, 393 (1993) ("[U]p to one- half of asbestos claims are now being filed by people who have little or no physical impairment. Many of these claims produce substantial payments (and substantial costs) even though the individual litigants will never become impaired"). These lawsuits have taken up more than 6% of all federal civil filings in one recent year, and are subject to a delay that is twice that of other civil suits. Judicial Conference Report 7, 10-11.

***632** Delays, high costs, and a random pattern of noncompensation led the Judicial Conference Ad Hoc Committee on Asbestos Litigation to transfer all federal asbestos personal-injury cases to the Eastern District of Pennsylvania in an effort to bring about a fair and comprehensive settlement. It is worth considering a few of the Committee's comments. See Judicial Conference Report 2 (" 'Decisions concerning thousands of deaths, millions of injuries, and billions of dollars are entangled in a litigation system whose strengths have increasingly been overshadowed by its weaknesses.' The ensuing five years have seen the picture worsen: increased filings, larger backlogs, higher costs, more bankruptcies and poorer prospects that judgments—if ever obtained—can be collected' ") (quoting Rand Corporation Institute for Civil Justice); id., at 13 ("The transaction ****2254** costs associated with asbestos litigation are an unconscionable burden on the victims of asbestos disease," and citing Rand finding that "of each asbestos litigation dollar, 61 cents is consumed in transaction costs.... Only 39 cents were paid to the asbestos victims"); id., at 12 ("Delays also can increase transaction costs, especially the attorneys' fees paid by defendants at hourly rates. These costs reduce either the insurance fund or the company's assets, thereby reducing the funds available to pay pending and future claimants. By the end of the trial phase in [one case], at least seven defendants had declared bankruptcy (as a result of asbestos claims generally)"); see also J. Weinstein, Individual Justice in Mass Tort Litigation 155 (1995); Edley & Weiler, supra, at 389-395.

Although the transfer of the federal asbestos cases did not produce a general settlement, it was intertwined with and led to a lengthy year-long negotiation between the co-chairs of the Plaintiff's Multi-District Litigation Steering Committee (elected by the Plaintiff's Committee Members and approved by the District Court) and the 20 asbestos defendants who are before us here. Georgine v. Amchem Products, Inc., 157 F.R.D. 246, 266-267, (E.D.Pa.1994); App. 660-662. ***633** These "protracted and vigorous" negotiations led to the present partial settlement, which will pay an estimated $1.3 billion and compensate perhaps 100,000 class members in the first 10 years. 157 F.R.D., at 268, 287. "The negotiations included a substantial exchange of information" between class counsel and the 20 defendant companies, including "confidential data" showing the defendants' historical settlement averages, numbers of claims filed and settled, and insurance resources. Id., at 267. "Virtually no provision" of the settlement "was not the subject of significant negotiation," and the settlement terms "changed substantially" during the negotiations. Ibid. In the end, the negotiations produced a settlement that, the District Court determined based on its detailed review of the process, was "the result of arms-length adversarial negotiations by extraordinarily competent and experienced attorneys." Id., at 335.

The District Court, when approving the settlement, concluded that it improved the plaintiffs' chances of compensation and reduced total legal fees and other transaction costs by a significant amount. Under the previous system, according to the court, "[t]he sickest of victims often go uncompensated for years while valuable funds go to others who remain unimpaired by their mild asbestos disease." Ibid. The court believed the settlement would create a compensation system that would make more money available for plaintiffs who later develop serious illnesses.

I mention this matter because it suggests that the settlement before us is unusual in terms of its importance, both to many potential plaintiffs and to defendants, and with respect to the time, effort, and expenditure that it reflects. All of which leads me to be reluctant to set aside the District Court's findings without more assurance than I have that

they are wrong. I cannot obtain that assurance through comprehensive review of the record because that is properly the job of the Court of Appeals and that court, understandably, but as we now hold, mistakenly, believed that settlement ***634** was not a relevant (and, as I would say, important) consideration.

Second, the majority, in reviewing the District Court's determination that common "issues of fact and law predominate," says that the predominance "inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement." Ante, at 2249 (footnote omitted). I find it difficult to interpret this sentence in a way that could lead me to the majority's conclusion. If the majority means that these pre-settlement questions are what matters, then how does it reconcile its statement with its basic conclusion that "settlement is relevant" to class certification, or with the numerous lower court authority that says that settlement is not only relevant, but important? See, e. g., In re A.H. Robins Co., 880 F.2d 709, 740(C.A.4), cert. denied sub nom. Anderson v. Aetna Casualty & Surety Co., 493 U.S. 959, 110 S.Ct. 377, 107 L.Ed.2d 362 (1989); In re Beef Industry Antitrust Litigation, ****2255** 607 F.2d 167, 177-178 (C.A.5 1979), cert. denied sub nom. Iowa Beef Processors, Inc. v. Meat Price Investigators Assn., 452 U.S. 905, 101 S.Ct. 3029, 69 L.Ed.2d 405 (1981); 2 H. Newberg & A. Conte, Newberg on Class Actions § 11.27, pp. 11-54 to 11-55 (3d ed.1992).

Nor do I understand how one could decide whether common questions "predominate" in the abstract—without looking at what is likely to be at issue in the proceedings that will ensue, namely, the settlement. Every group of human beings, after all, has some features in common, and some that differ. How can a court make a contextual judgment of the sort that Rule 23 requires without looking to what proceedings will follow? Such guideposts help it decide whether, in light of common concerns and differences, certification will achieve Rule 23's basic objective—"economies of time, effort, and expense." Advisory Committee's Notes on Fed. Rule Civ. Proc. 23(b)(3), 28 U.S.C.App., p. 697. As this Court has previously observed, "sometimes it may be necessary for the court to probe behind the pleadings before coming to ***635** rest on the certification question." General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 160, 102 S.Ct. 2364, 2372, 72 L.Ed.2d 740 (1982); see also C. Wright, A. Miller, & M. Kane, 7B Federal Practice and Procedure § 1785, p. 107, and n. 34 (1986). I am not saying that the " settlement counts only one way." Ante, at 2248 n. 16. Rather, the settlement may simply "add a great deal of information to the court's inquiry and will often expose diverging interests or common issues that were not evident or clear from the complaint" and courts "can and should" look to it to enhance the "ability… to make informed certification decisions." In re Asbestos, 90 F.3d 963, 975 (C.A.5 1996).

The majority may mean that the District Court gave too much weight to the settlement. But I am not certain how it can reach that conclusion. It cannot rely upon the Court of Appeals, for that court gave no positive weight at all to the settlement. Nor can it say that the District Court relied solely on "a common interest in a fair compromise," ante, at 2249, for the District Court did not do so. Rather, it found the settlement relevant because it explained the importance of the class plaintiffs' common features and common interests. The court found predominance in part because:

> "The members of the class have all been exposed to asbestos products supplied by the defendants and all share an interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system." 157 F.R.D., at 316.

The settlement is relevant because it means that these common features and interests are likely to be important in the proceeding that would ensue—a proceeding that would focus primarily upon whether or not the proposed settlement fairly and properly satisfied the interests class members had in common. That is to say, the settlement underscored the importance ***636** of (a) the common fact of exposure, (b) the common interest in receiving some compensation for certain rather than running a strong risk of no compensation, and (c) the common interest in avoiding large legal fees, other transaction costs, and delays. Ibid.

Of course, as the majority points out, there are also important differences among class members. Different plaintiffs were exposed to different products for different times; each has a distinct medical history and a different history of smoking; and many cases arise under the laws of different States. The relevant question, however, is how much these differences matter in respect to the legal proceedings that lie ahead. Many, if not all, toxic tort class actions involve plaintiffs with such differences. And the differences in state law are of diminished importance in respect to a proposed settlement in which the defendants have waived all defenses and agreed to compensate all those who were injured. Id., at 292.

These differences might warrant subclasses, though subclasses can have problems of their own. "There can be a cost in creating more distinct subgroups, each with its own representation…. [T]he more subclasses created, the more severe conflicts bubble to ****2256** the surface and inhibit settlement…. The resources of defendants and, ultimately, the community must not be exhausted by protracted litigation." Weinstein, Individual Justice in Mass Tort Litigation, at 66. Or these differences may be too serious to permit an effort at group settlement. This kind of determination, as I have said, is one that the law commits to the discretion of the district court—reviewable for abuse of discretion by a court of appeals. I believe that we are far too distant from the litigation itself to reweigh the fact-specific Rule 23 de-

terminations and to find them erroneous without the benefit of the Court of Appeals first having restudied the matter with today's legal standard in mind.

***637** Third, the majority concludes that the "representative parties" will not "fairly and adequately protect the interests of the class." Rule 23(a)(4). It finds a serious conflict between plaintiffs who are now injured and those who may be injured in the future because "for the currently injured, the critical goal is generous immediate payments," a goal that "tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation- protected fund for the future." Ante, at 2251.

I agree that there is a serious problem, but it is a problem that often exists in toxic tort cases. See Weinstein, supra, at 64 (noting that conflict "between present and future claimants" "is almost always present in some form in mass tort cases because long latency periods are needed to discover injuries"); see also Judicial Conference Report 34-35 ("Because many of the defendants in these cases have limited assets that may be called upon to satisfy the judgments obtained under current common tort rules and remedies, there is a 'real and present danger that the available assets will be exhausted before those later victims can seek compensation to which they are entitled' ") (citation omitted). And it is a problem that potentially exists whenever a single defendant injures several plaintiffs, for a settling plaintiff leaves fewer assets available for the others. With class actions, at least, plaintiffs have the consolation that a district court, thoroughly familiar with the facts, is charged with the responsibility of ensuring that the interests of no class members are sacrificed.

But this Court cannot easily safeguard such interests through review of a cold record. "What constitutes adequate representation is a question of fact that depends on the circumstances of each case." Wright, Miller, & Kane, 7A Federal Practice and Procedure, § 1765, at 271. That is particularly so when, as here, there is an unusual baseline, namely, the " 'real and present danger' " described by the Judicial Conference Report above. The majority's use of the ***638** lack of an inflation adjustment as evidence of inadequacy of representation for future plaintiffs, ante, at 2251, is one example of this difficulty. An inflation adjustment might not be as valuable as the majority assumes if most plaintiffs are old and not worried about receiving compensation decades from now. There are, of course, strong arguments as to its value. But that disagreement is one that this Court is poorly situated to resolve.

Further, certain details of the settlement that are not discussed in the majority opinion suggest that the settlement may be of greater benefit to future plaintiffs than the majority suggests. The District Court concluded that future plaintiffs receive a "significant value" from the settlement due to variety of its items that benefit future plaintiffs, such as: (1) tolling the statute of limitations so that class members "will no longer be forced to file premature lawsuits or risk their claims being time-barred"; (2) waiver of defenses to liability; (3) payment of claims, if and when members become sick, pursuant to the settlement's compensation standards, which avoids "the uncertainties, long delays and high transaction costs [including attorney's fees] of the tort system"; (4) "some assurance that there will be funds available if and when they get sick," based on the finding that each defendant "has shown an ability to fund the payment of all qualifying claims" under the settlement; and (5) the right to additional compensation if cancer develops (many settlements for plaintiffs with noncancerous conditions bar such additional claims). 157 F.R.D., at 292. For these reasons, and others, the District Court found that the distinction ****2257** between present and future plaintiffs was "illusory." 157 F.R.D., at 317-318.

I do not know whether or not the benefits are more or less valuable than an inflation adjustment. But I can certainly recognize an argument that they are. (To choose one more brief illustration, the majority chastises the settlement for extinguishing loss-of-consortium claims, ante, at 2251, 2252, but ***639** does not note that, as the District Court found, the "defendants' historical [settlement] averages, upon which the compensation values are based, include payments for loss of consortium claims, and, accordingly, the Compensation Schedule is not unfair for this ascribed reason," 157 F.R.D., at 278.) The difficulties inherent in both knowing and understanding the vast number of relevant individual fact-based determinations here counsel heavily in favor of deference to district court decisionmaking in Rule 23 decisions. Or, at the least, making certain that appellate court review has taken place with the correct standard in mind.

Fourth, I am more agnostic than is the majority about the basic fairness of the settlement. Ante, at 2250-2252. The District Court's conclusions rested upon complicated factual findings that are not easily cast aside. It is helpful to consider some of them, such as its determination that the settlement provided "fair compensation… while reducing the delays and transaction costs endemic to the asbestos litigation process" and that "the proposed class action settlement is superior to other available methods for the fair and efficient resolution of the asbestos-related personal injury claims of class members." 157 F.R.D., at 316 (citation omitted); see also id., at 335 ("The inadequate tort system has demonstrated that the lawyers are well paid for their services but the victims are not receiving speedy and reasonably inexpensive resolution of their claims. Rather, the victims' recoveries are delayed, excessively reduced by transaction costs and relegated to the impersonal group trials and mass consolidations. The sickest of victims often go uncompensated for years while valuable funds go to

others who remain unimpaired by their mild asbestos disease. Indeed, [these] unimpaired victims have, in many states, been forced to assert their claims prematurely or risk giving up all rights to future compensation for any future lung cancer or mesothelioma. The plan which this Court approves today will correct that unfair result for the class members and the… defendants"); ***640** id., at 279, 280 (settlement "will result in less delay for asbestos claimants than that experienced in the present tort system" and will "result in the CCR defendants paying more claims, at a faster rate, than they have ever paid before"); id., at 292; Edley & Weiler, 30 Harv. J. Legis., at 405, 407 (finding that "[t]here are several reasons to believe that this settlement secures important gains for both sides" and that they "firmly endorse the fairness and adequacy of this settlement"). Indeed, the settlement has been endorsed as fair and reasonable by the AFL-CIO (and its Building and Construction Trades Department), which represents a " 'substantial percentage' " of class members, 157 F.R.D., at 325, and which has a role in monitoring implementation of the settlement, id., at 285. I do not intend to pass judgment upon the settlement's fairness, but I do believe that these matters would have to be explored in far greater depth before I could reach a conclusion about fairness. And that task, as I have said, is one for the Court of Appeals.

Finally, I believe it is up to the District Court, rather than this Court, to review the legal sufficiency of notice to members of the class. The District Court found that the plan to provide notice was implemented at a cost of millions of dollars and included hundreds of thousands of individual notices, a wide-ranging television and print campaign, and significant additional efforts by 35 international and national unions to notify their members. 157 F.R.D., at 312-313, 336. Every notice emphasized that an individual did not currently have to be sick to be a class member. And in the end, the District Court was "confident" that Rule 23 and due process requirements were satisfied because, as a result of this "extensive and expensive notice procedure," "over six million" individuals "received actual notice materials," and "millions more" were reached by the media campaign. Id., at 312, 333, 336. Although the majority, in principle, is reviewing a Court of Appeals' ***2258** conclusion, it seems to me that its opinion might call into question the fact-related determinations of the District ***641** Court. Ante, at 2252. To the extent that it does so, I disagree, for such findings cannot be so quickly disregarded. And I do not think that our precedents permit this Court to do so. See Reiter, 442 U.S., at 345, 99 S.Ct., at 2334; Yamasaki, 442 U.S., at 703, 99 S.Ct., at 2558-2559.

II

The issues in this case are complicated and difficult. The District Court might have been correct. Or not. Subclasses might be appropriate. Or not. I cannot tell. And I do not believe that this Court should be in the business of trying to make these fact-based determinations. That is a job suited to the district courts in the first instance, and the courts of appeal on review. But there is no reason in this case to believe that the Court of Appeals conducted its prior review with an understanding that the settlement could have constituted a reasonably strong factor in favor of class certification. For this reason, I would provide the courts below with an opportunity to analyze the factual questions involved in certification by vacating the judgment, and remanding the case for further proceedings.

END OF DOCUMENT

Exhibit "B"

(Cite as: 119 S.Ct. 2295)

Esteban ORTIZ, et al., Petitioners,
v.
FIBREBOARD CORPORATION et al.

No. 97-1704.
Supreme Court of the United States
Argued Dec. 8, 1998.
Decided June 23, 1999.

Following global settlement of claims against manufacturer of asbestos- containing products, certification of settlement class action was sought. The United States District Court for the Eastern District of Texas, Robert M. Parker, Circuit Judge, sitting by designation, certified class and approved settlements. Appeals were taken and consolidated, and the Court of Appeals for the Fifth Circuit affirmed, 90 F.3d 963. On petition for writ of certiorari, the United States Supreme Court vacated and remanded for reconsideration in light of Amchem Products, Inc. v. Windsor, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689. On remand, the Court of Appeals again affirmed, 134 F.3d 668. Certiorari was granted, and the Supreme Court, Justice Souter, held that: (1) issue of propriety of class certification would be addressed before issue of Article III standing; (2) certification of mandatory settlement class on limited fund theory requires showing that fund is limited independently of agreement by parties, and that class include all those with claims unsatisfied at time of settlement, with intraclass conflicts addressed; and (3) class certification was impermissible, as insufficient showing was made that fund was so limited, or to establish inclusiveness of proposed class and equitable treatment of class members.

Reversed and remanded.

Chief Justice Rehnquist filed a concurring opinion in which Justices Scalia and Kennedy joined.

Justice Breyer filed a dissenting opinion in which Justice Stevens joined.

134 F.3d 668, reversed and remanded.

(Key numbers and synopsis have been deleted)
SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and O'CONNOR, SCALIA, KENNEDY, THOMAS, and GINSBURG, JJ., joined. REHNQUIST, C.J., filed a concurring opinion, in which SCALIA and KENNEDY, JJ., joined. BREYER, J., filed a dissenting opinion, in which STEVENS, J., joined.

Laurence H. Tribe, Cambridge, MA, for petitioners.

Elihu Inselbuch, New York City, for respondents.

Justice SOUTER delivered the opinion of the Court.

This case turns on the conditions for certifying a mandatory settlement class on a limited fund theory under Federal Rule of Civil Procedure 23(b)(1)(B). We hold that applicants for contested certification on this rationale must show that the fund is limited by more than the agreement of the parties, and has been allocated to claimants belonging within the class by a process addressing any conflicting interests of class members.

I

Like Amchem Products, Inc. v. Windsor, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), this case is a class action prompted by the elephantine mass of asbestos cases, and our discussion in Amchem will suffice to show how this litigation defies customary judicial administration and calls for national legislation. [FN1] In 1967, one of the first actions ***2303** for personal asbestos injury was filed in the United States District Court for the Eastern District of Texas against a group of asbestos manufacturers. App. to Pet. for Cert. 252a. In the 1970's and 1980's, plaintiffs' lawyers throughout the country, particularly in East Texas, honed the litigation of asbestos claims to the point of almost mechanical regularity, improving the forensic identification of diseases caused by asbestos, refining theories of liability, and often settling large inventories of cases. See D. Hensler, W. Felstiner, M. Selvin, & P. Ebener, Asbestos in the Courts: The Challenge of Mass Toxic Torts vii (1985); McGovern, Resolving Mature Mass Tort Litigation, 69 B.U.L.Rev. 659, 660-661 (1989); see also App. to Pet. for Cert. 253a.

FN1. "[This] is a tale of danger known in the 1930s, exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits beginning in the 1970s." On the basis of past and current filing data, and because of a latency period that may last as long as 40 years for some asbestos related diseases, a continuing stream of claims can be expected. The final toll of asbestos related injuries is unknown. Predictions have been made of 200,000 asbestos disease deaths before the year 2000 and as many as 265,000 by the year 2015. " 'The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine;

trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.'" Amchem Products, Inc. v. Windsor, 521 U.S., at 598, 117 S.Ct. 2231 (quoting Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation 2-3 (Mar.1991) (hereinafter Report)). We noted in Amchem that the Judicial Conference Ad Hoc Committee on Asbestos Litigation in 1991 had called for "federal legislation creating a national asbestos dispute-resolution scheme." Ibid. (citing Report 3, 27-35 (Mar.1991)). To date Congress has not responded.

Respondent Fibreboard Corporation was a defendant in the 1967 action. Although it was primarily a timber company, from the 1920's through 1971 the company manufactured a variety of products containing asbestos, mainly for high-temperature industrial applications. As the tide of asbestos litigation rose, Fibreboard found itself litigating on two fronts. On one, plaintiffs were filing a stream of personal injury claims against it, swelling throughout the 1980's and 1990's to thousands of new claims for compensatory damages each year. Id., at 265a; App. 1040a. On the second front, Fibreboard was battling for funds to pay its tort claimants. From May, 1957, through March, 1959, respondent Continental Casualty Company had provided Fibreboard with a comprehensive general liability policy with limits of $1 million per occurrence, $500,000 per claim, and no aggregate limit. Fibreboard also claimed that respondent Pacific Indemnity Company had insured it from 1956 to 1957 under a similar policy. App. to Pet. for Cert. 267a-268a. Beginning in 1979, Fibreboard was locked in coverage litigation with Continental and Pacific in a California state trial court, which in 1990 held Continental and Pacific responsible for indemnification as to any claim by a claimant exposed to Fibreboard asbestos products prior to their policies' respective expiration dates. Id., at 268a-269a. The decree also required the insurers to pay the full cost of defense for each claim covered. Ibid. The insurance companies appealed.

With asbestos case filings continuing unabated, and its secure insurance assets almost depleted, Fibreboard in 1988 began a practice of "structured settlement," paying plaintiffs 40 percent of the settlement figure up front with the balance contingent upon a successful resolution of the coverage dispute. [FN2] By 1991, however, the pace of filings forced Fibreboard to start settling cases entirely with the assignments of its rights against Continental, with no initial payment. To reflect the risk that Continental might prevail in the coverage dispute, these assignment agreements generally carried a figure about twice the nominal amount of earlier settlements. Continental challenged Fibreboard's right to make unilateral assignments, ***2304** but in 1992 a California state court ruled for Fibreboard in that dispute. [FN3]

FN2. Because Fibreboard's insurance policy with Continental expired in 1959, before the global settlement the settlement value of claims by victims exposed to Fibreboard's asbestos prior to 1959 was much higher than for victims exposed after 1959, where the only right of recovery was against Fibreboard itself. See In re Asbestos Litigation, 90 F.3d 963, 1012-1013 (C.A.5 1996) (SMITH, J., dissenting).

FN3. Id., at 969, and n. 1 (citing Andrus v. Fibreboard, No. 614747- 3 (Sup.Ct., Alameda Cty. June 1, 1992)). Continental appealed, and, after the Global Settlement Agreement was reached in this case, but before the fairness hearing, see infra, at 2305, a California appellate court reversed. See 90 F.3d, at 969, and n. 1 (citing Fibreboard Corp. v. Continental Casualty Co., No. A059716 (Cal.App., Oct. 19, 1994)). See 90 F.3d, at 969 and n. 1. Continental and Fibreboard had each brought actions seeking to establish (or challenge) the validity of Fibreboard's assignment-settlement program, but only Andrus produced a definitive ruling as opposed to a settlement. See App. to Pet. for Cert. 288a-290a.

Meanwhile, in the aftermath of a 1990 Federal Judicial Center conference on the asbestos litigation crisis, Fibreboard approached a group of leading asbestos plaintiffs' lawyers, offering to discuss a "global settlement" of its asbestos personal-injury liability. Early negotiations bore relatively little fruit, save for the December 1992 settlement by assignment of a significant inventory of pending claims. This settlement brought Fibreboard's deferred settlement obligations to more than $1.2 billion, all contingent upon victory over Continental on the scope of coverage and the validity of the settlement assignments.

In February 1993, after Continental had lost on both issues at the trial level, and thus faced the possibility of practically unbounded liability, it too joined the global settlement negotiations. Because Continental conditioned its part in any settlement on a guarantee of "total peace," ensuring no unknown future liabilities, talks focused on the feasibility of a mandatory class action, one binding all potential plaintiffs and giving none of them any choice to opt out of the certified class. Negotiations continued throughout the spring and summer of 1993, but the difficulty of settling both actually pending and potential future claims simultaneously led to an agreement in early August to segregate and settle an inventory of some 45,000 pending claims, being substantially all those filed by one of the plaintiffs' firms negotiating the global settlement. The settlement amounts per claim were higher than average, with one-half due on closing and the remainder contingent upon either a global settlement or Fibreboard's success in

the coverage litigation. This agreement provided the model for settling inventory claims of other firms.

With the insurance companies' appeal of the consolidated coverage case set to be heard on August 27, the negotiating parties faced a motivating deadline, and about midnight before the argument, in a coffee shop in Tyler, Texas, the negotiators finally agreed upon $1.535 billion as the key term of a "Global Settlement Agreement." $1.525 billion of this sum would come from Continental and Pacific, in the proportion established by the California trial court in the coverage case, while Fibreboard would contribute $10 million, all but $500,000 of it from other insurance proceeds, App. 84a. The negotiators also agreed to identify unsettled present claims against Fibreboard and set aside an as-then unspecified fund to resolve them, anticipating that the bulk of any excess left in that fund would be transferred to class claimants. Ahearn v. Fibreboard Corp., 162 F.R.D. 505, 517 (E.D.Tex.1995). The next day, as a hedge against the possibility that the Global Settlement Agreement might fail, plaintiffs' counsel insisted as a condition of that agreement that Fibreboard and its two insurers settle the coverage dispute by what came to be known as the "Trilateral Settlement Agreement." The two insurers agreed to provide Fibreboard with funds eventually set at $2 billion to defend against asbestos claimants and pay the winners, should the Global Settlement Agreement fail to win approval. Id., at 517, 521; see also App. to Pet. for Cert. 492a. [FN4]

FN4. Two related settlement agreements accompanied the Global and Trilateral Settlement Agreements. The first, negotiated with representatives of Fibreboard's major codefendants, preserved credit rights for codefendant third parties, In re Asbestos Litigation, 90 F.3d 963, 973 (C.A.5 1996); the second provided that final approval of the Global Settlement Agreement would not constitute a "settlement" under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 933(g), 162 F.R.D., at 521-522. Neither of these agreements is before the Court.

***2305** On September 9, 1993, as agreed, a group of named plaintiffs filed an action in the United States District Court for the Eastern District of Texas, seeking certification for settlement purposes of a mandatory class comprising three groups: all persons with personal injury claims against Fibreboard for asbestos exposure who had not yet brought suit or settled their claims before the previous August 27; those who had dismissed such a claim but retained the right to bring a future action against Fibreboard; and "past, present and future spouses, parents, children, and other relatives" of class members exposed to Fibreboard asbestos. [FN5] The class did not include claimants with actions presently pending against Fibreboard or claimants "who filed and, for cash payment or some other negotiated value, dismissed claims against Fibreboard, and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignancy." Id., at 534a-535a. The complaint pleaded personal injury claims against Fibreboard, and, as justification for class certification, relied on the shared necessity of ensuring insurance funds sufficient for compensation. Id., at 552a-569a. After Continental and Pacific had obtained leave to intervene as party- defendants, the District Court provisionally granted class certification, enjoined commencement of further separate litigation against Fibreboard by class members, and appointed a guardian ad litem to review the fairness of the settlement to the class members. See In re Asbestos Litigation, 90 F.3d 963, 972 (C.A.5 1996).

FN5. The final judgment regarding class certification in the District Court defined the class as follows:
"(a) All persons (or their legal representatives) who prior to August 27, 1993 were exposed, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member or any other person), to asbestos or to asbestos-containing products for which Fibreboard may bear legal liability and who have not, before August 27, 1993, (i) filed a lawsuit for any asbestos related personal injury, or damage, or death arising from such exposure in any court against Fibreboard or persons or entities for whose actions or omissions Fibreboard bears legal liability; or (ii) settled a claim for any asbestos-related personal injury, or damage, or death arising from such exposure with Fibreboard or with persons or entities for whose actions or omissions Fibreboard bears legal liability;
"(b) All persons (or their legal representatives) exposed to asbestos or toasbestos-containing products, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member or any other person), who dismissed an action prior to August 27, 1993 without prejudice against Fibreboard, and who retain the right to sue Fibreboard upon development of a nonmalignant disease process or a malignancy; provided, however, that the Settlement Class does not include persons who filed and, for cash payment or some other negotiated value, dismissed claims against Fibreboard, and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignancy; and
"(c) All past, present and future spouses, parents, children and other relatives (or their legal representatives) of the class members described in paragraphs (a) and (b) above, except for any such person who has, before August 27, 1993, (i) filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) or (b) above in any court against Fibreboard (or against entities for whose actions or omissions Fibreboard bears legal liability), or (ii) settled a claim for the asbestos-related

personal injury, or damage, or death of a class member described in (a) or (b) above with Fibreboard (or with entities for whose actions or omissions Fibreboard bears legal liability)." App. to Pet. for Cert. 534a-535a.

As finally negotiated, the Global Settlement Agreement provided that in exchange for full releases from class members, Fibreboard, Continental, and Pacific would establish a trust to process and pay class members' asbestos personal injury and death claims. Claimants seeking compensation would be required to try to settle with the trust. If initial settlement attempts failed, claimants would have to proceed to mediation, arbitration, and a mandatory settlement conference. Only after exhausting that process could claimants go to court against the trust, subject to a limit of $500,000 per claim, with punitive damages and prejudgment interest barred. Claims resolved without litigation would be discharged over three years, while judgments would be paid out over a 5- to 10-year period. The Global Settlement Agreement also contained spendthrift provisions to conserve the trust, and provided for paying more serious claims first in the event of a shortfall in any given year. Id., at 973.

After an extensive campaign to give notice of the pending settlement to potential class ***2306** members, the District Court allowed groups of objectors, including petitioners here, to intervene. After an 8-day fairness hearing, the District Court certified the class and approved the settlement as "fair, adequate, and reasonable," under Rule 23(e). Ahearn, 162 F.R.D., at 527. Satisfied that the requirements of Rule 23(a) were met, id., at 523-526, [FN6] the District Court certified the class under Rule 23(b)(1)(B), [FN7] citing the risk that Fibreboard might lose or fare poorly on appeal of the coverage case or lose the assignment-settlement dispute, leaving it without funds to pay all claims. Id., at 526. The "allowance of individual adjudications by class members," the District Court concluded, "would have destroyed the opportunity to compromise the insurance coverage dispute by creating the settlement fund, and would have exposed the class members to the very risks that the settlement addresses." Id., at 527. In response to intervenors' objections that the absence of a "limited fund" precluded certification under Rule 23(b)(1)(B), the District Court ruled that although the subdivision is not so restricted, if it were, this case would qualify. It found both the "disputed insurance asset liquidated by the $1.535 billion Global Settlement," and, alternatively, "the sum of the value of Fibreboard plus the value of its insurance coverage," as measured by the insurance funds' settlement value, to be relevant "limited funds." App. to Pet. for Cert. 491a-492a.

FN6. "Rule 23(a) states four threshold requirements applicable to all class actions: (1) numerosity (a 'class [so large] that joinder of all members is impracticable'); (2) commonality ('questions of law or fact common to the class'); (3) typicality (named parties' claims or defenses 'are typical… of the class'); and (4) adequacy of representation (representatives 'will fairly and adequately protect the interests of the class')." Amchem Products, Inc. v. Windsor, 521 U.S. 591, 613, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997).

FN7. Rule 23(b)(1)(B) provides that "[a]n action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: (1) the prosecution of separate actions by or against individual members of the class would create a risk of… (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests."

On appeal, the Fifth Circuit affirmed both as to class certification and adequacy of settlement. In re Asbestos Litigation, supra. [FN8] Agreeing with the District Court's application of Rule 23(a), the Court of Appeals found that there was commonality in class members' shared interest in securing and equitably distributing maximum possible settlement funds, and that the representative plaintiffs were sufficiently typical both in sharing that interest and in basing their claims on the same legal and remedial theories that absent class members might raise. Id., at 975-976. The Fifth Circuit also thought that there were no conflicts of interest sufficiently serious to undermine the adequacy of class counsel's representation. Id., at 976-982. [FN9] As to Rule 23(b)(1)(B), the Court approved the class certification on a "limited fund" rationale based on the threat to "the ability of other members of the class to receive full payment for their injuries from Fibreboard's limited assets." Ibid. [FN10] The Court of Appeals cited expert testimony that Fibreboard faced enormous potential liabilities and defense costs that would likely equal or exceed the amount of damages paid out, and concluded that even combining Fibreboard's value of some $235 million with the $2 billion provided in the Trilateral Settlement Agreement, the company would be unable ***2307** to pay all valid claims against it within five to nine years. Ibid. Judge Smith dissented, arguing among other things that the majority had skimped on serious due process concerns, had glossed over problems of commonality, typicality, and adequacy of representation, and had ignored a number of justiciability issues. See generally id., at 993-1026. [FN11]

FN8. Continental and Pacific also filed a class action against a defendant class essentially identical to the plaintiff class in the Global Settlement Agreement as well as a class of third parties with asbestos-related claims against Fibreboard, seeking a declaration that the Trilateral Settlement Agreement was fair and reasonable. The District Court certified the class and ap-

proved the Trilateral Settlement Agreement, which the Fifth Circuit consolidated with the review of the case below and affirmed. See In re Asbestos Litigation, 90 F.3d, at 974, 991-993. That decision is now final and is not before this Court.

FN9. As the objectors did not challenge the adequacy of representation of class representatives, the Fifth Circuit did not consider the issue. Id., at 976, n. 10. Likewise, no party raised concerns with Rule 23(a)'s numerosity requirement.

FN10. Abandoning the District Court's alternative rationale, the Court of Appeals rested entirely on a limited fund theory.

FN11. The Fifth Circuit denied rehearing en banc, with Judge Smith, joined by five other Circuit Judges, dissenting. In re Asbestos Litigation, 101 F.3d 368, 369 (1996).

Shortly thereafter, this Court decided Amchem and proceeded to vacate the Fifth Circuit's judgment and remand for further consideration in light of that decision. 521 U.S. 1114, 117 S.Ct. 2503, 138 L.Ed.2d 1008 (1997). On remand, the Fifth Circuit again affirmed, in a brief per curiam opinion, distinguishing Amchem on the grounds that the instant action proceeded under Rule 23(b)(1)(B) rather than (b)(3), and did not allocate awards according to the nature of the claimant's injury. In re Asbestos Litigation, 134 F.3d 668, 669-670 (1998). Again citing the findings on certification under Rule 23(b)(1)(B), the Fifth Circuit affirmed as "incontestable" the District Court's conclusion that the terms of the subdivision had been met. Id., at 670. The Court of Appeals acknowledged Amchem 's admonition that settlement class actions may not proceed unless the requirements of Rule 23(a) are met, but noted that the District Court had made extensive findings supporting its Rule 23(a) determinations. Ibid. Judge Smith again dissented, reiterating his previous concerns, and argued specifically that the District Court erred in certifying the class under Rule 23(b)(1)(B) on a "limited fund" theory because the only limited fund in the case was a creature of the settlement itself. Id., at 671-674.

We granted certiorari, 524 U.S. ——, 118 S.Ct. 2339, 141 L.Ed.2d 711 (1998), and now reverse.

II

[1][2][3][4] The nub of this case is the certification of the class under Rule 23(b)(1)(B) on a limited fund rationale, but before we reach that issue, there are two threshold matters. First, petitioners call the class claims nonjusticiable under Article III, saying that this is a feigned action initiated by Fibreboard to control its future asbestos tort liability, with the "vast majority" of the "exposure-only" class members being without injury in fact and hence without standing to sue. Brief for Petitioners 44-50. Ordinarily, of course, this or any other Article III court must be sure of its own jurisdiction before getting to the merits. Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 88-89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). But the class certification issues are, as they were in Amchem, "logically antecedent" to Article III concerns, 521 U.S., at 612, 117 S.Ct. 2231, and themselves pertain to statutory standing, which may properly be treated before Article III standing, see Steel Co., supra, at 92, 118 S.Ct. 1003. Thus the issue about Rule 23 certification should be treated first, "mindful that [the Rule's] requirements must be interpreted in keeping with Article III constraints…." Amchem, supra, at 612-613, 117 S.Ct. 2231.

Petitioners also argue that the Fifth Circuit on remand disregarded Amchem in passing on the Rule 23(a) issues of commonality, typicality, and adequacy of representation. Brief for Petitioners 13-22. We agree that in reinstating its affirmance of the District Court's certification decision, the Fifth Circuit fell short in its attention to Amchem 's explanation of the governing legal standards. Two aspects in particular of the District Court's certification should have received more detailed treatment by the Court of Appeals. First, the District Court's enquiry into both commonality and typicality focused almost entirely on the terms of the settlement. See Ahearn, 162 F.R.D., at 524. [FN12] ***2308** Second, and more significantly, the District Court took no steps at the outset to ensure that the potentially conflicting interests of easily identifiable categories of claimants be protected by provisional certification of subclasses under Rule 23(c)(4), relying instead on its post-hoc findings at the fairness hearing that these subclasses in fact had been adequately represented. As will be seen, however, these points will reappear when we review the certification on the Court of Appeals's "limited fund" theory under Rule 23(b)(1)(B). We accordingly turn directly to that.

FN12. In Amchem, the Court found that class members' shared exposure to asbestos was insufficient to meet the demanding predominance requirements of Rule 23(b)(3). Amchem Products, Inc. v. Windsor, 521 U.S. 591, 623-624, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). We left open the possibility, however, that such commonality might suffice for the purposes of Rule 23(a). Ibid.

III

A

[5][6][7] Although representative suits have been recognized in various forms since the earliest days of English law, see generally S. Yeazell, From Medieval Group Litigation to the Modern Class Action (1987); see also Marcin,

Searching for the Origin of the Class Action, 23 Cath. U.L.Rev. 515, 517-524 (1973), class actions as we recognize them today developed as an exception to the formal rigidity of the necessary parties rule in equity, see Hazard, Gedid, & Sowle, An Historical Analysis of the Binding Effect of Class Suits, 146 U. Pa. L.Rev. 1849, 1859-1860 (1998) (hereinafter Hazard, Gedid, & Sowle), as well as from the bill of peace, an equitable device for combining multiple suits, see Z. Chafee, Some Problems of Equity 161-167, 200-203 (1950). The necessary parties rule in equity mandated that "all persons materially interested, either as plaintiffs or defendants in the subject matter of the bill ought to be made parties to the suit, however numerous they may be." West v. Randall, 29 F. Cas. 718, 721 (No. 17,424) (C.C.D.R.I.1820) (Story, J.). But because that rule would at times unfairly deny recovery to the party before the court, equity developed exceptions, among them one to cover situations "where the parties are very numerous, and the court perceives, that it will be almost impossible to bring them all before the court; or where the question is of general interest, and a few may sue for the benefit of the whole; or where the parties form a part of a voluntary association for public or private purposes, and may be fairly supposed to represent the rights and interests of the whole…." Id., at 722; see J. Story, Commentaries on Equity Pleadings § 97 (J. Gould 10th rev. ed. 1892); F. Calvert, A Treatise upon the Law Respecting Parties to Suits in Equity 17- 29 (1837) (hereinafter Calvert, Parties to Suits in Equity). From these roots, modern class action practice emerged in the 1966 revision of Rule 23. In drafting Rule 23(b), the Advisory Committee sought to catalogue in "functional" terms "those recurrent life patterns which call for mass litigation through representative parties." Kaplan, A Prefatory Note, 10 B.C. Ind. & Com. L.Rev. 497 (1969).

[8][9][10] Rule 23(b)(1)(B) speaks from "a vantage point within the class, [from which the Advisory Committee] spied out situations where lawsuits conducted with individual members of the class would have the practical if not technical effect of concluding the interests of the other members as well, or of impairing the ability of the others to protect their own interests." Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L.Rev. 356, 388 (1967) (hereinafter Kaplan, Continuing Work). Thus, the subdivision (read with subdivision (c)(2)) provides for certification of a class whose members have no right to withdraw, when "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." Fed. Rule Civ. Proc. 23(b)(1)(B). [FN13] Classic examples of such a risk of impairment may, for example, be ***2309** found in suits brought to reorganize fraternal-benefit societies, see, e.g., Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 41 S.Ct. 338, 65 L.Ed. 673 (1921); actions by shareholders to declare a dividend or otherwise to "fix [their] rights," Kaplan, Continuing Work 388; and actions charging "a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class" of beneficiaries, requiring an accounting or similar procedure "to restore the subject of the trust," Advisory Committee's Notes on Fed. Rule Civ. Proc. 23, 28 U.S.C.App., p. 696 (hereinafter Adv. Comm. Notes). In each of these categories, the shared character of rights claimed or relief awarded entails that any individual adjudication by a class member disposes of, or substantially affects, the interests of absent class members.

> FN13. In contrast to class actions brought under subdivision (b)(3), in cases brought under subdivision (b)(1), Rule 23 does not provide for absent class members to receive notice and to exclude themselves from class membership as a matter of right. See 1 H. Newberg & A. Conte, Class Actions § 4.01, p. 4-6 (3d ed.1992) (hereinafter Newberg). It is for this reason that such cases are often referred to as "mandatory" class actions.

[11] Among the traditional varieties of representative suit encompassed by Rule 23(b)(1)(B) were those involving "the presence of property which call [ed] for distribution or management," J. Moore & J. Friedman, 2 Federal Practice 2240 (1938) (herein after Moore & Friedman). One recurring type of such suits was the limited fund class action, aggregating "claims… made by numerous persons against a fund insufficient to satisfy all claims." Adv. Comm. Notes 697; cf. Newberg § 4.09, at 4-33 ("Classic" limited fund class actions "include claimants to trust assets, a bank account, insurance proceeds, company assets in a liquidation sale, proceeds of a ship sale in a maritime accident suit, and others"). [FN14] The Advisory Committee cited Dickinson v. Burnham, 197 F.2d 973(CA2), cert. denied, 344 U.S. 875, 73 S.Ct. 169, 97 L.Ed. 678 (1952), as illustrative of this tradition. In Dickinson, investors hoping to save a failing company had contributed some $600,000, which had been misused until nothing was left but a pool of secret profits on a fraction of the original investment. In a class action, the District Court took charge of this fund, subjecting it to a constructive trust for division among subscribers who demonstrated their claims, in amounts proportional to each class member's percentage of all substantiated claims. 197 F.2d, at 978. [FN15] The Second Circuit approved the class action and the distribution of the entire pool to claimants, noting that "[a]lthough none of the contributors has been paid in full, no one… now asserts or suggests that they should have full recovery… as on an ordinary tort liability for conspiracy and defrauding. The court's power of disposition over the fund was therefore absolute and final." Id., at 980. [FN16] As the Advisory Committee recognized ***2310** in describing Dickinson, eq-

uity required absent parties to be represented, joinder being impractical, where individual claims to be satisfied from the one asset would, as a practical matter, prejudice the rights of absent claimants against a fund inadequate to pay them all.

FN14. Indeed, Professor Kaplan, reporter to the Advisory Committee's 1966 revision of Rule 23, commented in a letter to another member of the Advisory Committee that the phrase " 'impair or impede the ability of the other members to protect their interests' " is "redolent of claims against a fund." Letter from Benjamin Kaplan to John P. Frank, Feb. 7, 1963, Congressional Information Service Records of the U.S. Judicial Conference, Committee on Rules of Practice and Procedure 1935-1988, No. CI-6312- 31, p.2.
Some fund-related class actions involved claims for the creation or preservation of a specific fund subject to the interests of numerous claimants. See, e.g., City & County of San Francisco v. Market Street R. Co., 95 Cal.App.2d 648, 213 P.2d 780 (1950). The rationale in such cases for representative plaintiffs suing on behalf of all similarly situated potential parties was that benefits arising from the action necessarily inured to the class as a whole. Another type of fund case involved the adjudication of the rights of all participants in a fund in which the participants had common rights. See, e.g., Hartford Life Ins. Co. v. Ibs, 237 U.S. 662, 35 S.Ct. 692, 59 L.Ed. 1165 (1915); Supreme Council of Royal Arcanum v. Green, 237 U.S. 531, 35 S.Ct. 724, 59 L.Ed. 1089 (1915); Hartford Life Ins. Co. v. Barber, 245 U.S. 146, 38 S.Ct. 54, 62 L.Ed. 208 (1917); see also Smith v. Swormstedt, 16 How. 288, 14 L.Ed. 942 (1853). In such cases, regardless of the size of any individual claimant's stake, the adjudication would determine the operating rules governing the fund for all participants. This category is more analogous in modern practice to class actions seeking structural injunctions and is not at issue in this case.

FN15. The District Court in Dickinson, as was the usual practice in such cases, distributed the limited fund only after notice had been given to all class members, allowing them to come into the suit, prove their claim, and share in the recovery. See 197 F.2d, at 978; see also Adv. Comm. Notes 697 (describing limited fund class actions as involving an "action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund").

FN16. As Dickinson demonstrates, the immediate precursor to the type of limited fund class action invoked in this case was a subset of "hybrid" class actions under the 1938 version of Rule 23. Cf. 1 Newberg § 1.09, at 1-25. The original Rule 23 categorized class actions by "the character of the right sought to be enforced for or against the class," dividing such actions into "(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it; (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought." Fed. Rule Civ. Proc. 23(a) (1938 ed., Supp. V). See Moore & Friedman 2240; see also Moore & Cohn, Federal Class Actions, 32 Ill. L.Rev. 307, 317-318 (1937); Moore, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 Geo. L.J. 551, 574 (1937).

Equity, of course, recognized the same necessity to bind absent claimants to a limited fund when no formal imposition of a constructive trust was entailed. In Guffanti v. National Surety Co., 196 N.Y. 452, 458, 90 N.E. 174, 176 (1909), for example, the defendant received money to supply steamship tickets and had posted a $15,000 bond as required by state law. He converted to personal use funds collected from more than 150 ticket purchasers, was then adjudged bankrupt, and absconded. One of the defrauded ticket purchasers sued the surety in equity on behalf of himself and all others like him. Over the defendant's objection, the New York Court of Appeals sustained the equitable class suit, citing among other considerations the fact that all recovery had to come from a "limited fund out of which the aggregate recoveries must be sought" that was inadequate to pay all claims, and subject to pro rata distribution. Id., at 458, 90 N.E. 174, 90 N.E., at 176. See Hazard, Gedid, & Sowle 1915 ("[Guffanti] explained that when a debtor's assets were less than the total of the creditors' claims, a binding class action was not only permitted but was required; otherwise some creditors (the parties) would be paid and others (the absentees) would not"). See also Morrison v. Warren 174 Misc. 233, 234, 20 N.Y.S.2d 26, 27 (1940) (suit on behalf of more than 400 beneficiaries of an insurance policy following a fire appropriate where "the amount of the claims… greatly exceeds the amount of the insurance"); National Surety Co. v. Graves, 211 Ala. 533, 534, 101 So. 190 (1924) (suit against a surety company by stockholders "for the benefit of themselves and all others similarly situate who will join the suit" where it was alleged that individual suits were being filed on surety bonds that "would result in the exhaustion of the penalties of the bonds, leaving many stockholders without remedy").

[12] Ross v. Crary, 1 Paige Ch. 416, 417-418 (N.Y.Ch.1829), presents the concept of the limited fund class action in another incarnation. "[D]ivers suits for general legacies," id., at 417, were brought by various legatees against the executor of a decedent's estate. The Ross court stated that where

"there is an allegation of a deficiency of the fund, so that an account of the estate is necessary," the court will "direc[t] an account in one cause only" and "stay the proceedings in the others, leaving all the parties interested in the fund, to come in under the decree." Id., at 417-418. Thus, in equity, legatee and creditor bills against the assets of a decedent's estate had to be brought on behalf of all similarly situated claimants where it was clear from the pleadings that the available portion of the estate could not satisfy the aggregate claims against it. [FN17]

> FN17. In early creditors' bills, for example, equity would order a master to call for all creditors to prove their debts, to take account of the entire estate, and to apply the estate in payment of the debts. See 1 J. Story, Commentaries on Equity Jurisprudence §§ 547, 548 (I. Redfield 8th rev. ed. 1861). This decree, with its equitable benefit and incorporation of all creditors was not, however, available when the executor of the estate admitted assets sufficient to cover its debts, because where assets were not limited, no prejudice to the other creditors would result from the simple payment of the debt to the creditor who brought the bill. See Woodgate v. Field, 2 Hare 211, 213, 67 Eng. Rep. 88, 89 (Ch. 1842) ("The reason for… the usual form of decree… has no application where assets are admitted, for the executor thereby makes himself liable to the payment of the debt. In such a case, the other creditors cannot be prejudiced by a decree for payment of the Plaintiff's debt; and the object of the special form of the decree in a creditors' suit fails"); see also Hallett v. Hallett, 2 Paige 15, 21 (N.Y.1829) ("[I]f by the answer of the defendant [in a creditors' or legatees' suit] it appears there will be a deficiency of assets so that all the creditors cannot be paid in full, or that there must be an abatement of the complainant's legacy, the court will make a decree for the general administration of the estate, and a distribution of the same among the several parties entitled thereto, agreeable to equity").

***2311** B

[13][14] The cases forming this pedigree of the limited fund class action as understood by the drafters of Rule 23 have a number of common characteristics, despite the variety of circumstances from which they arose. The points of resemblance are not necessarily the points of contention resolved in the particular cases, but they show what the Advisory Committee must have assumed would be at least a sufficient set of conditions to justify binding absent members of a class under Rule 23(b)(1)(B), from which no one has the right to secede.

The first and most distinctive characteristic is that the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximums, demonstrate the inadequacy of the fund to pay all the claims. The concept driving this type of suit was insufficiency, which alone justified the limit on an early feast to avoid a later famine. See, e.g., Guffanti, supra, at 457, 90 N.E., at 176 ("The total amount of the claims exceeds the penalty of the bond…. A just and equitable payment from the bond would be a distribution pro rata upon the amount of the several embezzlements. Unless in a case like this the amount of the bond is so distributed among the persons having claims which are secured thereby, it must necessarily result in a scramble for precedence in payment, and the amount of the bond may be paid to the favored, or to those first obtaining knowledge of the embezzlements"); Graves, supra, at 534, 101 So., at 190 ("The primary equity of the bill is the adjustment of claims and the equitable apportionment of a fund provided by law, which is insufficient to pay claimants in full"). The equity of the limitation is its necessity.

Second, the whole of the inadequate fund was to be devoted to the overwhelming claims. See, e.g., Dickinson, 197 F.2d, at 979-980 (rejecting a challenge by holder of funds to the court's disposition of the entire fund); see also United States v. Butterworth-Judson Corp., 269 U.S. 504, 513, 46 S.Ct. 179, 70 L.Ed. 380 (1926) ("Here, the fund being less than the debts, the creditors are entitled to have all of it distributed among them according to their rights and priorities"). It went without saying that the defendant or estate or constructive trustee with the inadequate assets had no opportunity to benefit himself or claimants of lower priority by holding back on the amount distributed to the class. The limited fund cases thus ensured that the class as a whole was given the best deal; they did not give a defendant a better deal than seriatim litigation would have produced.

Third, the claimants identified by a common theory of recovery were treated equitably among themselves. The cases assume that the class will comprise everyone who might state a claim on a single or repeated set of facts, invoking a common theory of recovery, to be satisfied from the limited fund as the source of payment. Each of the people represented in Ross, for example, had comparable entitlement as a legatee under the testator's will. Those subject to representation in Dickinson had a common source of claims in the solicitation of funds by parties whose subsequent defalcation left them without their investment, while in Guffanti the individuals represented had each entrusted money for ticket purchases. In these cases the hope of recovery was limited, respectively, by estate assets, the residuum of profits, and the amount of the bond. Once the represented classes were so identified, there was no question of omitting anyone whose claim shared the common theory of liability and would contribute to the calculated shortfall of recovery. See Nashville & Decatur Railroad Co. v. Orr, 18 Wall. 471, 474, 21 L.Ed. 810 (1873) (reciting the "well settled" general rule "that when it appears on the face

of the bill that there will be a deficiency in the fund, and that there are other creditors or legatees who are entitled ***2312** to a ratable distribution with the complainants, and who have a common interest with them, such creditors or legatees should be made parties to the bill, or the suit should be brought by the complainants in behalf of themselves and all others standing in a similar situation"). The plaintiff appeared on behalf of all similarly situated parties, see Calvert, Parties to Suits in Equity 24 ("[I]t is not sufficient that the plaintiff appear on behalf of numerous parties: the rule seems to be, that he must appear on behalf of all who are interested"); thus, the creditors' bill was brought on behalf of all creditors, cf. Leigh v. Thomas, 2 Ves. Sen. 312, 313, 28 Eng. Rep. 201 (Ch. 1751) ("No doubt but a bill may be by a few creditors in behalf of themselves and the rest… but there is no instance of a bill by three or four to have an account of the estate, without saying they bring it in behalf of themselves and the rest of the creditors"), the constructive trust was asserted on behalf of all victims of the fraud, and the surety suit was brought on behalf of all entitled to a share of the bond. [FN18] Once all similar claims were brought directly or by representation before the court, these antecedents of the mandatory class action presented straightforward models of equitable treatment, with the simple equity of a pro rata distribution providing the required fairness, see 1 Pomeroy Equity Jurisprudence § 407, p. 764 (4th ed. 1918) ("[I]f the fund is not sufficient to discharge all claims upon it in full… equity will incline to regard all the demands as standing upon an equal footing, and will decree a pro rata distribution or payment"). [FN19]

FN18. Professor Chafee explained, in discussing bills of peace, that where a case presents a limited fund, "it is impossible to make a fair distribution of the fund or limited liability to all members of the multitude except in a single proceeding where the claim of each can be adjudicated with due reference to the claims of the rest. The fund or limited liability is like a mince pie, which can not be satisfactorily divided until the carver counts the number of persons at the table." Bills of Peace with Multiple Parties, 45 Harv. L.Rev. 1297, 1311 (1932).

FN19. As noted above, traditional limited fund class actions typically provided notice to all claimants and the opportunity for those claimants to establish their claims before the actual distribution took place. See, e.g., Dickinson v. Burnham, 197 F.2d 973, 978 (C.A.2 1952); Terry v. President and Directors of the Bank of Cape Fear, 20 F. 777, 782 (C.C.W.D.N.C.1884); cf. Johnson v. Waters, 111 U.S. 640, 674, 4 S.Ct. 619, 28 L.Ed. 547 (1884) (in a creditors' bill, "it is the usual and correct course to open a reference in the master's office and to give other creditors, having valid claims against the fund, an opportunity to come in and have the benefit of the decree"). Rule 23, however, specifies no notice requirement for subdivision (b)(1)(B) actions beyond that required by subdivision (e) for settlement purposes. Plaintiffs in this case made an attempt to notify all presently identifiable class members in connection with the fairness hearing, though the adequacy of the effort is disputed. Since satisfaction or not of a notice requirement would not effect the disposition of this case, we express no opinion on the need for notice or the sufficiency of the effort to give it in this case.

In sum, mandatory class treatment through representative actions on a limited fund theory was justified with reference to a "fund" with a definitely ascertained limit, all of which would be distributed to satisfy all those with liquidated claims based on a common theory of liability, by an equitable, pro rata distribution.

C

The Advisory Committee, and presumably the Congress in approving subdivision (b)(1)(B), must have assumed that an action with these characteristics would satisfy the limited fund rationale cognizable under that subdivision. The question remains how far the same characteristics are necessary for limited fund treatment. While we cannot settle all the details of a subdivision (b)(1)(B) limited fund here (and so cannot decide the ultimate question whether settlements of multitudes of related tort actions are amenable to mandatory class treatment), there are good reasons to treat these characteristics as presumptively necessary, and not merely sufficient, to satisfy the limited fund rationale for a mandatory action. At the least, the burden of justification rests on the proponent of any departure from the traditional norm.

[15] It is true, of course, that the text of Rule 23(b)(1)(B) is on its face open to a more lenient limited fund concept, just as it covers more historical antecedents than the limited ***2313** fund. But the greater the leniency in departing from the historical limited fund model, the greater the likelihood of abuse in ways that will be apparent when we apply the limited fund criteria to the case before us. The prudent course, therefore, is to presume that when subdivision (b)(1)(B) was devised to cover limited fund actions, the object was to stay close to the historical model. As will be seen, this limiting construction finds support in the Advisory Committee's expressions of understanding, minimizes potential conflict with the Rules Enabling Act, and avoids serious constitutional concerns raised by the mandatory class resolution of individual legal claims, especially where a case seeks to resolve future liability in a settlement-only action.

[16] To begin with, the Advisory Committee looked cautiously at the potential for creativity under Rule 23(b)(1)(B), at least in comparison with Rule 23(b)(3). Al-

though the committee crafted all three subdivisions of the Rule in general, practical terms, without the formalism that had bedeviled the original Rule 23, see Kaplan, Continuing Work 380-386, the Committee was consciously retrospective with intent to codify pre-Rule categories under Rule 23(b)(1), not forward-looking as it was in anticipating innovations under Rule 23(b)(3). Compare Civil Rules Advisory Committee Meeting, Oct. 31-Nov. 2, 1963, Congressional Information Service Records of the U.S. Judicial Conference, Committee on Rules of Practice and Procedure 1935-1988, CI 7104-53, p. 11 (hereinafter Civil Rules Meeting) (comments of Reporter Prof. Benjamin Kaplan) (Rule 23(b)(3) represents "the growing point of the law"); id., at 16 (comments of Committee Member Prof. Albert M. Sacks) (Rule 23(b)(3) is "an evolving area"). Thus, the Committee intended subdivision (b)(1) to capture the " 'standard' " class actions recognized in pre-Rule practice, Kaplan, Continuing Work 394.

[17] Consistent with its backward look under subdivision (b)(1), as commentators have pointed out, it is clear that the Advisory Committee did not contemplate that the mandatory class action codified in subdivision (b)(1)(B) would be used to aggregate unliquidated tort claims on a limited fund rationale. See Monaghan, Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members, 98 Colum. L.Rev. 1148, 1164 (1998) ("The 'framers' of Rule 23 did not envision the expansive interpretations of the rule that have emerged.... No draftsmen contemplated that, in mass torts, (b)(1)(B) 'limited fund' classes would emerge as the functional equivalent to bankruptcy by embracing 'funds' created by the litigation itself"); see also Schwarzer, Settlement of Mass Tort Class Actions: Order Out of Chaos, 80 Cornell L.Rev. 837, 840 (1995) ("The original concept of the limited fund class does not readily fit the situation where a large volume of claims might eventually result in judgments that in the aggregate could exceed the assets available to satisfy them"); Marcus, They Can't Do That, Can They? Tort Reform Via Rule 23, 80 Cornell L.Rev. 858, 877 (1995). None of the examples cited in the Advisory Committee Notes or by Professor Kaplan in explaining Rule 23(b)(1)(B) remotely approach what was then described as a "mass accident" case. While the Advisory Committee focused much attention on the amenability of Rule 23(b)(3) to such cases, the Committee's debates are silent about resolving tort claims under a mandatory limited fund rationale under Rule 23(b)(1)(B). [FN20] It is simply implausible that the Advisory Committee, so concerned about the potential difficulties posed by dealing ***2314** with mass tort cases under Rule 23(b)(3), with its provisions for notice and the right to opt out, see Rule 23(c)(2), would have uncritically assumed that mandatory versions of such class actions, lacking such protections, could be certified under Rule 23(b)(1)(B). [FN21] We do not, it is true, decide the ultimate question whether Rule 23(b)(1)(B) may ever be used to aggregate individual tort claims, cf. Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 121, 114 S.Ct. 1359, 128 L.Ed.2d 33 (1994) (per curiam). But we do recognize that the Committee would have thought such an application of the Rule surprising, and take this as a good reason to limit any surprise by presuming that the Rule's historical antecedents identify requirements.

FN20. To the extent that members of the Advisory Committee explicitly considered cases resembling the current mass tort limited fund class action, they did so in the context of the debate about bringing "mass accident" class actions under Rule 23(b)(3). There was much concern on the Advisory Committee about the degree to which subdivision (b)(3), which the Committee was drafting to replace the old spurious class action category, would be applied to "mass accident" cases. Compare, e.g., CivilRules Meeting 9, 14, with, e.g., id., at 13, 44-45. See also id., at 51. As a compromise, the Advisory Committee Notes state that a " 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways." Adv. Comm. Notes 697. See also Kaplan, Continuing Work 393.

FN21. The Advisory Committee noted, moreover, that "[w]here the class- action character of the lawsuit is based solely on the existence of a 'limited fund,' the judgment, while extending to all claims of class members against the fund, has ordinarily left unaffected the personal claims of nonappearing members against the debtor." Adv. Comm. Notes 698. Cf. Bone, Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation, 70 B.U.L.Rev. 213, 282 (1990) (historically suits involving individual claims in the absence of a common fund did not automatically bind class members, instead providing a mechanism for notice and the opportunity to join the suit). This recognition underscores doubt that the Advisory Committee would have intended liberality in allowing such a circumscribed tradition to be transmogrified by operation of Rule 23(b)(1)(B) into a mechanism forresolving the claims of individuals not only against the fund, but also against an individual tortfeasor.

[18] The Rules Enabling Act underscores the need for caution. As we said in Amchem, no reading of the Rule can ignore the Act's mandate that "rules of procedure 'shall not abridge, enlarge or modify any substantive right,' " Amchem, 521 U.S., at 613, 117 S.Ct. 2231 (quoting 28 U.S.C. § 2072(b)); cf. Guaranty Trust Co. v. York, 326 U.S. 99, 105, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945) ("In giving federal courts 'cognizance' of equity suits in cases of diversity jurisdiction, Congress never gave, nor did the federal courts

ever claim, the power to deny substantive rights created by State law or to create substantive rights denied by State law"). Petitioners argue that the Act has been violated here, asserting that the Global Settlement Agreement's priorities of claims and compromise of full recovery abrogated the state law that must govern this diversity action under 28 U.S.C. § 1652. See Brief for Petitioners 31-36. Although we need not grapple with the difficult choice-of- law and substantive state-law questions raised by petitioners' assertion, we do need to recognize the tension between the limited fund class action's pro rata distribution in equity and the rights of individual tort victims at law. Even if we assume that some such tension is acceptable under the Rules Enabling Act, it is best kept within tolerable limits by keeping limited fund practice under Rule 23(b)(1)(B) close to the practice preceding its adoption.

[19][20] Finally, if we needed further counsel against adventurous application of Rule 23(b)(1)(B), the Rules Enabling Act and the general doctrine of constitutional avoidance would jointly sound a warning of the serious constitutional concerns that come with any attempt to aggregate individual tort claims on a limited fund rationale. First, the certification of a mandatory class followed by settlement of its action for money damages obviously implicates the Seventh Amendment jury trial rights of absent class members. [FN22] We noted in Ross v. Bernhard, 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970), that since the merger of law and equity in 1938, it has become settled among the lower courts that "class action plaintiffs may obtain a jury trial on any legal issues they present." Id., at 541, 90 S.Ct. 733. By its nature, however, a mandatory settlement-only class action with legal issues and future claimants compromises their Seventh Amendment rights without their consent.

> FN22. The Seventh Amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved…."

[21][22] Second, and no less important, mandatory class actions aggregating damage claims implicate the due process "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he ***2315** is not designated as a party or to which he has not been made a party by service of process," Hansberry v. Lee, 311 U.S. 32, 40, 61 S.Ct. 115, 85 L.Ed. 22 (1940), it being "our 'deep-rooted historic tradition that everyone should have his own day in court,' " Martin v. Wilks, 490 U.S. 755, 762, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989) (quoting 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4449, p. 417 (1981)); see Richards v. Jefferson County, 517 U.S. 793, 798-799, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996). Although " '[w]e have recognized an exception to the general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party,' " or "where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate," Martin, supra, at 762, n. 2, 109 S.Ct. 2180 (citations omitted), the burden of justification rests on the exception.

The inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damage claims gathered in a mandatory class. Unlike Rule 23(b)(3) class members, objectors to the collectivism of a mandatory subdivision (b)(1)(B) action have no inherent right to abstain. The legal rights of absent class members (which in a class like this one would include claimants who by definition may be unidentifiable when the class is certified) are resolved regardless either of their consent, or, in a class with objectors, their express wish to the contrary. [FN23] And in settlement-only class actions the procedural protections built into the Rule to protect the rights of absent class members during litigation are never invoked in an adversarial setting, see Amchem, supra, at 620, 117 S.Ct. 2231.

> FN23. It is no answer in this case that the settlement agreement provided for a limited, back-end "opt out" in the form of a right on the part of class members eventually to take their case to court if dissatisfied with the amount provided by the trust. The "opt out" in this case requires claimants to exhaust a variety of alternative dispute mechanisms, to bring suit against the trust, and not against Fibreboard, and it limits damages to $500,000, to be paid out in installments over 5 to 10 years, see supra, at 2305, despite multimillion-dollar jury verdicts sometimes reached in asbestos suits, In re Asbestos Litigation, 90 F.3d 963, 1006, n. 30 (C.A.5 1996) (Smith, J., dissenting). Indeed, on approximately a dozen occasions, Fibreboard had settled for more than $500,000. See App. to Pet. for Cert. 373a.

In related circumstances, we raised the flag on this issue of due process more than a decade ago in Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). Shutts was a state class action for small sums of interest on royalty payments suspended on the authority of a federal regulation. Id., at 800, 105 S.Ct. 2965. After certification of the class, the named plaintiffs notified each member by first-class mail of the right to opt out of the lawsuit. Out of a class of 33,000, some 3,400 exercised that right, and another 1,500 were excluded because their notices could not be delivered. Id., at 801, 105 S.Ct. 2965. After losing at trial, the defendant, Phillips Petroleum, argued that the state court had no jurisdiction over claims of out-of-state plaintiffs without their affirmative consent. We said no and held that out-of-state plaintiffs could not invoke the same due process limits on personal jurisdiction that out-

of-state defendants had under International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and its progeny. 472 U.S., at 806-808, 105 S.Ct. 2965. But we also saw that before an absent class member's right of action was extinguishable due process required that the member "receive notice plus an opportunity to be heard and participate in the litigation," and we said that "at a minimum… an absent plaintiff [must] be provided with an opportunity to remove himself from the class." Id., at 812, 105 S.Ct. 2965. [FN24]

FN24. We also reiterated the constitutional requirement articulated inHansberry v. Lee, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940), that "the named plaintiff at all times adequately represent the interests of the absent class members." Phillips Petroleum Co. v. Shutts, 472 U.S., at 812, 105 S.Ct. 2965 (citing Hansberry, supra, at 42-43, 45, 61 S.Ct. 115). In Shutts, as an important caveat to our holding, we made clear that we were only examining the procedural protections attendant on binding out-of-state class members whose claims were "wholly or predominately for money judgments," 472 U.S., at 811, n. 3, 105 S.Ct. 2965.

***2316** IV

The record on which the District Court rested its certification of the class for the purpose of the global settlement did not support the essential premises of mandatory limited fund actions. It failed to demonstrate that the fund was limited except by the agreement of the parties, and it showed exclusions from the class and allocations of assets at odds with the concept of limited fund treatment and the structural protections of Rule 23(a) explained in Amchem.

A

[23][24][25] The defect of certification going to the most characteristic feature of a limited fund action was the uncritical adoption by both the District Court and the Court of Appeals of figures [FN25] agreed upon by the parties in defining the limits of the fund and demonstrating its inadequacy. [FN26] When a district court, as here, certifies for class action settlement only, the moment of certification requires "heightene[d] attention," Amchem, 521 U.S., at 620, 117 S.Ct. 2231, to the justifications for binding the class members. This is so because certification of a mandatory settlement class, however provisional technically, effectively concludes the proceeding save for the final fairness hearing. And, as we held in Amchem, a fairness hearing under Rule 23(e) is no substitute for rigorous adherence to those provisions of the Rule "designed to protect absentees," ibid., among them subdivision (b)(1)(B). [FN27] Thus, in an action such as this the settling parties must present not only their agreement, but evidence on which the district court may ascertain the limit and the insufficiency of the fund, with support in findings of fact following a proceeding in which the evidence is subject to challenge, see In re Bendectin Products Liability Litigation, 749 F.2d 300, 306 (C.A.6 1984) ("[T]he district court, as a matter of law, must have a fact-finding inquiry on this question and allow the opponents of class certification to present evidence that a limited fund does not exist"); see also In re Temple, 851 F.2d 1269, 1272 (C.A.11 1988) ("Without a finding as to the net worth of the defendant, it is difficult to see how the fact of a limited fund could have been established given that all of [the defendant's] assets are potentially available to suitors"); In re Dennis Greenman Securities Litigation, 829 F.2d 1539, 1546 (C.A.11 1987) (discussing factual findings necessary for certification of a limited fund class action).

FN25. The plural reflects the fact that the insurers agreed to provide $1.525 billion under the Global Settlement Agreement and $2 billion under the Trilateral Settlement Agreement.

FN26. The federal courts have differed somewhat in articulating the standard to evaluate whether, in fact, a fund is limited, in cases involving mass torts. Compare, e.g., In re Northern Dist. of California, Dalkon Shield IUD Products Liability Litigation, 693 F.2d 847, 852 (C.A.9 1982), cert. denied sub nom. A.H. Robins Co., Inc. v. Abed et al., 459 U.S. 1171, 103 S.Ct. 817, 74 L.Ed.2d 1015 (1983) (class proponents must demonstrate that allowing the adjudication of individual claims will inescapably compromise the claims of absent class members), with, e.g., In re "Agent Orange" Product Liability Litigation, 100 F.R.D. 718, 726 (E.D.N.Y.1983), aff'd. 818 F.2d 145 (C.A.2 1987), cert. denied sub nom. Fraticelli v. Dow Chemical Co., 484 U.S. 1004, 108 S.Ct. 695, 98 L.Ed.2d 648 (1988) (requiring only a "substantial probability—that is less than a preponderance but more than a mere possibility—that if damages are awarded, the claims of earlier litigants would exhaust the defendants' assets"). Cf. In re Bendectine Products Liability Litigation, 749 F.2d 300, 306 (C.A.6 1984). Because under either formulation, the class certification in this case cannot stand, it would be premature to decide the appropriate standard at this time.

FN27. See Issacharoff, Class Action Conflicts, 30 U.C.D.L.Rev. 805, 822 (1997) ("[I]n the context of a mandatory settlement class, the individual class member is presented with what purports to be a binding fait accompli, with the only recourse a likely futile objection at the fairness hearing required by Rule 23(e)").

We have already alluded to the difficulties facing limited fund treatment of huge numbers of actions for unliquidated damages arising from mass torts, the first such hurdle being a computation of the total claims. It is simply

not a matter of adding up the liquidated amounts, as in the models of limited fund actions. Although we might assume arguendo that prior judicial experience with asbestos claims would allow a court to make a sufficiently reliable determination of the probable total, the District Court here apparently thought otherwise, concluding that ***2317** "there is no way to predict Fibreboard's future asbestos liability with any certainty." 162 F.R.D., at 528. Nothing turns on this conclusion, however, since there was no adequate demonstration of the second element required for limited fund treatment, the upper limit of the fund itself, without which no showing of insufficiency is possible.

The "fund" in this case comprised both the general assets of Fibreboard and the insurance assets provided by the two policies, see 90 F.3d, at 982 (describing fund as Fibreboard's entire equity and $2 billion in insurance assets under the Trilateral Settlement Agreement). As to Fibreboard's assets exclusive of the contested insurance, the District Court and the Fifth Circuit concluded that Fibreboard had a then-current sale value of $235 million that could be devoted to the limited fund. While that estimate may have been conservative, [FN28] at least the District Court heard evidence and made an independent finding at some point in the proceedings. The same, however, cannot be said for the value of the disputed insurance.

> FN28. The District Court based the $235 million figure on evidence provided by an investment banker regarding what a "financially prudent buyer" would pay to acquire Fibreboard free of its personal injury asbestos liabilities, less transaction costs. App. to Pet. for Cert. 377a, 492a. In 1997, however, Fibreboard was acquired for about $515 million, plus $85 million of assumed debt. See In re Asbestos Litigation, 134 F.3d 668, 674 (C.A.5 1998) (Smith, J., dissenting); see also Coffee, Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L.Rev. 1343, 1402 (1995) (noting the surge in Fibreboard's stock price following the settlement below).

The insurance assets would obviously be "limited" in the traditional sense if the total of demonstrable claims would render the insurers insolvent, or if the policies provided aggregate limits falling short of that total; calculation might be difficult, but the way to demonstrate the limit would be clear. Neither possibility is presented in this case, however. Instead, any limit of the insurance asset here had to be a product of potentially unlimited policy coverage discounted by the risk that Fibreboard would ultimately lose the coverage dispute litigation. This sense of limit as a value discounted by risk is of course a step removed from the historical model, but even on the assumption that it would suffice for limited fund treatment, there was no adequate finding of fact to support its application here. Instead of undertaking an independent evaluation of potential insurance funds, the District Court (and, later, the Court of Appeals), simply accepted the $2 billion Trilateral Settlement Agreement figure as representing the maximum amount the insurance companies could be required to pay tort victims, concluding that "[w]here insurance coverage is disputed, it is appropriate to value the insurance asset at a settlement value." See App. to Pet. for Cert. 492a. [FN29]

> FN29. In describing possible limited funds in this case, the District Court discounted the $2 billion Trilateral Settlement Agreement figure by the amount necessary to resolve present claims included neither in the inventory settlements nor the global class claims and other items, yielding a figure equal to the $1.535 billion available under the Global Settlement Agreement. App. to Pet. for Cert. 492a. The Court of Appeals, by contrast, assumed that the full $2 billion represented by the Trilateral Settlement Agreement would be available to class claims. In re Asbestos Litigation, 90 F.3d 963, 982 (C.A.5 1996). The Court of Appeals provided no explanation for using the higher figure in light of the District Court's conclusion that only $1.535 billion of the $2 billion Trilateral Settlement Agreement figure would actually be available to the class. Either way, the figure represented only the amount the insurance companies agreed to pay, and not an independent evaluation of the limits of their payment obligations.

Settlement value is not always acceptable, however. One may take a settlement amount as good evidence of the maximum available if one can assume that parties of equal knowledge and negotiating skill agreed upon the figure through arms-length bargaining, unhindered by any considerations tugging against the interests of the parties ostensibly represented in the negotiation. But no such assumption may be indulged in this case, or probably in any class action settlement with the potential for gigantic fees. [FN30] In this case, certainly, any assumption ***2318** that plaintiffs' counsel could be of a mind to do their simple best in bargaining for the benefit of the settlement class is patently at odds with the fact that at least some of the same lawyers representing plaintiffs and the class had also negotiated the separate settlement of 45,000 pending claims, 90 F.3d, at 969-970, 971, the full payment of which was contingent on a successful global settlement agreement or the successful resolution of the insurance coverage dispute (either by litigation or by agreement, as eventually occurred in the Trilateral Settlement Agreement), id., at 971, n. 3; App. 119a-120a. Class counsel thus had great incentive to reach any agreement in the global settlement negotiations that they thought might survive a Rule 23(e) fairness hearing, rather than the best possible arrangement for the substantially unidentified global settlement class. Cf. Cramton, Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction, 80 Cornell L.Rev. 811, 832 (1995) ("[S]ide settlements suggest that class

counsel has been laboring under an impermissible conflict of interest and that it may have preferred the interests of current clients to those of the future claimants in the settlement class"). The resulting incentive to favor the known plaintiffs in the earlier settlement was, indeed, an egregious example of the conflict noted in Amchem resulting from divergent interests of the presently injured and future claimants. See 521 U.S, at 626-627, 117 S.Ct. 2231 (discussing adequacy of named representatives under Rule 23(a)(4)).

> FN30. In a strictly rational world, plaintiffs' counsel would always press for the limit of what the defense would pay. But with an already enormous fee within counsel's grasp, zeal for the client may relax sooner than it would in a case brought on behalf of one claimant.

We do not, of course, know exactly what an independent valuation of the limit of the insurance assets would have shown. It might have revealed that even on the assumption that Fibreboard's coverage claim was sound, there would be insufficient assets to pay claims, considered with reference to their probable timing; if Fibreboard's own assets would not have been enough to pay the insurance shortfall plus any claims in excess of policy limits, the projected insolvency of the insurers and Fibreboard would have indicated a truly limited fund. (Nothing in the record, however, suggests that this would have been a supportable finding.) Or an independent valuation might have revealed assets of insufficient value to pay all projected claims if the assets were discounted by the prospects that the insurers would win the coverage cases. Or the Court's independent valuation might have shown, discount or no discount, the probability of enough assets to pay all projected claims, precluding certification of any mandatory class on a limited fund rationale. Throughout this litigation the courts have accepted the assumption that the third possibility was out of the question, and they may have been right. But objecting and unidentified class members alike are entitled to have the issue settled by specific evidentiary findings independent of the agreement of defendants and conflicted class counsel.

B

[26] The explanation of need for independent determination of the fund has necessarily anticipated our application of the requirement of equity among members of the class. There are two issues, the inclusiveness of the class and the fairness of distributions to those within it. On each, this certification for settlement fell short.

The definition of the class excludes myriad claimants with causes of action, or foreseeable causes of action, arising from exposure to Fibreboard asbestos. While the class includes those with present claims never filed, present claims withdrawn without prejudice, and future claimants, it fails to include those who had previously settled with Fibreboard while retaining the right to sue again "upon development of an asbestos related malignancy," plaintiffs with claims pending against Fibreboard at the time of the initial announcement of the Global Settlement Agreement, and the plaintiffs in the "inventory" claims settled as a supposedly necessary step in reaching the global settlement, see 90 F.3d, at 971. The number of those outside the class who settled with a reservation of rights may be uncertain, but there is no such uncertainty about the significance of the settlement's exclusion of the 45,000 inventory plaintiffs and the plaintiffs in the unsettled present cases, estimated by the Guardian Ad Litem at more than 53,000 as of August 27, 1993, see App. in No. 95-40635(CA5), 6 Record, ***2319** Tab 55, p. 72 (Report of the Guardian Ad Litem). It is a fair question how far a natural class may be depleted by prior dispositions of claims and still qualify as a mandatory limited fund class, but there can be no question that such a mandatory settlement class will not qualify when in the very negotiations aimed at a class settlement, class counsel agree to exclude what could turn out to be as much as a third of the claimants that negotiators thought might eventually be involved, a substantial number of whom class counsel represent, see App. to Pet. for Cert. 321a (noting that the parties negotiating the global settlement agreed to use a negotiating benchmark of 186,000 future claims against Fibreboard).

Might such class exclusions be forgiven if it were shown that the class members with present claims and the outsiders ended up with comparable benefits? The question is academic here. On the record before us, we cannot speculate on how the unsettled claims would fare if the Global Settlement were approved, or under the Trilateral Settlement. As for the settled inventory claims, their plaintiffs appeared to have obtained better terms than the class members. They received an immediate payment of 50 percent of a settlement higher than the historical average, and would get the remainder if the global settlement were sustained (or the coverage litigation resolved, as it turned out to be by the Trilateral Settlement Agreement); the class members, by contrast, would be assured of a 3-year payout for claims settled, whereas the unsettled faced a prospect of mediation followed by arbitration as prior conditions of instituting suit, which would even then be subject to a recovery limit, a slower payout and the limitations of the trust's spendthrift protection. See supra, at 2309. Finally, as discussed below, even ostensible parity between settling nonclass plaintiffs and class members would be insufficient to overcome the failure to provide the structural protection of independent representation as for subclasses with conflicting interests.

[27] On the second element of equity within the class, the

fairness of the distribution of the fund among class members, the settlement certification is likewise deficient. Fair treatment in the older cases was characteristically assured by straightforward pro rata distribution of the limited fund. See supra, at 2321. While equity in such a simple sense is unattainable in a settlement covering present claims not specifically proven and claims not even due to arise, if at all, until some future time, at the least such a settlement must seek equity by providing for procedures to resolve the difficult issues of treating such differently situated claimants with fairness as among themselves.

[28] First, it is obvious after Amchem that a class divided between holders of present and future claims (some of the latter involving no physical injury and to claimants not yet born) requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel. See Amchem, 521 U.S., at 627, 117 S.Ct. 2231 (class settlements must provide "structural assurance of fair and adequate representation for the diverse groups and individuals affected"); cf. 5 J. Moore, T. Chorvat, D. Feinberg, R. Marmer, & J. Solovy, Moore's Federal Practice § 23.25[5][e], p. 23-149 (3d ed.1998) (an attorney who represents another class against the same defendant may not serve as class counsel). [FN31] As we said in Amchem, "for the ***2320** currently injured, the critical goal is generous immediate payments," but "[t]hat goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation- protected fund for the future." Amchem, supra, at 626, 117 S.Ct. 2231. No such procedure was employed here, and the conflict was as contrary to the equitable obligation entailed by the limited fund rationale as it was to the requirements of structural protection applicable to all class actions under Rule 23(a)(4).

> FN31. This adequacy of representation concern parallels the enquiry required at the threshold under Rule 23(a)(4), but as we indicated in Amchem, the same concerns that drive the threshold findings under Rule 23(a) may also influence the propriety of the certification decision under the subdivisions of Rule 23(b). See Amchem, 521 U.S., at 623, n. 18, 117 S.Ct. 2231. In Amchem, we concentrated on the adequacy of named plaintiffs, but we recognized that the adequacy of representation enquiry is also concerned with the "competency and conflicts of class counsel." Id., at 626, n. 20, 117 S.Ct. 2231 (citing General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 157, n. 13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)); see also 5 Moore's Federal Practice § 23.25[3][a] (adequacy of representation concerns named plaintiff and class counsel). In this case, of course, the named representatives were not even "named [until] after the agreement in principle was reached," App. to Pet. for Cert. 483a; and they then relied on class counsel in subsequent settlement negotiations, ibid.

Second, the class included those exposed to Fibreboard's asbestos products both before and after 1959. The date is significant, for that year saw the expiration of Fibreboard's insurance policy with Continental, the one which provided the bulk of the insurance funds for the settlement. Pre-1959 claimants accordingly had more valuable claims than post-1959 claimants, see 90 F.3d, at 1012-1013 (SMITH, J., dissenting), the consequence being a second instance of disparate interests within the certified class. While at some point there must be an end to reclassification with separate counsel, these two instances of conflict are well within the requirement of structural protection recognized in Amchem.

It is no answer to say, as the Fifth Circuit said on remand, that these conflicts may be ignored because the settlement makes no disparate allocation of resources as between the conflicting classes. See 134 F.3d, at 669-670. The settlement decides that the claims of the immediately injured deserve no provisions more favorable than the more speculative claims of those projected to have future injuries, and that liability subject to indemnification is no different from liability with no indemnification. The very decision to treat them all the same is itself an allocation decision with results almost certainly different from the results that those with immediate injuries or claims of indemnified liability would have chosen.

[29] Nor does it answer the settlement's failures to provide structural protections in the service of equity to argue that the certified class members' common interest in securing contested insurance funds for the payment of claims was so weighty as to diminish the deficiencies beneath recognition here. See Brief for Respondent Class Representatives Ahearn, et al. 31 (discussing this issue in the context of the Rule 23(a)(4) adequacy of representation requirement); id., at 35-36 (citing, e.g., In re "Agent Orange" Product Liability Litigation, 996 F.2d 1425, 1435-1436 (C.A.2 1993); In re "Agent Orange" Product Liability Litigation, 800 F.2d 14, 18- 19 (C.A.2 1986)). This argument is simply a variation of the position put forward by the proponents of the settlement in Amchem, who tried to discount the comparable failure in that case to provide separate representatives for subclasses with conflicting interests, see Brief for Petitioners in Amchem Products, Inc. v. Windsor, O.T.1996, No. 96-270, p. 48 (arguing that "achieving a global settlement" was "an overriding concern that all plaintiffs [held] in common"); see also id., at 42 (arguing that the requirement of Rule 23(b)(3) that there be predominance of common questions of law or fact had been met by shared interest in "the fairness of the settlement"). The current position is just as unavailing as its predecessor in Amchem. There we gave the argument no weight, see 521 U.S., at 625-628, 117

S.Ct. 2231, observing that "[t]he benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration," but the determination whether "proposed classes are sufficiently cohesive to warrant adjudication" must focus on "questions that preexist any settlement," id., at 622-623, 117 S.Ct. 2231. [FN32] Here, just as in the earlier case, the proponents of the settlement are trying to rewrite Rule 23; each ignores the fact that Rule 23 requires protections under subdivisions (a) and (b) against inequity and potential inequity at the pre-certification stage, quite independently of the required determination at postcertification fairness review under subdivision (e) that any settlement is fair in an overriding sense. A fairness hearing under subdivision (e) can no more swallow the preceding ***2321** protective requirements of Rule 23 in a subdivision (b)(1)(B) action than in one under subdivision (b)(3). [FN33]

FN32. We made this observation in the context of Rule 23(b)(3)'s predominance enquiry, see Amchem, 521 U.S., at 622-623, 117 S.Ct. 2231, and noted that no " 'limited fund' capable of supporting class treatment under Rule 23(b)(1)(B)" was involved, id., at 623, n. 19, 117 S.Ct. 2231.

FN33. As a variation of the argument that class members' common interest in securing the insurance settlement overrode any internal conflicts, respondents put forth an alternative rationale for sustaining the certification in this case under Rule 23(b)(1)(B). They assert that "failure by the class to file and maintain a class action to resolve the coverage disputes on a unitary basis—allowing class members instead to prosecute their claims separately—would have put class members to the 'significant risk[s]' that Fibreboard would lose its claimed insurance as a result of the coverage disputes," and that "any separate action by any class member could have itself resulted in an adjudication that the insurers owed no coverage to Fibreboard…." Brief for Respondents Continental et al. 25 (quoting Rule 23(b)(1)(B)). Whatever its merits, this rationale for certification is foreclosed by the class conflicts, rehearsed above, that tainted the negotiation of the global settlement, and that at this point cannot be undone. Thus, whether a mandatory class could now be certified without the excluded inventory plaintiffs (whose settlements would appear to be final), or with properly represented subclasses, is an issue we need not address.

C

A third contested feature of this settlement certification that departs markedly from the limited fund antecedents is the ultimate provision for a fund smaller than the assets understood by the Court of Appeals to be available for payment of the mandatory class members' claims; most notably, Fibreboard was allowed to retain virtually its entire net worth. Given our treatment of the two preceding deficiencies of the certification, there is of course no need to decide whether this feature of the agreement would alone be fatal to the Global Settlement Agreement. To ignore it entirely, however, would be so misleading that we have decided simply to identify the issue it raises, without purporting to resolve it at this time.

[30] Fibreboard listed its supposed entire net worth as a component of the total (and allegedly inadequate) assets available for claimants, but subsequently retained all but $500,000 of that equity for itself. [FN34] On the face of it, the arrangement seems irreconcilable with the justification of necessity in denying any opportunity for withdrawal of class members whose jury trial rights will be compromised, whose damages will be capped, and whose payments will be delayed. With Fibreboard retaining nearly all its net worth, it hardly appears that such a regime is the best that can be provided for class members. Given the nature of a limited fund and the need to apply its criteria at the certification stage, it is not enough for a District Court to say that it "need not ensure that a defendant designate a particular source of its assets to satisfy the class' claims; [but only that] the amount recovered by the class [be] fair." 162 F.R.D., at 527.

FN34. We need not decide here how close to insolvency a limited fund defendant must be brought as a condition of class certification. While there is no inherent conflict between a limited fund class action under Rule 23(b)(1)(B) and the Bankruptcy Code, cf., e.g., In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 292 (C.A.2 1992), it is worth noting that if limited fund certification is allowed in a situation where a company provides only a de minimis contribution to the ultimate settlement fund, the incentives such a resolution would provide to companies facing tort liability to engineer settlements similar to the one negotiated in this case would, in all likelihood, significantly undermine the protections for creditors built into the Bankruptcy Code. We note further that Congress in the Bankruptcy Reform Act of 1994, Pub.L. 103-394 § 111(a), amended the Bankruptcy Code to enable a debtor in a Chapter 11 reorganization in certain circumstances to establish a trust toward which the debtor may channel future asbestos-related liability, see 11 U.S.C. §§ 524(g), (h).

The District Court in this case seems to have had a further point in mind, however. One great advantage of class action treatment of mass tort cases is the opportunity to save the enormous transaction costs of piecemeal litigation, an advantage to which the settlement's proponents have referred in this case. [FN35] Although the District Court made no ***2322** specific finding about the transaction cost saving

likely from this class settlement, estimating the amount in the "hundreds of millions," id., at 529, it did conclude that the amount would exceed Fibreboard's net worth as the Court valued it, ibid. (Fibreboard's net worth of $235 million "is considerably less than the likely savings in defense costs under the Global Settlement"). If a settlement thus saves transaction costs that would never have gone into a class member's pocket in the absence of settlement, may a credit for some of the savings be recognized in a mandatory class action as an incentive to settlement? It is at least a legitimate question, which we leave for another day.

FN35. Some courts certifying limited fund class actions have focused on the advantages such suits have in reducing transaction costs when compared to piecemeal litigation. See, e.g., In re Drexel Burnham Lambert Group, Inc., supra, at 292 (certifying mandatory class in part because "some members of the putative class might attempt to maintain costly individual actions in the hope and, perhaps, the belief that their claims are more meritorious than the claims of other class members," and thus warranting mandatory class certification "to prevent claimants with such motivations from unfairly diminishing the eventual recovery of other class members"). Although the transaction costs Fibreboard faced prior to settlement were at times significant, see Ahearn, 162 F.R.D., at 509; see also App. to Pet. for Cert. 282a (Fibreboard's annual asbestos litigation defense costs ran, at times, as high as twice the total face value of settlements reached), given the exigencies of Fibreboard's contingent insurance asset, this case does not present an instance in which limited fund certification can be justified on the ground that such settlement necessarily provided funds equal to, or greater than, what might have been recovered through individual litigation factoring out transaction costs.

V

Our decision rests on a different basis from the ground of Justice BREYER's dissent, just as there was a difference in approach between majority and dissenters in Amchem. The nub of our position is that we are bound to follow Rule 23 as we understood it upon its adoption, and that we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act. Although, as the dissent notes, post, at 2331, the revised text adopted in 1966 was understood (somewhat cautiously) to authorize the courts to provide for class treatment of mass tort litigation, it was also the Court's understanding that the Rule's growing edge for that purpose would be the opt- out class authorized by subdivision (b)(3), not the mandatory class under subdivision (b)(1)(B), see supra, at 2313. While we have not ruled out the possibility under the present Rule of a mandatory class to deal with mass tort litigation on a limited fund rationale, we are not free to dispense with the safeguards that have protected mandatory class members under that theory traditionally.

Apart from its effect on the requirements of subdivision (a) as explained and held binding in Amchem, the dissent would move the standards for mandatory actions in the direction of opt-out class requirements by according weight to this "unusual limited fund['s] . . . witching hour," post, at 2319, in exercising discretion over class certification. It is on this belief (that we should sustain the allowances made by the District Court in consideration of the exigencies of this settlement proceeding) that the dissent addresses each of the criteria for limited fund treatment (demonstrably insufficient fund, intraclass equity, and dedication of the entire fund, see post, at 2327-2332).

As to the calculation of the fund, the dissent believes an independent valuation by the District Court may be dispensed with here in favor of the figure agreed upon by the settling parties. The dissent discounts the conflicts on the part of class counsel who negotiated the Global Settlement Agreement by arguing that the "relevant " settlement negotiation, and hence the relevant benchmark for judging the actual value of the insurance amount, was the negotiation between Fibreboard and the insurers that produced the Trilateral Settlement Agreement. See post, at ——. This argument, however, minimizes two facts: (1) that Fibreboard and the insurers made this separate, backup agreement only at the insistence of class counsel as a condition for reaching the Global Settlement Agreement; (2) even more important, that "[t]he Insurers were . . . adamant that they would not agree to pay any more in the context of a backup agreement than in a global agreement," a principle "Fibreboard acceded to" on the day the Global Settlement Agreement was announced "as the price of permitting an agreement to be reached with respect to a global settlement," Ahearn, 162 F.R.D., at 516. Under these circumstances the reliability of the Trilateral Settlement Agreement's figure is inadequate as an independent benchmark that might excuse the ***2323** want of any independent judicial determination that the Global Settlement Agreement's fund was the maximum possible. In any event, the dissent says, it is not crucial whether a $30 claim has to settle for $15 or $20. But it is crucial. Conflict-free counsel, as required by Rule 23(a) and Amchem, might have negotiated a $20 figure, and a limited fund rationale for mandatory class treatment of a settlement-only action requires assurance that claimants are receiving the maximum fund, not a potentially significant fraction less.

With respect to the requirement of intraclass equity, the dissent argues that conflicts both within this certified class and between the class as certified and those excluded from it may be mitigated because separate counsel were simply not to be had in the short time that a settlement agreement

was possible before the argument (or likely decision) in the coverage case. But this is to say that when the clock is about to strike midnight, a court considering class certification may lower the structural requirements of Rule 23(a) as declared in Amchem, and the parallel equity requirements necessary to justify mandatory class treatment on a limited fund theory.

Finally, the dissent would excuse Fibreboard's retention of virtually all its net worth, and the loss to members of the certified class of some 13 percent of the fund putatively available to them, on the ground that the settlement made more money available than any other effort would likely have done. But even if we could be certain that this evaluation were true, this is to reargue Amchem: the settlement's fairness under Rule 23(e) does not dispense with the requirements of Rule 23(a) and (b).

We believe that if an allowance for exigency can make a substantial difference in the level of Rule 23 scrutiny, the economic temptations at work on counsel in class actions will guarantee enough exigencies to take the law back before Amchem and unsettle the line between mandatory class actions under subdivision (b)(1)(B) and opt-out actions under subdivision (b)(3).

VI

In sum, the applicability of Rule 23(b)(1)(B) to a fund and plan purporting to liquidate actual and potential tort claims is subject to question, and its purported application in this case was in any event improper. The Advisory Committee did not envision mandatory class actions in cases like this one, and both the Rules Enabling Act and the policy of avoiding serious constitutional issues counsel against leniency in recognizing mandatory limited fund actions in circumstances markedly different from the traditional paradigm. Assuming arguendo that a mandatory, limited fund rationale could under some circumstances be applied to a settlement class of tort claimants, it would be essential that the fund be shown to be limited independently of the agreement of the parties to the action, and equally essential under Rule 23(a) and (b)(1)(B) that the class include all those with claims unsatisfied at the time of the settlement negotiations, with intraclass conflicts addressed by recognizing independently represented subclasses. In this case, the limit of the fund was determined by treating the settlement agreement as dispositive, an error magnified by the representation of class members by counsel also representing excluded plaintiffs, whose settlements would be funded fully upon settlement of the class action on any terms that could survive final fairness review. Those separate settlements, together with other exclusions from the claimant class, precluded adequate structural protection by subclass treatment, which was not even afforded to the conflicting elements within the class as certified.

The judgment of the Court of Appeals, accordingly, is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Chief Justice REHNQUIST, with whom Justice SCALIA and Justice KENNEDY join, concurring.

Justice BREYER's dissenting opinion highlights in graphic detail the massive impact of asbestos-related claims on the federal courts. Post, at 2324-2325. Were I devising ***2324** a system for handling these claims on a clean slate, I would agree entirely with that dissent, which in turn approves the near-heroic efforts of the District Court in this case to make the best of a bad situation. Under the present regime, transactional costs will surely consume more and more of a relatively static amount of money to pay these claims.

But we are not free to devise an ideal system for adjudicating these claims. Unless and until the Federal Rules of Civil Procedure are revised, the Court's opinion correctly states the existing law, and I join it. But the "elephantine mass of asbestos cases," ante, at 2302, cries out for a legislative solution.

Justice BREYER, with whom Justice STEVENS joins, **dissenting**.

This case involves a settlement of an estimated 186,000 potential future asbestos claims against a single company, Fibreboard, for approximately $1.535 billion. The District Court, in approving the settlement, made 446 factual findings, on the basis of which it concluded that the settlement was equitable, that the potential claimants had been well represented, and that the distinctions drawn among different categories of claimants were reasonable. 162 F.R.D. 505 (1995); App. to Pet. for Cert. 248a-468a. The Court of Appeals, dividing 2 to 1, held that the settlement was lawful. 134 F.3d 668 (C.A.5 1998). I would not set aside the Court of Appeals' judgment as the majority does. Accordingly, I dissent.

I

A

Four special background circumstances underlie this settlement and help to explain the reasonableness and consequent lawfulness of the relevant District Court determinations. First, as the majority points out, the settlement comprises part of an "elephantine mass of asbestos cases," which "defies customary judicial administration." Ante, at 2302. An estimated 13 to 21 million workers have been exposed to asbestos. See Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 6-7 (Mar.1991) (hereinafter Judicial Conference Report). Eight

years ago the Judicial Conference spoke of the mass of related cases having "reached critical dimensions," threatening "a disaster of major proportions." Id., at 2. In the Eastern District of Texas, for example, one out of every three civil cases filed in 1990 was an asbestos case. See id., at 8. In the past decade nearly 80,000 new federal asbestos cases have been filed; more than 10,000 new federal asbestos cases were filed last year. See U.S. District Courts Civil Cases Commenced by Nature of Suit, Administrative Office of the Courts Statistics (Table C2-A) (Dec. 31, 1994-1998) (hereinafter AO Statistics).

The Judicial Conference found that asbestos cases on average take almost twice as long as other lawsuits to resolve. See Judicial Conference Report 10-11. Judge Parker, the experienced trial judge who approved this settlement, noted in one 3,000-member asbestos class action over which he presided that 448 of the original class members had died while the litigation was pending. Cimino v. Raymark Industries, Inc., 751 F.Supp. 649, 651 (E.D.Tex.1990). And yet, Judge Parker went on to state, if the district court could close "thirty cases a month, it would [still] take six and one-half years to try these cases and [due to new filings] there would be pending over 5,000 untouched cases" at the end of that time. Id., at 652. His subsequent efforts to accelerate final decision or settlement through the use of sample cases produced a highly complex trial (133 trial days, more than 500 witnesses, half a million pages of documents) that eventually closed only about 160 cases because efforts to extrapolate from the sample proved fruitless. See Cimino v. Raymark Industries, Inc., 151 F.3d 297, 335 (C.A.5 1998). The consequence is not only delay but also attorney's fees and other "transaction costs" that are unusually high, to the point where, of each dollar that asbestos defendants pay, those costs consume an estimated 61 cents, with only 39 cents going to victims. See Judicial Conference Report 13.

***2325** Second, an individual asbestos case is a tort case, of a kind that courts, not legislatures, ordinarily will resolve. It is the number of these cases, not their nature, that creates the special judicial problem. The judiciary cannot treat the problem as entirely one of legislative failure, as if it were caused, say, by a poorly drafted statute. Thus, when "calls for national legislation" go unanswered, ante, at 2302, judges can and should search aggressively for ways, within the framework of existing law, to avoid delay and expense so great as to bring about a massive denial of justice.

Third, in that search the district courts may take advantage of experience that appellate courts do not have. Judge Parker, for example, has written of "a disparity of appreciation for the magnitude of the problem," growing out of the difference between the trial courts' "daily involvement with asbestos litigation" and the appellate courts' "limited" exposure to such litigation in infrequent appeals. Cimino, 751 F.Supp., at 651.

Fourth, the alternative to class-action settlement is not a fair opportunity for each potential plaintiff to have his or her own day in court. Unusually high litigation costs, unusually long delays, and limitations upon the total amount of resources available for payment, together mean that most potential plaintiffs may not have a realistic alternative. And Federal Rule of Civil Procedure 23 was designed to address situations in which the historical model of individual actions would not, for practical reasons, work. See generally Advisory Committee's Notes on Fed. Rule Civ. Proc. 23, 28 U.S.C.App., p. 696 (discussing, in relation to Rule 23(b)(1)(B), instances in which individual judgments, "while not technically concluding the other members, might do so as a practical matter").

For these reasons, I cannot easily find a legal answer to the problems this case raises by referring, as does the majority, to "our 'deep-rooted historic tradition that everyone should have his own day in court.' " Ante, at 2315 (citation omitted). Instead, in these circumstances, I believe our Court should allow a district court full authority to exercise every bit of discretionary power that the law provides. See generally Califano v. Yamasaki, 442 U.S. 682, 703, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979) ("[M]ost issues arising under Rule 23… [are] committed in the first instance to the discretion of the district court"); Reiter v. Sonotone Corp., 442 U.S. 330, 345, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979) (district courts have "broad power and discretion… with respect to matters involving the certification" of class actions). And, in doing so, the Court should prove extremely reluctant to overturn a fact-specific or circumstance-specific exercise of that discretion, where a court of appeals has found it lawful. Cf. Universal Camera Corp. v. NLRB, 340 U.S. 474, 490-491, 71 S.Ct. 456, 95 L.Ed. 456 (1951) (Supreme Court will rarely overturn appellate court review of agency fact-finding). This cautionary principle of review leads me to an ultimate conclusion different from that of the majority.

B

The case before us involves a class of individuals (and their families) exposed to asbestos manufactured by Fibreboard who, for the most part, had not yet sued or settled with Fibreboard as of August 1993. The negotiating parties estimated that Fibreboard faced approximately 186,000 of these future claims. See App. to Pet. for Cert. 321a; cf. AO Statistics, Table C2-A (total number of all civil cases filed in federal district courts in 1998 was 252,994). Although the District Court was unable to give a precise figure, see App. to Pet. for Cert. 356a-357a, there is no doubt that a realistic assessment of the value of these claims far exceeds Fibreboard's total net worth.

But, as of 1993, one potentially short-lived additional asset promised potential claimants a greater recovery. That asset consisted of two insurance policies, one issued by Conti-

nental Casualty, the other by Pacific Indemnity. If the policies were valid (i.e., if they covered most of the relevant claims), they were worth several billion dollars; but if they were invalid, this asset was worth nothing. At that time, a separate case brought by Fibreboard against the insurance companies in California state court seemed likely to ***2326** resolve the value of the policies in the near future. That separate litigation had a settlement value for the insurance companies. At the time the parties were negotiating, prior to the California court's decision, the insurance policies were worth, as the majority puts it, the value of "unlimited policy coverage" (i.e., perhaps the insurance companies' entire net worth) "discounted by the risk that Fibreboard would ultimately lose the coverage dispute litigation." Ante, at 2317.

The insurance companies offered to settle with both Fibreboard and those persons with claims against Fibreboard (who might have tried to sue the insurance companies directly). The settlement negotiations came to a head in August 1993, just as a California state appeals court was poised to decide the validity of the insurance policies. This fact meant speed was important, for the California court could well decide that the policies were worth nothing. It also meant that it was important to certify a non opt-out class of Fibreboard plaintiffs. If the class that entered into the settlement were an opt-out class, then members of that class could wait to see what the California court did. If the California court found the policies valid (hence worth many billions of dollars), they would opt out of the class and sue for everything they could get; if the California court found the policies invalid (and worth nothing), they would stick with the settlement. The insurance companies would gain little from that kind of settlement, and they would not agree to it. See In re Asbestos Litigation, 90 F.3d 963, 970 (C.A.5 1996).

After eight days of hearings, the District Court found that the insurance policies plus Fibreboard's net worth amounted to a "limited fund," valued at $1.77 billion (the amount the insurance companies were willing to contribute to the settlement plus Fibreboard's value). See App. to Pet. for Cert. 492a. The court entered detailed factual findings. See generally 162 F.R.D., at 518- 519. It certified a "non opt-out" class. And the court approved the parties' Global Settlement Agreement. The Global Settlement Agreement allows those exposed to asbestos (and their families) to assert their Fibreboard claims against a fund that it creates. It does not limit recoveries for particular types of claims, but allows for individual determinations of damages based on all historically relevant individual factors and circumstances. See 90 F.3d, at 976. It contains spendthrift provisions designed to limit the total payouts for any particular year, and a requirement that the claimants with the most serious injuries be paid first in any year in which there is a shortfall. It also permits an individual who wishes to retain his right to bring an ordinary action in court to opt out of the arrangement (albeit after mediation and nonbinding arbitration), but sets a ceiling of $500,000 upon the recovery obtained by any person who does so. See generally 162 F.R.D., at 518-519.

The question here is whether the court's certification of the class under Rule 23(b)(1)(B) violates the law. The majority seems to limit its holding (though not its discussion) to that question, and so I limit the focus of my dissent to the Rule 23(b)(1)(B) issues as well.

II

The District Court certified a class consisting primarily of individuals (and their families) who had been exposed to Fibreboard's asbestos but who had not yet made claims. See ante, at 2305, and n. 5. It did so under the authority of Federal Rule of Civil Procedure 23(b)(1)(B), which, by analogy to pre-Rules "limited fund" cases, permits certification of a non opt-out class where

> "the prosecution of separate actions by or against individual members of the class 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." The majority thinks this class could not be certified under Rule 23(b)(1)(B). I, on the contrary, think it could.

The case falls within the Rule's language as long as there was a significant "risk" that the total assets available to satisfy the claims of the class members would fall well below ***2327** the likely total value of those claims, for in such circumstances the money would go to those claimants who brought their actions first, thereby "substantially impair[ing]" the "ability" of later claimants "to protect their interests." And the District Court found there was indeed such a "risk." 162 F.R.D., at 526.

Conceptually speaking, that "risk" was no different from the risk inherent in a classic pre-Rules "limited fund" case. Suppose a broker agrees to invest the funds of 10 individuals who each give the broker $100. The broker misuses the money, and the customers sue. (1) Suppose their claims total $1,000, but the broker's total assets amount to $100. (2) Suppose the same broker has no assets left, but he does have an insurance policy worth $100. (3) Suppose the broker has both $100 in assets and a $100 insurance policy.

The first two cases are classic limited fund cases. See ante, at 2309 (citing, e.g., Dickinson v. Burnham, 197 F.2d 973 (C.A.2 1952), cert. denied, 344 U.S. 875, 73 S.Ct. 169, 97 L.Ed. 678 (1952), an investors' suit for the return of misused funds); ante, at 2310 (citing, e.g., Morrison v. Warren,

174 Misc. 233, 234, 20 N.Y.S.2d 26, 27 (1940), a suit to distribute insurance proceeds to third party beneficiaries). The third case simply combines the first two, and that third case is the case before us.

Of course the value of the insurance policies in our case is not as precise as the $100 in my example, nor was it certain at the time of settlement. But that uncertainty makes no difference. It was certain that the insurance policies' value was limited. And that limitation was created by the likelihood of an independent judicial determination of the meaning of words in the policy, in respect to which the merits or value of the underlying tort claims against Fibreboard were beside the point.

Nor does it matter that the value of the insurance policies in our case might have fluctuated over time. Long before the Federal Rules of Civil Procedure, courts permitted actions by one group of insurance policy holders to bind all policy holders, even where the group proceeded against an insurance- company-administered fund that fluctuated over time. SeeHartford Life Ins. Co. v. Ibs, 237 U.S. 662, 672, 35 S.Ct. 692, 59 L.Ed. 1165 (1915) (life insurance fund which, like the fund before us, was administered through court- ordered rules that bound all policy holders).

Neither does it matter that the insurance policies might be worth much more money if the California court decided the coverage dispute in Fibreboard's favor. A trust worth, say, $1 million (faced with $2 million in claims) is a limited fund, despite the possibility that a company whose stock it holds might strike oil and send the value of the trust skyrocketing. Limitation is a matter of present value, which takes appropriate account of such future possibilities.

I need not pursue the conceptual matter further, however, for the majority apparently concedes the conceptual point that a fund's limit may equal its "value discounted by risk." Ante, at 2317. But the majority sets forth three additional conditions, which it says are "sufficient… to justify binding absent members of a class under Rule 23(b)(1)(B), from which no one has the right to secede." Ante, at 2311. Those three conditions are:

> Condition One: That "the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximum, demonstrate the inadequacy of the fund to pay all the claims." Ibid.; Part IV-A, ante.
>
> Condition Two: That "the claimants identified by a common theory of recovery were treated equitably among themselves." Ante, at 2311; Part IV-B, ante.
>
> Condition Three: That "the whole of the inadequate fund was to be devoted to the overwhelming claims." Ante, at 2311; Part IV-C, ante. I shall discuss each condition in turn.

A

In my view, the first condition is substantially satisfied. No one doubts that the "totals of the aggregated" claims well exceed the value of the assets in the "fund available ***2328** for satisfying them," at least if the fund totaled about what the District Court said it did, namely, $1.77 billion at most. The District Court said that the limited fund equaled in value "the sum of the value of Fibreboard plus the value of its insurance coverage," or $235 million plus $1.535 billion. App. to Pet. for Cert. 492a. The Court of Appeals upheld the finding. 90 F.3d, at 982. And the finding is adequately supported.

The District Court found that the insurance policies were not worth substantially more than $1.535 billion in part because there was a "significant risk" that the insurance policies would soon turn out to be worth nothing at all. 162 F.R.D., at 526. The court wrote that "Fibreboard might lose" its coverage, i.e., that it might lose "on one or more issues in the [California] Coverage Case, or that Fibreboard might lose its insurance coverage as a result of its assignment settlement program." Ibid.

Two California insurance law experts, a Yale professor and a former state court of appeals judge, testified that there was a good chance that Fibreboard would lose all or a significant part of its insurance coverage once the California appellate courts decided the matter. 90 F.3d, at 974. And that conclusion is not surprising. The Continental policy (for which Fibreboard had paid $10,000 per year) carried limits of $500,000 "per-person" and $1 million "per-occurrence," had been in effect only between May 1957 and March 1959, and arguably denied Fibreboard the right to settle tort cases as it had been doing. See App. to Pet. for Cert. 267a. The Pacific policy was said (no one could find a copy) to carry a $500,000 per-claim limit, and had been in effect only for one year, from 1956-57. See ibid. To win significantly in respect to either of the two policies, Fibreboard had to show that the policies fully covered a person exposed to asbestos long before the policy year (say, in 1948) even if the disease did not appear until much later (say, in 2002). It also had to explain away the $1 million per occurrence limit in the Continental policy, despite policy language defining "one occurrence" as " '[a]ll… exposure to substantially the same general conditions existing at or emanating from each premises location.' " Brief for Respondents Continental Casualty et al. 5. And Fibreboard had to show that its tort-suit settlement practice was consistent with the policy.

The settlement value of previous cases also indicated that the insurance policies were of limited value. Fibreboard's "no-cash" settlements (which required a settling plaintiff to obtain recovery from the insurance companies) were twice as high on average as were its comparable 40% cash settle-

ments. App. to Pet. for Cert. 231a. That difference, suggesting a 50% discount for 40% cash, in turn suggests that settling parties estimated the odds of recovering on the insurance policies as worse than 2 to 1 against.

The District Court arrived at the present value of the policies ($1.535 billion) by looking to a different settlement, the settlement arrived at in the insurance coverage case itself as a result of bargaining between Fibreboard and the insurance companies. See id., at 492a. That settlement, embodied in the Trilateral Agreement, created a backup fund by taking from the insurance companies $1.535 billion (plus other money used to satisfy claims not here at issue) and simply setting it aside to use for the payment of claims brought against Fibreboard in the ordinary course by members of this class (in the event that the federal courts ultimately failed to approve the Global Settlement Agreement).

The Fifth Circuit approved this method of determining the value of the insurance policies. See 90 F.3d, at 982 (discussing value of Trilateral Agreement plus value of Fibreboard). And the majority itself sees nothing wrong with that method in principle. The majority concedes that one

> "may take a settlement amount as good evidence of the maximum available if one can assume that parties of equal knowledge and negotiating skill agreed upon the figure through arms-length bargaining, unhindered by any considerations tugging against the interests of the parties ostensibly represented in the negotiation." Ante, at 2317.

The majority rejects the District Court's valuation for a different reason. It says that the settlement negotiation that led to the ***2329** valuation was not necessarily a fair one. The majority says it cannot make the necessary "arms-length bargaining" assumption because "[c]lass counsel" had a "great incentive to reach any agreement" in light of the fact that "some of the same lawyers… had also negotiated the separate settlement of 45,000" pending cases, which was partially contingent upon a global settlement or other favorable resolution of the insurance dispute. Id., at 2317-2318 (emphasis added).

The District Court and Court of Appeals, however, did accept the relevant "arms-length" assumption, with good reason. The relevant bargaining (i.e., the bargaining that led to the Trilateral Agreement that set the policies' value) was not between the plaintiffs' class counsel and the insurance companies; it was between Fibreboardand the insurance companies. And there is no reason to believe that that bargaining, engaged in to settle the California coverage dispute, was not "arms-length." That bargaining did not lead to a settlement that would release Fibreboard from potential tort liability. Rather, it led to a potential backup settlement that did not release Fibreboard from anything. It created a fund of insurance money, which, once exhausted, would have left Fibreboard totally exposed to tort claims. Consequently, Fibreboard had every incentive to squeeze as much money as possible out of the insurance companies, thereby creating as large a fund as possible in order to diminish the likelihood that it would eventually have to rely upon its own net worth to satisfy future asbestos plaintiffs.

Nor are petitioners correct when they argue that the insurance companies' participation in setting the value of the insurance policies created a fund that is limited "only in the sense that… every settlement is limited." Brief for Petitioners 28. As the District Court found, the fund was limited by the value of the insurance policies (along with Fibreboard's own limited net worth), and that limitation arose out of the independent likelihood that the California courts would find the policies valueless. App. to Pet. for Cert. 492a. That is why the District Court said that certification in this case does not determine whether

> "mandatory class certification is appropriate in the typical case where a class action is settled with a defendant's own funds, or with insurance funds that are not the subject of genuine and vigorous dispute." 162 F.R.D., at 527.

The court added that, in the ordinary case: "If the settlement failed,… the defendant would retain the settlement funds (or the insurance coverage), and there might not be the 'impair[ment]' to class members' 'ability to protect their interests' required for mandatory class certification." Ibid. In this case, however, if settlement failed, coverage "may well disappear… with the result that Class members could not then secure their due through litigation." Ibid.

I recognize that one could reasonably argue about whether the total value of the insurance policies (plus the value of Fibreboard) is $1.535 billion, $1.77 billion, $2.2 billion, or some other roughly similar number. But that kind of argument, in this case, is like arguing about whether a trust fund, facing $30,000 in claims, is worth $15,000 or $20,000 (e.g., do we count Aunt Agatha's share as part of the fund?), or whether a ship, subject to claims that, by any count, exceed its value, is worth a little more or a little less (e.g., does the coal in the hold count as fuel, which is part of the ship's value, or as cargo, which is not?). A perfect valuation, requiring lengthy study by independent experts, is not feasible in the context of such an unusual limited fund, one that comes accompanied with its own witching hour. Within weeks after the parties' settlement agreement, the insurance policies might well have disappeared, leaving most potential plaintiffs with little more than empty claims. The ship was about to sink, the trust fund to evaporate; time was important. Under these circumstances, I would accept the valuation findings made by the District Court and affirmed by the Court of Appeals as legally sufficient. See supra, at 2325.

B

I similarly believe that the second condition is satisfied. The "claimants… were treated equitably among themselves." Ante, ***2330** at 2311. The District Court found equitable treatment, and the Court of Appeals affirmed. But a majority of this Court now finds significant inequities arising out of class counsel's "egregious" conflict of interest, the settlement's substantive terms, and the District Court's failure to create subclasses. See ante, at 2318-2320. But nothing I can find in the Court's opinion, nor in the objectors' briefs, convinces me that the District Court's findings on these matters were clearly erroneous, or that the Court of Appeals went seriously astray in affirming them.

The District Court made 76 separate findings of fact, for example, in respect to potential conflicts of interest. App. to Pet. for Cert. 392a-430a. Of course, class counsel consisted of individual attorneys who represented other asbestos claimants, including many other Fibreboard claimants outside the certified class. Since Fibreboard had been settling cases contingent upon resolution of the insurance dispute for several years, any attorney who had been involved in previous litigation against Fibreboard was likely to suffer from a similar "conflict." So whom should the District Court have appointed to negotiate a settlement that had to be reached soon, if ever? Should it have appointed attorneys unfamiliar with Fibreboard and the history of its asbestos litigation? Where was the District Court to find those competent, knowledgeable, conflict-free attorneys? The District Court said they did not exist. Finding of Fact ¶ 372 says there is "no credible evidence of the existence of other 'conflict-free' counsel who were qualified to negotiate" a settlement within the necessary time. Id., at 428a. Finding of Fact ¶ 317 adds that the District Court viewed it as "crucial… to appoint asbestos attorneys who were experienced, knowledgeable, skilled and credible in view of the extremely short window of opportunity to negotiate a global settlement, and the very high risk to future claimants presented by the Coverage Case appeal." Id., at 401a. Where is the clear error?

The majority emphasizes the fact that, by settling the claims of a class that consisted, for the most part, of persons who had not yet asserted claims against Fibreboard, counsel assured the availability of funds to pay other clients who had already asserted those claims. Ante, at 2318. The decision to split the latter "inventory" claims from the former "class" claims, however, reflected the suggestion, not of class counsel, but of a judge, Circuit Judge Patrick Higginbotham, who had become involved in efforts to produce a timely settlement. Judge Higginbotham thought that negotiations had broken down because the combined class was "too complex." App. to Pet. for Cert. 316a-317a; see also id., at 397a. He thought "inventory" claim settlements could be used as benchmarks to determine future class claim values, id., at 316a-317a, and that is just what happened. Although the majority is concerned that "inventory" plaintiffs "appeared to have obtained better terms than the class members," ante, at 2319, Finding of Fact ¶ 329 says that class counsel

> "used the higher-than-average [inventory plaintiff settlement values]… to achieve a global settlement for future claimants at similarly high values, effectively arguing they could not possibly accept less for a class of future claimants than they had just negotiated for their present clients." App. to Pet. for Cert. 407a.

In addition, more than 150 findings of fact, made after an 8-day hearing, support the District Court's finding that overall the settlement is "fair, adequate, and reasonable." See id., at 500a-501a. And, of course, Finding of Fact ¶ 318 says that appointing other attorneys—i.e., those who had no inventory clients—would have " 'jeopardiz[ed] any effort at serious negotiations' " and "resulted in a less favorable settlement" for the class, or perhaps no settlement followed by no insurance policy either. Id., at 402a.

The Fifth Circuit found that "[t]he record amply supports" these District Court findings. 90 F.3d, at 978. Does the majority mean to set them aside? If not, does it mean to set forth a rigid principle of law, such as the principle that asbestos lawyers with clients outside a class, who will potentially benefit from a class settlement, can never represent a class in settlement negotiations? And does that principle apply no matter how unusual the circumstances, or no matter how necessary that representation might be? ***2331** Why should there be such a rule of law? If there is not an absolute rule, however, I do not see how this Court can hold that the case before us is not that unusual situation.

Consider next the claim that "equity" required more subclasses. Ante, at 2319-2320. To determine the "right" number of subclasses, a district court must weigh the advantages and disadvantages of bringing more lawyers into the case. The majority concedes as much when it says "at some point there must be an end to reclassification with separate counsel." Ante, at 2320. The District Court said that if there had "been as many separate attorneys" as the objectors wanted, "there is a significant possibility that a global settlement would not have been reached before the Coverage Case was resolved by the California Court of Appeal." App. to Pet. for Cert. 428a. Finding of Fact & ¶ 346 lists the shared common interests among subclasses that argue for single representation, including "avoiding the potentially disastrous results of a loss… in the Coverage Case," "maximizing the total settlement contribution," "reducing transactions costs and delays," "minimizing… attorney's fees," and "adopting" equitable claims payment "procedures." Id., at 415a. Surely the District Court was within its discretion to conclude that "the point" to which the majority alludes was reached in this case.

I need not go into further detail here. Findings of Fact ¶¶ 347-354 explain why the alleged conflict between pre- and post-1959 claimants is not significant. Id., at 415a-418a (noting that "the decision as to how to divide the settlement among class members" did not take place until after the Trilateral Agreement was agreed to, at which point money was available equally to both pre- and post-1959 claimants). Findings of Fact ¶¶ 355-363 explain why the alleged conflict between claimants with, and those without, current illnesses is not significant. Id., at 419a-422a (explaining why "the interest of the two subgroups at issue here coincide to a far greater extent than they diverge"). The Fifth Circuit found that the District Court "did not abuse its discretion in finding that the class was adequately represented and that subclasses were not required." 90 F.3d, at 982. This Court should not overturn these highly circumstance-specific judgments.

C

The majority's third condition raises a more difficult question. It says that the "whole of the inadequate fund" must be "devoted to the overwhelming claims." Ante, at 2311 (emphasis added). Fibreboard's own assets, in theory, were available to pay tort claims, yet they were not included in the global settlement fund. Is that fact fatal?

I find the answer to this question in the majority's own explanation. It says that the third condition helps to guarantee that those who held the

> "inadequate assets had no opportunity to benefit [themselves] or claimants of lower priority by holding back on the amount distributed to the class. The limited fund cases thus ensured that the class as a whole was given the best deal; they did not give a defendant a better deal than seriatim litigation would have produced." Ante, at 2311.

That explanation suggests to me that Rule 23(b)(1)(B) permits a slight relaxation of this absolute requirement, where its basic purpose is met, i.e., where there is no doubt that "the class as a whole was given the best deal," and where there is good reason for allowing the third condition's substantial, rather than its literal, satisfaction.

Rule 23 itself does not require modern courts to trace every contour of ancient case law with literal exactness. Benjamin Kaplan, reporter to the Advisory Committee on Civil Rules that drafted the 1966 revisions, upon whom the majority properly relies for explanation, see, e.g., ante, at 2308, 2313, wrote of Rule 23:

> "The reform of Rule 23 was intended to shake the law of class actions free of abstract categories… and to rebuild the law on functional lines responsive to those recurrent life patterns which call for mass litigation through representative parties.… And whereas the old Rule had paid virtually no attention to the practical administration of class actions, the revised Rule dwelt long on this matter—not, to be ***2332** sure, by prescribing detailed procedures, but by confirming the courts' broad powers and inviting judicial initiative." A Prefatory Note, 10 B.C. Ind. & Com. L.Rev. 497 (1969).

The majority itself recognizes the possibility of providing incentives to enter into settlements that reduce costs by granting a "credit" for cost savings by relaxing the whole-of-the-assets requirement, at least where most of the savings would go to the claimants. Ante, at 2322.

There is no doubt in this case that the settlement made far more money available to satisfy asbestos claims than was likely to occur in its absence. And the District Court found that administering the fund would involve transaction costs of only 15%. App. to Pet. for Cert. 362a. A comparison of that 15% figure with the 61% transaction costs figure applicable to asbestos cases in general suggests hundreds of millions of dollars in savings—an amount greater than Fibreboard's net worth. And, of course, not only is it better for the injured plaintiffs, it is far better for Fibreboard, its employees, its creditors, and the communities where it is located for Fibreboard to remain a working enterprise, rather than slowly forcing it into bankruptcy while most of its money is spent on asbestos lawyers and expert witnesses. I would consequently find substantial compliance with the majority's third condition.

Because I believe that all three of the majority's conditions are satisfied, and because I see no fatal conceptual difficulty, I would uphold the determination, made by the District Court and affirmed by the Court of Appeals, that the insurance policies (along with Fibreboard's net value) amount to a classic limited fund, within the scope of Rule 23(b)(1)(B).

III

Petitioners raise additional issues, which the majority does not reach. I believe that respondents would likely prevail were the Court to reach those issues. That is why I dissent. But, as the Court does not reach those issues, I need not decide the questions definitively.

In some instances, my belief that respondents would likely prevail reflects my reluctance to second-guess a court of appeals that has affirmed a district court's fact- and circumstance-specific findings. See supra, at 2325; cf. Amchem Products, Inc. v. Windsor, 521 U.S. 591, 629-630, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (BREYER, J., concurring in part and dissenting in part). That reluctance applies to those of petitioners' further claims that, in effect, attack the District Court's conclusions related to: (1) the finding under Rule 23(a)(2) that there are "questions of law and fact common to the class," see App. to Pet. for Cert. 480a; see generally Amchem, supra, at 634-636, 117 S.Ct. 2231 (BREYER, J., concurring in part and dissenting in

part); (2) the finding under Rule 23(a)(3) that claims of the representative parties are "typical" of the claims of the class, see App. to Pet. for Cert. 480a-481a; (3) the adequacy of "notice" to class members pursuant to Rule 23(e) and the Due Process Clause, see id., at 511a; see generally Amchem, supra, at 640-641, 117 S.Ct. 2231 (BREYER, J., concurring in part and dissenting in part); and (4) the standing-related requirement that each class member have a good-faith basis under state law for claiming damages for some form of injury-in-fact (even if only for fear of cancer or medical monitoring), see App. to Pet. for Cert. 252a; cf., e.g., Coover v. Painless Parker, Dentist, 105 Cal.App. 110, 286 P. 1048 (1930).

In other instances, my belief reflects my conclusion that class certification here rests upon the presence of what is close to a traditional limited fund. And I doubt that petitioners' additional arguments that certification violates, for example, the Rules Enabling Act, the Bankruptcy Act, the Seventh Amendment, and the Due Process Clause, are aimed at or would prevail against a traditional limited fund (e.g., "trust assets, a bank account, insurance proceeds, company assets in a liquidation sale, proceeds of a ship sale in a maritime accident suit," ante, at 2309 (internal quotation marks and citations omitted)). Cf. In re Asbestos Litigation, 90 F.3d, at 986 (noting that Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985), involved a class certified ***2333** under the equivalent of Rule 23(b)(3), not a limited fund case under Rule 23(b)(1)(B)). Regardless, I need not decide these latter issues definitively now, and I leave them for another day. With that caveat, I respectfully dissent.

End Of Document

Exhibit "C"

Rule 23. Class Actions

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if

(1) the class is so numerous that joinder of all members is impracticable,

(2) there are questions of law or fact common to the class,

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) **Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.**

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all

members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) **Orders in Conduct of Actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders:

(1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(3) imposing conditions on the representative parties or on intervenors;

(4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

(5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) **Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) **Appeals.** A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Committee Comments (beginning with 1966 Amendments)

Difficulties with the original rule. The categories of class actions in the original rule were defined in terms of the abstract nature of the rights involved: the so-called "true" category was defined as involving "joint, common, or secondary rights"; the "hybrid" category, as involving "several" rights related to "specific property"; the "spurious" category, as involving "several" rights affected by a common question and related to common relief. It was thought that the definitions accurately described the situations amenable to the class-suit device, and also would indicate the proper extent of the judgment in each category, which would in turn help to determine the res judicata effect of the judgment if questioned in a later action. Thus the judgments in "true" and "hybrid" class actions would extend to the class (although in somewhat different ways); the judgment in a "spurious" class action would extend only to the parties including intervenors. See Moore, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 Geo.L.J. 551, 570-76 (1937).

In practice the terms "joint," "common," etc., which were used as the basis of the Rule 23 classification proved obscure and uncertain. See Chafee, Some Problems of Equity 245-46, 256-57 (1950); Kalven & Rosenfield, The Contemporary Function of the Class Suit, 8 U. of Chi.L.Rev. 684, 707 & n. 73 (1941); Keeffe, Levy & Donovan, Lee Defeats Ben Hur, 33 Corn.L.Q. 327, 329- 36 (1948); Developments in the Law: Multiparty Litigation in the Federal Courts, 71 Harv. L.Rev. 874, 931 (1958); Advisory Committee's Note to Rule 19, as amended. The courts had considerable difficulty with these terms. See, e.g., Gullo v. Veterans' Coop. H. Assn., 13 F.R.D. 11 (D.D.C.1952); Shipley v. Pittsburgh & L.E.R. Co., 70 F.Supp. 870 (W.D.Pa.1947); Deckert v. Independence Shares Corp., 27 F.Supp. 763 (E.D.Pa.1939), rev'd 108 F.2d 51 (3d Cir. 1939), rev'd, 311 U.S. 282 (1940), on remand, 39 F.Supp. 592 (E.D.Pa.1941), rev'd sub nom. Pennsylvania Co. for Ins. on Lives v. Deckert, 123 F.2d 979 (3d Cir.1941) (see Chafee, supra, at 264-65).

Nor did the rule provide an adequate guide to the proper extent of the judgments in class actions. First, we find instances of the courts classifying actions as "true" or intimating that the judgments would be decisive for the class where these results seemed appropriate but were reached by dint of depriving the word "several" of coherent meaning. See, e.g., System Federation No. 91 v. Reed, 180 F.2d 991 (6th Cir.1950); Wilson v. City of Paducah, 100 F.Supp. 116 (W.D.Ky.1951); Citizens Banking Co. v. Monticello State Bank, 143 F.2d 261 (8th Cir.1944); Redmond v. Commerce Trust Co., 144 F.2d 140 (8th Cir.1944), cert. denied, 323 U.S. 776 (1944); United States v. American Optical Co., 97 F.Supp. 66 (N.D.Ill.1951); National Hairdressers' & C. Assn. v. Philad Co., 34 F.Supp. 264 (D.Del.1940); 41 F.Supp. 701 (D.Del.1940), aff'd mem., 129 F.2d 1020 (3d Cir.1942). Second, we find cases classified by the courts as "spurious" in which, on a realistic view, it would seem fitting for the judgments to extend to the class. See, e.g., Knapp v. Bankers Sec. Corp., 17 F.R.D. 245 (E.D.Pa.1954), aff'd 230 F.2d 717 (3d Cir.1956); Giesecke v. Denver Tramway Corp., 81 F.Supp. 957 (D.Del.1949); York v. Guaranty Trust Co., 143 F.2d 503 (2d Cir.1944), rev'd on grounds not here relevant, 326 U.S. 99 (1945) (see Chafee, supra, at 208); cf. Webster Eisenlohr, Inc. v. Kalodner, 145 F.2d 316, 320 (3d Cir.1944), cert. denied, 325 U.S. 867 (1945). But cf. the early decisions, Duke of Bedford v. Ellis, [1901] A.C. 1; Sheffield Waterworks v. Yeomans, L.R. 2 Ch.App. 8 (1866); Brown v. Vermuden, 1 Ch.Cas. 272, 22 Eng.Rep. 796 (1676).

The "spurious" action envisaged by original Rule 23 was in any event an anomaly because, although denominated a "class" action and pleaded as such, it was supposed not to adjudicate the rights or liabilities of any person not a party. It was believed to be an advantage of the "spurious" category that it would invite decisions that a member of the "class" could, like a member of the class in a "true" or "hybrid" action, intervene on an ancillary basis without being required to show an independent basis of Federal jurisdiction, and have the benefit of the date of the commencement of the action for purposes of the statute of limitations. See 3 Moore's Federal Prac-

tice, pars. 23.10[1], 23.12 (2d ed.1963). These results were attained in some instances but not in others. On the statute of limitations, see Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir.1961), pet. cert. dism., 371 U.S. 801 (1963); but cf. P. W. Husserl, Inc. v. Newman, 25 F.R.D. 264 (S.D.N.Y.1960); Athas v. Day, 161 F.Supp. 916 (D.Colo.1958). On ancillary intervention, see Amen v. Black, 234 F.2d 12 (10th Cir.1956), cert. granted, 352 U.S. 888 (1956), dism. on stip., 355 U.S. 600 (1958); but cf. Wagner v. Kemper, 13 F.R.D. 128 (W.D.Mo.1952). The results, however, can hardly depend upon the mere appearance of a "spurious" category in the rule; they should turn on more basic considerations. See discussion of subdivision (c)(1) below.

Finally, the original rule did not squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness, particularly giving notice to members of the class, which may in turn be related in some instances to the extension of the judgment to the class. See Chafee, supra, at 230-31; Keeffe, Levy & Donovan, supra; Developments in the law, supra, 71 Harv.L.Rev. at 937-38; Note, Binding Effect of Class Actions, 67 Harv.L.Rev. 1059, 1062-65 (1954); Note, Federal Class Actions: A Suggested Revision of Rule 23, 46 Colum.L.Rev. 818, 833-36 (1946); Mich.Gen.Court R. 208.4 (effective Jan. 1, 1963); Idaho R.Civ.P. 23(d); Minn.R.Civ.P. 23.04; N.Dak.R.Civ.P. 23(d).

The amended rule describes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions.

Subdivision (a) states the prerequisites for maintaining any class action in terms of the numerousness of the class making joinder of the members impracticable, the existence of questions common to the class, and the desired qualifications of the representative parties. See Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L.Rev. 433, 458-59 (1960); 2 Barron & Holtzoff, Federal Practice & Procedure § 562, at 265, § 572, at 351-52 (Wright ed. 1961). These are necessary but not sufficient conditions for a class action. See, e.g., Giordano v. Radio Corp. of Am., 183 F.2d 558, 560 (3d Cir.1950); Zachman v. Erwin, 186 F.Supp. 681 (S.D.Tex.1959); Baim & Blank, Inc. v. Warren-Connelly Co., Inc., 19 F.R.D. 108 (S.D.N.Y.1956). Subdivision (b) describes the additional elements which in varying situations justify the use of a class action.

Subdivision (b)(1). The difficulties which would be likely to arise if resort were had to separate actions by or against the individual members of the class here furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device. The considerations stated under clauses (A) and (B) are comparable to certain of the elements which define the persons whose joinder in an action is desirable as stated in Rule 19(a), as amended. See amended Rule 19(a)(2)(i) and (ii), and the Advisory Committee's Note thereto; Hazard, Indispensable Party: The Historical Origin of a Procedural Phantom, 61 Colum.L.Rev. 1254, 1259-60 (1961); cf. 3 Moore, supra, par. 23.08, at 3435.

Clause (A): One person may have rights against, or be under duties toward, numerous persons constituting a class, and be so positioned that conflicting or varying adjudications in lawsuits with individual members of the class might establish incompatible standards to govern his conduct. The class action device can be used effectively to obviate the actual or virtual dilemma which would thus confront the party opposing the class. The matter has been stated thus: "The felt necessity for a class action is greatest when the courts are called upon to order or sanction the alteration of the status quo in circumstances such that a large number of persons are in a position to call on a single person to alter the status quo, or to complain if it is altered, and the possibility exists that [the] actor might be called upon to act in inconsistent ways." Louisell & Hazard, Pleading and Procedure: State and Federal 719 (1962); see Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 366-67 (1921). To illustrate: Separate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it, to

prevent or limit the making of a particular appropriation or to compel or invalidate an assessment, might create a risk of inconsistent or varying determinations. In the same way, individual litigations of the rights and duties of riparian owners, or of landowners' rights and duties respecting a claimed nuisance, could create a possibility of incompatible adjudications. Actions by or against a class provide a ready and fair means of achieving unitary adjudication. See Maricopa County Mun. Water Con. Dist. v. Looney, 219 F.2d 529 (9th Cir.1955); Rank v. Krug, 142 F.Supp. 1, 154-59 (S.D.Calif.1956), on app., State of California v. Rank, 293 F.2d 340, 348 (9th Cir.1961); Gart v. Cole, 263 F.2d 244 (2d Cir.1959), cert. denied 359 U.S. 978 (1959); cf. Martinez v. Maverick Cty. Water Con. & Imp. Dist., 219 F.2d 666 (5th Cir.1955); 3 Moore, supra, par. 23.11[2], at 3458-59.

Clause (B): This clause takes in situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, might do so as a practical matter. The vice of an individual action would lie in the fact that the other members of the class, thus practically concluded, would have had no representation in the lawsuit. In an action by policy holders against a fraternal benefit association attacking a financial reorganization of the society, it would hardly have been practical, if indeed it would have been possible, to confine the effects of a validation of the reorganization to the individual plaintiffs. Consequently a class action was called for with adequate representation of all members of the class. See Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921); Waybright v. Columbian Mut. Life Ins. Co., 30 F.Supp. 885 (W.D.Tenn.1939); cf. Smith v. Swormstedt, 16 How. (57 U.S.) 288 (1853). For much the same reason actions by shareholders to compel the declaration of a dividend[,] the proper recognition and handling of redemption or pre-emption rights, or the like (or actions by the corporation for corresponding declarations of rights), should ordinarily be conducted as class actions, although the matter has been much obscured by the insistence that each shareholder has an individual claim. See Knapp v. Bankers Securities Corp., 17 F.R.D. 245 (E.D.Pa.1954), aff'd, 230 F.2d 717 (3d Cir.1956); Giesecke v. Denver Tramway Corp., 81 F.Supp. 957 (D.Del.1949); Zahn v. Transamerica Corp., 162 F.2d 36 (3d Cir.1947); Speed v. Transamerica Corp., 100 F.Supp. 461 (D.Del.1951); Sobel v. Whittier Corp., 95 F.Supp. 643 (E.D.Mich.1951), app. dism., 195 F.2d 361 (6th Cir.1952); Goldberg v. Whittier Corp., 111 F.Supp. 382 (E.D.Mich.1953); Dann v. Studebaker-Packard Corp., 288 F.2d 201 (6th Cir.1961); Edgerton v. Armour & Co., 94 F.Supp. 549 (S.D.Calif.1950); Ames v. Mengel Co., 190 F.2d 344 (2d Cir.1951). (These shareholders' actions are to be distinguished from derivative actions by shareholders dealt with in new Rule 23.1). The same reasoning applies to an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust. See Boesenberg v. Chicago T. & T. Co., 128 F.2d 245 (7th Cir.1942); Citizens Banking Co. v. Monticello State Bank, 143 F.2d 261 (8th Cir.1944); Redmond v. Commerce Trust Co., 144 F.2d 140 (8th Cir.1944), cert. denied, 323 U.S. 776 (1944); cf. York v. Guaranty Trust Co., 143 F.2d 503 (2d Cir.1944), rev'd on grounds not here relevant, 326 U.S. 99 (1945).

In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem. Cf. Dickinson v. Burnham, 197 F.2d 973 (2d Cir.1952), cert. denied, 344 U.S. 875 (1952); 3 Moore, supra, at par. 23.09. The same reasoning applies to an action by a creditor to set aside a fraudulent conveyance by the debtor and to appropriate the property to his claim, when the debtor's assets are insufficient to pay all creditors' claims. See Heffernan v. Bennett & Armour, 110 Cal.App.2d 564, 243 P.2d 846 (1952); cf. City & County of San Francisco v. Market Street Ry., 95 Cal.App.2d 648, 213 P.2d 780 (1950). Similar problems, however, can arise in the absence of a fund either present or potential. A negative or mandatory injunction

secured by one of a numerous class may disable the opposing party from performing claimed duties toward the other members of the class or materially affect his ability to do so. An adjudication as to movie "clearances and runs" nominally affecting only one exhibitor would often have practical effects on all the exhibitors in the same territorial area. Cf. United States v. Paramount Pictures, Inc., 66 F.Supp. 323, 341-46 (S.D.N.Y.1946); 334 U.S. 131, 144-48 (1948). Assuming a sufficiently numerous class of exhibitors, a class action would be advisable. (Here representation of subclasses of exhibitors could become necessary; see subdivision (c)(3)(B).)

Subdivision (b)(2). This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. Declaratory relief "corresponds" to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief. The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.

Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration. See Potts v. Flax, 313 F.2d 284 (5th Cir. 1963); Bailey v. Patterson, 323 F.2d 201 (5th Cir. 1963), cert. denied, 376 U.S. 910, (1964); Brunson v. Board of Trustees of School District No. 1, Clarendon Cty., S.C., 311 F.2d 107 (4th Cir. 1962), cert. denied, 373 U.S. 933 (1963); Green v. School Bd. of Roanoke, Va., 304 F.2d 118 (4th Cir. 1962); Orleans Parish School Bd. v. Bush, 242 F.2d 156 (5th Cir. 1957), cert. denied, 354 U.S. 921 (1957); Mannings v. Board of Public Inst. of Hillsborough County, Fla., 277 F.2d 370 (5th Cir. 1960); Northcross v. Board of Ed. of City of Memphis, 302 F.2d 818 (6th Cir. 1962), cert. denied, 370 U.S. 944 (1962); Frasier v. Board of Trustees of Univ. of N.C., 134 F.Supp. 589 (M.D.N.C.1955, 3-judge court), aff'd 350 U.S. 979 (1956). Subdivision (b)(2) is not limited to civil- rights cases. Thus an action looking to specific or declaratory relief could be brought by a numerous class of purchasers, say retailers of a given description, against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers, say retailers of another description, when the applicable law forbids such a pricing differential. So also a patentee of a machine, charged with selling or licensing the machine on condition that purchasers or licensees also purchase or obtain licenses to use an ancillary unpatented machine, could be sued on a class basis by a numerous group of purchasers or licensees, or by a numerous group of competing sellers or licensors of the unpatented machine, to test the legality of the "tying" condition.

Subdivision (b)(3). In the situations to which this subdivision relates, class-action treatment is not as clearly called for as in those described above, but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. Cf. Chafee, supra, at 201.

The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device. In this view, a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed. See Oppenheimer v. F. J. Young & Co., Inc., 144 F.2d 387 (2d Cir. 1944); Miller v. National City Bank of N.Y., 166 F.2d

723 (2d Cir. 1948); and for like problems in other contexts, see Hughes v. Encyclopaedia Britannica, 199 F.2d 295 (7th Cir. 1952); Sturgeon v. Great Lakes Steel Corp., 143 F.2d 819 (6th Cir. 1944). A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried. See Pennsylvania R.R. v. United States, 111 F.Supp. 80 (D.N.J.1953); cf. Weinstein, supra, 9 Buffalo L.Rev. at 469. Private damage claims by numerous individuals arising out of concerted antitrust violations may or may not involve predominating common questions. See Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1961), pet. cert. dism., 371 U.S. 801 (1963); cf. Weeks v. Bareco Oil Co., 125 F.2d 84 (7th Cir. 1941); Kainz v. Anheuser-Busch, Inc., 194 F.2d 737 (7th Cir. 1952); Hess v. Anderson, Clayton & Co., 20 F.R.D. 466 (S.D.Calif.1957).

That common questions predominate is not itself sufficient to justify a class action under subdivision (b)(3), for another method of handling the litigious situation may be available which has greater practical advantages. Thus one or more actions agreed to by the parties as test or model actions may be preferable to a class action; or it may prove feasible and preferable to consolidate actions. Cf. Weinstein, supra, 9 Buffalo L.Rev. at 438-54. Even when a number of separate actions are proceeding simultaneously, experience shows that the burdens on the parties and the courts can sometimes be reduced by arrangements for avoiding repetitious discovery or the like. Currently the Coordinating Committee on Multiple Litigation in the United States District Courts (a subcommittee of the Committee on Trial Practice and Technique of the Judicial Conference of the United States) is charged with developing methods for expediting such massive litigation. To reinforce the point that the court with the aid of the parties ought to assess the relative advantages of alternative procedures for handling the total controversy, subdivision (b)(3) requires, as a further condition of maintaining the class action, that the court shall find that that procedure is "superior" to the others in the particular circumstances.

Factors (A)-(D) are listed, non-exhaustively, as pertinent to the findings. The court is to consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit. See Weeks v. Bareco Oil Co., 125 F.2d 84, 88-90, 93-94 (7th Cir. 1941) (anti- trust action); see also Pentland v. Dravo Corp., 152 F.2d 851 (3d Cir. 1945), and Chafee, supra, at 273-75, regarding policy of Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C. § 216(b), prior to amendment by Portal-to- Portal Act of 1947, § 5(a). [The present provisions of 29 U.S.C. § 216(b) are not intended to be affected by Rule 23, as amended.]

In this connection the court should inform itself of any litigation actually pending by or against the individuals. The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical; the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable. The burden that separate suits would impose on the party opposing the class, or upon the court calendars, may also fairly be considered. (See the discussion, under subdivision (c)(2) below, of the right of members to be excluded from the class upon their request.)

Also pertinent is the question of the desirability of concentrating the trial of the claims in the particular forum by means of a class action, in contrast to allowing the claims to be litigated separately in forums to which they would ordinarily be brought. Finally, the court should consider the problems of management which are likely to arise in the conduct of a class action.

Subdivision (c)(1). In order to give clear definition to the action, this provision requires the court to determine, as early in the proceedings as may be practicable, whether an action brought as a class action is to be so

maintained. The determination depends in each case on satisfaction of the terms of subdivision (a) and the relevant provisions of subdivision (b).

An order embodying a determination can be conditional; the court may rule, for example, that a class action may be maintained only if the representation is improved through intervention of additional parties of a stated type. A determination once made can be altered or amended before the decision on the merits if, upon fuller development of the facts, the original determination appears unsound. A negative determination means that the action should be stripped of its character as a class action. See subdivision (d)(4). Although an action thus becomes a nonclass action, the court may still be receptive to interventions before the decision on the merits so that the litigation may cover as many interests as can be conveniently handled; the questions whether the intervenors in the nonclass action shall be permitted to claim "ancillary" jurisdiction or the benefit of the date of the commencement of the action for purposes of the statute of limitations are to be decided by reference to the laws governing jurisdiction and limitations as they apply in particular contexts.

Whether the court should require notice to be given to members of the class of its intention to make a determination, or of the order embodying it, is left to the court's discretion under subdivision (d)(2).

Subdivision (c)(2) makes special provision for class actions maintained under subdivision (b)(3). As noted in the discussion of the latter subdivision, the interests of the individuals in pursing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b)(3), this individual interest is respected. Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request. A member who does not request exclusion may, if he wishes, enter an appearance in the action through his counsel; whether or not he does so, the judgment in the action will embrace him.

The notice[,] setting forth the alternatives open to the members of the class, is to be the best practicable under the circumstances, and shall include individual notice to the members who can be identified through reasonable effort. (For further discussion of this notice, see the statement under subdivision (d)(2) below.)

Subdivision (c)(3). The judgment in a class action maintained as such to the end will embrace the class, that is, in a class action under subdivision (b)(1) or (b)(2), those found by the court to be class members; in a class action under subdivision (b)(3), those to whom the notice prescribed by subdivision (c)(2) was directed, excepting those who requested exclusion or who are ultimately found by the court not to be members of the class. The judgment has this scope whether it is favorable or unfavorable to the class. In a (b)(1) or (b)(2) action the judgment "describes" the members of the class, but need not specify the individual members; in a (b)(3) action the judgment "specifies" the individual members who have been identified and described the others.

Compare subdivision (c)(4) as to actions conducted as class actions only with respect to particular issues. Where the class-action character of the lawsuit is based solely on the existence of a "limited fund," the judgment, while extending to all claims of class members against the fund, has ordinarily left unaffected the personal claims of nonappearing members against the debtor. See 3 Moore, supra, par. 23.11[4].

Hitherto, in a few actions conducted as "spurious" class actions and thus nominally designed to extend only to parties and others intervening before the determination of liability, courts have held or intimated that class members might be permitted to intervene after a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision. See, as to the propriety of this so-called "one-way" intervention in "spurious" actions, the conflicting views expressed in Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1961), pet. cert. dism., 371 U.S. 801 (1963); York v. Guaranty Trust Co., 143 F.2d 503, 529 (2d Cir. 1944), rev'd on grounds not here relevant, 326 U.S. 99 (1945); Pentland v. Dravo Corp., 152 F.2d 851, 856 (3d Cir. 1945); Speed v.

Transamerica Corp., 100 F.Supp. 461, 463 (D.Del.1951); State Wholesale Grocers v. Great Atl. & Pac. Tea Co., 24 F.R.D. 510 (N.D.Ill.1959); Alabama Ind. Serv. Stat. Assn. v. Shell Pet. Corp., 28 F.Supp. 386, 390 (N.D.Ala.1939); Tolliver v. Cudahy Packing Co., 39 F.Supp. 337, 339 (E.D.Tenn.1941); Kalven & Rosenfield, supra, 8 U. of Chi.L.Rev. 684 (1941); Comment, 53 Nw.U.L.Rev. 627, 632-33 (1958); Developments in the Law, supra, 71 Harv.L.Rev. at 935; 2 Barron & Holtzoff, supra, § 568; but cf. Lockwood v. Hercules Powder Co., 7 F.R.D. 24, 28-29 (W.D.Mo.1947); Abram v. San Joaquin Cotton Oil Co., 46 F.Supp. 969, 976-77 (S.D.Calif.1942); Chafee, supra, at 280, 285; 3 Moore, supra, par. 23.12, at 3476. Under proposed subdivision (c)(3), one-way intervention is excluded; the action will have been early determined to be a class or nonclass action, and in the former case the judgment, whether or not favorable, will include the class, as above stated.

Although thus declaring that the judgment in a class action includes the class, as defined, subdivision (c)(3) does not disturb the recognized principle that the court conducting the action cannot predetermine the res judicata effect of the judgment; this can be tested only in a subsequent action. See Restatement, Judgments § 86, comment (h), § 116 (1942). The court, however, in framing the judgment in any suit brought as a class action, must decide what its extent or coverage shall be, and if the matter is carefully considered, questions of res judicata are less likely to be raised at a later time and if raised will be more satisfactorily answered. See Chafee, supra, at 294; Weinstein, supra, 9 Buffalo L.Rev. at 460.

Subdivision (c)(4). This provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case the action may retain its "class" character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

Two or more classes may be represented in a single action. Where a class is found to include subclasses divergent in interest, the class may be divided correspondingly, and each subclass treated as a class.

Subdivision (d) is concerned with the fair and efficient conduct of the action and lists some types of orders which may be appropriate.

The court should consider how the proceedings are to be arranged in sequence, and what measures should be taken to simplify the proof and argument. See subdivision **(d)(1)**. The orders resulting from this consideration, like the others referred to in subdivision (d), may be combined with a pretrial order under Rule 16, and are subject to modification as the case proceeds.

Subdivision (d)(2) sets out a non-exhaustive list of possible occasions for orders requiring notice to the class. Such notice is not a novel conception. For example, in "limited fund" cases, members of the class have been notified to present individual claims after the basic class decision. Notice has gone to members of a class so that they might express any opposition to the representation, see United States v. American Optical Co., 97 F.Supp. 66 (N.D.Ill.1951), and 1950-51 CCH Trade Cases 64573-74 (par. 62869); cf. Weeks v. Bareco Oil Co., 125 F.2d 84, 94 (7th Cir. 1941), and notice may encourage interventions to improve the representation of the class. Cf. Oppenheimer v. F. J. Young & Co., 144 F.2d 387 (2d Cir. 1944). Notice has been used to poll members on a proposed modification of a consent decree. See record in Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1961).

Subdivision (d)(2) does not require notice at any stage, but rather calls attention to its availability and invokes the court's discretion. In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum. These indicators suggest that notice under subdivision (d)(2) may be particularly useful and advisable in certain class actions maintained under subdivision (b)(3), for example, to permit members of the class to object to the representation. Indeed, under subdivision (c)(2), notice must be ordered, and is not merely discretionary, to give the members in a subdivision (b)(3)

class action an opportunity to secure exclusion from the class. **This mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which the class action procedure is of course subject.** See Hansberry v. Lee, 311 U.S. 32 (1940); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); cf. Dickinson v. Burnham, 197 F.2d 973, 979 (2d Cir. 1952), and studies cited at 979 in 4; see also All American Airways, Inc. v. Elderd, 209 F.2d 247, 249 (2d Cir. 1954); Gart v. Cole, 263 F.2d 244, 248-49 (2d Cir. 1959), cert. denied, 359 U.S. 978 (1959).

Notice to members of the class, whenever employed under amended Rule 23, should be accommodated to the particular purpose but need not comply with the formalities for service of process. See Chafee, supra, at 230-31; Brendle v. Smith, 7 F.R.D. 119 (S.D.N.Y.1946). The fact that notice is given at one stage of the action does not mean that it must be given at subsequent stages. Notice is available fundamentally "for the protection of the members of the class or otherwise for the fair conduct of the action" and should not be used merely as a device for the undesirable solicitation of claims. See the discussion in Cherner v. Transitron Electronic Corp., 201 F.Supp. 934 (D.Mass.1962); Hormel v. United States, 17 F.R.D. 303 (S.D.N.Y.1955).

In appropriate cases the court should notify interested government agencies of the pendency of the action or of particular steps therein.

Subdivision (d)(3) reflects the possibility of conditioning the maintenance of a class action, e.g., on the strengthening of the representation, see subdivision (c)(1) above; and recognizes that the imposition of conditions on intervenors may be required for the proper and efficient conduct of the action.

As to orders under subdivision (d)(4), see subdivision (c)(1) above.

Subdivision (e) requires approval of the court, after notice, for the dismissal or compromise of any class action.

1987 Amendments The amendments are technical. No substantive change is intended.

1998 Amendments

Subdivision (f). This permissive interlocutory appeal provision is adopted under the power conferred by 28 U.S.C. § 1292(e). Appeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals. No other type of Rule 23 order is covered by this provision. The court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari. This discretion suggests an analogy to the provision in 28 U.S.C. § 1292(b) for permissive appeal on certification by a district court. Subdivision (f), however, departs from the § 1291(b) model in two significant ways. It does not require that the district court certify the certification ruling for appeal, although the district court often can assist the parties and court of appeals by offering advice on the desirability of appeal. And it does not include the potentially limiting requirements of § 1292(b) that the district court order "involve[] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

The courts of appeals will develop standards for granting review that reflect the changing areas of uncertainty in class litigation. The Federal Judicial Center study supports the view that many suits with class-action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings. Yet several concerns justify expansion of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can

be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.

Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive. Permission is most likely to be granted when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation.

The district court, having worked through the certification decision, often will be able to provide cogent advice on the factors that bear on the decision whether to permit appeal. This advice can be particularly valuable if the certification decision is tentative. Even as to a firm certification decision, a statement of reasons bearing on the probably benefits and costs of immediate appeal can help focus the court of appeals decision, and may persuade the disappointed party that an attempt to appeal would be fruitless.

The 10-day period for seeking permission to appeal is designed to reduce the risk that attempted appeals will disrupt continuing proceedings. It is expected that the courts of appeals will act quickly in making the preliminary determination whether to permit appeal. Permission to appeal does not stay trial court proceedings. A stay should be sought first from the trial court. If the trial court refuses a stay, its action and any explanation of its views should weigh heavily with the court of appeals.

Appellate Rule 5 has been modified to establish the procedure for petitioning for leave to appeal under subdivision (f).

Exhibit "D"

United States Code Annotated
Title 28. Judiciary And Judicial Procedure
Part V—Procedure
Chapter 131—Rules Of Courts

§ 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

Endnotes

[1] The companies involved were: Amchem Products, Inc.; A.P. Green Industries, Inc.; Armstrong World Industries, Inc.; Asbestos Claims Management Corp.; Certainteed Corp.; C.E. Thurston & Sons, Inc.; Dana Corp.; Ferodo America, Inc.; Flexitallic, Inc.; GAF Building Materials, Inc.; I.U. North America, Inc.; Maremont Corp.; National Services Industries, Inc.; Nosroc Corp.; Pfizer Inc.; Quigley Co.; Shook & Fletcher Insulation Co.; T & N, PLC; Union Carbide Corp.; and United States Gypsum Co.

[2] Within the space of a single day, the settling parties presented to the District Court a complaint, an answer, a proposed settlement agreement, and a joint motion for conditional class certification. On the same day, the CCR defendants filed a third party action against their insurers seeking a declaration holding the insurers liable for the costs of the settlement. Amchem at 601-602.

[3] The complaint defines the class as follows: "(a) All persons (or their legal representatives) who have been exposed in the United States or its territories (or while working aboard U.S. military, merchant, or passenger ships), either occupationally or through the occupational exposure of a spouse or household member, to asbestos or to asbestos-containing products for which one or more of the Defendants may bear legal liability and who, as of January 15, 1993, reside in the United States or its territories, and who have not, as of January 15, 1993, filed a lawsuit for asbestos-related personal injury, or damage, or death in any state or federal court against the Defendant(s) (or against entities for whose actions or omissions the Defendant(s) bear legal liability) "(b) All spouses, parents, children, and other relatives (or their legal representatives) of the class members described in paragraph (a) above who have not, as of January 15, 1993, filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) above in any state or federal court against the Defendant(s) (or against entities for whose actions or omissions the Defendant(s) bear legal liability)." 1 App. 13-14. *Amchem* at 603.

[4] The complaint and accompanying documents were filed on January 15, 1993, the conditional certification occurred on January 29, 1993.

[5] The text of Rule 23 with comments addressing 1966 and later amendments is Exhibit "C".

[6] Ironically, the *Amchem* opinion then goes on to quote the Fifth Circuit opinion from In re Asbestos Litigation, 90 Fed.3d, at 976, n.8 where they had quoted the Third Circuit's reversal of *Amchem* stating that such a huge class hinders satisfaction of Rule 23. *Amchem*, at 624-625. That Fifth Circuit opinion would later become the subject of *Ortiz*.

[7] The statute is Exhibit "D".

[8] There is a brief mention of a proposed amendment to Rule 23 expressly authorizing settlement class certification in a Rule 23(b)(3) setting "even though the requirements of subdivision (b)(3) might not be met for purposes of trial." *Amchem,* at 619.

[9] *Amchem* at 623. It is interesting to note that a footnote appears in the decision pointing out the Rule 23(b)(1)(B) does not have a predominance requirement.

[10] Cigarette smoking is referred to as a "factor that complicates the causation inquiry." *Amchem*, at 624.

[11] At this point the Supreme Court again mentions that this is not a "limited fund" case under Rule 23(b)(1)(B) but the terms of the settlement reflect essential allocation decision designed to confine compensation and to limit defendants' liability.

[12] See also *Ortiz*, at 2314 where the Court addresses the tension between choice of law and substantive state law questions and the rights of individual tort victims at law. Again, the Court states it view that such tensions are best kept within tolerable limits by keeping limited fund practice close to the practice preceding its adoption.

[13] Not the least of these constitutional concerns is the Seventh Amendment jury trial right of absent class members. Another equally important concern arising from a mandatory class action aggregating scheme is the due process principle of our jurisprudence that one is not bound by a judgment *in personam* in litigation where he has not been designated as a party or to which he has not been made a party by service of process. While there are exceptions, the burden of justification rests on the exception. *Ortiz*, at 1314-1315.