

**CERTIFICATION ISSUES
IN MASS TORT CLASS ACTIONS:
Challenges, Appeals and Settlement**

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I.

INTRODUCTION

Mass tort class actions have increasingly become a favorite vehicle for the plaintiff's bar. And most often class certification in these cases dramatically raises the stakes for defendants. With significant stakes at risk for both sides, the law affecting mass tort class actions has been rapidly developing.

The Supreme Court and the Advisory Committee on the Federal Rules of Civil Procedure have recently taken some action regarding the application and amendment of Rule 23 and class certification. Those are the *Amchem* and *Fibreboard* decisions and the amendment of Rule 23 to permit interlocutory appeal of a certification decision. This paper discusses how those events influence certification challenges, the appeal of certification decisions, and settlement in mass tort cases. Section I identifies for the practitioner what issues may be used to challenge class certification. Section II discusses interlocutory appeal of a certification decision. And Section III discusses how certification issues impact settlement of mass tort cases.

II.

CHALLENGING MASS TORT CLASS CERTIFICATION UNDER FEDERAL RULE OF CIVIL PROCEDURE 23 (a) and 23 (b)(3)

As the Supreme Court has recently demonstrated in *Amchem* and *Fibreboard*, mass tort cases can face significant obstacles - - in both Rule 23 and the Constitution - - to class certification. *Amchem Products, Inc. v. Windsor*, 117 Sup. Ct. 2231, 521 U.S. 591, 138 L. Ed. 2d 689 (1997) and *Ortiz v. Fibreboard Corporation*, 119 Sup. Ct. 2295, 527 U.S. 815, 144 L. Ed. 2d 715 (1999). These cases, particularly *Amchem*, serve as a road map pointing out for the practitioner the obstacles to class certification. Asking a lower court to closely examine these certification obstacles, an exercise mandated by the Supreme Court in both *Amchem* and *Fiberboard*, can lead to an effective challenge of class certification.

Rule 23 outlines the threshold requirements all class actions must meet in order to be certified. Rule 23 (a) sets forth four requirements: (1) numerosity - a class is so large joinder is impractical; (2) commonality - questions of law and fact are common to the class; (3) typicality - named parties claims or defenses are typical to the class; and (4) adequacy of representation - representatives will fairly and adequately protect class interests. *Amchem*, at 2245. In addition to satisfying all Rule 23 (a) requirements, parties seeking certification must also show the action is maintainable under either Rule 23 (b) (1), (b) (2) or (b) (3). *Id.* Rule 23 (b)(1) mandatory class actions will be discussed in the context of settlement in Section III. 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,” such as civil rights cases or, in some instances, environmental claims. *Id.* Rule 23 (b)(3) is the “opt out” class.

Most mass tort cases are (b)(3) opt out classes. To qualify for certification under this subsection a class must meet two requirements beyond Rule 23 (a) - - (1) common questions must predominate over questions affecting individual members and (2) class resolution must be superior to the other methods of resolution. *Id.* These are commonly referred to as the predominance and superiority requirements. Subsection (b) (3) sets forth a non-exhaustive list of factors to help a court determine whether the predominance and superiority criteria are met. They are “(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.” FRCP (b)(3).

Mass tort cases often cannot meet the Rule 23 (b) (3) predominance requirement. While the Rule 23 (a) commonality requirement may be met by a shared experience (a single accident or event), the requirement of predominance demands far more. *Amchem*, at 2250.

Amchem involves an asbestos mass tort. What the practitioner learns from *Amchem* is that mass torts typically involve significant uncommon questions, a great number of which are peculiar to different categories of claimants, and often involve disparate health consequences related to a particular exposure. *Id.* These disparate questions run afoul of the predominance requirement. *Id.* As identified in *Amchem*, the specific “disparate questions undermining class cohesion” in mass torts are: exposure to different products, length of exposure, manner of exposure, periods of exposure, harms involved, the injuries manifested, medical monitoring issues, and factors in individual claim that may complicate a causation inquiry. *Id.* Close examination of these questions can lead to the defeat of class certification.

Another certification requirement that mass tort cases often run afoul of is the Rule 23 (a) adequacy of representation requirement. (Admittedly, this requirement tends to merge with other Rule 23 (a) requirements for commonality and typicality. *Id.* at 2250.) In order to satisfy it, a class representative must possess the same interest and suffer the same injury as class members. *Id.* at 2250 - 2251. But in mass tort cases, where often there are significant numbers of future claimants (i.e., those exposed but not yet manifesting injury and unborn claimants), class representatives do not possess the same interest or injury as all class members. *Id.*, at 2251. For example, in *Amchem*, the Court noted:

“In significant respects, the interests of those within the single [mass tort] 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 insuring an ample, inflation-protected fund for the future.” *Id.*

While creating subclasses may remedy this problem, the Rule 23 (a) adequacy of representation requirement provides ammunition for a party seeking to challenge a mass tort class, particularly where future claims are involved.

The presence of future claims also raises due process and notice concerns under both the Constitution and Rule 23. See, *Amchem*, at 2252. Problems arise because many future claimants do not even know of their exposure or realize the extent of harm they may

face. *Id.* Even if notice is received, these claimants may not have the information necessary to make an intelligent decision as to whether to opt out of a class. *Id.* The Supreme Court in *Amchem* did not rule on the notice issue, finding it unnecessary because predominance and adequacy of representation requirements were not met. Yet, it commented, “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” as future claimants. *Amchem*, at 2252. Notice is another significant concern that limits a court’s ability to certify a mass tort class and should be raised by a party seeking to defeat certification.

Another avenue of challenge to mass tort cases that has been recognized is justiciability under Article III. While this may ultimately prevail as a weapon to challenge some claims in a class action, the Supreme Court has twice said that class certification issues are antecedent to an Article III issue. *Amchem*, at 2244; *Fiberboard*, at 2307. Certification issues pertain to statutory standing and, thus, must properly be heard before Article III standing. *Id.* But the Supreme Court cautions, courts should be “mindful that Rule 23’s requirement must be interpreted in keeping with Article III constraints and with the Rules Enabling Act...” *Id.*

In sum, mass tort cases present three compelling issues for certification challenge. One, Rule 23 (b)(3) predominance issues exist because there are significant questions of damages, liability and defenses to liability that affect individual class members (and defendants) differently. Defendants challenging certification on this basis may take a cue from the Class Action Subcommittee to the Advisory Committee on the Federal Rules of Civil Procedure. It has suggested that a Court’s inquiry here should focus not simply on the questions, but the answers. “The idea would be to focus on the issue whether the evidence likely to be admitted at trial of the class action would bear equally on all the elements of all of the claims of all class members, supporting a uniform ‘yes’ or ‘no’ answer to each.” Draft Minutes, Rule 23 Subcommittee, February 18, 2000 meeting, p. 3. Second, the presence of future claimants creates an issue as to whether Rule 23 (a) adequacy of representation, as well

as commonality and typicality, requirements can be met. Finally, due process and notice concerns are very real considerations in cases involving future claimants. A party challenging certification should raise each of these issues – all limit the ability of a court to certify a class.

II.

INTERLOCUTORY APPEALS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE RULE 23 (f)

The Class Action Subcommittee to the Advisory Committee on the Federal Rules of Civil Procedure has been spending the last several years studying different approaches to class action rule revision. Accumulating a wealth of information on class action litigation, the Subcommittee has set itself to the task of determining what areas of Rule 23 present the greatest problems and where lies the most promise for meaningful and successful rule revision. The April 24, 1998 (effective December 1, 1998) amendment to Rule 23, providing for interlocutory appeal of a decision regarding class certification, is the first evidence of the Subcommittee's efforts.

Rule 23 (f) provides in full:

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. FRCP 23 (f).

The Advisory Committee Notes advise that Rule 23 (f) gives to the Court of Appeals unfettered discretion, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari, as to whether to permit an appeal. *F.R.C.P. 23 (f) Advisory Committee Notes*. The Advisory Committee provides guidance as to when this permission should be granted. "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.” *Id.*

Rule 23 (f) is still too new to be able to fully appreciate its impact. But several trends have emerged from the circuits that have reviewed a class certification decision under the Rule. The first court of appeals to consider a Rule 23(f) application has been the Seventh Circuit. *See Blair v. Equifax Check Services, Inc.*, 181 F. 3d 832 (7th Cir. 1999). The Seventh Circuit in *Blair* notes that courts must necessarily experiment with this new class of appeals. *Id.* at 834. It comments that under the Rule neither a bright line approach nor a catalog of factors would serve well to guide it in deciding whether to consider an appeal. *Id.* It looked to the reasons for the amendment for guidance. *Id.*

Rule 23(f) came into being for three reasons. First, it provides an avenue of redress to litigants for whom denial of class status would effectively end the litigation because the representative plaintiff's claim is too small to justify the expense of litigation. *Id.* Second, it provides an avenue of redress to defendants on whom the granting of class status puts considerable pressure to settle, even when the possibility for success on the merits is slight. *Id.* These are those cases where, as the Advisory Committee comments, the decision of certification will likely dispose of the litigation. Third, it facilitates the development of class action law. *Id.* at 835. Because a large number of class actions settle, or are resolved in ways that overtake procedural matters, some fundamental issues about class actions are poorly developed. *Id.* The Advisory Committee anticipates that appeals under Rule 23 (f) will resolve some of these fundamental questions, as well as illuminate others. *Id.*

Following the reasoning behind Rule 23(f), the *Blair* court outlines three categories of cases that customarily will warrant the exercise of the discretionary appellate jurisdiction provided by the Rule. These are (1) cases where denial of class status effectively ends the plaintiffs' case; (2) cases where granting of class status puts irresistible pressure on a defendant to settle, and (3) cases where clarification of a fundamental issue of law is

necessary. *Id.*, at 834-835. The *Blair* opinion is considered the seminal opinion dealing with application of Rule 23 (f).

The only other substantive opinion regarding Rule 23 (f) comes from the First Circuit. The First Circuit, taking its cue from the *Blair* court, also uses the Rule's underlying reasons as a beacon for determining whether it should consider an appeal under the Rule. See *Waste Management Holding Inc. v. Mowbray*, 208 F. 3d 288 (1st Cir. 2000). The First Circuit succinctly states:

The *raison d'être* for Rule 23 (f), then, is two fold. First, the Rule provides a mechanism through which appellate courts, in the interest of fairness, can restore equilibrium when a doubtful class certification ruling would virtually compel a party to abandon a potentially meritorious claim or defense before trial. Second, the rule furnishes an avenue, if the need is sufficiently acute, whereby the Court of Appeals can take earlier - than - usual cognizance of important, unsettled legal questions, thus contributing to both the orderly progress of complex litigation and the orderly development of the law. *Id.* at 293.

After identifying the categories of cases to be considered under the Rule, both the Seventh and the First Circuit advise the Rule 23(f) applicant what must be demonstrated to gain review of decision regarding certification. An applicant invoking either of the first two categories of cases must “demonstrate that the district court’s ruling on class certification is questionable – and must do this taking into account the discretion the district judge possesses in implementing Rule 23, and the correspondingly differential standard of appellate review.” *Waste Management Holdings, Inc.* 208 F.3d at 293, citing *Blair* 181 F3d at 835. As to the third category of cases - - where fundamental issues of law are said to exist – the *Blair* court notes that “the importance of the issue to be resolved, more so than the likelihood of reversal, ought to determine whether a case falls into this grouping.” *Blair*, at 835.

The First Circuit, however, fearing too many disappointed litigants may file fruitless Rule 23 (f) applications citing this third category, has further restricted review of certification

decisions in this category of cases. It cautions litigants that interlocutory appeals are disruptive, time consuming and expensive. *Waste Management Holdings, Inc.* 208 F. 3d at 294. And advises an applicant that to gain review of a decision in the third category the applicant must show that the case involves “those instances in which an appeal will permit the resolution of an unsettled legal issue that is important in itself and likely to escape effective review if left hanging until the end of the case.” The First Circuit concludes by stating it would err on the side of giving the trial court an opportunity to fine tune its class certification order – as allowed by Rule 23 (c)(1) – rather than open the door too widely to interlocutory appellate review. *Id.* This approach is consistent with the Advisory Committee’s comment that “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 an appeal.” See *F.R.C.P. 23(f) Advisory Committee Notes*.

In sum, while Rule 23(f) provides an expanded opportunity to appeal a class certification decision, it has not opened a flood gate for such appeals. The categories of cases for which permission under Rule 23 (f) is likely to be granted have been clearly defined by the Advisory Committee and those circuits who have had opportunity to apply the Rule. So far, the circuit courts have demonstrated that they are not eager to hear fruitless or frivolous appeals under the new Rule.

III.

CERTIFICATION OF SETTLEMENT AFTER *AMCHEM AND FIBREBOARD*

Providing defendants a road map on how to challenge certification in a mass tort case, the Supreme Court in *Amchem* and *Fibreboard* narrowed the permissible parameters of class action settlements in these cases. *Amchem* establishes guidelines for settlement only classes, while recognizing that settlement is relevant to class certification consideration. *Amchem Products, Inc. v. Windsor, et al.*, 117 S.Ct. 2231, 521 U.S. 591, 138 L.Ed.2d 689 (1997).

And *Fibreboard* establishes essential guidelines for Rule 23(b)(1)(B) limited fund classes. *Ortiz v. Fibreboard Corp.*, 119 S.Ct. 2295, 527 U.S. 815, 144 L.Ed.2d 715 (1999).

Amchem, as discussed above, highlights the certification obstacles that mass tort cases face -- Rule 23(b)(3) predominance and Rule 23(a) typicality, commonality and adequacy of representation requirements. *Amchem*, at 2250-2251. To avoid these obstacles, the tactic of negotiating a class action settlement even before a lawsuit has been filed and the use of settlement only classes has begun to emerge. In *Amchem* plaintiffs' simultaneously filed a complaint and settlement agreement for a settlement only class, which did not meet the predominance and adequacy of representation requirements. The district court certified the class. The Supreme Court voiced its concern over this end-running strategy and decertified the class. After *Amchem* it is clear that settlement only classes must meet all the requirements of Rule 23 (a) and (b), except one. Only the Rule 23(b)(3) consideration of the intractability of class action trial management may be excused in consideration of a settlement only class - - for the proposal is that there would be no trial. *Id.* at 2247-2249. In this way settlement itself becomes relevant to class certification. *Id.*

The limited fund class settlement has also been attempted in an asbestos mass tort case -- *Fibreboard*. The Supreme Court in *Fibreboard* again voiced concern over the use of this device. The opinion provides a detailed guide for future limited fund class action settlements.

Like *Amchem*, *Fibreboard* involved the simultaneous filing of a complaint and settlement agreement. All but \$10 million of the \$1.535 billion settlement was to be contributed by Fibreboard's insurers. Fibreboard itself would contribute the remaining \$10 million. The Supreme Court, analyzing the use of the (b)(1)(B) limited fund settlement vehicle in a case involving unliquidated tort claims, noted "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." *Fibreboard*, 119 S.Ct. at 2313. Traditionally, these mandatory classes have involved liquidated

claims, not pending tort claims. *Id.* While the Supreme Court did not decide the ultimate question of whether Rule 23(b)(1)(B) may ever be used to aggregate individual tort claims, it did set forth the requirements that must be met by any settlement under this section of Rule 23. *Id.* at 2314. It noted that there are many difficulties facing limited fund treatment of unliquidated damages arising from mass torts - - the first such hurdle being a computation of the total claims. *Id.* at 2316.

As set forth in *Fibreboard*, the three mandatory essentials of a Rule 23(b)(1)(B) limited fund are: (1) that the fund has a definite, ascertained limit and that the totals of the aggregated liquidated claims and the fund available to satisfy them (set at their maximums) demonstrate the inadequacy of the fund to pay all claims; (2) the entirety of the fund is distributed to satisfy all those with liquidated claims based on a common theory of liability; and (3) there is an equitable pro rata distribution. *Id.* at 2312. As to the first requirement, the proponents must produce evidence, subject to challenge, that the fund is truly limited and insufficient. *Id.* at 2316.

The limited fund settlement agreement between the class and *Fibreboard* did not meet these essentials. First, the proponents did not demonstrate the fund was truly limited. *Id.* The Supreme Court observes that the *Fibreboard* agreement provided for a fund smaller than the assets the court understood to be available for payment to class members. *Id.* at 2321. “Most notably, *Fibreboard* was allowed to retain virtually its entire net worth with contributions from the fund being made from insurance proceeds. . . it hardly appears that such a regime is the best that can be provided for class members.” *Id.* Subdivision (b)(1)(B) also requires equity among class members. This raises two issues the inclusiveness of the class and the fairness of distribution to those in it. *Id.* The proposed settlement ran afoul from the Rule because the class definition impermissibly excluded myriad claimants who had current or potential claims arising from exposure to *Fibreboard*’s products. *Id.*, at 2318-2319. The Supreme Court reiterated in *Fibreboard* its holding in *Amchem* when a class is divided between holders of present and future claims there must be “structural protection of

independent representation as for subclasses with conflicting interests.” *Id.* at 2319. There was no such protection given future claimants in the *Fibreboard* settlement. Failing to meet these mandatory essentials, the *Fibreboard* settlement failed.

One of the Class Action Subcommittee to the Advisory Committee on the Federal Rules of Civil Procedure's tasks is to study the settlement ramifications of *Amchem* and *Fibreboard*. In doing so it has recognized that insisting on the *Amchem* limitations may continue an emerging trend of increased reliance on state courts for class actions. See Memorandum, Lee H. Rosenthal, Chair, Class Action Subcommittee to Members, Advisory Committee on the Federal Rules of Civil Procedure. A trend it does not find desirable for a host of obvious reasons. It is currently in the process of preparing an alternative draft of settlement class provisions to Rule 23. A proposed rule would confirm and make explicit in Rule 23 *Amchem's* holding that a court can certify a settlement only class that meets the Rule 23(a) requirements and one of the Rule 23(b) categories, except for trial manageability. *Id.* The proposed rule would allow a court to consider the fact of settlement in deciding whether the criteria for certification have been met. *Id.* The proposed rule, however, would not allow a court to give such weight to that factor that the court relaxes the other requirements of Rule 23(a) and (b). *Id.* The Subcommittee also proposes that a Note to the Rule would express the view that *Amchem* is too narrow an approach to settlement only classes. Draft minutes, Rule 23 Subcommittee, February 14, 2000 meeting, p. 7.

As to *Fibreboard*, the Subcommittee has identified at least one setting where it believes the limited fund approach would be far superior for the claimants, as well as the defendants. At a February 18, 2000 meeting, the Subcommittee discussed fen-phen litigation involving a small defendant startup company who only has one current product and insufficient insurance. Draft Minutes, Rule 23 Subcommittee, February 14, 2000 Meeting, p. 4; and see, *In re: Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liability Litigation*, 1999 WL 782560 (E.D. Penn. 1999). The Subcommittee discussed the relevant facts of that case, which are:

The company had licenses for two new products and enough money only to conduct clinical trials to prove whether the new products could be marketed. If the company were to enter bankruptcy, the licenses would self destruct. The company's insurance was limited to \$30 million. A limited fund settlement was proposed. It would deliver all of the insurance coverage to the claimants rather than spend it on defense costs. It also would deliver the claimants any money not needed by the company for clinical trials on new products, and would give claimants royalties for a period of years on any successful new products. *Id.*

This proposal was rejected by the district court on the belief that *Fibreboard* bars approval. *In re: Diet Drugs Products Liability Litigation*, at *10. An appeal to the Third Circuit pursuant to Rule 23(f) has been withdrawn.

The Subcommittee, however, believes that a limited fund class is justified in circumstances such as this. Draft Minutes, at p. 4. It points out that there would be no incentive for the defendants to enter into a true limited fund settlement whereby complete equity ownership of the defendant would be assigned to the class and the class would be able to decide for itself the best course to maximize the defendant's value. *Id.* But the Subcommittee notes that an authorization of this form of modified limited fund class should be done apart from subdivision (b)(1) and should be very closely confined. *Id.*

In sum, life for mass tort class action settlement after *Amchem* and *Fibreboard* is somewhat uncertain. Proponents of settlement only classes still must meet the certification requirements of Rule 23. This may be exceedingly difficult in mass tort class actions. But, there have been successful (b)(3) settlements post-*Amchem*. For example, on May 1, 2000 a federal judge sitting in the Western District of Missouri approved what is probably the largest post-*Amchem* Rule 23 (b) (3) national class action settlement, involving a class of consumers who purchased 14.2 million water heaters made between August and October 1993 containing a potentially defective part. See, *Heilman v. Perfection Corp.*, W.D. Mo., No. 99-0679 - CV - W - HFS (5/1/00). Under the settlement, defendant/manufacturers agreed to replace or repair the partially defective parts. The settlement treated differently those

claimants who had made repairs, those who had experienced problems, but not made repairs and those who had not experienced problems. See, *BNA Class Action Litigation*, Vol. 1, No. 2, p. 57 (May 12, 2000). As to Rule 23 (b)(1)(B) limited fund settlements of unliquidated tort damages, their future appears less certain. Still, there may be some use for such settlements, as the Class Action Subcommittee to the Rule's Advisory Committee has identified one scenario where this approach makes sense. See, *In re Diet Drugs Products Liability Litigation*. It remains to be seen whether the courts will adopt their view.