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Civil Procedure: Managing Class-Action Conflicts

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The advent of the twentieth anniversary of the Supreme Court's landmark decision in *Amchem Products, Inc. v. Windsor*[2] provides the opportunity to reflect on the largely unnoticed collapse of the framework it announced for managing intra-class conflicts. The *Amchem* framework was bold, in that it broadly defined actionable conflicts to include divergent interests with regard to settlement allocation; market-based, in that it sought to regulate such conflicts by using subclasses to harness competing plaintiffs' counsel's financial incentives; and committed to intrinsic process values, insofar as, to assure structural fairness, the court was willing to upend settlements that would have eased the crush of asbestos litigation.

Since the late 1990s, the lower federal courts have quietly flipped that regime on its head, limiting *Amchem* and *Ortiz v. Fibreboard Corp.*,[3] to their facts, narrowly defining the kinds of conflicts that warrant subclassing, and turning to alternative assurances of fairness—such as reliance on court-appointed settlement neutrals—that do not involve fostering competition among subclass counsel. This article connects the dots between *Amchem* and more recent, sprawling mass-tort settlement class actions in the BP oil spill and NFL concussion-injury litigations by providing a descriptive and institutional account of *Amchem*'s treatment in the lower courts.

The Amchem *Conflicts Management Regime*

In *Amchem* and *Ortiz*, the Supreme Court overturned two of the largest mass tort settlements in U.S. history on the ground that intra-class conflicts of interest rendered representation inadequate. The trial court in each case had approved a class-action settlement of asbestos claims even though the members of the settlement class had divergent interests with regard to settlement design and fund allocation. The Court held that such conflicts could not be overcome merely by showing that a settlement was fair. Instead, the representation of absent class members in the settlement

1. Summarized and adapted from Morris A. Ratner, *Class Conflicts*, 92 WASH. L. REV. 785 (2017).
2. 521 U.S. 591 (1997).
3. 527 U.S. 815 (1999).

process also had to be adequate. In *Amchem* and *Ortiz*, that meant that the settlement classes had to be divided into subclasses, each with their own representative plaintiffs and, importantly, their own lawyers, whose fees depended on the subclass members' recoveries and who could thus be trusted to advance their interests when negotiating settlement terms. Failure to do so rendered class certification illegitimate and justified overturning the class settlements, leaving the federal trial courts saddled with the asbestos-litigation crisis without any viable tools for resolving it outside of bankruptcy proceedings.

This approach to conflicts arose out of the mass-tort procedural infrastructure of the day. Due to then-prevailing jurisdictional doctrine, including the limits of diversity jurisdiction, much nationwide-class litigation occurred in state courts. Because class counsel's role was contingent upon a court certifying the class and rendering a class judgment, and because other camps of plaintiffs' counsel could easily file in a competing jurisdiction, settle with the defendant, and scoop the case, plaintiffs' counsel experienced an intense and existential form of role-insecurity. Their investment in class litigation could at any moment be wiped out by an interloper, leading to what leading commentators saw as the most glaring ethical lapse of the era: the reverse auction, when defendants pitted competing camps of plaintiffs' counsel against each other, awarding the role of settlement class counsel to the lowest bidder.

Thus, at the time it decided *Amchem* and *Ortiz*, the Supreme Court faced a landscape in which federal courts seemed poorly situated to regulate the quality of multijurisdictional class actions, class counsel's self-seeking stood out as the central problem, and agency-cost theory provided the conceptual framework for providing a conflicts-management solution.[4] Building on that foundation, the Court was naturally drawn to find some way to strengthen the adequacy-of-representation inquiry using a market- or incentive-based frame, one that looked to the manipulation of counsel's incentives. The Court accomplished its goal by stating what read like a clear approach to class conflicts: deny class certification in the absence of subclassing with separate counsel whose fees depended on outcomes achieved for the subclass.

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4. *See* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 684-90 (1986).

Upending Amchem*: A Quiet Revolution*

With few exceptions,[5] the lower federal courts have quietly and successfully revolted. Two recent mass-tort cases reveal just how far the courts have moved away from the *Amchem* regime. In both cases, class members' divergent interests regarding the design and allocation of any eventual settlement were apparent at the outset of the litigation. Nevertheless, the trial and appellate courts found either an absence of conflicts or that any conflicts were insufficiently fundamental to warrant denial of certification.

In the BP oil-spill litigation, the same group of plaintiffs' counsel appointed at the outset of the litigation to serve as members of the multidistrict-litigation ("MDL") plaintiffs' steering committee served as settlement class counsel in a series of economic-loss, personal-injury, and punitive-damages class-action settlements that were structured in a way that invited tradeoffs among class members and, even, with regard to the punitive-damages settlements, pitted class members against each other.

For example, in the economic-loss settlement, BP assigned its claims against non-settling defendants to the settlement class. To resolve those and other claims, the MDL plaintiffs' steering committee negotiated two new class settlements, one with Halliburton, the provider of the cement used at the original BP drill site, and another with Transocean, the owners of the drilling rig. These settlements resolved two categories of claims, those of the "Old Class" (the BP economic loss class described above), to end litigation regarding BP's Assigned Claims, as well as those of a "New Class" of all persons with punitive-damages claims against Halliburton and Transocean, only a subset of whom were members of the Old Class. The New Class was both narrower and broader than Old Class. It was broader because it included "many claimants whose property suffered direct physical damage from the explosion and oil spill, but who were excluded from the Old Class. Among others, these include local governments . . . and oil and gas interests."[6] It was narrower because it included only that subset of Old Class members who could satisfy the "physical injury" threshold of the

5. The Second Circuit is the lone flag-bearer of a strict reading of *Amchem* and *Ortiz*. *See* Payment Card Interchange Fee & Merchant Discount Antitrust Litig., 827 F.3d 223 (2d Cir. 2016); *In re* Literary Works in Elec. Databases Copyright Litig. v. Thomson Corp., 654 F.3d 242 (2d Cir. 2011).

6. Transocean's Punitive Damages and Assigned Claims Settlement Agreement ("Transocean Settlement Agreement") at *19, *In re* BP Oil Spill, No. 2:10-md-02179 (E.D. La. May 29, 2015), ECF No. 14644-1.

Robins Dry Dock rule[7] and thus were entitled to a punitive-damages award.[8] The same lawyers served as "Old Class" and "New Class" counsel. The agreements they negotiated with Halliburton and Transocean expressly pitted Old and New Class members against each other, in that the capped settlement amounts had to be allocated between them. Nevertheless, the trial court certified the settlement classes and granted final approval to the proposed settlements.[9]

Unlike the BP litigation settlements, which involved no subclassing with separate counsel, the NFL concussion-injury litigation illustrates minimalist and pro forma use of subclassing, without guaranteeing truly separate and independent representation. From the outset of the case, it was obvious that any settlement would have to distinguish among class members based on a range of factors, including type of illness. The final NFL settlement did so through its central feature, an uncapped Monetary Award Fund overseen by a claims administrator that would provide compensation for Retired Players who submit proof of Qualifying Diagnosis. The settlement recognized only six Qualifying Diagnoses, from varying levels of neurological impairment to Alzheimer's Disease, Parkinson's Disease, ALS, and death with chronic traumatic encephalopathy (CTE). The settlement also released claims without compensation for many of the symptoms of CTE, such as changes in mood, including depression.[10]

Though one can imagine subclassing on multiple dimensions, the trial court certified only two subclasses, for claimants with and without a Qualifying Diagnosis. The trial court appointed separate counsel for each subclass to participate in the negotiations, but they were appointed only after negotiations by all counsel had begun.[11] Moreover, subclass counsel were appointed from the group of common-benefit counsel who had already been representing all plaintiffs in the MDL and were not only counsel for the subclasses but were also common-benefit counsel for all MDL plaintiffs as well as class counsel for all class members who *also* happened to have special responsibility for advancing subclass members' interests.[12] They did not even have responsibility for negotiating a settlement of subclass members' claims or issues and instead just "played

7. Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927).

8. Transocean Settlement Agreement at *18.

9. *See* Final Order and Judgment Granting Approval of HESI and Transocean Punitive Damages and Assigned Claims Settlement Agreements at 2-4, *In re* BP Oil Spill, No. 2:10-md-02179 (E.D. La. Feb. 15, 2017), ECF No. 22253.

10. *See* Turner v. NFL, 307 F.R.D. 351, 365, 367, 397 (E.D. Pa 2015).

11. *In re* NFL Players, 821 F.3d 410, 429 (3d Cir. 2016).

12. *NFL Players*, 821 F.3d at 429; *Turner*, 307 F.R.D. at 425.

an active role" in the mediation process.[13] In the NFL concussion-injury litigation, subclass counsel's fortunes did not clearly rise or fall with those of the class members; instead, as class counsel for all class members, their fees could arguably be determined based on the value of the settlement to class members as a whole. Nevertheless, the Third Circuit affirmed the class-certification and settlement-approval order entered by the trial court.[14]

The trial and intermediate appellate courts in these recent mass tort class settlements deployed a stock set of moves to avoid being more rigorously faithful to the *Amchem* regime, including narrowly defining the scope of "fundamental" conflicts,[15] raising the specter of "Balkanization" as a result of subclassing,[16] relying on court-appointed neutrals in lieu of structural fairness,[17] and finding proof of procedural fairness in the settlements' substantive terms.[18] In short, they flipped the broad, market-based, *Amchem* regime rooted in a commitment to intrinsic process values. In its stead, these and other courts have articulated a new conflicts-management regime that is more tolerant of conflicts, places more faith in the trial court's ability to regulate conflicts, and looks to outcomes as proof of adequate representation.

An Institutional Account

What explains the emergence of this new conflicts-management regime? As noted, at the time *Amchem* and *Ortiz* were decided, federal courts were jurisdictionally challenged with regard to mass-tort class actions, and, relatedly, the reverse auction was the most glaring ethical challenge of the day. Congress and courts responded with new formal and informal institutional arrangements for managing mass-tort and other geographically dispersed class actions that together constitute a new

13. *See* Declaration of Robert H. Klonoff Relating to the Proposed Class Settlement in the National Football League Players' Concussion Injury Litigation ¶ 31, *In re* Nat'l Football League Players' Concussion Injury Litig., No. 2:12-md-02323-AB (E.D. La. Nov. 12, 2014), ECF No.6423-9.

14. *NFL Players*, 821 F.3d at 447-48.

15. Economic Final Approval Order at 34 (finding no "fundamental" conflicts, and that "[i]t's perfectly fair and reasonable, and indeed common and accepted, for settlement benefits to turn on strength of class members' claims"); *Turner*, 307 F.R.D. at 376 (narrowly defining "fundamental" conflicts as existing "where some [class] members claim to have been harmed by the same conduct that benefitted other members of the class.").

16. Economic Final Approval Order at 35-36.

17. *Id.* at 33; *Turner*, 307 F.R.D. at 377.

18. Economic Final Approval Order at 31.

MDL model. This new model results from the interaction between the Class Action Fairness Act (CAFA) of 2005, which has largely federalized multistate class actions, and the MDL statute,[19] which centralizes them before a single federal court trial judge. So empowered, federal trial-court judges have innovated a range of case-management techniques that give them substantial control over litigation, partly via the appointment and supervision of plaintiffs' steering committees whose positions are secure and who thus do not feel pressure to engage in reverse auctions. But without the possibility of class trials in these mass torts, MDL judges have only one possible successful outcome: settlement. Thus, while the new MDL model for managing litigation of mass torts and other geographically dispersed harms was born of mistrust of class counsel, it has had the effect of inspiring lower federal courts to trust them all the more at the time of settlement. The *Amchem* framework for regulating class conflicts now feels both less necessary and far less convenient, insofar as it fosters competition among subclass counsel in a system with only one endgame.

19. 28 U.S.C. § 1407.