
EQUITY AND SETTLEMENT CLASS
ACTIONS: CAN THERE BE JUSTICE FOR
ALL IN *ORTIZ v. FIBREBOARD?*

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INTRODUCTION

Barring litigation,¹ the “settlement class action” is one of the most realistic and efficient means available through which victims of mass torts² receive compensation for their injuries.³ Defined as “a lawsuit certified as a class action solely for the purpose of settling the claims made in the complaint, rather than for litigating them,”⁴ the settlement class action allows victims, as well as defendants, to escape the exorbitant costs⁵ and complicated issues involved with litigating a claim.⁶ Consequently, both lawyers and courts have fashioned the

1. See Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 401-07 (1993) (noting that legislative response to current asbestos litigation is unlikely, and asserting that settlement class actions offer the best means to judicial reform).

2. See Anne E. Cohen, *Mass Tort Litigation After Amchem*, cited in ALI-ABA CIVIL PRACTICE AND LITIGATION TECHNIQUES IN THE FEDERAL COURTS 269, 275-76 (1998) (defining “mass tort” as multiple party litigation of tort claims, and categorizing mass tort claims into four groups: mass accidents, personal injury mass torts, property damage mass torts, and economic loss torts); see also Joseph F. Rice & Nancy Worth Davis, *Judicial Innovation in Asbestos Mass Tort Litigation*, 33 TORT & INS. L.J. 127, 127 n.2 (1997) (defining “mass tort” as a term that describes the occurrence of multiple torts resulting from a single causal factor, such as asbestos exposure).

The settlement class action is also applicable outside the mass tort realm to claims involving insurance fraud, securities, and consumer fraud. See Cohen, *supra*, at 276 (noting that multiple claims can arise from property damages and economic losses); see also Richard B. Schmitt, *Class-Action Settlement Proposal Is Upset by Supreme Court Ruling*, WALL ST. J., July 10, 1997, at B10 (stating that settlement class actions have been used to address a wide range of claims, from those involving arsenic poisoning to those involving wood siding). This Comment, however, focuses exclusively on the use of settlement class actions in the mass tort context, especially those involving asbestos-related claims. Still, the arguments relating to settlement class actions in the mass tort context are generally applicable to other areas as well. Cf. Rice & Davis, *supra*, at 140 (noting that all mass tort claims entail common problems).

3. See Note, *Back to the Drawing Board: The Settlement Class Action and the Limits of Rule 23*, 109 HARV. L. REV. 828, 831 n.24 (1996) [hereinafter *Back to the Drawing Board*] (assuming that settlement class actions are a valuable tool in resolving mass tort claims); cf. Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 805-06 (1997) (asserting that adequate resolution of claims arising from a “mass society” demands aggregate or collective adjudication of claims). But see James A. Henderson, Jr., *Comment: Settlement Class Actions and the Limits of Adjudication*, 80 CORNELL L. REV. 1014, 1014 (“Settlement class actions are inherently unlawful because they . . . exceed the legitimate limits of adjudication.”).

4. John D. Aldock & Richard M. Wyner, *The Use of Settlement Class Actions to Resolve Mass Tort Claims After Amchem Products, Inc. v. Windsor*, 33 TORT & INS. L.J. 905, 905 (1998).

5. See Roger C. Cramton, *Individualized Justice, Mass Torts, and “Settlement Class Actions”: An Introduction*, 80 CORNELL L. REV. 811, 817 (1995) (discussing the high costs associated with individual litigation of a mass tort claim and citing to a study that found less than half of each dollar spent on asbestos litigation reaches the injured plaintiff). For example, cost is not only an issue for the litigants involved, but also for those indirectly affected by the outcome of the case, such as the employees and shareholders of a defendant corporation. See Edley & Weiler, *supra* note 1, at 391 (claiming that “stakeholders in defendant firms . . . and surrounding communities” carry the financial burden caused by tort litigation).

6. Cf. Cramton, *supra* note 5, at 817 (describing difficulties of individual trial of a mass tort claim such as proof of causation, replication of evidence, and judicial

settlement class action as a catchall solution to the explosion of mass tort litigation⁷ and the crisis to which it has given birth.⁸

The settlement class action is a judicial creation⁹ that evolved from the class action,¹⁰ which is governed and regulated by Rule 23 of the Federal Rules of Civil Procedure ("FRCP").¹¹ Although not explicitly

delay).

7. See *The Supreme Court, 1996 Term—Leading Cases*, 111 HARV. L. REV. 197, 350 (1997) [hereinafter *Leading Cases*] (noting the significant increase of mass tort claims being filed in the last few decades) (citing David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 563 n.9 (1987)); see also Aldock & Wyner, *supra* note 4, at 907 (noting that in the past ten years there has been an "explosion" of mass tort claims being filed against corporate defendants); Edley & Weiler, *supra* note 1, at 383 ("Federal and state courts are clogged with 100,000 asbestos suits . . . [a] number [that] is rising every month.").

8. See *Leading Cases*, *supra* note 7, at 356 (perceiving asbestos litigation in the throes of a crisis); see also John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1346-47 (1995) (commenting that most commentators agree that a mass tort litigation crisis exists, citing cost, corporate bankruptcies, escalating attorney fees, and burdened court dockets as causal factors).

9. See Rice & Davis, *supra* note 2, at 145 (classifying settlement class actions as one of the many innovative judicial responses to asbestos and other mass tort related litigation); see also *Back to the Drawing Board*, *supra* note 3, at 828 n.1 ("[T]he procedural phenomenon of the 'settlement class' is a relatively recent innovation in the federal court settlement arsenal.") (quoting LINDA S. MULLENIX, MASS TORT LITIGATION: CASES AND MATERIALS 258 (1996)).

10. A class action permits a group of plaintiffs who meet all technical requirements set forth by Rule 23(b) of the Federal Rules of Civil Procedure to aggregate their claims and litigate against defendants through representative parties. See STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION ix (1987) (defining the class action device as a procedural tool that allows the combining of claims and defenses of many persons); see also Markham R. Leventhal, *Class Actions: Fundamentals of Certification Analysis*, 72 FLA. B.J. 10, 10 (1998) ("A class action is . . . a procedural device designed to promote the efficient and orderly adjudication of substantive rights affecting an entire class of persons, without the necessity of joining all such persons as formal parties.").

11. See FED. R. CIV. P. 23(b). Rule 23 is referenced throughout this Comment. Rule 23 states in pertinent part:

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied [numerosity, common questions of law or fact, typicality, and adequacy of representation], 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

provided for, courts construe Rule 23 to extend to settlement class actions.¹² Other than Rule 23(e),¹³ a general provision that governs court approval of dismissal and settlement of class actions, no guidelines exist by which judges can determine the fairness, reasonableness, or suitability of a proposed settlement.¹⁴ Thus, with only judicial construction of Rule 23 and no clear procedural guidance, it is not surprising that the legal system struggles with the

the fair and efficient adjudication of the controversy.

Id.

12. See *Back to the Drawing Board*, *supra* note 3, at 828 (commenting that courts have been forced to manipulate Rule 23 to handle the current mass tort litigation crisis).

The Advisory Committee has been considering potential revisions to Rule 23 that would resolve some of the current problems associated with mass tort litigation. See Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 ARIZ. L. REV. 615, 615 (1997) (noting that the public comment phase on potential revisions to Rule 23 ended on February 15, 1997). In particular, the Advisory Committee has discussed amending Rule 23 with provision Rule 23(b)(4), a fourth class action category that would explicitly provide for settlement class actions. See *id.* at 622-24 (discussing proposed Rule 23(b)(4) provision). The Rule 23(b)(4) amendment would authorize courts to certify a settlement class action “[if] the parties to a settlement request certification under subdivision (b)(3) [of Rule 23] for the purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial.” *Proposed Amendments to the Federal Rules of Civil Procedure*, 167 F.R.D. 559, 559 (1996).

The proposed amendment of Rule 23(b) has caused considerable debate both over the use of settlement class actions and the constitutionality of the proposed provision (b)(4). See generally Mullenix, *supra*, at 624-37 (evaluating the issues raised by the proposed rule in the context of the Rules Enabling Act and as well as constitutional arguments against proposed Rule 23(b)(4), and concluding that a defeat of the proposed amendment on such grounds “will kill off the possibility of resolving mass tort litigation”). In addition, a number of legal scholars and commentators debate various components of proposed Rule 23(b)(4). See, e.g., Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 ARIZ. L. REV. 461, 462-74 (1997) (arguing that proposed Rule 23(b)(4) is substantive and, thus, violates the Rules Enabling Act’s rulemaking power); John C. Coffee, Jr., *Class Action ‘Reform’: Advisory Committee Bombshell*, 215 N.Y. L.J. 1, 6 (1996) (defining a stipulation as a proposal because it requires that parties settle before coming to the court and questioning the constitutionality of the opt-out provision of Rule 23(b)(4)); Eric D. Green, *What Will We Do When Adjudication Ends? We’ll Settle in Bunches: Bringing Rule 23 into the Twenty-First Century*, 44 UCLA L. REV. 1773, 1798-1800 (1997) (referring to the proposed amendment as a “necessary and desirable improvement”); George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521, 537-39 (1997) (reviewing the proposed changes to Rule 23, which gives greater judicial control over the class action process and their criticism by a group of academics, the Steering Committee).

13. Rule 23(e) states that “[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.” FED. R. CIV. P. 23(e).

14. Cf. Cramton, *supra* note 5, at 823 (stipulating that Rule 23(e) is a provision offering only “limited guidance” to courts evaluating proposed settlement class actions because it contains general standards such as “fair” or “reasonable,” and suggesting that the lack of detailed standards for these terms impairs judicial scrutiny of settlements).

permissibility of settlement class actions in the mass tort context.¹⁵

The debate over the advantages and disadvantages of class actions has been well versed over the past several decades.¹⁶ Many legal scholars and commentators have heralded the class action as a device that gives leverage to plaintiffs seeking resolution of their claims in the judicial system.¹⁷ Others have condemned the class action as a means used by self-serving corporations to wage a battle against less powerful plaintiffs.¹⁸ Nowhere is the debate more heated and complex than in the context of a settlement class action.¹⁹

Although described by commentators as “cutting-edge judicial innovation,”²⁰ the continued existence of the settlement class action is in jeopardy. On June 22, 1998, the Supreme Court granted certiorari,²¹ for a second time,²² to review a Fifth Circuit decision that

15. See *supra* note 12 and accompanying text (noting that the Advisory Committee considered extending Rule 23 to the mass tort context to provide for settlement class actions).

16. Cf. Symposium, *Mass Torts: Serving Up Just Desserts*, 80 CORNELL L. REV. 811 (1995) (exploring common problems of class actions from various perspectives).

17. See Jeffrey G. Casurella & John R. Bevis, *Class Action Law in Georgia: Emerging Trends in Litigation, Certification, and Settlement*, 49 MERCER L. REV. 39, 70 (1997) (concluding that proper use of class action lawsuits provides plaintiffs with opportunities to ‘watchdog’ large corporations and constrain “conduct not otherwise tolerated under our system of jurisprudence”); see also Stephen C. Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, 39 ARIZ. L. REV. 687, 687 (1997) (commenting on the diverse perspectives of both the utility and integrity of the settlement class).

18. See Green, *supra* note 12, at 1784 (describing plaintiffs as “have-nots” and defendants as “haves”); see also John Leubsdorf, *Co-Opting the Class Action*, 80 CORNELL L. REV. 1222, 1223 (“We fear that what was meant to provide a remedy for those who would otherwise lack one, enabling them to pool their voices and finances, will become a device to take away remedies from those who could otherwise invoke them.”); Edwin Lamberth, Comment, *Injustice by Process: A Look at and Proposals for the Problems and Abuses of the Settlement Class Action*, 28 CUMB. L. REV. 149, 152 (1997-98) (characterizing settlement class actions as a contemptuous tool that breeds injustice and abuse); cf. Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1049 (stating that settlement class actions themselves are not an inherent evil, but expressing distaste for judges and lawyers who use the device to resolve mass tort claims).

19. Commentators and legal scholars alike agree that the recent emergence of settlement class actions has created heightened tension over the use of class actions to resolve mass tort claims. See, e.g., Cramton, *supra* note 5, at 811 (stating that the debate over a settlement class action is the tension between individual justice and judicial economy); Green, *supra* note 12, at 1783-88 (reviewing motivations of academics as well as other groups for opposing settlement class actions); Lamberth, *supra* note 18, at 151-52 (demonstrating inequities to a subsequent plaintiff that resulted from settling an asbestos tort claim); Yeazell, *supra* note 17, at 687 (indicating that settlement class action cases have “sharply polarized the legal community”).

20. *Back to the Drawing Board*, *supra* note 3, at 828.

21. The Esteban Ortiz objectors and the James Flanagan objectors filed two separate petitions for certiorari on April 13 and April 16, 1998, seeking review of the Fifth Circuit decision in *Flanagan v. Ahearn*, 134 F.3d 668 (5th Cir. 1998) (per curiam), *cert. granted sub nom. Ortiz v. Fibreboard Corp.*, 524 U.S. 936 (1998). See

certified a settlement class action involving thousands of asbestos claims.²³ In *Flanagan v. Ahearn*,²⁴ the Fifth Circuit approved a

Ahearn *Objectors Again Ask U.S. Supreme Court to Review Settlement*, MEALEY'S LITIG. REP.: ASBESTOS (Mealey Publications, Inc., King of Prussia, Pa), Apr. 17, 1998, at 3 (briefly reviewing the procedural history of the case). The Supreme Court granted certiorari on June 22, 1998. See *Ortiz v. Fibreboard Corp.*, 524 U.S. 936 (1998).

22. The Supreme Court previously granted certiorari to *Flanagan v. Ahearn*, 90 F.3d 963 (5th Cir. 1996), in 1997. See *Flanagan v. Ahearn*, 521 U.S. 1114 (1997) (mem.), *vacated and remanded for reconsideration in light of Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). The Fifth Circuit, in a terse opinion, re-affirmed their prior decision approving certification of the settlement class action. See *Flanagan v. Ahearn*, 134 F.3d 668 (5th Cir. 1998) (per curiam), *aff'g* 90 F.3d 963 (5th Cir. 1996), *cert. granted sub nom. Ortiz v. Fibreboard Corp.*, 524 U.S. 936 (1998). See *infra* note 23 (discussing the Supreme Court's recent decision in *Ortiz v. Fibreboard*, which reversed and remanded *Flanagan* to the Fifth Circuit).

23. After this Comment had been selected for publication and was in the throes of the production process, the Supreme Court decided and handed down its decision in *Ortiz v. Fibreboard*, reversing the Fifth Circuit decision *Flanagan v. Ahearn*. See *Ortiz v. Fibreboard*, 119 S. Ct. 2295 (1999), *rev'g* *Flanagan v. Ahearn*, 134 F.3d 668 (5th Cir. 1998), *vacated and remanded for further proceedings*, 182 F.3d 1013 (5th Cir. 1999). The Supreme Court did not address all the issues presented by the settlement class action in *Flanagan* and focused upon in this Comment—such as notice and due process issues, ethical considerations, or the need for an inexpensive alternative solution to individual litigation—because it found that the proffered settlement class action failed to qualify as a limited fund under Rule 23(b)(1)(B) and therefore, could not be certified as a settlement class action. See *id.* at 2312 n.19 (refusing to opine on whether the notice provided to class members bound by the mandatory settlement class action was sufficient or even necessary); *id.* at 2312 (claiming that the Court could not resolve “the ultimate question [of] whether settlements of multitudes of related tort actions are amenable to mandatory class treatment”); *id.* at 2322 (leaving for “another day” the following question: “[I]f a settlement class action 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?”). Thus, the Court reversed and remanded the decision, thereby taking the “prudent course” and presuming “that when subdivision (b)(1)(B) was devised to cover limited fund actions, the object was to stay close to the historical model.” See *id.* at 2300.

This Comment differs from the Supreme Court's decision and finds that the settlement class action presented in *Flanagan* qualified as a limited fund. Based upon this premise, this Comment then reaches issues that involve overall certification standards and guidelines, due process concerns, and ethical issues raised with using settlement class actions in a mass tort scenario. Interestingly, Justice Breyer in his dissent gives support for the views set forth and argued in this Comment: that the class action qualified as a limited fund and in any event, even if it did not, the Court should have certified the settlement class on the basis of equity and public policy concerns as an alternative solution to the growing number of asbestos cases overwhelming the courts today. See *Ortiz*, 119 S. Ct. at 2326 (Breyer, J., dissenting) (commenting that the settlement class action could be certified under Rule 23(b)(1)(B) as a limited fund, even though the majority concluded that it could not); see also *id.* at 2325 (noting that the number of asbestos cases creates a “special judicial problem” that “courts, not legislatures, ordinarily will resolve” and therefore, “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”) (emphasis added).

Specifically, this Comment analyzes the settlement class action and reasoning used by the Fifth Circuit in *Flanagan* and contrasts it to the Court's prior settlement class action decision in *Amchem Products, Inc. v. Windsor* to conclude that the settlement class action in *Flanagan* was proper and should have been allowed to stand. See *infra*

settlement class action structure that established an administrative proceeding through which victims of asbestos exposure could receive compensation for their injuries.²⁵ The principal issues before the Supreme Court in *Ortiz v. Fibreboard* are whether the settlement class action in *Flanagan* is properly certified as a limited fund under Rule 23(b)(1)(B) and whether using such a mandatory settlement class action device in the mass tort context violates due process. The outcome of the Supreme Court's decision in *Ortiz* will ultimately impact upon the viability of the settlement class action as an alternative to individual litigation.²⁶

This Comment explores pertinent issues raised by the judicial system's use of settlement class actions to resolve mass tort claims, including due process, ethical, and judicial management issues. For example, settlement class actions implicate victims' constitutional due process rights to retain individual control over their claims and not be bound to litigation without meaningful consent.²⁷ Settlement class actions also provide fertile ground for collusion between defendants' and plaintiffs' counsel that can lead to a potential "sell-out" of the victims of the mass tort,²⁸ as well as cause an inappropriate conflict of

Part III.C (analyzing the factual and legal distinction between *Flanagan* and *Amchem*). As compared to *Amchem*, the *Flanagan* settlement class action met all the certification standards necessary under FRCP Rule 23 and also complied with due process concerns. Unfortunately, the Court failed to consider much of what this Comment focuses upon, as mentioned *supra*. Specifically, the Court chose not to address the due process issues and failed to provide clear guidelines for future settlement class actions in the mass tort context. Instead, the Court cried out again for Congress to take action. *See id.* at 2324 ("[T]he elephantine mass of asbestos cases' . . . cries out for a legislative solution."); *see also* *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 598 (1997) (calling for a federal, legislative response to resolve the numerous asbestos claims filed across the nation). Although bills were introduced in Congress in 1999 and referred to Committees, it still remains unclear whether such bills will garner enough support to pass or whether they will fall to the wayside, as they have in the past. *See generally, e.g.*, H.R. 1283, 106th Cong. (1999) (providing for "legal standards and procedures for the fair, prompt, inexpensive, and efficient resolution of personal injury claims arising out of asbestos exposure"). Thus, although this Comment was written prior to the Supreme Court handing down its decision in *Ortiz*, its arguments remain the same and its historical evaluation of the settlement class action device itself, as used in the mass tort context, remains pertinent to the issues yet to be resolved by the Court.

24. 134 F.3d 668 (5th Cir. 1998).

25. *See id.* at 670 (finding that the settlement class satisfied Rule 23's requirements and was properly certified as a "limited fund" class under Rule 23(b)(1)(B)).

26. *See* Joseph F. Rice, *Objectors Seek Supreme Court Review of Ahearn Settlement*, 16 PROD. LIAB. L. & STRATEGY 5 (1998) (characterizing the *Flanagan* settlement as illustrative of the objective of tort law, which is to compensate victims for injuries suffered).

27. *See, e.g., Cramton, supra* note 5, at 827-28 (arguing that settlement class actions require adequate representation of future claimants by class action counsel and, thus, implicate their due process rights).

28. *See* Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the*

interest.²⁹ Finally, settlement class actions raise the question of whether judges have exceeded their authority through active, rather than passive, involvement in the case.³⁰ This Comment analyzes these issues in the context of the Fifth Circuit's decision in *Flanagan*.³¹ This Comment also compares and distinguishes the *Flanagan* settlement class action from the settlement class action rejected by the Supreme Court in *Amchem Products, Inc. v. Windsor*.³²

Part I of this Comment discusses the origin and development of the class action and, in particular, the evolution of the settlement class action from its equitable roots. Part II evaluates *Amchem*, a pivotal case in recent legal jurisprudence concerning settlement class actions. Part III summarizes the procedural and factual background of *Flanagan* and evaluates the structural attributes of that settlement class action. Part IV analyzes the Fifth Circuit's rationale in *Flanagan* and explores, among other issues, whether strict preservation of a plaintiff's due process rights impairs or benefits future victims of mass torts. Part V reflects on the impact and consequences of the Supreme Court's decision of *Ortiz* in the arena of mass tort litigation. This Comment recommends that the Supreme Court should preserve the settlement class action as a useful device to be used in mass tort litigation by providing clearer procedural guidelines to strengthen and sustain both the equity and integrity principles that support the settlement class action.

I. BACKGROUND

The settlement class action is a judicial creation carved from the

Rules Meet the Road, 80 CORNELL L. REV. 1159, 1198 (discussing issues raised by plaintiffs' counsel's purported "sell-out" of claimants in settlement class actions when defendants' counsel approach plaintiffs' counsel to commence settlement negotiations).

29. See Cramton, *supra* note 5, at 832 (asserting that simultaneous representation of both future claimants and present claimants by plaintiffs' counsel produces impermissible conflicts of interests).

30. Cf. Mary J. Davis, *Toward the Proper Role for Mass Tort Class Actions*, 77 OR. L. REV. 157, 224 (1998) (stating that jurors are extensively criticized for "helping" plaintiffs and broadening rules of product liability); see also David Luban, *Heroic Judging in an Antiheroic Age*, 97 COLUM. L. REV. 2064, 2082 (1997) (stating that judges favor settlement class actions because of the interest in disposing of the cases quickly and, consequently, they "cannot be counted on to monitor the settlements with a skeptical eye").

31. 134 F.3d 668 (5th Cir. 1998) (per curiam), *aff'd* 90 F.3d 963 (5th Cir. 1996), *cert. granted sub nom.* Ortiz v. Fibreboard Corp., 524 U.S. 936 (1998).

32. 521 U.S. 591, 619-20 (holding that the settlement itself is a relevant consideration when deciding whether a class action filed with a proposed settlement should be certified under Rule 23, but emphasizing that Rule 23 requirements "demand undiluted, even heightened, attention in the settlement context").

modern-day class action,³³ which is currently governed by Rule 23.³⁴ To understand both the overall purpose and current necessity of the settlement class action, it is helpful to trace the historical roots of the class action, the underlying reasons for its development, and the eventual creation of Rule 23.³⁵

A. *Historical Development of Group Litigation*

The class action traces its origin to twelfth century “group litigation,” commonly known as “medieval group litigation.”³⁶ Manorial, royal and ecclesiastical courts used group litigation to meet varying social needs of the medieval culture that were primarily political or religious in nature and often involved multiple litigants.³⁷ For example, courts used group litigation to address issues arising from social obligations or privileges accorded to different rural groups, parishes, and guilds within the hierarchical-structured medieval community.³⁸ Today, class actions are used to meet societal needs of an industrialized and capitalistic society, such as those involving civil rights, financial, or economic interests.³⁹ This

33. See *supra* note 9 (discussing settlement class actions as an innovative response to the mass tort crisis).

34. See *supra* note 11 (listing pertinent provisions of Rule 23 governing class actions).

35. See Yeazell, *supra* note 17, at 687 (“The spectacle of the settlement class . . . shows how little sense we can make of procedural rules if we fail to put them in the context of their economic dynamics.”).

36. See *id.* at 688 (claiming that a twelfth century case, *Martin v. Parishioners*, which involved a defendant class comprised of four representatives against whom a parish rector brought suit claiming certain fees, is demonstrative proof that class actions evolved from “medieval group litigation” roots). Professor Yeazell argues that while the majority of legal literature traces modern-day class actions only to the seventeenth century, the roots of modern-day class actions actually extend much further back to medieval group litigation. See YEAZELL, *supra* note 10, at 25 (supporting his argument with accounts by historians of medieval English law). In particular, Professor Yeazell posits that examples of medieval group litigation contest the assumption that the class action is a “distinctively modern phenomenon.” See *id.* at 39.

37. See *id.* at 41-46, 57-58 (describing the economic and political structure of medieval society that gave rise to varying types of collective suits).

38. Professor Yeazell claims that the “rural English agriculture and its concomitant social organization” between 1200 and 1700 dictated the need for representative group litigation. See *id.* at 70 (suggesting that the durability of group litigation is due to the fact that villages did not substantially change during the past five centuries). Specifically, the structure of “rural [English] village[s], [each] with its manor(s) and parish,” impaired proper communication between villagers, which subsequently affected their social and political status. See *id.* at 41. Thus, the villagers, many of whom were villeins with relatively little freedom and power, came to rely on collective representation to foster communication and strengthen the already existing unity of social status between themselves. See *id.* at 42, 46 (asserting that social status and social organization circumstances “lie at the heart of medieval manor and parish [group] litigation”).

39. See Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the*

comparative legal response to social context and ideology traces the progressive development of the class action, which is used to address societal needs associated with multiple litigants, from the medieval era.⁴⁰

The goals of the modern-day class action, however, diverge from those of medieval group litigation.⁴¹ For example, present-day class actions seek to address the problems of repetitive claims, the high costs associated with individual litigation, and overcrowded court dockets.⁴² The class action is also a method used to “alter the relations of power between the group and its adversary.”⁴³

Conversely, medieval courts used group litigation to enforce “group-based norms” that arose from association with a particular political or religious status.⁴⁴ Many current benefits of the modern class action, such as lower transaction costs, are not attributable to medieval group litigation.⁴⁵ “[T]he issues at stake in such litigation

History of Adjudicative Representation, 70 B.U. L. REV. 213, 222-26 (1990) (reviewing *Medieval Group Litigation*, and summarizing Professor Yeazell’s theory that the modern-day class action developed in response to changing social and economic issues that accompanied industrialization and the entrepreneurial nature of society); see also YEAZELL, *supra* note 10, at 39-40 (asserting that the evolution of the modern day class action device over the past eight centuries was not a consistent and unified development, but rather a fragmented and broken one).

40. See YEAZELL, *supra* note 10, at 5 (“[L]egal responses have . . . expressed a reaction to the circumstances of . . . medieval guilds, seventeenth-century villagers, eighteenth-century investors, nineteenth-century preachers, and twentieth-century civil-rights groups.”). *But cf.* Bone, *supra* note 39, at 227 (agreeing that social circumstances helped to shape group litigation, but asserting that the social “contextualist thesis” excludes the influential effects of legal ideology).

41. Professor Yeazell distinguishes medieval group litigation from modern-day class actions by stipulating that medieval group litigation grew out of principles significantly different from the principles underlying class actions today. See YEAZELL, *supra* note 10, at 39, 57 (stating medieval group litigation suits involved different political ideologies and social circumstances than modern-day class action suits).

Although the social contexts of medieval group litigation and modern class actions differ, one can still observe that representative litigation responds to current social needs and circumstances. See *id.* at 21 (positing that “[s]ocial context matters” because “procedural rules take on different colors in the light of differing social settings”). Thus, one can argue that the evolution of the settlement class action is a natural phenomenon that is responding to current societal needs, much as the development of the class action suit has over the past eight centuries. See *id.* at 39 (arguing that all cases must be understood in their social context).

42. See William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837, 837-38 (delineating both the objectives of mass tort litigation and the hurdles that must be overcome to obtain such stated objectives).

43. See YEAZELL, *supra* note 10, at 57 (contrasting medieval group litigation and modern class action and stating that group litigation did not have the power rebalancing effect).

44. See *id.* at 46, 52 (describing how group litigation addressed the issues arising from social status and organization in medieval life).

45. See *id.* at 57 (explaining the benefits of medieval group litigation and modern class action in light of the fact that medieval group litigation involved a social group whereas modern class action litigation merely involves a section of society that shows

[do not] involve[] incidents of [political or social] status [as it did with medieval group litigation, but] rather . . . claims of individual right”⁴⁶ Despite the different attributes or justifications for its use, the class action finds its genesis in the medieval era.⁴⁷ This historical origin exists because group litigation bestowed upon modern society a model of representative litigation that is not only contributive, but at times necessary to meet the current judicial problems of repetitive claims, high costs, and burdened dockets.⁴⁸

In the seventeenth century, medieval group litigation,⁴⁹ now known as the “bill of peace,”⁵⁰ began its express association with equitable roots. The English Courts of Chancery, as courts of equity, used the “bill of peace” to permit representative parties of larger groups of litigants with a joint interest to aggregate their claims and bring a collective action before the court.⁵¹ The “bill of peace” served two primary and equitable goals: (1) to reduce multiple, and sometimes unnecessary, litigation,⁵² and (2) to enable individuals to litigate

a hypothesized interest).

^{46.} *Id.*

^{47.} *See id.* at 3 (noting English and American courts have reorganized group litigants for eight hundred years and that class actions are merely the latest version).

^{48.} *See id.* at 7 (stating that group litigation, although fundamentally different from modern-day class actions, “bequeathed us forms of litigative representation that we today find useful and in some respects essential”).

An Illinois Court of Appeals also made comparisons between historical group litigation and modern class actions. *See* Elizabeth J. Cabraser, *Life After Amchem: The Class Struggle Continues*, 31 LOY. L.A. L. REV. 373, 390 (1998) (noting parallels between medieval and modern uses of litigation). The Court drew parallels between the objectives of medieval group litigation and the modern-day class action and stated “[n]o matter how refined, how revised, or how evolved this flashy import becomes, the goal of the class action remains the same—justice for the lowly, the tenants, the parishioners, the multitudes.” *Id.* (quoting *Wood River Area Dev. Corp. v. Germania Fed. Sav. & Loan Ass’n*, 555 N.E.2d 1150, 1152 (Ill. App. 1990)).

^{49.} Professor Yeazell notes that “because the social and economic organization of the Middle Ages persisted into the modern age, so did the litigative expression of that organization.” YEAZELL, *supra* note 10, at 69. Again, Professor Yeazell stipulates that the transformation of medieval group litigation to the seventeenth-century chancery court cases, was rather shaky. *See id.* at 136 (discussing the transition from the medieval cases and modern class actions). Nevertheless, there are sufficient characteristics between group litigation, the seventeenth-century cases, and the modern-day class action to advance the proposition that the class action traces back to twelfth century litigation. *See id.* (noting that seventeenth century cases form a bridge between modern and medieval cases); *see also* Yeazell, *supra* note 17, at 690-93 (providing an overview of the changes accompanying group litigation from the twelfth century until the seventeenth century).

^{50.} Professor Yeazell defines the bill of peace as “a proceeding in which one claiming a right might once and for all, vindicate it against repeated suits on similar grounds.” YEAZELL, *supra* note 10, at 24.

^{51.} *See generally* COUND ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 683 (7th ed. 1997) (defining the “bill of peace” as a “procedural device utilized by the Courts of Chancery to allow an action to be brought by or against representative parties” after meeting certain qualifications).

^{52.} *See* YEAZELL, *supra* note 10, at 218 (citing 2 JOSEPH STORY, COMMENTARIES ON

claims as a group that would be too difficult to litigate individually.⁵³

Eventually, due process issues relating to group litigation emerged.⁵⁴ This emergence paralleled the shift in society “from a rural, customary, agricultural world to one that is urban, *individualistic*, entrepreneurial-capitalistic.”⁵⁵ To address such concerns, Chancellors scrutinized the representation of a group of litigants more closely.⁵⁶ In particular, they required litigants to tender an explanation for litigating jointly rather than separately.⁵⁷

Despite these due process issues, Chancellors continued to grant permission for group litigation, often justifying the aggregation of

EQUITY JURISPRUDENCE 148 (1836)) (discussing early recognition of the conflicting purposes of the group action).

53. *See id.* (noting accessibility of adjudication as the second aim of group litigation). Professor Yeazell discusses and evaluates the subtle tension between these two equitable goals. Summarizing theories from Joseph Story's *Commentaries on Equity Jurisprudence*, he speculates that Story stumbled upon one of the most axiomatic issues revolving around the use of class action suits today:

whether the function of the class action is to consolidate suits that would otherwise be brought (and thus to reduce the caseload of the judiciary) or to facilitate the bringing of suits that would otherwise not be brought because the individual stakes are too small (and thus to increase the accessibility of adjudication).

YEAZELL, *supra* note 10, at 218 (citing JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 148 (1836)).

These contrasting theories offer a potential explanation for the divergent views towards settlement class actions. If the objective of a class action suit is to lessen the number of duplicative claims in the judicial system, then the settlement class action, in the mass tort context, is an essential procedural tool because it reduces repetitive claims. Conversely, if the objective of a class action suit is to increase accessibility to the judicial system, then the necessity of the settlement class action becomes uncertain because mass tort claims are usually substantial enough to warrant individual litigation. *See generally id.* at 218-19 (discussing possible divergent purposes of mass group litigation).

54. *See* Bone, *supra* note 39, at 223 (summarizing the Chancellors' concerns about issues involving consent and adequate representation); *see also* Yeazell, *supra* note 17, at 692 (musing about Lord Nottingham's, known as “the parent of modern equity,” approach to adequate representation where Lord Nottingham required the representative parties to have sufficient authority to sue in the name of the rest of the group and to be accountable for the costs of the suit).

55. YEAZELL, *supra* note 10, at 165 (emphasis added).

56. Professor Yeazell uses two cases to illustrate the emergence of due process related issues. First, Professor Yeazell discusses *Brown v. Vermuden*, a seventeenth-century group litigation case in which the Chancellor dismissed a due process claim and instead focused exclusively upon the goal of efficiency. *See* Yeazell, *supra* note 17, at 691 (citing *Brown v. Vermuden*, 22 Eng. Rep. 796, 797 (Ch. 1676) and noting if group suits were not allowed, some types of cases would be impossible to end). Professor Yeazell then discusses *Chancey v. May*, an eighteenth-century group litigation case in which the Chancellor expresses dislike for representative suits that bind absent members of the class. *See id.* at 693 (citing *Chancey v. May*, 24 Eng. Rep. 264 (Ch. 1722) and noting that the Chancellor felt that litigation that binds absent parties is at best a poor solution to an otherwise insoluble problem).

57. *See id.* at 690 (noting that by 1700 courts checked the credentials of the group litigants and required justification for allowing the suit to be brought collectively).

claims because of its suitability and efficiency.⁵⁸ Thus, the face of group litigation changed and evolved into the current form of the modern-day class action.⁵⁹ Along with this evolution, however, came increasing concerns over adequate representation and notice that often conflicted with the goals of expediency and equity.⁶⁰

B. Promulgation of Federal Rules of Civil Procedure Rule 23

The evolution of group litigation, which paralleled changing social conditions, culminated in the statutory creation of Rule 23.⁶¹ The “bill of peace” and the idea of group litigation permeated Anglo-American law as it emerged from English common law.⁶² In the late nineteenth century, the Supreme Court promulgated Federal Equity Rule 48⁶³ which, for the first time, expressly provided for “group representative litigation.”⁶⁴ Federal Equity Rule 48, however, was a provision used infrequently.⁶⁵ Thus, in 1912, the Supreme Court reformulated Equity Rule 48, which resulted in the creation of Equity Rule 38.⁶⁶ Equity Rule 38 simply stated “that where the parties were too numerous for joinder, a few could sue or defend on behalf of the rest.”⁶⁷ Hence, Federal Equity Rule 48 was the predecessor to Rule 23.

58. *See id.* at 691-93 (noting that expediency and necessity were two reasons Chancellors permitted group litigation).

59. *See id.* at 693-94 (noting that chancery cases like *Chancey* provide modern justifications for group litigation and that it is easy to parallel the needs of that time to modern needs).

60. *See id.* at 643 (noting the manner in which the competing concerns of represented interests and efficiency collide even in the modern action).

61. *See* COUND ET AL., *supra* note 51, at 683 (noting that in 1938 the equitable “bill of peace” and the class action evolved further with the creation of Rule 23).

62. *See* Cabraser, *supra* note 48, at 379 (asserting that Rule 23 “has its deepest roots in English equity practice”).

63. Federal Equity Rule 48 stated in pertinent part:

Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.

FED. R. EQ. 48 (provided in 42 U.S. (1 How.) xlii, lvi (1843)).

64. *See* YEAZELL, *supra* note 10, at 221 (commenting on the Supreme Court’s promulgation of a set of equity rules, one of which was Equity Rule 48, which provided for group representation).

65. *See id.* (“The Supreme Court promulgated a rule that permitted group litigation but made it an exercise in futility.”).

66. *See id.* at 225 (discussing the reformulation as part of an overall revision of the equity rules, but claiming that the re-formulation of Equity Rule 48 into Equity Rule 38 failed to define group litigation in better terms).

67. *Id.*

In 1938, the promulgation of the FRCP gave rise to the modern-day class action and Rule 23.⁶⁸ Rule 23 in its original form proved inadequate because it lacked clear and workable guidelines.⁶⁹ The Rule's vagueness resulted in infrequent, inefficient, and at times, inappropriate uses of the class action.⁷⁰ In response to these problems, in 1966 the advisory committee modified Rule 23 to provide lawyers and courts with clearer guideposts and procedures for using and certifying class actions.⁷¹

Following the premise that social issues involving multiple litigants, such as medieval political or religious obligations, influenced and molded group litigation as it progressed,⁷² it is worth noting the overriding "spirit" of the FRCP. Rule 1 states that the Rules "shall be construed and administered to secure *the just, speedy, and inexpensive* determination of every action."⁷³ Controversy over the use of class actions under Rule 23, especially settlement class actions, often arises where the "spirit" of the FRCP and the principles of due process, namely adequate representation and notice, intersect.⁷⁴ Nevertheless,

68. See COUND ET AL., *supra* note 51, at 683 (recognizing that the Equity Rules influenced the shape of Rule 23, but asserting that the 1938 promulgation of the Rule 23, and the 1966 revision, endeavored to create a more refined model of the class action).

69. See Bone, *supra* note 39, at 225 (describing the initial promulgation of Rule 23 as conceptual and often misunderstood by both the courts and legal commentators).

70. In his account of group litigation, Professor Yeazell focuses upon *Hansberry v. Lee*, which, although not even litigated under Rule 23, "constitutionalized individualism" in America and simultaneously stagnated the development of the class action device for 30 years. See YEAZELL, *supra* note 10, at 237 (citing *Hansberry v. Lee*, 311 U.S. 32 (1940), and noting that *Hansberry* involves issues of restrictive covenants and racial discrimination).

71. See YEAZELL, *supra* note 10, at 238 & n.2 (discussing the advisory committee's changes to Rule 23 in 1966 to replace the conceptual categories, which were the "true," "hybrid," and "spurious" classifications, with more practical terms); see also Yeazell, *supra* note 17, at 695-96 (characterizing *Trustees v. Greenough*, 105 U.S. 527 (1881), a case that involved the "common fund doctrine," as "the engine for the modern class action [and] the 1966 revision of the Federal Rules of Civil Procedure [as] the wheels").

72. See *supra* Part I.A (summarizing the theory that social context has influenced and shaped group litigation).

73. FED. R. CIV. P. 1 (emphasis added).

74. See Greer Pagan, Comment, *Renewed Resistance?: The Federal Circuit Courts and the Problem of Mass Tort Class Actions*, 34 HOUS. L. REV. 807, 808 (1997) (recognizing that the judicial system strives to eliminate obstacles that contribute to inefficiency, but that these efforts often conflict with due process rights, such as individual control over one's case).

Several commentators rely heavily upon the mandate in Rule 1 to provide "just, speedy, and inexpensive determination of every action," FED. R. CIV. P. 1, as justification for settlement class actions. See, e.g., Edley & Weiler, *supra* note 1, at 401-06 (discussing the benefits to both plaintiffs and defendants of using settlement class actions); Rice & Davis, *supra* note 2, *passim* (noting the failure of the courts to meet the Rule 1 requirement and claiming the only solution is the settlement class action);

it is the spirit of Rule 1 that shapes the current goals of the class action and helps to define society's current judicial need for group litigation:⁷⁵ an alternative to individual litigation that allows victims of mass tort injuries to achieve compensation for their injuries fairly, quickly, and inexpensively.⁷⁶

C. Evolution of the Settlement Class Action from Roots of Equity

By tracing the development of the class action, it becomes apparent that the creation of the settlement class action from Rule 23 finds its historical roots in equity.⁷⁷ The evolution of Rule 23 and the goals of the FRCP also explain the eventual creation of the settlement class action as a response to the social and judicial needs of multiple

Schwarzer, *supra* note 42, at 840-41 (noting the settlement class action can help with burgeoning dockets, provide just results for plaintiffs waiting in line, and allow defendants to manage liabilities); *cf.* John Gibeaut, *At the Crossroads*, 84 A.B.A. J. 60, 61 (1998) (noting that supporters say that ADR is the only fair and effective way to dispose of thousands of claims that can flow from a mass tort). Other legal scholars and commentators choose instead to focus upon the preservation of constitutional due process rights as the reason for denouncing the use of settlement class actions in the arena of mass torts. *See, e.g.*, Coffee, *supra* note 8, at 1453-57 (noting the one-sided weakness of the settlement class action and that they should only be adopted as a temporary solution); Henderson, *supra* note 3, *passim* (claiming the settlement class action is inappropriate because they place the power with the powerful to the detriment of the individual).

75. *See* Manuel L. Real, *What Evil Have We Wrought: Class Action, Mass Torts, and Settlement*, 31 LOY. L.A. L. REV. 437, 437 (1998) (discussing how Rule 1 as well as Rule 23 provide guidance for defining the complete question of how to resolve mass tort litigation); *see also* Linda S. Mullinix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039, 1048 (1986) (noting judicial use of class action to be consonant with the requirements of Rule 1).

76. *See* T. Dean Malone, Comment, *Castano v. American Tobacco Co. and Beyond: The Propriety of Certifying Nation Wide Mass-Tort Class Actions Under Federal Rules of Civil Procedure 23 When the Basis of the Suit is a "Novel" Claim or Injury*, 49 BAYLOR L. REV. 817, 817 (1997) (noting that several arguments support the use of the large class action as an alternative means of assuring fairness to the plaintiffs). The question raised by the Rules Enabling Act relative to using the settlement class action device in the mass tort context is outside the scope of this Comment. The Rules Enabling Act, which governs federal judicial rulemaking, mandates that "[s]uch rules shall not abridge, enlarge or modify any substantive right." *See* Appendix B, 28 U.S.C. § 2072(b) (1994). For a thorough discussion on the Rules Enabling Act and its relation to settlement class actions, *see generally* Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 ARIZ. L. REV. 615, 617 (1997) (commenting that "[t]he generalized Rules Enabling Act argument is inherently unresolvable").

77. *See* Yeazell, *supra* note 17, at 703-04 (claiming that the settlement-only class action "returns group litigation to its historical roots, as an engine that could be used by—but also against—unincorporated persons" and theorizing its potential as a "real procedural tool"); *see also* Cabraser, *supra* note 48, at 378 (stating that the modern-day class action is rooted in equity); Schwarzer, *supra* note 42, at 841 ("In the mass tort settlement context, then, the class action is becoming a creature that resembles a cross between an equity receivership and a bill of peace."). *But see* Cramton, *supra* note 5, at 812 (insinuating that settlement class actions, "which contain a novel combination of features, illustrate something quite new in degree and kind").

litigants exposed to mass torts.⁷⁸ Since 1966, plaintiffs, defendants, lawyers, and court systems have manipulated Rule 23 to accommodate the increase in mass tort litigation, especially for claims involving asbestos exposure.⁷⁹ This use of Rule 23 has enabled the judicial system to provide large numbers of mass tort victims with an alternative to traditional individual litigation of a claim.⁸⁰ Still, it is unlikely that the original drafters of Rule 23 envisioned that the judicial system would use Rule 23 in this fashion.⁸¹

Although Rule 23 contains no provision expressly providing for settlement class actions,⁸² plaintiffs and defendants commonly use it for this purpose. This use of Rule 23 has led critics to argue that the rule is abused.⁸³ A number of reasons, however, have created the need to use settlement class actions to resolve mass tort claims:⁸⁴ lack of congressional action to resolve the growing number of outstanding tort claims;⁸⁵ repeated litigation with inherent costs and prolonged delays imposed upon the court system;⁸⁶ and exorbitant transaction costs.⁸⁷ Thus, the settlement class action allows mass tort victims to

78. See *Back to the Drawing Board*, *supra* note 3, at 828 n.3 (noting that, over time, courts have increasingly used class actions to avoid duplicative litigation, primarily through settlement class actions).

79. See *id.* at 828 (noting how the rule has been stretched to meet the demands of modern complex litigation, but also depicting the settlement class action as being on the outskirts of Rule 23).

80. See *id.* at 829 (describing the typical settlement class action context and noting that they are generally designed as an alternative to litigation).

81. See Yeazell, *supra* note 17, at 699 (noting that the drafters probably envisioned use of Rule 23 in situations involving serious injury resulting from one catastrophic event, such as an airplane crash, rather than the current and more common use of Rule 23 to certify class actions involving serious injuries occurring over extended periods of time, resulting from various exposures to chemicals or toxins); see also Schwarzer, *supra* note 42, at 838-39 (asserting that the drafters of Rule 23 never intended for the rule to encompass mass tort litigation).

82. See Aldock & Wyner, *supra* note 4, at 906 (noting that much of the criticism revolves around the questionable permissibility of settlement class actions under the terms of Rule 23); see also *supra* Part I (discussing the background of the settlement class action and its evolution from Rule 23).

83. See Aldock & Wyner, *supra* note 4, at 905-06 (noting use of Rule 23 for settlement class actions and discussing concerns and questioning the permissibility of using class actions, particularly settlement class actions, to resolve mass tort claims).

84. See Cramton, *supra* note 5, at 817-18 (citing judicial delay, high transaction costs, minimal compensation payments to victims, escalating attorney fees, repetitive trials, and "inevitable interrelationship among claimants" as factors, among others, that have pressured lawyers and courts to aggregate and settle sprawling claims involving mass torts); see also Schwarzer, *supra* note 42, at 837-38 (listing the problems plaguing mass tort litigation).

85. See Linda S. Mullenix, *Federalizing Choice of Law for Mass-Tort Litigation*, 70 TEX. L. REV. 1623, 1632 (1992) (discussing the lack of congressional action toward substantive mass-tort legislation).

86. See Cramton, *supra* note 5, at 817 (discussing the burden on the courts of duplicative individual trials).

87. See *id.* (noting complex, difficult cases of mass tort exposure present

receive fair, quick and inexpensive resolution of their claims.⁸⁸

Due to the increased use by defendants' counsel⁸⁹ and lack of clear procedural guidelines to which courts should adhere when handling settlement class actions, critics of the settlement class action will continue to grow in number.⁹⁰ The guideposts of equity and the desire to compensate the wrongfully injured victim, however, lend support to the continued use of settlement class actions,⁹¹ as exemplified in *Flanagan*.⁹²

II. *AMCHEM PRODUCTS, INC. v. WINDSOR*: SUPREME COURT PRECEDENT ON SETTLEMENT CLASS ACTIONS

To understand the Fifth Circuit decision in *Flanagan*, a review of recent case law and its subsequent impact on settlement class actions is necessary. Although several recent decisions have dealt with and

problems of high transaction costs because of difficult fault and causation requirements).

88. Settlement class actions also fill the void of noticeably absent legislative action in the mass tort arena. See Edley & Weiler, *supra* note 1, at 400-01 (commenting that legislative action is unlikely and "beyond the realm of the politically possible" and subsequently urging the judicial system to respond to the mass tort crisis, especially asbestos, "with imagination and urgency"). But see David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 951 & n.7 (1998) (suggesting that the legislature, not the judicial system, should promulgate change relating to federal law governing mass torts and that a majority of commentators support this consensus, and that the judiciary should not take over the task simply because political pressure has made the legislature incapable of acting). The current debate over whether there should be legislative response versus judicial action to the current crisis surrounding mass tort litigation is discussed briefly in note 189.

89. See Yeazell, *supra* note 17, at 700 (noting that the use of class actions by plaintiffs' lawyers have had the effect of also increasing the development of defendant classes). The return of the defendant class has effectively restored the device to its historical roots. See *id.* (postulating that plaintiffs' use of settlement class actions allows the class action to be a procedural tool that is really a defendant class that can be used both for and against a plaintiff class).

90. See Aldock & Wyner, *supra* note 4, at 906 (noting that there has been a "rising tide of criticism" over the use of settlement class actions in the mass tort context).

91. For example, Judge Weinstein discusses the significance of equitable principles in current mass tort litigation:

[c]ourts of equity traditionally have taken into account the equities—the concrete issues of fact and fairness of the particular situation—in fashioning remedies. In the mass tort context, these include (1) fairly and expeditiously compensating numerous victims and (2) deterring wrongful conduct where possible while (3) preventing overdeterrence in mass torts from shutting down industry or removing needed products from the market, (4) keeping the courts from becoming paralyzed by tens or even hundreds of thousands of repetitive personal injury cases, and (5) reducing transactional costs of compensation.

JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS AND OTHER MULTIPARTY DEVICES* 125 (1995).

92. 134 F.3d 668 (5th Cir. 1998), *cert. granted sub nom. Ortiz v. Fibreboard Corp.*, 524 U.S. 936 (1998).

rejected the settlement class action,⁹³ *Amchem* impacts most significantly upon the *Flanagan* decision.

A. Importance of *Amchem*

On June 25, 1997, the Supreme Court decided the leading case in settlement class action law:⁹⁴ *Amchem Products, Inc. v. Windsor*.⁹⁵ The Court in *Amchem* held that the concept of the settlement itself is an important consideration during the certification process,⁹⁶ a process where the court decides whether the proposed settlement class action meets the requirements set forth in Rule 23.⁹⁷ The Court also carefully noted, however, that such settlement class actions may actually require greater scrutiny because the court will not have the opportunity to witness the case unfold in a judicial proceeding.⁹⁸ The *Amchem* decision is meaningful because it explicitly allows courts to consider the structure, attributes, benefits, and disadvantages of the settlement when deciding whether to certify the settlement class action.⁹⁹ Consequently, the Supreme Court further developed the possibility that judges and lawyers could use settlement class actions as a viable alternative to individual litigation to handle mass tort claims.

93. Recent court decisions refusing certification of class actions, particularly settlement class actions, strongly implies that federal courts are disinclined to approve settlement class actions in the mass tort context. *See, e.g.*, *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (denying certification of a class consisting of nicotine-dependent individuals); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995), *cert. denied*, 516 U.S. 824 (1996) (reversing certification of a settlement class action involving product defect claims); *In re Stucco Litig.*, 175 F.R.D. 210 (E.D.N.C. 1997) (refusing certification of a settlement class composed of homeowners); *Walker v. Liggett Group, Inc.*, 175 F.R.D. 226 (S.D. W. Va. 1997) (rejecting a settlement filed as a limited fund under Rule 23(b)(1)(B) that involved smoking-related claims); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332 (D.N.J. 1997) (refusing certification of a class alleging a product defect). *But see* *Elkins v. Equitable Life Ins. Co.*, No. Civ.A.96-296-Civ-T-17B, 1998 WL 133741 (M.D. Fla. Jan. 27, 1998) (approving of a proposed settlement involving claims of insurance fraud); *Small v. Lorillard Tobacco Co.*, 668 N.Y.S.2d 307 (N.Y. Sup. Ct. 1997) (certifying a settlement class that involved smoking-related injuries).

94. *See* *Aldock & Wyner*, *supra* note 4, at 905 (commenting that the Supreme Court dealt with settlement class action law for the first time in *Amchem*).

95. 521 U.S. 591 (1997).

96. *See id.* at 619 (holding that "settlement is relevant to a class certification," yet warning that potential settlement class actions may require more in-depth scrutiny than class actions filed for litigation purposes).

97. *See* FED. R. CIV. P. 23(a) & (b) (defining both the prerequisites for a suitable class action and the factual determinations that must be considered in deciding class maintenance).

98. *See Amchem*, 521 U.S. at 620-21.

99. *See id.* at 622 (reversing, in a limited context, the lower court's holding that the attributes of the settlement should not be considered during the certification process, but finding that a remand of the case was not necessary).

The Supreme Court, however, simultaneously made it more difficult for courts to *approve* settlement class actions by ruling out certain types of settlement structures.¹⁰⁰ The Court also failed to clearly articulate the attributes of a settlement that are appropriate,¹⁰¹ making *Amchem* uncertain precedent for future settlement class actions. The settlement class action in *Amchem* was structured as an alternative dispute resolution¹⁰² (“ADR”) to resolve all outstanding asbestos tort claims against a group of defendant manufacturers.¹⁰³ The Court stated that this particular settlement structure did not meet the mandatory requirements set forth in Rule 23(b)(3).¹⁰⁴ Moreover, the settlement class action did not provide for adequate representation of the plaintiff class,¹⁰⁵ a crucial due process protection for the plaintiff class and a requirement under Rule 23(a).¹⁰⁶ Therefore, the Court de-certified the *Amchem* global settlement filed under Rule 23(b)(3), although it found that settlement was a pertinent consideration to the certification process.¹⁰⁷

B. Supreme Court’s Reasons for De-Certifying *Amchem*

The global settlement in *Amchem*, which sought to bind both present claims and future claims not yet in litigation,¹⁰⁸ contained

100. See *id.* at 624 (finding that certification of classes, such as the one before the Court, can not be approved under Rule 23(b)(3) because it encompassed a class that was too large and “sprawling”); see also Kenneth J. Ashman, *Class Action Settlements After Amchem*, 218 N.Y. L.J. 1 (1997) (noting *Amchem* has made it tougher for future settlement class actions to obtain certification under Rule 23).

101. The Supreme Court vaguely suggests that cases involving mass tort claims of such proportions “resort to less bold aggregation techniques, including more narrowly defined class certifications.” *Amchem*, 521 U.S. at 629 (quoting *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (1996)). But see Green, *supra* note 12, at 1778 n.17 (commenting that the Supreme Court’s recommendation to utilize “less bold aggregation techniques” provides unhelpful guidance “at best and cruelly disempower[s] and dismiss[es] . . . workers’ health, safety, and welfare interests at worst”) (quoting *Amchem*, 521 U.S. at 629).

102. See generally Gibeaut, *supra* note 74, at 60-62 (discussing ADR as a means of resolving outstanding asbestos mass tort claims efficiently).

103. See *Amchem*, 521 U.S. at 599-601 (summarizing events leading up to a global settlement that would provide “a workable administrative system for the handling of future [asbestos] claims”) (citing *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 270 (E.D. Pa. 1994)).

104. See *Amchem*, 521 U.S. at 624-25 (finding the settlement class did not meet predominance requirement of Rule 23(b)(3)). Rule 23(b)(3) states in part that “questions of law or fact common to the members of the class [must] predominate over any questions affecting only individual members.” FED. R. CIV. P. 23(b)(3).

105. See *Amchem*, 521 U.S. at 625 (finding that the class representatives did not meet Rule 23(a)(4)’s requirement of adequate representation).

106. See *id.* at 626 n.20 (requiring that “the plaintiff’s claim and class claim are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.”).

107. See *id.* at 624.

108. See *id.* at 595, 605 (the settlement class sought to bind those class members

several deficiencies¹⁰⁹ that ultimately led to its de-certification. Adequate representation problems proved to be the most detrimental.¹¹⁰ For example, plaintiffs' counsel represented present claimants ("inventory plaintiffs") while simultaneously representing future claimants with whom no actual attorney-client relationship existed.¹¹¹ In addition, inventory plaintiffs' claims were settled separately and prior to any agreement concerning future claimants, indicating a possible "sell out" of the future claimants' interests.¹¹² Finally, nine plaintiffs alleging varying exposure levels to asbestos represented a global class of future claimants that did not consist of any sub-classes.¹¹³

On these facts, the Supreme Court found that the *Amchem* settlement structure did not provide adequate representation for the plaintiff class, and thus failed to comply with the due process protections afforded plaintiffs by Rule 23.¹¹⁴ Consequently, in the

exposed to asbestos products produced by defendants, that did not file suit before January 15, 1993).

109. Some of the other deficient characteristics of the settlement structure that the Court in *Amchem* discussed, but did not necessarily elaborate upon were: the settlement agreement established four compensable disease categories with a cap on how many 'exceptional' claims (those that did not fall within the four categories) the defendant class would have to cover; for claims relating to the four categories, a range of damages was established with no ability to adjust for inflation and with different categories able to receive different levels of compensation; a cap was placed on how many claims the defendant class would be liable for in a given year; certain claims were excluded, regardless of the fact that under state tort law they could possibly receive compensation; only a limited number of class plaintiffs per year would be able to elect pursuing their claims in court rather than being bound by the settlement, and moreover, could not claim punitive damages if they did elect trial. *See Amchem*, 521 U.S. at 603-06.

110. *See id.* at 628 (holding that because the class requirements of common issue predominance and adequacy of representation could not be met, there was no need to give a definitive ruling on notice).

111. *See id.* at 600-01 (outlining the proposed settlement's process for the administration of liability payments to both present and future claimants).

112. *See id.* (expressing the court's cynicism towards the proposed settlement process).

113. *See id.* at 602-03 ("The complaint delineated no subclasses; all named plaintiffs were designated as representatives of the class as a whole.").

114. *See id.* at 623-25 (affirming the circuit court's decision to de-certify the class). The Supreme Court also held that the global settlement constructed in *Amchem* did not meet the Rule 23(b)(3)'s predominance requirement. *See id.* at 622-23 ("The predominance requirement stated in Rule 23(b)(3), we hold, is not met by the factors on which the district court relied."). The Court cited several factors to support the conclusion that the settlement class did not meet the predominance requirement, but focused on two in particular. *See id.* at 624-25 (citing differences in state law as one factor that contributes to class disparity). First, the global class contained numerous factual disparities. *See id.* (citing different medical histories and length of exposure times as disparate facts that weaken the unity of the class). Second, the interests of the named plaintiff representatives did not align with the interests of the global class members. *See id.* at 624 (describing the class as "sprawling" and incapable of sharing sufficient common interests with the class

form presented to the Court, the settlement class action could not proceed.¹¹⁵ In short, the Court stated that even in the settlement class action context, courts must strictly adhere to the requirements established by Rule 23(a) and (b), regardless of how fairly the settlement treats class members.¹¹⁶ The Court did, however, recognize petitioners' argument that the global settlement provided for a "secure, fair, and efficient means of compensating victims," but insinuated that such a procedure should find its legitimacy through legislative action, not judicial intervention.¹¹⁷

C. *Impact of Amchem on Future Settlement Class Actions*

The *Amchem* decision represents the Supreme Court's intent to

representatives). These two factors, therefore, precluded the settlement class action from meeting the predominance requirement.

Although the predominance issue was significant for the *Amchem* settlement class action, it was much less relevant for the *Flanagan* settlement class action. See *Flanagan v. Ahearn*, 134 F.3d 665 (5th Cir. 1998) (validating a district court's holding that approved a settlement class action of asbestos claims). *Flanagan* was filed under Rule 23(b)(1)(B) as a limited fund, which has no predominance requirement, only a commonality or typicality requirement as set forth by Rule 23(a)(4). See *id.* at 670 (comparing *Flanagan* to *Amchem*); see also *Amchem*, 521 U.S. at 623 n.19 (noting that a settlement class action filed under Rule 23(b)(1)(B) need not provide that common issues predominate over individual issues) (citing *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 318 (E.D. Pa. 1994)).

115. See *Amchem*, 117 U.S. at 629 (affirming the lower court's decision to de-certify the settlement class action).

116. The Supreme Court found that, without strict adherence to Rule 23(a) and (b)(3) and absent a trial, a global settlement agreement may have unfair and unanticipated consequences. The Supreme Court stated that:

The safeguards provided by the Rule 23(a) and (b) class-qualifying criteria . . . are not impractical impediments—checks shorn of utility—in the settlement-class context. . . . [T]he 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 judgement or overarching impression of the settlement's fairness.

Id. at 621.

117. See *id.* at 628-29. A great number of commentaries focus on the highly sensitive issue of judicial involvement and the proper role of judges in resolving the problems surrounding mass tort litigation. See generally Carrington & Apanovitch, *supra* note 12, at 461 (asserting that in the context of settlement class actions concerning mass tort litigation, "[i]t is time to recall that the judicial power of the United States has limits"); Henderson, *supra* note 3, at 1020 (asserting that in the settlement-only class action context, "judges are directly and personally benefited by their approvals of the 'done deals' between the defendants' and plaintiffs' counsel" and therefore, demoralize the entire adjudication process); Lamberth, *supra* note 18, at 164-65 (arguing that regardless of the strain placed upon the court system by the growing number of filed mass tort claims, judges do not have the authority nor the ability to provide an adequate solution). But see Rice & Davis, *supra* note 2, at 146 (arguing that due to the lack of adequate procedural devices to contend with mass tort litigation, "the only resolution in sight is through effective class action settlements within the procedural strictures laid out by the courts"). For additional comments on this subject, see *infra* note 189, which discusses the current debate over legislation versus judicial management of mass tort litigation.

protect plaintiffs' constitutional due process rights,¹¹⁸ regardless of how efficient, fair, or inexpensive the settlement class action appears.¹¹⁹ The decision also reflects the Court's belief that it is vital for a plaintiff to retain individual control over claims that are serious enough to warrant individual litigation.¹²⁰ But critics of settlement class actions should heed the Court's cogent observation in *Amchem*: that application of Rule 23 as a corrective measure to mass tort issues is imperiled as much by those who are disinclined to using it as by those who are too eager to use it.¹²¹

Regardless of the Court's intent, the significance of *Amchem* rests principally on the Court's holding that settlement is a pertinent consideration during the class certification process.¹²² Therefore, the implications of the *Amchem* decision are at once vague, but still poignant for future settlement class actions.¹²³ It is now accepted that when a class action is presented for settlement-only purposes, the requirements of Rule 23(a) and (b) will receive increased scrutiny.¹²⁴ Despite this heightened level of scrutiny, there still exists a strong possibility that similarly constructed global settlements could proceed under alternative subsections of Rule 23 and meet with the Court's

118. See Cabraser, *supra* note 48, at 373 (postulating that the *Amchem* decision is heralded by advocates of victims' due process rights as a divine intervention that has "spare[d] the 'unselfconscious and amorphous legions' of asbestos victims and their families") (quoting *Amchem*, 521 U.S. at 628).

119. See *Amchem*, 521 U.S. at 622-23 (stating that the advantages resulting from an administrative compensation structure are not relevant to the determination of whether the predominance requirement, which ensures due process under Rule 23(b)(3), has been met).

120. See *id.* at 625 (recommending greater caution during the certification process of a proposed settlement class actions when "individual stakes are high"); cf. YEAZELL, *supra* note 10, at 13-14 (observing that the idea of individualism is pervasive throughout American law, and as a result, strongly influences the debate over representative litigation and its binding effects).

121. The Court took special care to note that "the rulemaker's 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.'" *Amchem*, 521 U.S. at 629 (quoting CHARLES A. WRIGHT, LAW OF THE FEDERAL COURTS 508 (5th ed. 1994)) (emphasis added).

122. See *Amchem*, 521 U.S. at 619-20. The Court also held that Rule 23(b)(3)(D), which governs the inquiry as to whether litigation as a class would cause "intractable management" concerns, is not a relevant inquiry for settlement class actions because litigation of the suit is not anticipated. See *id.* at 620.

123. See Green, *supra* note 12, at 1776 (commenting that the Supreme Court sent a "mixed message" through its first decision concerning the viability of settlement class actions by showing distrust towards settlement class actions in the mass tort context, but not outright denouncing their use or necessity).

124. See Aldock & Wyner, *supra* note 4, at 913-20 (discussing the implications of the *Amchem* decision and noting the greater scrutiny with which lower courts will have to review future settlement class actions); see also Barry F. McNeil & Beth L. Fancsal, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 509-11 (1996) (noting the increased scrutiny given to settlement class action suits after *Amchem* and speculating that closer judicial scrutiny will follow).

approval.¹²⁵

If this possibility proves untrue, however, *Amchem* may have single-handedly halted the development of the settlement class action. This would imply reversal of the Fifth Circuit's decision in *Flanagan*,¹²⁶ discussed more fully in the following section.¹²⁷ Therefore, the following section examines the circumstances under which the *Flanagan* settlement class action developed.¹²⁸ The discussion then focuses on the pertinent attributes of the *Flanagan* settlement and distinguishes it from the *Amchem* settlement class action.¹²⁹

III. THE *FLANAGAN V. AHEARN* SETTLEMENT CLASS ACTION

A. *Procedural History of Flanagan*

Despite the desire to compensate thousands of asbestos claims in an expedited manner, the litigation surrounding this case has a history spanning over four years.¹³⁰ The United States District Court for the Eastern District of Texas first certified the *Flanagan* settlement class action in 1995.¹³¹ Objectors appealed, but the Fifth Circuit affirmed the decision of the lower court.¹³² In two separate petitions, objectors Flanagan and Ortiz again appealed to the Supreme Court

125. See *Amchem*, 521 U.S. at 626-27 (noting several times that the settlement class action was filed under Rule 23(b)(3) and therefore, distinguishable from settlement class actions that proceed under different categories of Rule 23); see also John C. Coffee, Jr., *After the High Court Decision in 'Amchem Products, Inc. v. Windsor,' Can a Class Action Ever Be Certified Only for the Purpose of Settlement?*, NAT'L L.J., July 21, 1997, at B4 (noting that "alternative subsections of Rule 23 [may] permit sidestepping [of] *Amchem's* holding"); *Fibreboard Settlement Approved by Court Panel*, WALL ST. J., Feb. 3, 1998, at B6 (reporting that *Flanagan v. Ahearn* was governed under different rules than *Amchem* and therefore, was legally distinct).

126. See 134 F.3d 668, 683 (5th Cir. 1998) (Smith, J., dissenting) (asserting that the majority panel "casually dismiss[ed] the teaching of *Amchem* and blesse[d] a class that falls far short of legal and constitutional requirements").

127. See *infra* Part III (discussing the *Flanagan* settlement class action in general).

128. See *infra* Part III.B (tracing the development of the settlement negotiations in *Flanagan*).

129. See *infra* Part III.C (comparing the *Flanagan* and *Amchem* settlements).

130. The Eastern District of Pennsylvania initially decided the case in June of 1994. See *Georgine v. Amchem Prods., Inc.*, 878 F. Supp. 716 (E.D. Pa. 1994) (enjoining claimants, who failed to opt out of the class action, from filing separate claims). The scope of *Amchem* was argued and applied through the adjudication of *Flanagan v. Ahearn* in January of 1998. See 134 F.3d 668 (5th Cir. 1998) (upholding certification of asbestos settlement class action).

131. See *Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505 (E.D. Tex. 1995) (certifying the settlement class action filed with the court by the settling parties on August 27, 1993, under Rule 23(b)(1)).

132. See *Flanagan v. Ahearn*, 90 F.3d 963 (5th Cir. 1996) (affirming the lower court's decision to certify an asbestos settlement class action in holding that the requirements of Rule 23 were satisfied), *aff'g Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505 (E.D. Tex. 1995), *reh'g en banc denied*, 101 F.3d 368 (5th Cir. 1997) [hereinafter "*Flanagan I*"].

in 1997.¹³³

On June 27, 1997, the Supreme Court granted certiorari, vacated, and remanded the petitions for certiorari for reconsideration in light of *Amchem*.¹³⁴ After receiving additional briefs and hearing oral arguments from the principal parties involved, the Fifth Circuit reaffirmed its prior decision to certify the filed settlement class action under Rule 23(b)(1)(B).¹³⁵ In February 1998, two separate groups of petitioners, Flanagan and Ortiz, again filed petitions of certiorari to the Supreme Court.¹³⁶ The petitions asserted that the Fifth Circuit ignored the Court's holding in *Amchem* and disregarded the constitutional protections afforded to the class members.¹³⁷ On June 22, 1998, the Supreme Court granted certiorari to *Flanagan* for the second time.¹³⁸

B. *Circumstances Leading to the Flanagan Settlement*

The principal parties involved in *Flanagan* constructed the settlement class action as a response to unusual circumstances.¹³⁹ These circumstances could have potentially destroyed the ability of numerous future claimants to obtain compensation for their asbestos-related injuries.¹⁴⁰

Fibreboard Corporation ("Fibreboard") faced a number of asbestos-exposure claims that far exceeded its then available \$100 million in assets.¹⁴¹ Fibreboard also found itself in the midst of insurance litigation with its two previous insurers, Pacific Indemnity Company ("Pacific") and Continental Casualty Company

133. Both the *Flanagan* objectors and the *Ortiz* objectors filed petitions of certiorari with the Supreme Court in 1997. See *Flanagan v. Ahearn*, 521 U.S. 1114 (1997) (Mem.), *vacated and remanded in light of Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); see also *Ortiz v. Fibreboard Corp.*, 521 U.S. 1114 (1997) (mem.), *vacated and remanded in light of Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

134. See *infra* note 136.

135. See *Flanagan v. Ahearn*, 134 F.3d 668, 669 (5th Cir. 1998) (2-1 per curiam), ("After oral argument and reconsideration, we can find nothing in the *Amchem* opinion that changes our prior decision. We again affirm."), *aff'g* 90 F.3d 963 (5th Cir. 1996) [hereinafter "*Flanagan II*"].

136. See *supra* note 21 (noting that both the *Flanagan* objectors and the *Ortiz* objectors filed petitions of certiorari with the Supreme Court in 1998).

137. See *id.*

138. See *Ortiz v. Fibreboard Corp.*, 524 U.S. 936 (1998) (consolidating the objectors' petitions for certiorari).

139. See *Flanagan I*, 90 F.3d at 968-69 (summarizing how defendant's insurance suits played a role in the plaintiff's settlement class action).

140. See *id.* at 970 (discussing the insurer's willingness to participate in a global settlement if the settlement brought "total peace" and the settlement class could not opt out).

141. See *id.* at 968-69 (noting that although Fibreboard, a manufacturer of asbestos, retained close to \$100 million in assets at the outset of the case, it quickly exhausted these funds due to litigation by the late 1980s).

(“Continental”), to provide insurance coverage for outstanding exposure claims.¹⁴² Unsure of the insurance litigation outcome, plaintiffs’ and defendants’ counsel began negotiations for an agreement that would secure compensation for victims of the asbestos exposure.¹⁴³

Although Fibreboard initially won the insurance litigation, Continental appealed the court’s decision.¹⁴⁴ Consequently, settlement negotiations continued.¹⁴⁵ When Continental finally approached the settlement table, negotiations had commenced already between Fibreboard, Pacific, and plaintiffs’ counsel.¹⁴⁶ As a prerequisite for its participation in the settlement talks, Continental, whose insurance was necessary to compensate claims, demanded that any agreed upon settlement be global and binding on all future claimants.¹⁴⁷

Settlement negotiations first revolved around issues relating to the present claimants that plaintiffs’ counsel currently represented.¹⁴⁸ On the suggestion of the settlement facilitator,¹⁴⁹ the parties negotiated and finalized the settlement concerning the “inventory plaintiffs”¹⁵⁰ before beginning in-depth negotiations regarding a settlement for future claimants.¹⁵¹ Ongoing discussions between defendants’ and plaintiffs’ counsel then culminated, with the assistance of Judge

142. *See id.* at 968-71 (describing the pending insurance litigation between Fibreboard, Pacific, and Continental).

143. *See id.* at 969-70 (realizing the risk that their clients may not receive sufficient compensation for their claims if Continental won the insurance litigation, plaintiffs’ counsel was amicable to negotiations when Fibreboard approached them with the suggestion of a global settlement).

144. *See id.* at 968-69 (identifying the extensive litigation between Fibreboard and insurers from 1979-1993).

145. *See id.* at 971 (noting that the fact that “Fibreboard faced immediate bankruptcy if it lost the coverage case” with Continental gave impetus to the global settlement class that arose from intense negotiations).

146. *See id.* at 970 (“Continental knew that Fibreboard and plaintiffs’ counsel were actively engaged in negotiating a global settlement to be funded with Continental’s money.”).

147. *See id.* (detailing Continental’s arguments for a mandatory and global settlement class action).

148. *See id.* at 971 (explaining that the parties agreed to the court’s recommendation that the parties should attempt to settle the inventory of approximately 45,000 present claims).

149. In February 1993, Judge Parker, sitting by designation, appointed Judge Patrick E. Higgenbotham as the settlement facilitator, to aid the principal parties throughout the settlement negotiations. *See id.* at 970. Judge Higgenbotham suggested, for unstated reasons, that the parties first settle the claims of the inventory plaintiffs’ claims. *See id.* at 971.

150. The “Substitute Ness Motley Agreement” settled the 45,000 present claims, which were called “inventory claims.” *See id.*

151. *See id.* (“With the Ness Motley settlement behind them, the parties intensified their efforts to reach a global settlement.”).

Parker,¹⁵² in the creation of a \$1.535 billion trust set up solely for the future claimants.¹⁵³

As a result of these negotiations, a global settlement class action was eventually reached and filed¹⁵⁴ as a “limited fund” under Rule 23(b)(1)(B).¹⁵⁵ The “limited fund” category binds all necessary parties¹⁵⁶ and does not allow opt outs or provide notice to absent members of the class.¹⁵⁷ The “limited fund” is also an equitable tool that permits for resolution of both duplicative and multiple claims that could be dispositive of other claimants’ interests who are not members of the class.¹⁵⁸ This equitable attribute of the limited fund aligns with FRCP’s mandate that there be “just, speedy, and

152. *See id.* (describing the settlement negotiations that continued throughout the evening of August 26, 1993, at Judge Parker’s residence, and then later, at a coffee shop).

153. *See id.* (discussing plaintiffs’ initial refusal of the global settlement offer at Judge Parker’s home, but eventual acceptance of the offer at the coffee shop). The future claimants were individuals with asbestos exposure-related claims against Fibreboard. *See id.* These claimants neither filed suit nor settled their claims before August 27, 1993. *See id.* at 972. This class was known as the “Global Health Claimant Class.” *See id.*

154. The Global Health Claimant Class settlement class action was filed on September 9, 1993. *See id.*

155. *See* FED. R. CIV. P. 23(b)(1)(B) advisory committee’s notes. Rule 23(b)(1)(B) does not expressly provide for a “limited fund,” but the advisory committee notes of 1966 stated that the provision is useful where separate adjudication of each claim would be dispositive of other claimants’ interests because of limited resources or an insufficient fund. *See id.*

In his dissenting opinion, Judge Smith discussed this facet of Rule 23(b)(1)(B) and asserted that Fibreboard, then a solvent corporation, artificially created limited resources by capping compensation at the level that insurers Continental and Pacific were able to pay. *See Flanagan II*, 134 F.3d at 671-73 (Smith, J., dissenting). Judge Smith concluded that no limited fund existed and, therefore, the settlement class action should have proceeded under Rule 23(b)(3). *See id.* at 672 n.7 (Smith, J., dissenting). The Advisory Committee, however, noted that “[s]imilar problems . . . can arise in the absence of a fund either present or *potential*.” FED. R. CIV. P. 23(b)(1)(B) advisory committee notes (emphasis added). This point is significant for *Flanagan* because Fibreboard faced a *potential* limited fund of insurance proceeds if it did not win its pending insurance coverage case against one of its principal insurers, Continental. *See Flanagan I*, 90 F.3d at 969 (stating that, even with the Pacific agreement, “Fibreboard faced acute problems with increased large-scale asbestos litigation”).

156. *See* FED. R. CIV. P. 23(b)(1)(B) advisory committee notes.

157. Under Rule 23(b)(1)(B), neither notice nor an opt out provision, allowing individuals to exclude themselves from the class, is required. *See* FED. R. CIV. P. 23(c)(2)-(3) (making the requirements of notice and the opportunity to opt out from the class applicable only to class actions filed under Rule 23(b)(3)). Notice and the opportunity to opt out can be granted in class actions filed under subsections other than Rule 23(b)(3) at the discretion of the court. *See* FED. R. CIV. P. 23(d) (stating that the court, at its discretion, can implement certain orders).

158. *See* YEAZELL, *supra* note 10, at 256-57 (explaining that Rule 23(b)(1) is “an instance of class action by necessity” to prevent inconsistent outcomes and “a way out of a situation that would otherwise force the legal system into either futility or contradiction”).

inexpensive determination of every [claim],”¹⁵⁹ and prevents situations where persons would be compelled to race to the courthouse for the greatest amount in damages.¹⁶⁰

Certification of the settlement class action as a “limited fund” generated criticism from dissenting Judge Jerry E. Smith, who claimed that the class did not meet the requirements of Rule 23(b)(1)(B).¹⁶¹ Judge Smith asserted that because Fibreboard was *currently* a solvent corporation, the settlement class action should have been classified under Rule 23(b)(3).¹⁶² As discussed above, however, Fibreboard faced impending bankruptcy if it failed to win its insurance litigation with Continental and Pacific.¹⁶³ If Fibreboard lost, an otherwise solvent corporation would not only be unable to compensate present claimants fully, but would also be unable to fulfill any financial obligations to future claimants.¹⁶⁴ In this context, the settlement class action based upon a limited fund theory represented the most viable solution to secure compensation for all victims of asbestos exposure both fairly and equitably.¹⁶⁵

C. Flanagan and Amchem: The Factual and Legal Distinction

Perhaps observing the inherent limitation of *Amchem*,¹⁶⁶ the Fifth Circuit in *Flanagan* held that the settlement class action, filed as a “limited fund” under Rule 23(b)(1)(B), met the requirements of Rule 23 and therefore was properly certified.¹⁶⁷ Nevertheless,

159. FED. R. CIV. P. 1.

160. See Edley & Weiler, *supra* note 1, at 392 (noting that the level of expenditures involved with asbestos litigation is astronomical and difficult to quantify, but that of the original twenty-five asbestos defendants, sixteen have filed bankruptcy already).

161. See *Flanagan II*, 134 F.3d at 671 (Smith, J., dissenting) (alleging that the settlement agreement is what established the so-called “limited fund”).

162. See *id.* at 671 (“This issue alone should be dispositive of the matter, for if this class cannot go forward as a ‘limited fund’ class, it would require certification under [R]ule 23(b)(3) and would then be subject to the requirements of predominance and superiority.”).

163. See *supra* Part III.B (discussing the circumstances leading to the *Flanagan* settlement agreement).

164. See Rice, *supra* note 26, at 5 (asserting that without the *Flanagan* settlement agreement, the prospect of future claimants receiving compensation for their claims was minimal).

165. See *id.* (stating that the *Flanagan* settlement fulfilled both the objective of tort law, to compensate injured victims, and the objective of the FRCP, to provide the “just, speedy, and inexpensive determination of every claim”) (quoting FED. R. CIV. P. 1).

166. See *supra* Part II.C (suggesting that *Amchem* was decided within the limited scope of Rule 23(b)(3)).

167. See *Flanagan II*, 134 F.3d at 669-70 (“In our prior opinion, we affirmed the judgment below, which approved the class action settlements of asbestos-related claims involving Fibreboard Corporation. . . . [W]e can find nothing in the *Amchem* opinion that changes our prior decision.”).

compared to *Amchem*, objectors have attacked *Flanagan* with equal, if not greater, intensity.¹⁶⁸ The objectors to *Flanagan* claim that the settlement class action affirmed by the Fifth Circuit represents a blatant disregard of the Supreme Court's holding and rationale in *Amchem*.¹⁶⁹

The objections to the *Flanagan* settlement class action are unwarranted. In addition to the unusual circumstances that led to the settlement agreement,¹⁷⁰ *Flanagan* also is legally and factually distinct from *Amchem*.¹⁷¹ First, *Flanagan* was filed as a limited fund under Rule 23(b)(1)(B), whereas *Amchem* was filed under Rule 23(b)(3).¹⁷² Consequently, *Flanagan* does not have to meet the higher 'predominance' threshold, a requirement of Rule 23(b)(3) and the central issue in *Amchem*.¹⁷³ Instead, *Flanagan* must show only that the proposed settlement class meets the commonality and

168. See, e.g., Rex Bossert, *Asbestos Case Deepens Rift in Fifth Circuit: Judge Says Colleagues Ignored the Supreme Court*, NAT'L L.J., Feb. 16, 1998, at A6 ("The [panel majority] is thumbing its nose at the Supreme Court.") (quoting Linda S. Mullenix of the University of Texas School of Law) (alteration in original).

169. See *Flanagan II*, 134 F.3d at 683 (Smith, J., dissenting) (asserting that "[t]he panel majority embraces a settlement that it considers a triumph of practicality . . . [and] casually dismisses the teaching of *Amchem* and blesses a class that falls far short of legal and constitutional requirements").

170. See *supra* Part III.B.

171. See *Flanagan II*, 134 F.3d at 669-70 (discussing briefly the differences between the *Amchem* settlement class and the *Flanagan* settlement class).

172. See *id.* at 669. For purposes of this Comment, it is assumed that the *Flanagan* settlement class action was properly certified as a limited fund because of the external pressures present before the settlement was reached. See *infra* notes 182-86 and accompanying text (noting the possibility of inadequate funds by Fibreboard to satisfy all of the claims); see also *infra* notes 252-55 and accompanying text (noting that what constitutes a limited fund will be the cause of much future debate). As noted *supra* note 23, the Supreme Court actually found that the settlement class action in *Flanagan* did not qualify as a limited fund and thus, reversed and remanded the Fifth Circuit decision. Interestingly, the Court refused to define the contours of what would qualify as a limited fund and therefore, this still remains a debatable issue.

There is criticism that *Flanagan* circumvented bankruptcy law by permitting defendants to file as a limited fund, even though Fibreboard retained solvency. See *id.* at 671-74 (Smith, J., dissenting). The Fifth Circuit, however, previously addressed this issue with brevity, asserting that "[t]o the extent intervenors are arguing that certification is improper because Fibreboard fares better under the class action settlement than under a bankruptcy proceeding, we find their focus misplaced. The inquiry instead should be whether the class is better served by avoiding impairment of their interests." *Flanagan I*, 90 F.3d at 963, 985.

173. See Coffee, *supra* note 125, at 1, B4 (noting that the predominance inquiry of *Amchem* will not be relevant to *Flanagan*). But cf. Cohen, *supra* note 2, at 316 (recognizing that settlement class actions filed under Rule 23(b)(1)(B) do not have to meet the higher "predominance" threshold present for class actions filed under Rule 23(b)(3), but claiming that the commonality of the class interests under mandatory class actions should be at least equivalent to those classes where absentees have the right to opt out from the class).

typicality requirements of Rule 23(a).¹⁷⁴

Second, unlike *Amchem*, the claim of inadequate representation by plaintiff class representatives is not asserted in *Flanagan*.¹⁷⁵ Rather, they directed their objection solely to the simultaneous representation by plaintiffs' counsel of both the present and future claimants.¹⁷⁶ Therefore, the objection to adequate representation in *Flanagan* implicates ethical considerations rather than procedural issues.¹⁷⁷

Third, in *Flanagan* the Fifth Circuit appointed a guardian ad litem on behalf of the future claimant class.¹⁷⁸ The Fifth Circuit also appointed Judge Higgenbotham, who oversaw all settlement negotiations.¹⁷⁹ These precautions taken by the Fifth Circuit in *Flanagan*, but not present in *Amchem*,¹⁸⁰ ensured that plaintiff's counsel adequately represented the future claimant class.

174. See FED. R. CIV. P. 23(a)(2)-(3) (delineating the requirements applicable to Rule 23(b)(1)(B) class action suits).

The Fifth Circuit concluded that the *Flanagan* settlement class action satisfied the commonality and typicality requirements of Rule 23(a)(2) & (3). See *Flanagan I*, 90 F.3d at 979. The Fifth Circuit listed the following as common interests of the "Global Health Claimant Class":

avoiding . . . catastrophic results of a loss by Fibreboard in the coverage case appeal; maximizing the total settlement contribution from [defendants]; streamlining the procedures for the filing, processing, and resolution of claims, thereby reducing transaction costs and delays in compensation; minimizing the percentage of their compensation diverted from the fund to pay attorney's fees; and adopting procedures that provide for payments to claimants in an equitable manner.

Id. at 981. See generally Cohen, *supra* note 2, at 302 (asserting that the only conflict between present and future claimants in *Flanagan* was the desire to control limited funds to provide future claimants with monetary damages, but that this is the same reason for certifying the class as a limited fund).

175. See *Flanagan I*, 90 F.3d at 976 n.10 (refraining from considering whether the class representatives provided adequate representation because no objection to that effect was lodged).

176. Because the objectors to the global settlement in *Flanagan* did not contest the class representatives' adequacy of representation, only the issue of whether counsel adequately represented the class was present. See *id.* at 976 ("Intervenors do not challenge the adequacy of representation of class representatives so we do not consider this issue.").

177. See *id.* at 977-78 (discussing the legal ethics experts called by the intervenors and settling parties to testify on the issue of whether class counsel adequately represented the plaintiff class). But see *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 n.20 (1997) (finding that inquiries relating to adequate representation merge with the procedural questions of commonality and typicality found within Rule 23(a)).

178. See *Flanagan I*, 90 F.3d at 972 (stating that Judge Parker appointed Professor Eric D. Green, a Boston University Law Professor, as guardian ad litem for the future claimant class).

179. See *id.* at 970 ("With the approval of the parties, Judge Parker named Judge Patrick E. Higgenbotham of this court to serve as settlement facilitator.").

180. No special appointment of a judge or a guardian ad litem occurred in the *Amchem* settlement class action. See *Amchem*, 521 U.S. at 600-06 (describing the settlement negotiations process).

Fourth, *Flanagan* involved a situation where Fibreboard faced impending insolvency if the parties could not reach a settlement agreement.¹⁸¹ The threat of inadequate funding which could fail to satisfy future claims provided the impetus for plaintiffs to seek a settlement agreement.¹⁸² No such threat preceded the settlement negotiations in *Amchem*.¹⁸³ Rather, *Amchem* concerned a multi-district litigation suit involving a consortium of 20 defendants who desired to finalize the seemingly never-ending flow of asbestos claims.¹⁸⁴

Finally, the structure and terms of the *Flanagan* settlement class action differ from that of the *Amchem* settlement. The terms of the *Amchem* settlement structure “reflect[ed] essential allocation decisions designed to confine compensation and to limit defendants’ liability.”¹⁸⁵ In contrast, the terms of the *Flanagan* settlement structure “[did] not award damages to individual victims: [rather] it provide[d] [for a secure pool of] money and an equitable distribution process to pay victims.”¹⁸⁶

Despite these legal and factual distinctions between *Amchem* and *Flanagan*, and whatever the outcome, *Flanagan* still must contend with other issues raised by the settlement class action in the mass tort context.¹⁸⁷ In particular, Judge Smith’s criticism—that constitutional due process protections are violated by the *Flanagan* settlement class action¹⁸⁸—exemplifies an overriding issue in *Flanagan* and this Comment: whether settlement class actions can and should be used

181. See *supra* Part III.B (discussing the circumstances surrounding the *Flanagan* settlement negotiations).

182. See *Flanagan I*, 90 F.3d at 976 (noting that plaintiffs settled because of a desire to avoid the risks of insurance coverage litigation and to insure that funds remained available to pay their claims).

183. See *Amchem*, 521 U.S. at 601 (stating that settlement discussions “concentrated on devising an administrative scheme for disposition of asbestos claims” not yet in litigation).

184. See *id.* (noting that defendants made an offer “designed to settle all pending and future asbestos cases”).

185. *Id.* at 627.

186. *Flanagan I*, 90 F.3d at 976; see also Rice, *supra* note 26, at 5 (claiming that the *Flanagan* settlement did not set awards among class members, and “merely provided a classwide procedure to determine individual damages”). Another distinguishing feature of the *Flanagan* settlement is that it provides for a meaningful “back-end opt out provision.” See *Flanagan I*, 90 F.3d at 976 n.7. Because this “back-end opt out provision” allows a class member to go to trial after going through the administrative proceedings, there are incentives for the parties involved to consider both individual medical histories and comparative state tort laws. See *id.*

187. These other issues involve adequate representation by class counsel, ethical rules and professional obligations, and the authority of the court to approve of such settlement class actions. See Koniak, *supra* note 18, at 1049-50 (discussing these issues in the context of the *Georgine* case).

188. See *Flanagan II*, 134 F.3d at 675 (Smith, J., dissenting) (asserting that the *Flanagan* settlement class does not meet the requirements of due process because of the “lack of common issues” and “inadequately-representative named plaintiffs”).

as a legal response to pressing societal needs involving multiple litigants or confined to a more limited use. Implicit in this issue is the following question: If the judicial system gives full effect to due process rights in the settlement class action context, i.e. adequate representation and notice, can the settlement class action continue to be used effectively as an alternative to litigation to secure compensation for injured victims?

IV. ANALYSIS OF *FLANAGAN V. AHEARN* AND PERTINENT ISSUES CONCERNING THE SETTLEMENT CLASS ACTION

This section addresses and dismisses two principal arguments¹⁸⁹ against using the settlement class action as a solution to resolving mass tort claims. The prevalent and most controversial argument against the settlement class action is that it infringes upon the due

189. There are multiple arguments against using settlement class actions in the mass tort context. For example, many legal scholars and commentators assert that Congress, and not the Supreme Court, should provide the resolution to the existing mass tort crisis. See Carrington & Apanovitch, *supra* note 12, at 474 (asserting that the judicial system's efforts to resolve mass tort litigation problems is constitutionally unacceptable, citing Article III of the Constitution and the Rules Enabling Act as the limiting factors); cf. Green, *supra* note 12, at 1801 (stating that even though it may be better for the legislative branch to resolve the current issues of mass tort litigation, the judicial system will have to continue to provide solutions, "within reasonable bounds of competence and power," until Congress chooses to act).

This issue, although not analyzed in this Comment, is of importance because it signifies the magnitude of the controversy surrounding settlement class actions and questions the judicial system's power. See Carrington & Apanovitch, *supra* note 12, at 476 (discussing the need to limit judicial authority because the separation of powers between the three branches of government must be preserved). Certification and approval of settlement class actions entail broad exercise of judicial discretion to determine the fairness and suitability of the settlement, which is dependent on the specific circumstances of a case. See Menkel-Meadow, *supra* note 28, at 1184-85 (detailing the numerous decisions judges must make in settlement class actions and noting that these decisions "touch on important separation of powers issues"). Thus, the outcome of *Flanagan* can potentially affect the ability of courts to exercise judicial discretion to resolve social and legal crisis in the mass tort arena through settlement class actions.

In the face of legislative inaction, curtailing judicial activism in mass tort resolution can potentially prove most detrimental to victims of mass torts. See Green, *supra* note 12, at 1795 (arguing that depriving plaintiffs of the ability to conclude a settlement on a classwide basis "could seriously harm class members by depriving them of the best vehicle to obtain the largest net recovery"). The Supreme Court should not shun from addressing a much-needed solution to the growing number of mass tort claims and should view the settlement class action as a viable and equitable resolution when addressing *Flanagan*. See Cabraser, *supra* note 48, at 392 (imploping federal judges to provide solutions to the mass tort crisis through equitable tools, such as class actions, and stating that "equity fears no difficulty") (quoting *Wheelock v. First Presbyterian Church*, 51 P. 841, 844 (Cal. 1897)). But see Shapiro, *supra* note 88, at 951 n.107 (recognizing that external factors, such as divergent political interests, may preclude legislative action in the mass tort arena, but claiming that legislative inertia is not a reason to allow unauthorized judicial activism).

process protections afforded to victims of mass tort injuries.¹⁹⁰ The due process protections in the settlement class action context under Rule 23 consist primarily of two procedural prongs: 1) the need for adequate representation, both by the plaintiffs' counsel and the plaintiffs' class representatives,¹⁹¹ and 2) notice¹⁹² to all class members bound by the settlement. The due process prongs of adequate representation and notice are discussed separately *infra* in Part IV.A and Part IV.B, respectively.

In addition, objectors also argue that settlement class actions are ripe for potential collusion between defendants' and plaintiffs' counsel.¹⁹³ The underlying premise of this argument is that current ethical rules and professional responsibilities prohibit lawyers from actively engaging in settlement class actions versus traditional individual litigation.¹⁹⁴ The topic of collusion is discussed *infra* in Part IV.C.

A. Due Process Prong One: Adequate Representation

Adequate representation of future claimants is an important issue in *Flanagan* because class actions that proceed as a "limited fund"

190. See *Flanagan II*, 134 F.3d at 676 (Smith, J., dissenting) (arguing that the *Flanagan* settlement class action violates Congress' mandate that no court can promulgate rules or procedures that "abridge any substantive right") (citing 28 U.S.C. § 2072(b)); see also Carrington & Apanovitch, *supra* note 12, at 461 (arguing that the judicial system has exceeded its authority by permitting settlement class actions in the mass tort context). The arguments concerning plaintiffs' due process right are intertwined with issues involving the Rules Enabling Act, Article III of the Constitution, and the *Erie* doctrine. See generally Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858, 872-95 (1995) (addressing arguments for and against judicial authority to resolve current problems with mass tort litigation through settlement class actions and Rule 23).

191. See FED. R. CIV. P. 23(a)(4) (mandating that "the representatives will fairly and adequately protect the interests of the class").

192. The issue of notice implicitly raises yet another objection to the use of settlement class actions: the right to opt out from the class. This is vital in the context of classes that are filed as a limited fund because under Rule 23(b)(1)(B) no provision to opt out from the class exists. Consequently, the issue of opt out is not discussed in this Comment, except in the context of notice, which necessarily precludes the exercise of the opt out provision. See *infra* Part IV.B (focusing on the notice requirement of Rule 23).

193. See Koniak, *supra* note 18, at 1051-86 (claiming that settlement class actions designed to resolve mass tort exposure cases suffer from self-interested and greedy lawyers). See generally Coffee, *supra* note 8, at 1367-84 (discussing the inherent problem of collusion in settlement class actions); Genine C. Swanzey, *Using Class Actions to Litigate Mass Torts: Is There Justice for the Individual?*, 11 GEO. J. LEGAL ETHICS 421-22 (1998) (addressing the special ethical problems class actions raise when dealing with mass tort litigation such as "conflicts of interest, astronomical attorneys' fees," and lack of communication between class members and their attorneys).

194. See Swanzey, *supra* note 193, at 429 (claiming that "collective justice is at odds with the traditional lawyer-client relationship" because it creates impermissible conflicts of interests between the attorney and the client).

under Rule 23(b) (1) (B) preclude consent and bind all knowing and unknowing plaintiffs.¹⁹⁵ As discussed *supra* Part III.B, depending on the outcome of insurance litigation with Continental and Pacific,¹⁹⁶ Fibreboard faced impending insolvency. This threat of inadequate funding for pending and future claims allowed the settlement class action to be filed as a “limited fund.”¹⁹⁷ Consequently, *Flanagan* eluded that which the Supreme Court stated was necessary for a settlement class action filed under Rule 23(b) (3), a predominance of an underlying issue over individual claims.¹⁹⁸ Nevertheless, *Flanagan* still must contend with Rule 23(a)’s requirement of adequate representation.¹⁹⁹

The argument concerning inadequate representation in *Flanagan* is two-fold. In *Flanagan*, plaintiffs’ counsel simultaneously represented both present claimants and future claimants, giving rise to the first assertion of inadequate representation.²⁰⁰ The general objection to simultaneous representation is that plaintiffs’ counsel may be tempted to negotiate settlement terms that compromise future claimants’ interests for the benefit of present claimants.²⁰¹

195. See FED. R. CIV. P. 23(b) (1) (B) and advisory committee notes.

196. See *supra* Part III.B (detailing the circumstances leading to the *Flanagan* settlement).

197. See *supra* Part III.B (explaining the “limited fund” concept).

198. The *Flanagan* settlement class action still needed to meet both the commonality and typicality requirements of Rule 23(a). See FED. R. CIV. P. 23(a). The class members’ interests in obtaining reasonable assurance of available funds, however, must be sufficient to meet the requirements of commonality and typicality under Rule 23(a). See *supra* note 174 and accompanying text (describing the common interests between the present and future claimants); see also Rice & Davis, *supra* note 2, at 140-45 (asserting that the future claimant class “shared a real and enormous risk concerning the insurance coverage dispute” and that the Fifth Circuit and district court complied with *Amchem* by focusing upon whether Rule 23(a)’s commonality requirement was present without taking into consideration settlement).

199. Interestingly, the Supreme Court in *Amchem* did not address the issue of whether plaintiffs’ counsel adequately represented the plaintiff class. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 n.20 (1997) (concluding that because common questions of law or fact did not predominate in this case and that the named plaintiffs did not adequately represent the interests of the whole class, there was no need to address the adequacy of counsel issue). The Supreme Court found that the class representatives did not represent the class interests adequately, as required under Rule 23(a). See *id.* at 624-26. Consequently, this finding precluded any inquiry as to the issue of “adequacy-of-counsel.” See *id.* at 626 n.20 (stating that the Court “discretely” declined to address “adequacy-of-counsel” issues). In *Flanagan*, however, the objection to adequate representation concerned only plaintiffs’ counsel and not the named representatives of the plaintiff class. See *Flanagan I*, 90 F.3d at 976 n.10 (noting that there was no challenge to the adequacy of representation of class representatives and declining to consider the issue).

200. See *Flanagan I*, 90 F.3d at 978-80 (discussing the alleged conflict of interest and finding that none existed).

201. See Menkel-Meadow, *supra* note 28, at 1198 (explaining that collusion arguments allege that a “sell out” of class members’ interests has occurred for the benefit of other parties, such as the attorneys or present claimants); see also Cabraser,

Objectors to *Flanagan* also argued that an “intraclass” conflict existed within the future claimants class itself.²⁰² The alleged conflict involved the “near futures,” who desired a settlement providing for uncapped damages, and the “far futures,” who wanted limitations placed on individual damage awards.²⁰³ The “near futures” preferred uncapped damages because the likelihood of Fibreboard’s insolvency appeared to be low at the time they would hope to collect their damages.²⁰⁴ Conversely, the “far futures” feared that by the time they were eligible to receive damages, Fibreboard’s resources would already have been depleted by the damage awards paid out to the “near futures.”²⁰⁵

The Fifth Circuit, after evaluating extensive testimony of expert witnesses, determined that plaintiffs’ counsel represented both present and future claimant classes vigorously.²⁰⁶ Moreover, the Fifth Circuit found that because Fibreboard’s insurance litigation outcome was uncertain it could not provide any assurance that funds would be available for any claimant.²⁰⁷ Specifically, if Fibreboard lost its insurance litigation, it would likely fight all claims made against them aggressively.²⁰⁸ This fight inevitably would result in lengthy and costly litigation, causing delayed recovery of compensation, if any, and increased attorney fees.²⁰⁹ Thus, the Fifth Circuit held that no “intraclass” conflict between “near futures” and “far futures” existed.²¹⁰

The Supreme Court in *Amchem* concluded that simultaneous representation of present and future claimants, as well as the

supra note 48, at 385 (noting that perhaps the real downfall of the *Amchem* settlement class action was the perception that “class members’ rights were traded away for the inventory plaintiffs’ benefit”).

202. *See Flanagan I*, 90 F.3d at 980-82 (discussing the alleged conflict between class members who currently had an asbestos-related illness and those whose illness was not expected to become apparent for many years).

203. *See id.* at 981 (discussing the argument that the “near futures” wanted no limits placed on damages and the “far futures” preferred limits to “conserve funds” so that resources would be available for them in the future).

204. *See id.*

205. *See id.*

206. *See id.* at 980 (noting that the record supports the district court’s finding that the class was “adequately represented”).

207. *See id.* at 981 (citing the lower court’s finding of the importance of avoiding “catastrophic results” which would result if Fibreboard lost its appeal in the coverage case).

208. *See id.* (speculating that Fibreboard “would live up to its pledge to actively defend any claims and delay any recovery”).

209. *See id.* (enumerating the problems claimants would face if Fibreboard actively defended against the claims at issue, such as delayed recovery and risk of attrition of available funds due to larger legal fees).

210. *See id.* at 982 (affirming the lower court’s finding of fact “that common interests within the class overwhelmed minimal conflicts”).

combination of a “sprawling” class, precluded a finding of adequate representation.²¹¹ Although counsel simultaneously represented both present claimants and future claimants in *Flanagan* as well, the Supreme Court should not de-certify the settlement class on this basis.²¹² Precautions taken by the Fifth Circuit ensured adequate representation for both present and future claimants throughout the *Flanagan* settlement negotiations.²¹³ In addition to the factual distinction from *Amchem*,²¹⁴ the *Flanagan* settlement class action also presented the best solution to all claimants’ need for compensation.²¹⁵

Several factors suggest that, despite simultaneous representation of both the present and future claimant classes, plaintiffs’ counsel represented the interests of all class members adequately. First, the settlement negotiations in *Flanagan* began because of the potential risk that Fibreboard would lose its insurance coverage case with Continental.²¹⁶ Loss of this insurance coverage would leave both present and future claimants with inadequate funding for their claims.²¹⁷ Present claimants would face drawn-out and expensive litigation and future claimants would face a depleted fund.²¹⁸ Thus, the settlement itself was a response to the *overall need* by the class members to secure sufficient compensation for their injuries and prevent delayed recovery.²¹⁹ In this context, the settlement class action presented a viable alternative to costly litigation. By focusing on the overall need of the class the Fifth Circuit realized that

211. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-26 (1997) (maintaining that “no settlement class called to our attention is as sprawling as this one” and concluding that the requirement of adequacy of representation was not satisfied).

212. See *Flanagan I*, 90 F.3d at 980 (agreeing with the district court which found that “at no time, did a material limitation on the representation of the class . . . exist due to concurrent representation of present and future claimants”).

213. See discussion *infra* notes 217-28 and accompanying text (discussing the actions taken by the court to ensure fair representation for both present and future claimants, including the appointment of a judge and a guardian ad litem to protect the interests at stake in the settlement process).

214. See *supra* Part III.C (comparing the *Flanagan* and *Amchem* settlements).

215. See Rice, *supra* note 26, at 5 (arguing that the *Flanagan* settlement agreement was fair to both the present and future claimants and asserting that absent a settlement, both groups of claimants faced the real possibility of recovering nothing).

216. See *supra* Part III.

217. See *Flanagan I*, 90 F.3d at 993 (declaring that the settlement was driven by the insurance litigation which would have been “catastrophic for whomever was on the losing side”).

218. See *id.*

219. See *id.* (asserting that under the settlement, the entire class benefits from the greater likelihood that funds will be available and distributed under a less complicated system).

individual interests needed to be suppressed²²⁰ so that maximum gain could be attained. This perspective reflects an equitable approach that allows “individuals . . . to enjoy their full measure of rights in an absolute, timely, and cost-effective fashion without impairing the similar rights and interests of others.”²²¹

Second, when Judge Parker appointed Judge Higgenbotham to oversee and facilitate the settlement negotiations,²²² his presence prevented the settlement negotiations from becoming an avenue for the attorneys’ self-interests.²²³ Judge Higgenbotham, as an objective party, also presented what is often lacking in individual litigation: a clear and continuous focus of the objectives, as well as a desire to use the most “just, speedy, and inexpensive”²²⁴ route necessary to meet such objectives. Consequently, Judge Higgenbotham’s presence also integrated the spirit of the FRCP.

Third, to supplement protection of the future claimants’ interests, the court appointed a law professor as guardian ad litem for the future claimant class.²²⁵ The professor’s sole responsibility was to guard and protect the interests of the futures class members by reviewing the terms of the settlement agreement.²²⁶ Therefore, the likelihood that plaintiffs’ counsel negotiated the present claimants’ interests to the detriment of future claimants’ interests is minimal.²²⁷

220. See Cabraser, *supra* note 48, at 381-82 (commenting that although some compromise of a party’s interests and a lack of individual control are often necessary in a class action context, this is typical in all types of litigation because there are always factors that contribute to the outcome of litigation that are beyond individual control).

221. *Id.* at 382 (noting that in the mass tort context, an equitable intercession is preferred).

222. See *Flanagan I*, 90 F.3d at 978. The appointment of Judge Higgenbotham occurred after Continental approached the settlement negotiations in March 1993. See *id.* Thus, Judge Higgenbotham was present throughout the core settlement negotiations process, which spanned from March 1993 until September 1993. See *id.* at 970-72 (outlining the settlement negotiation process).

223. See *Flanagan I*, 90 F.3d at 982 (stating that “negotiations . . . were often conducted under the auspices of Judge Higgenbotham”). Cf. Cabraser, *supra* note 48, at 378 (commenting that the *Amchem* decision frowns upon the use of Rule 23 and the settlement class action as a means for “instant gratification of self-interest” by attorneys seeking high contingency fees).

224. See FED. R. CIV. P. 1 (articulating the scope and purpose of the Federal Rules of Civil Procedure).

225. See *Flanagan I*, 90 F.3d at 972 (stating that the court appointed Professor Eric D. Green of the Boston University School of Law to serve as guardian ad litem for the class).

226. See *id.* (“Professor Green was directed to render a report to the court analyzing the fairness, reasonableness and adequacy of the settlement from the point of view of the members of the provisionally certified Global Health Claimant Class.”).

227. See *id.* at 979 (recounting the testimony of Professor Geoffrey Hazard, an experienced consultant in asbestos cases, who testified that during the April 1993 to August 9, 1993 negotiation period, plaintiffs’ counsel negotiated primarily for present claims to be settled and that because Continental offered potentially

Thus, the Fifth Circuit properly addressed the issue of adequate representation. The Fifth Circuit appointed an objective representative, Judge Higgenbotham, who protected the class members' overall interests.²²⁸ In addition, appointment of the guardian ad litem for the future claimant class ensured avocation of their interests.²²⁹ Therefore, the Fifth Circuit heeded the Court's warning in *Amchem* that adequate representation be provided "either in the terms of the settlement or in the structure of the negotiations."²³⁰

Nevertheless, the argument that *Flanagan's* circumstances mandated separate counsel representation for the future claimants and present claimants still exists.²³¹ Further division of the future claimants class into sub-classes, each with its own representative and counsel, to ensure adequate and fair representation as required by Rule 23(a), may also be necessary.²³² If, however, the Supreme Court concludes that the *Flanagan* future claimants class required sub-classes, then the Court should: (1) clearly delineate the requirement of sub-classes for all settlement class actions, regardless of its classification under Rule 23,²³³ (2) provide a detailed structure that will assist courts in deciding how many sub-classes are necessary and under what circumstances they are needed, and (3) remand the *Flanagan* case so that this new requirement can be met.

This approach still glosses over the realities of mass tort litigation and of the *Flanagan* case in particular.²³⁴ A peculiar aspect of the class action, and the settlement class action, is that it can offer greater

unlimited funds if Fibreboard won, future claimants were not competing for the same fund as the present claimants).

228. See *id.* at 978.

229. See *id.*

230. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627 (1997).

231. See *Ashman*, *supra* note 100, at 1 (suggesting that a class of future claimants should be further divided into sub-classes to obtain court's approval of the settlement class action after *Amchem*).

232. See *Aldock & Wyner*, *supra* note 4, at 905 (postulating that a "prudent reading" of the Supreme Court's decision in *Amchem* yields the potential requirement of sub-classes for all future global classes that contain both present and future claimants). *But see* *Cohen*, *supra* note 2, at 315-16 (positing that if a large number of sub-classes are required to obtain certification for the class, "the efficiencies of the class [action] device [may be] lost").

233. See *Aldock & Wyner*, *supra* note 4, at 905 (noting that with regards to the adequate representation requirement, the Court's decision in *Amchem* gave minimal guidance and its rationale lacked "articulat[ion]" of any meaningful standards).

234. See *id.* at 905 (noting that current mass tort litigation is plagued by: repeated and prolonged delays; high transaction costs; inconsistent and unsubstantiated verdicts; and the threat of defendant's future bankruptcy or insolvency leading to no assurances for future victims of the tort) (citing *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994)).

protection to the class members than individual litigation.²³⁵ This observation exposes the subtle irony of the arguments often made by opponents to the settlement class action regarding inadequate representation.²³⁶ Specifically, if a claim is litigated individually, no prerequisites or rules exist to ensure that a certain level of adequate representation is met.²³⁷ The plaintiff's attorney can easily negotiate a settlement with the defendant's attorney that is detrimental to the interests of the plaintiff.²³⁸ Other than vague professional and ethical guideposts, no representative or judge is actively looking out for the plaintiff's best interest.²³⁹ Thus, the settlement class action not only provides a viable alternative to litigation, but it also sets forth standards to ensure that proposed agreements are "fair, adequate and reasonable."²⁴⁰

B. Due Process Prong Two: Notice

This section addresses the second prong of due process: notice. If the Supreme Court finds that the *Flanagan* settlement class action meets the procedural requirements of Rule 23(a), which requires adequate representation, and of Rule 23(b) (1) (B), the "limited fund" category, then it may be forced to address an issue²⁴¹ it avoided in

235. See Cabraser, *supra* note 48, at 385 (arguing that class actions actually afford individual litigants greater protection and better representation because of the stringent requirements that the class action suit demands: notice of all the events occurring during litigation must be given to all class members; class representatives, who are not attorneys, "who act as watchdogs of their interests"; extensive judicial approval and evaluation as mandated by the procedures of a class action; regulated attorney fees; and the ability for class members to voice their concerns directly to the judge overseeing the proceedings); see also Mullenix, *supra* note 12, at 638 (evaluating the advisory committee's proposal of Rule 23(b) (4) to expressly provide a provision permitting settlement class actions and questioning opponents' efforts to defeat such proposal because it would deny plaintiffs of mass tort injuries "one of the few means for resolving these massive disputes" and "forego, on behalf of these citizens, an array of judicially required protections that simply are not available in other forms of litigation").

236. See Cabraser, *supra* note 48, at 385 (questioning "who checks for adequacy of representation or conflict" when a claim is settled outside of the class action context).

237. See Aldock & Wyner, *supra* note 4, at 905 (commenting that most mass tort claims brought by individuals settle and asserting that "[t]hroughout [this individualized] settlement process, there is a lack of the important structural protections for class members that [FRCP] Rule 23 guarantees in connection with settlement class actions").

238. See Mullenix, *supra* note 12, at 637 (arguing that in individual litigation, nothing prevents attorneys from "sell[ing] their clients down the river").

239. See *id.* at 638 (noting that many aspects of individual litigation can not come under judicial review).

240. See *id.* at 637-38 (listing all the judicial protections afforded to class action members to safeguard their interests that are often not provided in other forms of litigation).

241. The Supreme Court noted in *Amchem* that "[i]f certification issues were

Amchem.²⁴² whether notice is required in a “limited fund” action filed under Rule 23(b)(1)(B). Indeed, the Supreme Court’s cogent recognition in *Amchem* that notice is a serious issue in the settlement context further supports the proposition that it may be a central issue in *Flanagan*.²⁴³ If the Supreme Court addresses the notice issue, the *Flanagan* decision will overshadow *Amchem* because it will spell the future legitimacy of the settlement class action and potentially limit the judicial role in approving use of such device.²⁴⁴

The Supreme Court stated that unlike Rule 23(b)(3), Rules 23(b)(1) & (2) are aptly suited for “class action treatment.”²⁴⁵ Under Rules 23(b)(1) & (2), however, no provision explicitly grants the opportunity to opt out,²⁴⁶ which makes any notice to a class member unnecessary. This *res judicata* effect thereby implicitly raises the following issue: whether in the context of mass tort litigation

genuinely in doubt . . . the jurisdictional issues would loom larger” and therefore, insinuated that if a settlement class did meet certification requirements, then issues concerning notice and lack of actual case or controversy would be ripe for consideration. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 n.15 (1997).

242. The Supreme Court concluded that it did not have to address notice because it found that the settlement class could not be certified under the requirements of Rule 23(a) and Rule 23(b)(3). See *id.* at 628-29.

243. See *id.* (stating that although issue of notice did not have to be contended with in the present case, they recognized “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”); see also Rice & Davis, *supra* note 2, at 10 (noting that whether notice will be required for future claimant classes is a subject matter that was not addressed in *Amchem*).

244. Currently, only class actions that proceed under Rule 23(b)(3) require both notice and the opportunity to opt out. See FED. R. CIV. P. 23(c)(2) (describing the requirements imposed on Rule 23(b)(3) class action suits). Alternative categories of Rule 23, on the other hand, do not have to provide class members notice or an opportunity to opt out. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 n.3 (1985) (restricting its holding that notice is required to “those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgements”).

The Supreme Court has not addressed the notice issue in the class action context since its decision in *Shutts*. See Steven T. O. Cottreau, *The Due Process Right to Opt Out of Class Actions*, 73 N.Y.U. L. REV. 480, 480 (1998). In particular, the Supreme Court recently dismissed two cases, *Adams v. Robertson*, 520 U.S. 83 (1997) (*per curiam*), and *Ticor Title Insurance Co. v. Brown*, 511 U.S. 117 (1994) (*per curiam*), that would have forced it to decide when the right to notice and the right to opt out from a class must be given to class members. See Cottreau, *supra*, at 480 n.3 (dismissing because issue not properly presented to the court); *Ticor* (dismissing because issue was not ripe for consideration). Therefore, *Flanagan* represents the unique opportunity for the Supreme Court to clarify whether notice and opt out requirements are imposed on all of the Rule 23 class action categories, or just class actions that proceed under Rule 23(b)(3).

245. *Amchem*, 521 U.S. at 615.

246. See Cottreau, *supra* note 244, at 480 n.2 (defining the right to opt out as “the right to return a form and be excluded from both the benefits and the binding effect of the class litigation” and noting that class actions which do not grant the right to opt out are considered “mandatory”).

requiring predominantly monetary damages, notice should be required, regardless of the classification of the settlement class action.²⁴⁷

The question then becomes: how does one accomplish notice to those who have yet to discover their injuries? The logical conclusion is that any form of notice to an “unknowing” victim of a mass tort is inherently futile because such victim has yet to discover their injury and realize the significance of the notice.²⁴⁸ In addition, with respect to “knowing” future claimants, the opportunity to opt out does not increase the protection already afforded to them by requiring adequate representation throughout settlement negotiations.²⁴⁹

247. The Fifth Circuit classified the settlement class action under Rule 23(b)(1)(B), which does not require that notice be given to members of the class. *See Flanagan I*, 90 F.3d 963, 984 (5th Cir. 1996) (noting that the explicit language of Rule 23(b)(1)(B) supports the classification). *See id.* at 984 (noting that the explicit language of Rule 23(b)(1)(B) supports the classification); *see also Shutts*, 472 U.S. at 811 n.3 (excusing notice for class actions filed under Rule 23(b)(1)(B)). In doing so, the Fifth Circuit claimed that Rule 23(b)(1)(B) has always been an equitable provision that traces back to English common law and the bill of peace:

The traditional limited-fund class action is an equitable and unitary disposition of a fund too small to satisfy all claims. . . . Unitary adjudication of a limited fund is crucial because allowing plaintiffs to sue individually would make the litigation “an unseemly race to the courtroom door with monetary prizes for a few winners and worthless judgements for the rest.” . . . Thus, [limited fund actions] sound in equity even though the relief they provide necessarily affects the amount of money damages that claimants can ultimately receive.

Flanagan I, 90 F.3d at 986 (citations omitted).

The Fifth Circuit constructed its rationale concerning opt out and notice around the interpretation of *Shutts*, which confined its holding regarding personal jurisdiction and notice to certain class actions filed. *See Shutts*, 472 U.S. at 811 n.3; *see also supra* note 244 and accompanying text. The Court in *Shutts* stated: “[w]e intimate no view concerning other types of class actions, such as those seeking equitable relief.” *Shutts*, 472 U.S. at 811. Thus, the Court declined to answer the dispositive issue of whether notice is required in mandatory class actions that involve claimants seeking largely monetary damages.

As more lawyers and courts try to contend with the expounding issues and problems raised by mass tort litigation, use of mandatory non-opt out settlement class actions to resolve litigation involving predominantly monetary damages may be a popular alternative after *Amchem*. *See* Coffee, *supra* note 125, at B4 (noting that the different standards between Rule 23(b)(1)(B) and Rule 23(b)(3) class actions provide strong incentives for future settlement class actions to proceed under the “mandatory” class action categories and avoid *Amchem*). Consequently, the pressure on the Supreme Court to resolve this complicated issue is rising. *See* Linda S. Mullenix, *Getting to Shutts*, 46 U. KAN. L. REV. 727, 741 (1998) (reviewing the Court’s decision in *Shutts* and subsequent circumvention of the notice issue and commenting that “[o]ddly, the *Shutts* problem has now been transformed into an entirely different problem of simply getting to *Shutts*”).

248. *See* Cramton, *supra* note 5, at 835 (noting that those who have yet to suffer a cognizable injury will not appreciate notice of a class action suit, regardless of which method of notice is used).

249. *See* Green, *supra* note 12, at 1797-98 (arguing that other means exist, such as fairness hearings and appointment of a guardian ad litem, to ensure the interests of class members are protected). *But see* Cottreau, *supra* note 244, at 518 n.152

Consequently, requiring notice in a “limited fund” action serves no legitimate purpose.

Moreover, the objective of a Rule 23(b)(1)(B) class is to ensure its binding effect on all future claimants. Permitting future claimants the option to opt out of a settlement class action creates the precise problem the “limited fund” is designed to avoid—a race to the courthouse to compete for monetary and punitive damages that could drive a corporation into insolvency, thereby leaving other future claimants with no recourse.²⁵⁰ Thus, although the Supreme Court should clarify notice requirements for settlement class actions filed under Rule 23(b)(3), it should not impose notice requirements upon the equitable categories of Rule 23.

The argument that without imposition of a notice requirement, *Flanagan*-like settlement class actions will become a widespread reality is likewise unfounded.²⁵¹ Few defendants can argue impending insolvency legitimately, which would be a necessary prerequisite to certification under Rule 23(b)(1)(B) as “limited fund.”²⁵² *Flanagan*

(asserting that the right to opt out, and hence the right to notice, provides protective measures against “erroneous deprivation”); *cf. id.* at 500 n.85 (citing Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 IND. L.J. 597, 602-05 (1986-1987), noting that in situations where it is not feasible to adjudicate a representative’s claim without also adjudicating all other claimants’ claims, the adequate representation requirement is sufficient to guarantee due process).

250. See Cabraser, *supra* note 48, at 382 (insinuating that equity demands that the judicial system prevent the abhorrent effects of seemingly endless mass tort litigation that ultimately results in future claimants foregoing compensation for their injuries and dooming corporations to exile because of impending insolvency); see also Cohen, *supra* note 2, at 302 (stipulating that the precise reason for seeking certification under Rule 23(b)(1)(B) as a limited fund is to control the conflict between present claimants desiring “larger and earlier shares of available money” and future claimants wanting to preserve limited funds). But see Cottreau, *supra* note 244, at 481 (claiming that “[t]he unfairness of many mandatory class actions demands a robust right to opt out”); *cf.* Swanzey, *supra* note 193, at 424, 434 (acknowledging the conflict between present and future claimants for monetary damages from a limited fund, but concluding that Rule 23 is an inappropriate mechanism to resolve such conflicts because it trades personal justice for judicial economy).

251. See Rice, *supra* note 26, at 5 (noting petitioner’s arguments that *Flanagan* “will become a road map for future settlement class actions,” but acknowledging that the “unique, factual setting” of *Flanagan* undermines that fear). But see *Flanagan I*, 90 F.3d 963, 994 (5th Cir. 1996) (Smith, J., dissenting) (claiming that the outcome of *Flanagan* carries significant weight and will allegedly provide the impetus for other financially troubled companies to file similarly-structured global settlements to avoid bankruptcy and resolve all future claims); *cf.* Richard B. Schmitt, *The Deal Makers: Some Firms Embrace the Widely Dreaded Class-Action Lawsuit*, WALL ST. J., July 18, 1996, at A1 (discussing how companies are using class action suits as a tool for settling all future claims and thus eliminating the time and expense of individual suits).

252. See Rice, *supra* note 26, at 5 (claiming *Flanagan* will not have a large impact in the settlement class action area of law); see also Coffee, *supra* note 125, at B4 (recognizing that after *Amchem* future defendants will try to argue insolvency in order to be classified under Rule 23(b)(1)(B), but noting the difficulties of making a credible argument).

presented a unique factual setting that potentially precluded compensation for victims if Fibreboard did not secure insurance coverage for the claims.²⁵³ For *Flanagan* to become a “role-model,” future defendants would need to replicate the threatening insurance litigation, as well as the poor financial condition that Fibreboard found itself facing.²⁵⁴ Rather, the constitution of a “limited fund” itself will be a crucial issue liable to generate much debate and controversy.²⁵⁵ Therefore, even though notice and the opportunity to opt out may be necessary for settlement class actions filed under Rule 23(b)(3), the Supreme Court should not extend the notice requirement to other provisions of Rule 23.

C. *Legal Ethics, Professional Responsibilities, and Collusion*

Outside of due process concerns relating to adequate representation and notice, settlement class actions also raise perplexing issues relating to legal ethics and the professional responsibilities of a lawyer.²⁵⁶ The class action device first gained popularity among the plaintiffs’ bar as a way of pressuring defendants to approach the settlement table.²⁵⁷ Recently, however, the defendants’ bar has attempted to use the class action device to facilitate settlement in a variety of cases spanning the spectrum from product liability to mass torts.²⁵⁸

253. See *supra* Part III.

254. See *supra* notes 249, 250 and accompanying text.

255. See Cohen, *supra* note 2, at 316 (predicting that there will be future battles over what comprises a limited fund, asserting that “no defendant has truly ‘unlimited’ funds to resolve any litigation”).

256. See, e.g., Menkel-Meadow, *supra* note 28, at 1188 (noting that class action suits give rise to conflict of interest problems because of the large number of plaintiffs represented by one lawyer); Sofia Adroque, *Mass Tort Class Actions in the New Millennium*, 17 REV. LITIG. 427, 451 (1998) (listing the ethical issues that may be triggered by class action suits); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 481 (1994) (discussing how the attorney/client bond is non-existent in mass tort litigation).

257. See Ross F. Bass, Jr. & John W. Robinson, III, *The Metamorphosis of Mass Tort Class Actions: A Fifth Circuit Perspective*, 17 MISS. C. L. REV. 207, 207-08 (1997) (comparing the initial use of the class action device as solely the plaintiffs’ device to pressure defendants to settle the class to the present use of the class action device by defendants to achieve global resolution and finality to all outstanding claims or suits filed against them).

258. See, e.g., *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir.) (anti-hemophilic blood products), *cert. denied*, 516 U.S. 867 (1995); *In re Northern District of Calif. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982) (contraception medical device), *cert. denied*, 459 U.S. 1171 (1983); *Walker v. Liggett Group, Inc.*, 175 F.R.D. 226 (S.D. W. Va. 1997) (smoking-related health claims); *Castano v. American Tobacco Co.*, 160 F.R.D. 544 (E.D. La. 1995) (nicotine levels in cigarettes), *rev’d*, 84 F.3d 734 (5th Cir. 1996); *In re General Motors Corp. Pickup Truck Fuel Tank Prods. Liab. Litig.*, 846 F. Supp. 330 (E.D. Pa. 1993) (defective fuel tanks), *vacated and remanded*, 55 F.3d 768 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995).

This recent, innovative use of settlement class actions by the defendants' bar has met with intense criticism.²⁵⁹ Critics accuse defendants' counsel of using settlement class actions to seek umbrella protection from expansive lawsuits involving mass tort claims.²⁶⁰ These same critics also accuse plaintiffs' counsel of using settlement class actions to generate healthy attorney fees and dispense with time-consuming claims.²⁶¹ Finally, objectors to settlement class actions argue that simultaneous representation of both present and future claimants creates a conflict of interest that prevents lawyers from adhering to the professional responsibilities owed to their clients.²⁶²

A factor that leads to such accusations is the collusive²⁶³ appearance of settlement proposals. For example, in *Flanagan* the defendants' counsel approached plaintiffs' counsel with a global settlement proposal to resolve both inventory and future claims.²⁶⁴ The attempted settlement negotiations were tedious. Progress moved slowly from April 1993 until July 1993.²⁶⁵ Finally, in August 1993, both parties reached an agreement and in September 1993, the settlement class action commenced.²⁶⁶ Despite the skill and expertise of plaintiffs' class counsel and the intensive negotiations that spanned more than five months, objectors complained that the global settlement was a non-adversarial sell-out of the future claimants.²⁶⁷

259. See Bass & Robinson, *supra* note 257, at 213-14 (discussing criticisms of settlement class actions).

260. See Lamberth, *supra* note 18, at 150 (claiming that defendant corporations use settlement class actions to limit their liability and eliminate the nuisance of ongoing litigation).

261. See *id.* at 157-58 (asserting that plaintiffs' counsel abuses settlement class actions to settle inventory claims and increase their fees).

262. Thus, the arguments involving simultaneous representation and adequate representation are also pertinent in the discussion of legal ethics and professional responsibilities. See *supra* Part IV.C.

263. Collusion is defined as:

[a]n agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law. *It implies the existence of fraud of some kind, the employment of fraudulent means, or of lawful means for the accomplishment of an unlawful purpose.* A secret combination, conspiracy or concert action between two or more persons for fraudulent or deceitful purpose.

Adroque, *supra* note 256, at 456 (quoting *Georgine v. Amchem Products, Inc.*, 157 F.R.D. 246, 331 (E.D. Pa. 1994)).

264. See *Flanagan I*, 90 F.3d 963, 969 (5th Cir. 1996) (noting that Fibreboard first approached plaintiffs' counsel to discuss a possible global settlement in 1990 and 1991, which ultimately proved unfruitful).

265. See *id.* at 970-71.

266. See *id.* at 972.

267. See *id.* at 994 (Smith, J., dissenting) (accusing the global settlement reached between plaintiffs' and defendants' counsel as a means to achieve "profit at the expense of absent class members" and "an affront to the integrity of the judicial system"). At least one commentator disagrees, however, arguing that no basis exists for claims of collusion where plaintiffs' class counsel are

Many of the objections to the *Flanagan* settlement class action reflect the arguments sketched above concerning legal ethics and professional responsibilities.²⁶⁸

The critics overlook that the settlement class action relieves defendants of the continual threat of repetitive and costly litigation.²⁶⁹ Thus, the class action, although certified for settlement purposes rather than for litigation, continues to provide meaningful leverage to the plaintiff class.²⁷⁰ In addition, factors such as the fairness hearing,²⁷¹ the appointment of a guardian ad litem,²⁷² and objectors themselves²⁷³ further preserve the adversarial nature of the settlement negotiations.²⁷⁴ Finally, plaintiffs' counsel, although approached by

likely to be the most experienced, knowledgeable, and passionate advocates for the class[,] . . . tend[ing] to be the lawyers who . . . "made" the class by taking on the individual cases early when they were immature, investing their time and effort in risky matters, and developing the evidence and law that enables the class to be mature enough to be in a position to settle the action.

Green, *supra* note 12, at 1795.

268. See *supra* note 256 (outlining the ethical arguments proffered by critics of class action suits).

269. See Green, *supra* note 12, at 1794 (arguing that settlement class actions provide powerful leverage to the plaintiff class because they relieve defendants of "multiple repetitive individual actions over many years").

Professor Coffee argues that plaintiffs' counsel cannot effectively use the threat of a class action trial as leverage during settlement negotiations because the class is "provisionally certified 'for settlement only'" but not for actual litigation. See John C. Coffee, Jr., *Summary, The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851, 854 (1995). This argument is no longer valid after *Amchem*, where the Supreme Court stated that full effect must be given to all the requirements laid out by Rule 23(a) and 23(b) even when a class is seeking certification for purposes of settlement. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997). Thus, the possibility that plaintiffs' counsel can litigate the class action suit is still viable because all the requisite requirements of Rule 23 have been met. See Coffee, *supra*, at 857.

270. See Green, *supra* note 12, at 1794-95 (asserting that settlement class actions' value as a leverage mechanism for the plaintiffs class does not rely exclusively on whether it is "triable").

271. Under Rule 23(e), judges assess the fairness of the settlement to the parties involved. See FED. R. CIV. P. 23(e) (requiring court approval for dismissal or compromise). Rule 23(e) does not delineate clear standards, however, leaving the judges to depend upon jurisprudence that disfavors bargaining. See Menkel-Meadow, *supra* note 28, at 1168-69 (discussing courts' reliance on jurisprudence and ethics codes).

272. See Green, *supra* note 12, at 1796-97 (discussing factors that lessen the possibility of collusion between defendants and plaintiffs' counsel).

273. See *id.*

274. It is important to note that negotiations between plaintiffs' and defendants' counsel typically occur before the settlement class action is filed. Therefore, these factors do not address the possibility that defendants have "picked" plaintiffs' counsel. Rather, they help to ensure the terms and structure of the negotiated settlement are fair to all class members. See Coffee, *supra* note 269, at 853 (discussing effects of defendants choosing plaintiffs' attorneys).

Another issue that runs alongside ethical concerns is that settlement class actions may violate Article III's requirement of an actual case or controversy. See U.S. CONST. art. III, § 2 (extending judicial authority over cases and controversies). For the

defendants' counsel to negotiate a settlement, must still contend with other attorneys seeking resolution of clients' claims. The free-market competition among the plaintiffs' bar to represent a global class of mass tort claimants also works to lower what would otherwise be higher attorney fees.²⁷⁵

The controversy surrounding legal ethics and their juxtaposition with settlement class actions is substantially a result of the individual-oriented view of the judicial system. Current legal institutions and ethical rules submit that individuals have the right to a jury trial, vigorous representation by their lawyers, and meaningful control over litigation of their claims.²⁷⁶ This individualistic premise of litigation,²⁷⁷ however, neglects to consider the evolution of the class action as a legal response to changing cultural and judicial needs involving multiple litigants, especially in the mass tort context.²⁷⁸ The current ethical and professional requirements that mandate or favor client autonomy in settlement class actions²⁷⁹ have the potential adverse

argument concerning lack of an actual case or controversy under Article III, see Mullenix, *supra* note 12, at 635, 636 n.96, quoting Professor Eric D. Green, guardian ad litem for the future claimant class in *Flanagan*, who states poignantly:

The second objection by the law teachers opposing the proposed [Rule 23(b)(4)] amendment[, which would expressly permit settlement class actions] is based on Article III "case or controversy" concerns when a class action is simultaneously certified and settled. This is, of course, a potentially serious issue in the abstract However, in all the cases in which I have been involved, there is no way in which any moderately objective observer could doubt the existence of a concrete dispute with all the requisite adverseness. Settlement does not eliminate the existence of a dispute between the parties. All it means is that they have tentatively worked out a way to resolve the dispute short of a fully adjudicated judgment, appeal and post-judgment skirmishes. To argue that the existence of a class action settlement destroys Article III jurisdiction overproves the contention to a point of dangerous absurdity that would have profound negative consequences far beyond the class action context.

Id. at 636 n.96.

275. See Edley & Weiler, *supra* note 1, at 406 (discussing how plaintiffs' class counsel is deterred from generating fees that are too high even if they are "freely-negotiated" because "members of the private bar [may be] prepared to bid with smaller percentage rates for the right to represent asbestos victims").

276. See Menkel-Meadow, *supra* note 28, at 1220 (suggesting that current paradigms guaranteeing a jury trial or solid communication with a lawyer no longer work and that innovative means are necessary to enable adequate process and compensation for people harmed in mass torts).

277. See YEAZELL, *supra* note 10, at 14 (arguing that group litigation must be approached as a caveat to the traditional "individualistic ethos" that pervades society).

278. See Cabraser, *supra* note 48, at 380 (asserting that it is well known that "[i]n a mass tort context, individuals have, as a matter of economic and institutional reality, little control over individual destinies").

279. Moreover, client autonomy is protected adequately by the due process protection afforded by Rule 23(a), which requires adequate representation. See Menkel-Meadow, *supra* note 28, at 1192 (stating that the judicial system has approached the ethical issues involved in a settlement class action by focusing upon

effect of harming the very persons they aim to protect.²⁸⁰

For example, a mass tort normally involves a large number of victims.²⁸¹ This mass infliction of harm causes at least thousands of identical claims to flood the judicial system.²⁸² A vast majority of these claims will settle because of delayed judicial response and high costs, not to mention the difficult causation and medical issues involved with litigating a mass tort claim.²⁸³ Settlement of the claim itself, however, is wholly dependent on whether the defendant is still solvent and able to compensate the injured victim.²⁸⁴ In effect, individual litigation in the mass tort context operates as a lottery.²⁸⁵ As the class action evolved to meet the needs of mass tort victims in the form of settlement class actions, so must the ethical rules and professional responsibilities that govern lawyers.²⁸⁶

To respond adequately to ethical problems raised by settlement class actions in the mass tort context, the Supreme Court must look beyond traditional ethical and professional responsibilities placed on lawyers in the arena of individual litigation.²⁸⁷ For example, the Model Code²⁸⁸ and the Model Rules of Professional Conduct²⁸⁹

adequate representation, thereby evading issues like client consent).

280. See Green, *supra* note 12, at 1795 (arguing that denouncing the use of settlement class actions on the basis of ethical concerns will hurt mass tort victims the most because it will “depriv[e] them of the best vehicle to obtain the largest net recovery”).

281. See Cabraser, *supra* note 48, at 381 (discussing the legal system’s limitations when dealing with victims of mass torts).

282. See *id.* (contrasting mass tort actions with those arising from “one-on-one” incidents).

283. See *id.* (stating that “[t]he individual trial of every tort claim in the mass tort context is not only statistically unlikely, but also logistically impossible” due to a number of interrelated factors).

284. See *id.* (discussing actions in which asbestos manufacturers filed for bankruptcy).

285. See *id.* (describing the judicial system as a lottery where the right to litigate a claim individually is “best expressed in Clint Eastwood’s ominous question ‘Do you feel lucky?’”); see also Menkel-Meadow, *supra* note 28, at 1171 n.44 (“Our legal system has privileged the ‘first come, first served’ rule in many contexts: first to the courthouse, first to record the deed, first to file a security interest, first to convert the property to use, etc.”); Rice & Davis, *supra* note 2, at 140 (asserting that individual litigation of a claim should be the prevalent method through which to resolve mass tort claims, and arguing that “[t]he only party that suffers . . . is the individual claimant who is out of work on disability, without adequate insurance, and facing rising medical costs, and who happens to be behind 5,000 previously filed cases”).

286. See Menkel-Meadow, *supra* note 28, at 1161 (recognizing that “[i]f living in a mass society means we produce mass harms and the need for ‘mass compensation’” then the need for “mass justice” exists as well).

287. See David Hricik, *The 1998 Mass Tort Symposium: Legal Ethical Issues at the Cutting Edge of Substantive and Procedural Law*, 17 REV. LITIG. 419, 419 (1998) (summarizing the academic view that current legal ethics rules are not applicable to “the mass action paradigm”); cf. Menkel-Meadow, *supra* note 28, at 1161 (positing that the current rules regulating ethics may need to be re-crafted).

288. See generally MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981).

preceded the majority of mass tort cases present in the judicial system today.²⁹⁰ No consideration was given to the “mass action paradigm”²⁹¹ when these rules were drafted.²⁹² Forced application of these ethical and professional rules in the mass tort context consequently is ineffective, and perhaps even detrimental.²⁹³

When evaluating counsels’ ethical and professional obligations to the class members, the Supreme Court should focus on expediting a victim’s claim in a just, fair and inexpensive manner. This perspective suggests that the Supreme Court relinquish the “individualistic ethos”²⁹⁴ view,²⁹⁵ and instead, consider larger public policy considerations and construct a legal response that addresses “the social, economic, and political needs of the community at large.”²⁹⁶

CONCLUSION: IMPACT OF SUPREME COURT’S *ORTIZ V. FIBREBOARD*
DECISION AND RECOMMENDATIONS

The Supreme Court must take an active role in resolving the

289. See generally MODEL RULES OF PROFESSIONAL CONDUCT (1983).

290. See Hricik, *supra* note 287, at 419-20 (summarizing observations that mass tort actions were not considered when the ethical rules were drafted).

291. See *id.*; see also Menkel-Meadow, *supra* note 28, at 1168-69 n.35 (noting that during drafting negotiations of the Model Rules of Professional Conduct, efforts to create ethical guidelines and disciplinary actions for lawyers involved in negotiations or settlements were defeated).

292. See Menkel-Meadow, *supra* note 28, at 1172 (suggesting that mass tort actions raise unique ethical issues distinct from those arising in the individual representation situations on which current ethical rules are based).

293. See Hricik, *supra* note 287, at 420 (suggesting that the efficacy of certain ethical rules diminishes when applied in the mass tort context).

294. YEAZELL, *supra* note 10, at 14.

295. See Menkel-Meadow, *supra* note 28, at 1161 n.5 (stating that the United States’ justice system “adhere[s] to the rhetoric and beliefs of a system based on individual justice values”).

296. See Hricik, *supra* note 287, at 422 n.10 (quoting Kenneth R. Feinberg, *Lawyering in Mass Torts*, 97 COLUM. L. REV. 2177, 2177 (1997)). Although no current resolution to the ethical problems posed by settlement class actions in the mass tort context exists, many commentators and legal scholars have proffered possible solutions that require a flexible approach to existing ethical rules and models of professional conduct. See, e.g., Adroque, *supra* note 256, at 451 (discussing various commentators’ views on ethical issues arising in complex mass tort litigation); Coffee, *supra* note 269, at 857 (recommending reform including reducing caseloads of the federal courts); Green, *supra* note 12, at 1793-94 (discussing due process and constitutional concerns); Hricik, *supra* note 287, at 419 (summarizing symposium participants’ views and concluding that “the ethical issues arising under the unique circumstances that accompany mass tort litigation at best results in incomplete and unsatisfactory solutions, and at worst creates actual barriers to substantive justice”); Menkel-Meadow, *supra* note 28, at 1219 (highlighting the need for “substantive, procedural, and ethical solutions”). See generally Charles W. Wolfram, *Mass Torts—Messy Ethics*, 80 CORNELL L. REV. 1228, 1234-35 (1995) (analyzing various recommendations for reform and suggesting that more control by class action claimants and defendants, rather than lawyers, may be an alternate solution).

current crisis surrounding mass tort litigation.²⁹⁷ Extensive debate exists over whether the judicial system or legislation should provide the solution to this crisis.²⁹⁸ Despite strong insinuations by the Supreme Court,²⁹⁹ however, Congress has chosen not to act³⁰⁰ on what is coined as “the godparent of mass tort litigation today,”³⁰¹ namely claims involving asbestos exposure. Thus, the resolution of the growing number of mass tort claims currently rests upon the shoulders of the judicial system. The Supreme Court should seize the chance in *Ortiz v. Fibreboard* to develop the use of settlement class actions as an alternative to individual litigation of a mass tort claim.³⁰²

Because the Supreme Court in *Amchem* failed to address either notice or ethical issues involved in settlement class actions,³⁰³ subsequent settlement class actions provide limited guidance. Moreover, the applicability of the *Amchem* decision concerning adequate representation potentially is limited to those suits filed under Rule 23(b)(3).³⁰⁴ Thus, the *Ortiz* decision also presents an opportunity for the Court to clarify the guidelines and procedures for using settlement class actions in the context of mass torts.

The Supreme Court should affirm the Fifth Circuit’s holding in *Flanagan* that approved the settlement class action. First, the

297. See *Access, Equity and Finality of Adjudication—The Role of Class Actions in our Civil Justice System: Oversight Hearing Before the Subcomm. on Courts and Intellectual Property of the Senate Comm. on the Judiciary*, 105th Cong. (Mar. 5, 1998), available in 1998 WL 278332 (testimony of Elizabeth J. Cabraser) (advocating that federal courts should have a central and active role in the use and application of class actions in mass tort litigation).

298. The issues concerning legislative versus judicial response are too great to address adequately within the scope of this Comment. Nevertheless, this issue is mentioned in recognition that to preserve the settlement class action, the Supreme Court must view itself as an activist in social and political change, much as it did throughout the civil rights era. See *supra* note 189 and accompanying text (discussing various arguments against using settlement class actions in the mass tort context).

299. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 629 (1997) (noting the sensibility of providing an administrative compensation procedure to handle mass tort claims, but stating that “Congress, however, has not adopted such a solution”).

300. See Menkel-Meadow, *supra* note 28, at 1184-85 (arguing that Congress has forced the judicial system to use settlement class actions to address the mass tort litigation crisis by virtue of their inaction).

301. Cohen, *supra* note 2, at 277; see also Menkel-Meadow, *supra* note 28, at 1172 n.48 (noting the irony that persons criticize judicial activism in the mass tort context—an area where no legislative action has been taken).

302. See Cohen, *supra* note 2, at 274-75 (describing several critical points in the battle with mass tort litigation, such as: the *Amchem* decision, the “tobacco settlement” and related legislation, and the National Bankruptcy Review Commission’s recommendation to Congress to amend the Bankruptcy Code to provide mechanisms to explicitly handle mass tort liability).

303. See *supra* Part IV.B-C (discussing the notice aspect of the due process analysis, as well as ethical issues and responsibilities).

304. See *supra* Part II.C (analyzing *Amchem* and its significance in the settlement class action context).

Flanagan settlement provides for adequate representation of the plaintiff class.³⁰⁵ Second, the settlement class action is filed as a “limited fund,” an equitable classification,³⁰⁶ and therefore, no notice is required.³⁰⁷ Third, the possibility of collusion between defendants’ and plaintiffs’ counsel is minimal in *Flanagan* because of certain precautions taken by the Fifth Circuit.³⁰⁸ Finally, the Supreme Court should remain cognizant of the judicial need for an effective solution to the problems raised by mass tort litigation.³⁰⁹ This requires the Supreme Court to establish clear procedural guidelines that ensure injured victims of mass torts receive compensation for their claims in a fair and efficient manner. The Court’s proposal must preserve the settlement class action as a viable, realistic, and affordable alternative to costly and inefficient litigation, especially in the face of legislative inaction. In short, the Supreme Court should remain loyal to the equitable principles that gave rise to the settlement class action³¹⁰ and realize that “[e]quity, the foundation of the American class action, does not permit any litigant to be priced out of access to civil justice.”³¹¹

305. See *supra* Part IV.A (addressing the adequate representation aspect of the due process analysis).

306. See Bass & Robinson, *supra* note 257, at 221 (describing that class actions filed under Rule 23(b)(1)(B) are grounded in equity and commonly involve future claimants who do not yet know of their injuries).

307. See YEAZELL, *supra* note 10, at 13-14 (noting that “courts have declined to hold that the individual citizen has the right of notice and hearing in regard to legislative or executive action that affects large numbers of people”); see also *supra* Part IV.B (discussing the notice prong of the due process analysis).

308. See *supra* Part IV.C (analyzing the appearance of collusion in settlement proposals and various ethical issues).

309. See *supra* note 189 and accompanying text (addressing arguments against using settlement class actions in the mass tort context).

310. See *supra* Part I.A-C (tracing the historical development of the class action).

311. Cabraser, *supra* note 48, at 378.