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## SUPREME COURT REINS IN "LIMITED FUND" CLASS SETTLEMENTS

On June 23, the U.S. Supreme Court issued a major decision, *Ortiz v. Fibreboard Corp.*, 1999 WL 412604 (June 23, 1999), severely restricting "limited fund" class settlements. In a 7-2 opinion, the Court overturned a Fifth Circuit decision approving certification of a "mandatory" settlement class (i.e., a class with no opt-out rights) created as part of a global settlement to liquidate all present and future asbestos claims against Fibreboard. The Court's ruling imposes stringent criteria for certification of a mandatory class under Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure, which may effectively foreclose use of the limited fund settlement device in mass tort cases, and leave some defendants in these cases no alternative to bankruptcy. Moreover, the decision reconfirms, as the Court held in its 1997 decision in *Amchem Products, Inc. v. Windsor*, that courts must strictly adhere to the requirements of Rule 23(a) (which applies to both mandatory and opt-out classes) in certifying a settlement class.

### CASE SUMMARY

Facing overwhelming liability from successive waves of asbestos-related suits, Fibreboard Corp. negotiated a complex global settlement with a leading group of asbestos plaintiffs' attorneys and the company's insurers, which called for certification of a mandatory class of "future claimants" consisting of all individuals exposed to asbestos and their families who had not sued or settled with Fibreboard as of August 1993. Claims by class members were to be paid by a \$1.535 billion settlement fund, to which Fibreboard's insurers would contribute \$1.525 billion and Fibreboard would contribute the remaining \$10 million. The parties agreed to exclude from the class settlement a large number of individuals with pending claims, many of whom were represented by the plaintiffs' firms negotiating the settlement. In the course of negotiations, the parties had agreed to segregate and settle tens of thousands of these pending claims — on more favorable terms than those applied to class members.

Plaintiffs sought and obtained certification of a mandatory settlement class under Rule 23(b)(1)(B), which provides for class certification where adjudication of separate claims "would as a practical matter be dispositive of the interests" of all class members. The lower courts approved certification of the mandatory class on the theory that Fibreboard's insurance coverage (as valued by the amount the insurers agreed to pay in the settlement) and the company's own net worth constituted "limited funds" available to discharge future asbestos claims, requiring resolution of all such claims in a single proceeding in order to ensure equitable distribution of the available funds among all claimants.

The Supreme Court ruled that the class settlement in *Fibreboard* was deficient in two fundamental respects. First, there had been no evidentiary showing that the settlement fund was "limited" by anything other than the agreement of the parties as to the settlement amount. Second, there were insufficient safeguards to ensure equitable treatment of dif-

ferent categories of asbestos claimants whose claims would be extinguished by the global settlement.

At the outset of its opinion, the Court expressed doubt whether it would ever be permissible to certify a mandatory class in a mass tort case based on a limited fund theory. The Court observed that the *Fibreboard* settlement presented serious constitutional concerns because class members would lose their rights to a "day in court" and a jury trial, with no opportunity to opt out of the settlement. The Court did not base its decision on constitutional grounds, however, since it found that Rule 23 itself imposes stringent criteria for class certification, which had not been met.

The Court held that a mandatory class may be certified under Rule 23(b)(1)(B) on a limited fund rationale only if three conditions are met: (i) the fund is shown to be limited independently of the agreement of parties to the action; (ii) the class includes all those with claims unsatisfied at the time of the settlement negotiations; and (iii) intraclass conflicts are addressed by creating independently represented subclasses. The settlement in *Fibreboard* failed the first condition because no evidence was presented that the funds available to satisfy asbestos claims were "limited" in any objective sense. Rather, the parties themselves had determined the limit of Fibreboard's contested insurance coverage by settling on a fixed amount to be paid by the insurers.

The Court found that the remaining two conditions, which relate to equity among class members, were not met because of inherent conflicts among different categories of asbestos claimants. The settlement could not satisfy the second condition because it excluded up to one-third of all asbestos claimants, many of whom were represented by plaintiffs' class counsel and whose claims had been separately settled on more favorable terms than those of class members. The third condition was not met because claimants with divergent interests did not have separate legal rep-

resentation in the settlement negotiations. The Court found (as it had in Amchem) that there is an inherent conflict between claimants presently suffering injury from asbestos, and future claimants who have been exposed to asbestos but who currently show no ill effects. The former seek generous and immediate payment, while the latter prefer an inflation-protected fund for the future. In the Court's view, the plaintiffs' firms negotiating the settlement could not fairly represent both sets of interests. Moreover, certain intraclass conflicts arising from disparities in the value of claims should have been, but were not, addressed through the creation of subclasses having separate representation.

Having overruled class certification on the preceding grounds, the Court did not decide other issues presented by the settlement. For example, the Court observed that the Fifth Circuit had not given sufficiently detailed treatment to the "commonality" and "typicality" requirements of Rule 23(a), which apply to all class actions. Citing Amchem, which held that the Rule 23(a) criteria must be met for certification of both settlement and litigation classes, the Court indicated that the trial court's inquiry into commonality and typicality was deficient because it focused on class members' common interests in the settlement, rather than considering these factors in the context of litigation. The Court also questioned whether a limited fund settlement could be approved where, as here, the defendant contributed only a fraction of its net worth to the settlement fund.

In overturning the settlement in Fibreboard, the Court acknowledged that the "elephantine mass" of asbestos cases demands a unitary solution. However, the Court admonished that it is the task of Congress, not the courts, to provide it. The Court warned against experimentation with novel class settlement devices under Rule 23(b)(1), finding that the drafters of the rule sought to codify the relatively few recognized, traditional forms of representative actions under that subdivision.

In summary, the Court's restrictive interpretation of Rule 23 in Fibreboard will greatly curtail, if not foreclose, "limited fund" settlements of mass tort cases, since the proponents of the settlement will have to demonstrate that the fund is limited by objective factors, such as the defendant's insolvency. Of course, it will be equally difficult to obtain certification of a limited fund litigation class under the Court's reading of Rule 23(b)(1)(B). The Fibreboard decision may have important implications for other types of class actions as well. Fibreboard reinforces the Supreme Court's holding in Amchem that no settlement class may be certified unless the certifying court determines that the basic Rule 23(a) adequacy of representation, commonality, and typicality criteria would be met if the case were litigated. Consequently, proponents of class settlements may face a higher burden in convincing federal courts to certify either a mandatory or an opt-out class under Rule 23.

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