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THE MORAL COMPASS: Action Needed on Class Action

Such suits are a vital part of our system, but they must be used wisely

By Richard Zitrin and Carol Langford

It seems that not a week goes by without a new headline about a controversial class action case. This week, it was the possible dismissal of a race discrimination class action suit against Coca-Cola because of the trial court's interpretation of a 1998 Fifth Circuit opinion. Last week, the story came straight from the Supreme Court, which set aside a proposed $1.5 billion settlement of a class action asbestos claim against Fibreboard. (*Ortiz v. Fibreboard Corp.*, USSC No. 97-1704.)

Justice David Souter's majority opinion in Ortiz criticized the inability of class members to "opt out" of the settlement and maintain their own lawsuits. The majority was also clearly offended by the fact that Fibreboard itself, as opposed to its insurers, would have contributed only half a million dollars. "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," wrote Souter.

The new Supreme Court decision strengthens the Court's resolve to protect consumers from the dangers of

collusive settlements between defendants and plaintiffs' class action lawyers. That protection began with Justice Ruth Bader Ginsburg's opinion in *Amchem Products, Inc. v. Windsor*, 117 S.Ct. 2231 (1997), another asbestos case, which held that no class could be certified solely for the purposes of settlement unless it could be certified as a class for trial.

What's wrong with defendants trying to buy global peace through large settlements? Plenty. The facts of *Amchem* are

through large settlements? Plenty. The facts of *Amchem* are a perfect example of how class actions can be abused in a way that harms many passive class members, but aggrandizes their lawyers while letting defendants off the hook.

Amchem pitted plaintiffs' groups against 20 companies whose workers had been exposed to asbestos, and who banded together to form the Center for Claims Resolution, or CCR. On a single day in January 1993, two plaintiffs' law firms filed a class action complaint, CCR's attorneys filed an answer to that complaint, and the two sides submitted an agreed-upon settlement. The deal was done even before it was filed. The advantage for the plaintiffs' lawyers, of course, is that they were in line for a very substantial fee. The advantage for the defense was that the CCR companies would purchase not just peace, but peace everlasting.

The settlement purported to resolve the claims of "all persons" who had been "exposed occupationally" to asbestos by one of the CCR companies, as well as the families of those exposed. But only those who had already become ill from asbestos-related diseases were sure to receive any compensation. Others who faced the danger of future illness, and their families, might receive money according to various formulas, but little was guaranteed.

The class filing was as diabolical as it was ingenious. Unlike *Ortiz*, the *Amchem* settlement made it possible to opt out. But to opt out, people must know that they are part of a class in the first place. Many of those exposed to asbestos never know, and never find out unless they become ill. So potential class members in *Amchem* didn't know they had been exposed; others, like construction workers who had worked many jobs for innumerable employers whose names were long forgotten, couldn't possibly learn through ordinary class action notice procedures that they might be members of a class.

Even worse, the class included both present and future spouses and family members of those exposed to asbestos -- spouses not yet married, and children not yet conceived or even contemplated.

Because the case was settled before it was filed, the class was presented for certification as a pre-packaged deal. The lawyers wanted only to settle, and never intended to litigate -- a task many considered impossible because of the case's complexity and the inclusion of future victims.

Nevertheless, the federal trial court in Philadelphia approved the settlement and enjoined everyone covered under the class from pursuing their own individual claims. Consumer groups, including Class Action Abuse Prevention Project of Trial Lawyers for Public Justice, appealed to the Third Circuit Court of Appeals, where they won; they then succeeded in persuading a majority of the Supreme Court.

We need class actions, just as we need contingency fees. Both help level the playing field by giving ordinary people access to the courts. But in order for class actions to be valid, they must be used wisely. This means that more control must be wrested from the hands of the lawyers on both sides.

Suggestions for reforming class action abuses range from the ridiculous -- one law professor has suggested doing away entirely with individual class representatives -- to the sublime -- former Republican Senator William Cohen of Maine proposed legislation requiring that class notices provide clear summaries in plainly written language instead of "legal jargon that the average citizen cannot understand." Academics debate in scholarly journals about technical changes to the federal rules. Some of these changes make sense, such as requiring a series of fairness hearings rather than just one. But they don't directly address how to control the behavior of the lawyers involved.

Almost all reform advocates support educating judges about class actions, and raising the level of objective judicial scrutiny. But increased judicial involvement alone will not make the difference in the average class action, where public interest lawyers have not been mobilized, and the judge is faced with both sides forcefully explaining how fair their settlement is. Making class action notices more understandable to the public is laudable, but is easier said than done, particularly in cases, like asbestos claims, that require proof from records or recollection from the distant past.

We suggest two additional proposals. First, don't merely educate the bench, require heightened judicial scrutiny. Class actions don't fit neatly into the typical civil litigation model, any more than family or probate cases. So give these cases special departments like probate and domestic relations courts, where judges are experts on the vagaries of class actions, and not rubber stamps who certify classes and, later, settlements that are anti-consumer. And give

these judges sufficient tools to work with: rules that require that no class shall be certified for settlement until a substantial burden of proof is met that the settlement is in the interests of all segments of the passive class population.

Second, give real power back to the named representatives of the class. Now, lawyers in many states can settle class actions even if the named class representatives disagree. This is an absurd state of affairs. After all, whose case is it, anyway? If the named representatives had a measure of true independence from their lawyers and were truly representative of the class and any legitimate sub-classes, and if these "class reps" were empowered to settle the case on advice instead of orders of counsel, at least some measure of control of the class would revert to those who are actually affected by the outcome.

This could limit the ability of unscrupulous plaintiffs' lawyers -- and those usually honest ones who might succumb to temptation -- to settle class actions because of the fees they receive. It would also limit the ability of defense attorneys to buy peace for their clients by paying some class members at the expense of others. Finally, these reforms would help re-establish class actions as the powerful consumer tool that they should and could continue to be.

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