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# LIFE AFTER AMCHEM: THE CLASS STRUGGLE CONTINUES

*Elizabeth J. Cabraser\**

## I. INTRODUCTION

And so the much dreaded and anticipated *Amchem*<sup>1</sup> decision has come, and that settlement is gone—at least for now—living only in the vigorous dissenting opinion of Justice Breyer.<sup>2</sup> The Third Circuit and the Supreme Court have interceded to spare the “unselfconscious and amorphous legions” of asbestos victims and their families<sup>3</sup> the indignity to their legal due process rights that might have accompanied the prospect for monetary compensation in their lifetimes offered by the \$1 billion-plus settlement. The champions of due process rejoice, as do those lawyers with large inventories of asbestos claims whose proprietary interests in the serial filing, trying, and settling of “their” clients’ claims *ad infinitum*—or at least until bankruptcy—remains unimpaired. Those of us who regularly advocate the rights of victims of dangerously defective products and human-made environmental catastrophes, but who were not involved in asbestos litigation in general or the *Amchem* settlement in particular, are disentangling the mixed messages of *Amchem* and teasing out the threads that must serve as lifelines to the just and timely compensation of those we serve in other cases. We look for messages of

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1. *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997), *aff'g* *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996).

2. Justice Breyer, with whom Justice Stevens joined, concurred in part and dissented in part. *See id.* at 2252-58 (Breyer and Stevens, JJ. concurring in part and dissenting in part). The dissent agreed “with the Court’s basic holding that ‘settlement is relevant to a class certification,’” but criticized the majority’s rejection of the settlement at issue. *Id.* at 2252 (Breyer & Stevens, JJ., concurring in part and dissenting in part).

3. *See id.* at 2252.

hope, for evidence of principled pragmatism, and for loyalty to the historical equitable precepts that were embodied in the first federal codification of class action procedures, Federal Equity Rule 38, and remain embedded in its successor, Rule 23 of the Federal Rules of Civil Procedure.

Aside from the substance of the deal, the settlement procedure utilized in *Amchem* was also highly unusual, and at the time perhaps unique. In most cases involving classes certified for settlement, actions were originally brought as class actions for litigation and trial. Class-related discovery has been conducted, and some or all of the class certification-related briefing has been concluded. Defendants who would feel compelled to continue opposing class certification for trial at the district and appellate levels then agree to the certification of the class for settlement. Ultimately, the case settles after substantial litigation but before the formal class certification decision is made. Appellate courts have widely used and approved of this procedure.<sup>4</sup>

Despite the advance buildup of the *Amchem* decision, in a very real sense, and as the decision itself implicitly acknowledges, the decision is limited to the case before it. The settlement featured a unique and unacceptable combination of future claimants with future claims,<sup>5</sup> potentially inadequate funding,<sup>6</sup> insufficient representation of theoretically divergent interests,<sup>7</sup> potential intra-class conflicts,<sup>8</sup> and a class perceived as receiving inferior benefits to those negotiated by the settling plaintiffs' counsel for their "inventory" of individual clients.<sup>9</sup> Appellate judicial displeasure with these features not only made disapproval inevitable, but also limited the breadth and applicability of the *Amchem* decision. The Third Circuit's central and most far-reaching holding, that a settlement class must equal a trial class in every respect, was rejected by the Supreme Court.<sup>10</sup> This re-

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4. For examples, see cases collected in HERBERT B. NEWBERG & ALBA CONTE, 2 NEWBERG ON CLASS ACTIONS §§ 11.27-11.28 (3d ed. 1992 & Cum. Supp. 1997). In *Amchem*, by contrast, "[t]he class action . . . was not intended to be litigated. Rather, within the space of a single day . . . the settling parties . . . presented to the District Court a complaint, an answer, a proposed settlement agreement, and a joint motion for conditional class certification." *Amchem*, 117 S. Ct. at 2239.

5. See *id.* at 2252.

6. See *id.* at 2251.

7. See *id.* at 2250-51.

8. See *id.* at 2251.

9. See *id.* at 2241.

10. See *id.* at 2248.

jection, however, resulted not in a reversal, but in an affirmance of the Third Circuit's decision because the Third Circuit's disdain for the settlement saved it. The Court affirmed the Third Circuit precisely because it *did* view the challenged certification of the class in the context of the merits of the settlement that gave it birth. The Court wrote that "the Court of Appeals in fact did not ignore the settlement; instead, that court homed [sic] in on settlement terms in explaining why it found the absentees' interests inadequately represented. The Third Circuit's close inspection of the settlement in that regard was altogether proper."<sup>11</sup>

Justice Breyer criticized the majority's preference for the Third Circuit's conclusions over the district court's "more than 300 findings of fact reached after five weeks of comprehensive hearings."<sup>12</sup> Breyer stated,

I do not believe that we should in effect set aside the findings of the District Court. That court is far more familiar with the issues and litigants than is a court of appeals or are we, and therefore has "broad power and discretion . . . with respect to matters involving the certification" of class actions.<sup>13</sup>

This view is a refreshing contrast to recent appellate decisions, including the Third Circuit's *Amchem* decision, *Georgine v. Amchem Products, Inc.*,<sup>14</sup> the Fifth Circuit's *Castano v. American Tobacco Co.*,<sup>15</sup> and the Seventh Circuit's *In re Rhone-Poulenc Rorer, Inc.*<sup>16</sup> These decisions appear to reconstruct the record to suit the intended outcome. Moreover, they disregard the broad discretion afforded trial courts under Rule 23, as well as the inherently conditional nature of class related rulings. Further, rather than remanding those matters for corrective procedures or serving as findings, these decisions declare the categorical impossibility of class treatment in those cases.

Such decisions have had a demonstrable chilling effect on the willingness of trial courts to exercise the broad discretion that was formerly—and is still formally—theirs. The decisions have also had a

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11. *Id.* (citation omitted).

12. *Id.* at 2253 (Breyer & Stevens, JJ., concurring in part and dissenting in part).

13. *Id.* (Breyer & Stevens, JJ., concurring in part and dissenting in part) (citations omitted).

14. 83 F.3d 610 (3d Cir. 1996).

15. 84 F.3d 734 (5th Cir. 1996).

16. 51 F.3d 1293 (7th Cir. 1995).

deleterious effect on class actions bearing little factual or legal resemblance to either *Rhone-Poulenc* or *Castano*. The Breyer dissent should give heart to judges who wonder whether any class is still certifiable. As this Essay discusses, the *Amchem* majority opinion has something for them, too.

In a sense, the *Amchem* Supreme Court decision was a non-event. Those who sought to enforce their own nostalgia for the non-existent halcyon days of "every man has his day in court" were disappointed that *Amchem* did not smite down either class action settlements or settlement class actions. Indeed, with the finesse of diplomacy, the *Amchem* decision masked with gentle language of modification what was actually a reversal of the Third Circuit's central holding.<sup>17</sup> It is now established that a class certified for purposes of settlement must meet the class certification criteria of Rule 23 in ways different than those of a class certified for trial.<sup>18</sup> The settlement class, as a district mechanism, retains legitimacy in its own right, with useful guidelines from the Supreme Court for application by practitioners and courts in future settlements.<sup>19</sup> Of course, those who were proponents of the innovative settlement in the *Amchem* litigation were also cruelly disappointed by the palpable distaste for the circumstances of the settlement that is evident in the majority opinion's description of its circumstances.<sup>20</sup> They were even more cruelly disappointed by the outcome: the rejection of the *Amchem* settle-

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17. Justice Ginsburg, writing for the majority, stated the following:

The Third Circuit's opinion stated that each of the requirements of Rule 23(a) and (b)(3) "must be satisfied without taking into account the settlement." That statement, petitioners urge, is incorrect.

We agree with petitioners to this limited extent: settlement is relevant to a class certification. The Third Circuit's opinion bears modification in that respect.

117 S. Ct. at 2248 (citation omitted).

18. *See id.*

19. *See id.* at 2248-52.

20. Justice Ginsburg, writing for the majority, stated:

Settlement talks . . . concentrated on devising an administrative scheme for disposition of asbestos claims not yet in litigation. In these negotiations, counsel for masses of inventory plaintiffs endeavored to represent the interests of the anticipated future claimants, although those lawyers then had no attorney-client relationship with such claimants . . . . After settling the inventory claims, CCR [consortium of 20 former asbestos manufacturers-defendants], together with the plaintiffs' lawyers CCR had approached, launched this case, exclusively involving persons outside the MDL Panel's province—plaintiffs without already pending lawsuits.

*Id.* at 2239.

ment and its sister settlement, *Ahearn*,<sup>21</sup> which was vacated and remanded for further consideration in light of *Amchem*.<sup>22</sup>

So while those involved on both sides of the debate in the *Amchem* settlement may view it as through a dark glass, and while those least familiar with the *Amchem* decision itself, or the events and decisions that preceded it, may don rose-colored glasses to proclaim that all class action settlements must die, the true import of *Amchem* is at once less obvious, more diffuse, and more hopeful. It is best perceived, to the extent that true perception is possible at this early date, through Lucy's kaleidoscope eyes.<sup>23</sup> The meaning of *Amchem* is elusive. Each must seek and find it on her own. Perhaps through exercise of willful optimism, but with an undeniable basis in the language of the opinion itself, I find that *Amchem* not only permits class actions to live but is fundamentally life-affirming.<sup>24</sup> There is not only life, but newly invigorated life, for class actions after *Amchem*.

Admittedly, *Amchem*'s immediate effects have been largely negative from the perspective of plaintiffs' advocates. Without meaning to do so, the opinion seems to have stymied, at least temporarily, the Federal Rules Advisory Committee's efforts to codify separate criteria for settlement-purposes classes in a new Rule 23(b)(4).<sup>25</sup> While *Amchem*, by its very terms, advocates the continued—and perhaps expanded—use of class actions in securities, anti-trust, and consumer class actions, some courts have seized upon the *Amchem* decision, or more accurately, the media coverage and legal commentary that depicted the decision as a blow to class actions, as an added excuse, or even a mandate, to deny class certification.<sup>26</sup>

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21. See *Flanagan v. Ahearn*, 117 S. Ct. 2503 (1997) (mem.), *vacating and remanding In re Asbestos Litig.*, 90 F.3d 963 (5th Cir.), *reh'g denied*, 101 F.3d 368 (5th Cir. 1996).

22. See *Ahearn*, 117 S. Ct. at 2503.

23. The author is *not* advocating drug use as an aid to interpretation of Supreme Court decisions. She and her many contemporaries at the bar and on the bench are entitled to the metaphors of their youth. In deference to those older—and wiser—who recall the late 1960s with a residual sense of disapprobation, I offer a more venerable colloquialism as an alternative title for this essay: "*Amchem*: 23 Skidoo?"

24. I use this term, advisedly, to curry favor with the readership in the state of Southern California. The term is not in common usage in the North—with Marin County constituting a notable exception.

25. See *Amchem*, 117 S. Ct. at 2247.

26. See, e.g., *Ford v. Murphy Oil U.S.A., Inc.*, No. 96-2913, 1997 WL 559888 (La. Sept. 9, 1997) (reversing lower court's class certification of plaintiffs who suffered property damage and personal injury as a result of noxious emissions from defendant's petrochemical plants, citing *Amchem* as the main reason for

Hopefully, this effect will be short-lived. We should expect that the long-term impact of *Amchem* will be essentially favorable to those class actions that pit individuals of average means against modern corporations in cases involving claims too small to litigate feasibly on a case-by-case basis. This description not only covers most securities fraud, consumer fraud, and antitrust class actions, as *Amchem* itself acknowledged,<sup>27</sup> but it also describes most mass torts—even those for personal injury or wrongful death. Equity, the foundation of the American class action, does not permit any litigant to be priced out of access to civil justice.

Thus, *Amchem* has lasting significance, I believe, in three respects, which are the focus of the remainder of this Essay. First, *Amchem* reinvokes the equitable principles inherent in each class action, as these have evolved in American law. Second, *Amchem* insists upon due process for class members and judicial assurance of their rights to adequate representation, and implicitly condemns those who exploit the class action procedure, not as a pragmatic means to a just end, but as the instant gratification of self-interest. Finally, in conjunction with Supreme Court action in other recent contexts,<sup>28</sup> *Amchem* has not only granted explicit approval but also implicit endorsement to the migration of state law-based class actions from the federal to the state courts for certification, trial, and settlement.

This migration has in large part been one of necessity, as federal courts have denied certification or decertified classes that in earlier practice would have gone forward in the federal system. Under our federalism, there is no litigation vacuum; these cases have moved to state court. To condemn either this move or the state courts that will certify classes is often an exercise in mere chauvinism. On the basis of my experience in the federal and state systems, I believe that the

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reversal):

27. "Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." *Amchem* 117 S. Ct. at 2250.

28. See, e.g., *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873 (1996) (affirming the jurisdiction of state courts to resolve nationwide class claims, including federal securities fraud claims that could have been litigated only in the federal courts). In a surprising sequel, the Ninth Circuit, on remand, has held that the Supreme Court did not dispositively establish the full faith and credit due the state court judgment. The majority held that the order approving the settlement was subject to collateral attack for failure of the state court to make findings of adequacy or representation. See *Epstein v. MCA, Inc.*, 1997 U.S. App. LEXIS 29678 (9th Cir. Oct. 22, 1997); see also *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (upholding the propriety of nationwide class certification by state courts in the Rule 23(b)(3) context if due process—notice, opportunity to be heard, and the right to opt out—was preserved).

state courts are often the equal of federal courts in their ability to fairly and efficiently manage, try, and resolve complex class action litigation.

## II. THE PRIMACY OF EQUITY

As *Amchem* reminds us, modern Rule 23—operative throughout the federal court system, and adopted by most states—has its deepest roots in English equity practice.<sup>29</sup> Equity as implemented under the class action rules, however, has evolved to embody three distinct, and distinctly American principles: (1) efficiency and economy in judicial administration; (2) universal access to civil justice; and (3) empowerment of small claimants to achieve equality between humans and corporate entities.<sup>30</sup> The Court invokes and affirms each of these principles in the *Amchem* decision as the class action's continuing mandate. As *Amchem* reminds us:

[T]he Advisory Committee had dominantly in mind vindication of "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all."

The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries to something worth someone's (usually an attor-

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29. See, e.g., *How v. Tenants of Broomsgrove*, 1 Vern. 22, 23 Eng. Rep. 277 (1681); JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS AND OTHER MULTIPARTY DEVICES* 125-26 (hereinafter "INDIVIDUAL JUSTICE"); Stephen C. Yeazell, *From Group Litigation to Class Action, Part II: Interest, Class, and Representation*, 27 UCLA L. REV. 1067, 1067 (1980).

30. As Judge Weinstein summarizes the evolution of equity principles in mass tort jurisprudence,

[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.

INDIVIDUAL JUSTICE, at 125.



ney's) labor.<sup>31</sup>

Courts tempted to invoke *Amchem* to justify the denial of certification or the decertification of nationwide classes would be well advised to heed the passages quoted above. They call for the continued use of the class action mechanism to fulfill its core purposes. It is self-evident that claimants in such cases cannot, will not, and should not be expected to initiate or pursue individual litigation as a prerequisite to relief. The existence of the class action rule and its grounding in equity means they need not do so. They are entitled to the representative prosecution of their claims and the courts' protection of their interests.

But after these principled declarations, the *Amchem* decision seems to go awry in analyzing the prospective personal injury/wrongful death claims whose class-wide compromise was before it, as if the claimants themselves could, and thus should, assert their claims individually. For many years, courts and commentators have been stating the obvious: In a mass tort context, individuals have, as a matter of economic and institutional reality, little control over their individual destinies. This is not the fault of class actions but is a product of limited individual and institutional resonances and is exacerbated when class actions are not employed.<sup>32</sup>

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31. *Amchem*, 117 S. Ct. at 2246 (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

32. See, e.g., Hon. Spencer Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323 (1983). Judge Williams, whose comprehensive, *sua sponte* class certification decision in the Dalkon Shield IUD litigation was reversed by the Ninth Circuit in *In re Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983), was ultimately vindicated, thirteen years later, by the Ninth Circuit's decision in *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996), which held "that the law of this circuit, and more specifically our leading decision in *Dalkon Shield*, does not create any absolute bar to the certification of a multi-state plaintiff class action in the medical products liability context." *Id.* at 1230. The Ninth Circuit focused on the sufficiency of the trial court's formal findings on certification criteria:

We decline to hold, at least at this early stage of the litigation, that there can never be a plaintiff class certification in this particular case. We do hold, however, on the basis of the record before us, that we must vacate this class certification order, because there has been no demonstration of how this class satisfies important Rule 23 requirements, including the predominance of common issues over individual issues and the superiority of class adjudication over other litigation alternatives.

*Id.* So, too, did the *Amchem* decision acknowledge that "the text of [Rule 23] does not categorically exclude mass tort cases from class certification," and recognized that "[e]ven mass tort cases arising from a common cause or disaster may, depending upon the circumstances, satisfy the predominance requirement." *Amchem*, 117 S. Ct. at 2250. Thus, while predominance and superiority in the

The right to an individual jury trial on each personal injury or wrongful death claim is a noble idea and against those who would deny any individual access to the courts, it must be defended at all costs. But most individuals do not, and cannot, seek such access to the courts, regardless of the merits or the economic value of their claims. The inexorable law of relativity is at work. In a tort claim arising from a one-on-one incident such as an auto accident or a slip-and-fall, the monetary value of a personal injury or wrongful death claim may make the expense of hiring experts, conducting an investigation, and outlasting an insurance-funded defense attractive to an experienced plaintiffs' lawyer. Nonetheless, there are not hundreds, thousands, or even millions of identical claims threatening to inundate the local court system. The system has developed ways to manage, try, and resolve the routine accident and other tort claims that are filed in a typical year. Notwithstanding the circumstances that make the jury trial of each such claim possible, most of these claims settle. While most such cases are brought and settled as individual suits, few tort litigants demand or achieve their individual days in court.

The individual trial of every tort claim in the mass tort context is not only statistically unlikely but also logistically impossible. Certainly, some victims of mass torts will be lucky and will proceed to judgment or settlement in advance of their less fortunate peers, for reasons having little or nothing to do with the relative merits of their claims. Yet how can a supposedly absolute right to an individual jury trial be granted to the few and denied to the many, without placing the entire civil justice system in disrepute? Despite our noble sentiments, this right is best expressed in Clint Eastwood's ominous question, "Do you feel lucky?" For instance, in the asbestos litigation, the decades-long prelude to *Amchem* and *Ahearn*, the ability to reach trial or settlement before manufacturers plunged into bankruptcy or the court system grounded to a complete halt depended upon the random variable of luck. That is, the system deteriorated into a lottery,<sup>33</sup> and most litigants—plaintiffs and defendants alike—were indeed unlucky. Such a disaster was precisely what the class action was

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mass tort/product liability context must be irrefutably shown and scrupulously found, class treatment of multi-state and nationwide tort claims remains both possible and proper.

33. See *Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505 (E.D. Tex. 1995) (commenting on the "lottery effects" often seen in asbestos litigation, in which a seriously ill claimant may recover little, while a far less seriously ill claimant hits the jackpot).

designed to avoid.

If individuals cannot enjoy their full measure of rights in an absolute, timely, and cost-effective fashion without impairing the similar rights and interests of others, equity must intercede to fairly apportion the opportunity for adjudication and the assets available for compensation. This may require "mandatory" class certification under the Federal Rule of Civil Procedure 23(b)(1)(B).<sup>34</sup> Class treatment may compromise, in the absolutist sense, the rights of class members to control their own destinies. As is all too frequently the case, however, the destiny of a lawsuit is placed beyond the individuals' control by the sheer number of claims arising from the sale of a mass-produced product and the overwhelming magnitude of the aggregate monetary value of such claims in relationship to the assets and insurance available to satisfy them, particularly if the defendants desire to stay in business.

Whether all mass tort litigation should be allowed—or even encouraged—to exhaust the litigants and the system until the endgame is reached, could be debated endlessly. Often, upon conclusion of a case, claimants have foregone any reasonable chance of compensation while defendants are punished with corporate extinction or insolvency. It is the duty of equity to prevent such outcomes. This duty was recognized in *Coburn v. 4-R Corporation*,<sup>35</sup> where the court stated that "[i]n no event . . . should . . . litigation become an unseemly race to the courtroom door with monetary prizes for a few winners and worthless judgments for the rest."<sup>36</sup>

And thus we come to the central paradox of *Amchem*. While noting that the "opt-out" Rule 23(b)(3) procedure used in the settlement before it was a modern departure from the equitable proce-

34. See *Amchem*, 117 S. Ct. at 2245. The Ninth Circuit summarized this concept:

It is conceivable of course, that the claims of named plaintiffs would be so large that if the action were to proceed as an individual action the decision "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." This would be the case where the claims of all plaintiffs exceeded the assets of the defendant and hence to allow any group of individuals to be fully compensated would impair the rights of those not in court.

*Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1340 n.9 (9th Cir. 1976) (quoting FED. R. CIV. P. 23(b)(1)(B)) (emphasis added). Portions of the Dalkon Shield IUD Litigation were resolved in precisely this way. See *In re A.H. Robins Co.*, 880 F.2d 709, 741 (4th Cir. 1989), cert. denied, 493 U.S. 959 (1989).

35. 77 F.R.D. 43 (E.D. Ky. 1977).

36. *Id.* at 45.

dures available under the earlier incarnations of the Rule, the *Amchem* Court also knew and articulated the practical differences between a trial class and a settlement class: while manageability for trial was not relevant, the requirement of adequate representation demanded stricter scrutiny in the settlement context.<sup>37</sup> Adequacy of representation is the touchstone of due process in equity's direct descendants—the “mandatory” classes certified in cases seeking primarily injunctive, declaratory, or other equitable relief, and in cases like *Coburn*, those involving “a limited fund.”

Despite the presence of the Rule 23(b)(3) opt-out right as a safety valve for those dissatisfied with their representation by the plaintiffs and attorneys who were the settlement's proponents and the ability of dissatisfied class members to pursue their own destinies, adequacy became the stumbling block of the *Amchem* settlement. Had the Court approved that settlement, no opt-out right would exist, and arguably, no right to notice at all. Also, the Supreme Court's *Amchem* decision acknowledges that there would not be any predominance or superiority requirements to meet. There are hints in both the Supreme Court and Third Circuit decisions that an analogous decision brought under the “mandatory” provision of the Rule might survive.<sup>38</sup> However, it is unlikely that the settlement's resort to the “pure equity” provisions of Rule 23(b)(1) would have saved it, although the procedural legitimacy of the settlement would have been questioned less. Whether it was stillborn or simply nagged to death, the *Amchem* settlement was doomed because the appellate courts disdained the ethically controversial context in which the deal was made. Indeed, as noted above, the Third Circuit's rejection of the particulars of the settlement saved that court from outright reversal, despite the Supreme Court's rejection of the Third Circuit's central holding that a class proposed for settlement purposes must meet Rule 23 criteria as if it were intended to proceed to trial.

The majority's dissatisfaction with the settlement is palpable throughout the opinion; the Third Circuit was equally merciless on the merits. Both decisions attempt to focus their discussions on the settlement's purported straying beyond the boundaries of Rule 23.

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37. See *Amchem*, 117 S. Ct. at 2248.

38. *Amchem*'s sister settlement, the *Ahearn* settlement, was indeed such a mandatory settlement. Whether this procedural distinction will save it, however, remains to be seen, as the action is again before the Fifth Circuit. See *Flanagan v. Ahearn*, 90 F.3d 963 (5th Cir.), *reh'g denied*, 101 F.3d 368 (5th Cir. 1996), *vacated and remanded*, 117 S. Ct. 2503 (1997).

The *Amchem* settlement was criticized incessantly by academics and lawyers from the date of its preliminary approval through the date of its ultimate demise. While unquestionably unique, the settlement became the centerpiece of discussion in a hundred seminars on mass tort class actions. It was the high-profile exception that would test—and in the hopes of some, revoke—the Rule.

With the possible exception of *Amchem's* sister, *Ahearn*, no other deal has been negotiated or approved under the same circumstances. Because the *Amchem* settlement was a bold departure from conventional settlement practice, the appellate decisions disapproving it should pose no threat to mass tort class action jurisprudence. Indeed, despite the pall which some perceived the Supreme Court's *Amchem* decision has cast upon the role of the class action in organizing, managing, structuring for trial, and resolving nationwide claims arising from defective products and consumer frauds, the language of *Amchem* itself reasserts the vital role of class actions in our modern consumer society.

While stopping short of embroidering "a mass tort is a class tort" on my underwear, I believe that more often than not, class membership offers better prospects for fair treatment and reasonable compensation than "traditional" aggregation regardless of the severity of the injury or the magnitude of the claim. As the *Amchem* decision's discussion of the asbestos litigation demonstrates, the alternatives for most mass tort claimants are not class membership or individual representation. The choice, if any, is between being part of a lawyer's "inventory" or part of a class. All things considered, I would rather be in a class. Attorneys' fees are lower and are directly regulated by the court. On this point alone, class membership can mean the difference between a forty percent contingent fee and a fifteen to twenty percent court-awarded fee.

In class actions, courts enforce the economies of scale: transaction costs are lower and more of every dollar paid by defendants translates directly into plaintiffs' recovery. In the main, entrepreneurial attorneys who gather large inventories of plaintiffs do not pass the savings to their clients. If clients do not receive truly individualized treatment by their attorney, they should not be required to pay for it. In class actions, courts not only regulate costs and attorneys' fees, but also regulate the conduct of attorneys and, again as demonstrated by *Amchem*, scrupulously guard the interests of class members. Sometimes, as Justice Breyer pointed out, this philosophy taken to the extreme defeats its practical purpose, and the best tri-

umphs over the good. Nonetheless, in most instances, a mass tort victim will be better served by the combination of economy, efficiency, court scrutiny, and enforced standards that class actions alone possess.

Ironically, class membership may afford *more* individual treatment than does individual representation. Class members receive notice of reports concerning important events in the litigation. Class members have representative plaintiffs who are like themselves and who act as watchdogs of their interests. Class members' claims cannot be settled, released, or dismissed without court review and approval. Class members' lawyers cannot be paid more than a reasonable fee under all the circumstances. Class members can come to court without counsel to comment and object. "Individually represented" inventory plaintiffs should be so lucky.

There is something inherently appealing in the traditional model of an individual client whose unique interests are zealously protected by a dedicated advocate. But much to the favor of defendants, this tradition does little to empower plaintiffs in a mass tort setting. Moreover, in the typical "opt-out" class action, those who wish to have such representation have a right to it. In fact, they may choose among: (1) class memberships with representation by class counsel, (2) class membership with representation by counsel of their own choosing, or (3) exclusion from the class for pursuit of their individual claims.<sup>39</sup> If the courts view *Amchem* as a license to deny class treatment, mass tort victims will be deprived of this choice, and we might as well declare defendants the winners at the outset of each litigation, regardless of the merits.

Ultimately, the *Amchem* settlement failed because of judicial concern for the interests of the class members, perception of intra-class conflict, and inadequate representation.<sup>40</sup> But who checks for adequacy of representation or conflict among the units in a plaintiff lawyers' inventory? Traditional aggregation disenfranchises claimants who have no direct recourse to the court and whose representation occurs largely beyond judicial control. The subtext of *Amchem* is that the settlement was disapproved not because it was packaged as a class action, but because, in the view of the courts, the class members' rights were traded away for the inventory plaintiffs' benefit. It would be a shame if *Amchem*, decided upon the best principles

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39. See FED. R. CIV. P. 23(b)(3), (c)(2).

40. See *Amchem*, 117 S. Ct. at 2251-52.

of class representation, were applied to deprive mass tort victims of the opportunity for class membership.

### III. STATE COURTS: THE HEIRS OF EQUITY

Unfortunately for those in the federal judiciary and those who practice in the federal courts, state courts will increasingly take the leading role in fulfilling *Amchem's* equitable precepts. Perhaps *Amchem* itself, properly understood and applied, will reverse this trend and restore to the federal courts the confidence and courage needed to exercise their inherent equitable jurisdiction to bring judicial access and fair compensation to those unselfconscious and amorphous legions whom the hyper-technical, rule-bound, and inequitable interpretation of the class action rule has consigned to litigation by lottery.

It is no secret that class actions—formerly the province of federal diversity jurisdiction—are being brought increasingly in the state courts. Class actions, including those nationwide in scope, are increasingly being tried and settled in these courts. Many academic commentators have lamented this trend, and some federal courts have disregarded or disparaged the certification decisions of their state court brethren.

There has, however, been an abdication by some federal courts of their rightful leadership in the struggle toward the full realization of the goals of civil justice.<sup>41</sup> The judicial escapism exhibited by courts that avoid the management challenges of nationwide class certification by invoking purported predominant variations in state law while ignoring or misstating the substance of state law,<sup>42</sup> or who

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41. The federal courts do continue to have their judicial champions. As Judge Weinstein declared,

I do not believe that the federal and other courts . . . should retreat from their post-World War II role of protecting the injured individual and offering a forum to vindicate economic, political, social, and medical rights. More justice for more people should be our goal—not less justice for ever fewer people. Nevertheless, I cannot agree with those who would have the courts attempt to treat mass tort cases on a one-by-one basis, as though they were two-car accidents.

INDIVIDUAL JUSTICE, *supra* note 29, at 127.

42. For example, recent federal decisions recited the purported need for proof of reliance to justify the non-certification of fraud claims, despite the long-established case law that “reliance”—or, more correctly, the causation element of fraud—may be proved by circumstantial evidence and does not require individual testimony as a matter of law. *See, e.g., Hunter v. McKenzie*, 197 Cal. 176 (1925). *Hunter* and many other state cases have long since resolved the issues of privity and reliance that are the resort of judges desiring a principled basis upon which to justify denial of class treatment. These cases did so in a manner fully consistent with class treatment and classwide proof. On privity, the *Hunter* court

consign persons of small means to a deadly war of attrition and deny them class treatment so that the "traditional" methods of thousands of individual trials might somehow yield a definitive outcome,<sup>43</sup> drives many litigants to state courts for relief. Additionally, there is an entirely justified preference for state courts as class certification courts of first resort since these are courts of general, not limited, jurisdiction and must address the issues.

Most states have incorporated Rule 23, often verbatim, into their codes or rules of civil procedure. Moreover, many states predated the federal system in their invocation of equity jurisprudence to certify class actions. State court experience with class actions can be traced, as in the federal courts, to the development of American equity doctrines in the nineteenth century, and state courts are often at the forefront of adapting these principles to modern needs. Indeed, it could be fairly said that the state courts have remembered, with greater fidelity, the equitable precepts of efficiency, access, empowerment, and economy recently invoked by *Amchem*, which some federal courts have readily forgotten.

The codification of the equity class action occurred in many states before Federal Rule 23, or its precursor, Equity Rule 38, was in existence. These equity statutes typically borrowed from equity jurisprudence and codified the fundamental principles to apply the

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stated the following:

While some connection, of course, direct or indirect, between the party charged with making the false representations and the party relying thereon must be shown, it is not essential, however, in support of a cause of action for damages resulting from false representations that the false representations be shown to have been made directly to the party claiming to have relied upon them.

*Id.* at 185 (citation omitted). On reliance, the court wrote that:

[I]t was not essential to a [misrepresentation] cause of action . . . to produce direct evidence that [plaintiff] relied upon such false representations. The fact of reliance upon alleged false representations may be inferred from the circumstances attending the transaction which oftentimes afford much stronger and more satisfactory evidence of the inducement . . . than . . . direct testimony to the same effect. We are satisfied that it may be fairly inferred from the evidence concerning the nature of the transaction . . . the relation of the parties, and the circumstances surrounding the entire transaction . . . .

*Id.* at 185-86 (citations omitted).

43. See, e.g., *Castano v. American Tobacco Co.*, 84 F.3d 734, 752 (5th Cir. 1996). The Fifth Circuit decertified the nationwide tobacco addiction class, stating that "[T]raditional ways of proceeding reflect far more than habit. They reflect the very culture of the jury trial . . . . The collective wisdom of individual juries is necessary before this court commits the fate of an entire industry or, indeed, the fate of a class of millions, to a single jury." *Id.* at 752 (quoting *In re Fibreboard Corp.*, 893 F.2d 706, 711 (5th Cir. 1990)).



class action to suits in both law and equity.<sup>44</sup> The state courts were again in the forefront in matters of consumer justice. The rights of consumers to compensation for unfair business practices, false advertising, and dangerous, misrepresented, or overpriced products was accompanied by the recognition of products liability law<sup>45</sup> and by a growing judicial recognition that such rights were meaningless if economic barriers prevented litigants from pursuing their claims. The class action mechanism was invoked to prevent mass producers and mass advertisers from cheating the many, a little at a time. The California Supreme Court landmark decision in *Vasquez v. Superior Court*<sup>46</sup> is illustrative of this movement.

Protection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society . . . . The alternatives of multiple liti-

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44. In England, the class action doctrine, a seventeenth century invention, was restated and shaped in a series of equity decisions, notably those of Lord Eldon in the early nineteenth century. See Stephen C. Yeazell, *From Group Litigation to Class Action, Part I: The Industrialization of Group Litigation*, 27 UCLA L. REV. 514, 548-52 (1980); see also INDIVIDUAL JUSTICE, *supra* note 29, at 548. In the United States, Justice Story formulated the American equitable doctrine of the representative suit based upon the English case law. See Scott D. Miller, Note, *Certification of Defendant Classes Under Rule 23(b)(2)*, 84 COLUM. L. REV. 1371, 1381 (1984). The class suit was adopted by many of the states in their Field Codes and related codification movements of the late nineteenth century. These state code provisions simply restated the formulations of English case law to provide that "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." CAL. CIV. PROC. CODE § 382 (West 1973). Federal Equity Rule 38 later used virtually identical language: "[W]hen the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

45. "[T]he classic [state] cases of products liability law that propelled the law toward tort and away from contract . . . were grounded, in part, on the courts' keen awareness of advertising's growing power over consumer decisionmaking." Note, *Harnessing Madison Avenue: Advertising and Products Liability Theory*, 107 HARV. L. REV. 895, 895 (1994). These cases, including *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944), and *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960), observed that consumers of mass-produced and mass-marketed goods and services must rely on the representations made and impressions created by modern advertising. Consumers have been "lulled" by manufacturer-provided advertising and marketing devices and "[u]nder modern conditions the ordinary layman, on responding to the importuning of colorful advertising, has neither the opportunity nor the capacity to inspect or to determine the fitness of [a product] for use." *Henningsen*, 161 A.2d at 83.

46. 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971).

gation (joinder, intervention, consolidation, the test case) do not sufficiently protect the consumer's rights because these devices "presuppose 'a group of economically powerful parties who are obviously able and willing to take care of their own interests individually through individual suits or individual decisions about joinder or intervention.'"

Frequently numerous consumers are exposed to the same dubious practice by the same seller so that proof of the prevalence of the practice as to one consumer would provide proof for all. Individual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefit of its wrongful conduct. A class action by consumers produces several salutary byproducts, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curbing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims. The benefit to the parties and the courts would, in many circumstances, be substantial.<sup>47</sup>

By contrast, lamented *Vasquez*,

[i]f each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all. This result is not only unfortunate in the particular case, but it will operate seriously to impair the deterrent effect of the sanctions which underlie much contemporary law.<sup>48</sup>

*Vasquez* was followed by a series of California decisions that certified or mandated the certification of statewide and nationwide classes in cases of consumer fraud, unfair business practices, and product liability.<sup>49</sup>

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47. *Id.* at 808, 484 P.2d at 968-69, 94 Cal. Rptr. at 800-01 (citation omitted).

48. *Id.* at 807, 484 P.2d at 968, 94 Cal. Rptr. at 800.

49. *See, e.g., Sindell v. Abbott Lab.*, 26 Cal. 3d 588, 611-12, 607 P.2d 924, 937, 163 Cal. Rptr. 132, 145 (1980) (establishing doctrine of market share liability in DES tort claimants' class action); *Clothesrigger, Inc. v. GTE Corp.*, 191 Cal.

California was not alone. Other states demonstrated a sophisticated understanding of the historical underpinnings, equitable principles, and modern application of the class action mechanism. For example, in *Wood River Area Development Corporation v. Germania Federal Savings and Loan Assoc'n*,<sup>50</sup> the Illinois Court of Appeals drew direct parallels between the original groups whose rights were adjudicated in English equity practice, "rural tenants and landlords, and parishioners and parsons," and the masses of average Americans who depend on them today: "No 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."<sup>51</sup>

Most recently, Judge Ramos of the New York State Supreme Court invoked these principles in the certification of five classes of New York smokers against the major tobacco companies on consumer fraud claims. In so doing, he reminded us that

[t]he purpose of the class action is to provide "a means of inducing socially and ethically responsible behavior on the part of large and wealthy institutions. Without the benefit of the class action, these institutions could act with impunity . . . since, realistically speaking, our legal system inhibits the bringing of suits based upon small claims."<sup>52</sup>

Thus, state courts recognized early—and have steadfastly remembered—what the federal courts appear frequently to forget: that modern society increasingly pits mortal humans of limited means against large corporations of multi-national influence and perpetual existence. Unassisted by procedures that allow individuals to effectively aggregate their claims and try to resolve common issues in a unitary fashion, the battle remains fatally unequal. Justice cannot result from unequal access to the mechanisms of justice. Justice cannot result from procedures that are priced beyond the reach of individuals. Justice—including the right to an individual jury trial—is a cruel

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App. 3d 605, 609-10, 236 Cal. Rptr. 605, 606 (1987) (seeking damages and injunctive relief for fraud, negligent misrepresentation, and unfair business practices in long distance telephone overcharges); *Anthony v. General Motors Corp.*, 33 Cal. App. 3d 699, 702, 109 Cal. Rptr. 254, 255-56 (1973) (seeking injunctive relief for truck wheel product liability).

50. 555 N.E.2d 1150 (Ill. App. 1990).

51. *Id.* at 1152.

52. Memorandum Disposing of Pending Class Certification Motions at 15, *Zito v. The American Tobacco Co.* (N.Y. Oct. 28, 1997) (Index No. 110949/96) (quoting *Pruitt v. Rockefeller Ctr. Properties Inc.*, 574 N.Y.S. 672 (N.Y. App. Div. 1991) (on file with *Loyola of Los Angeles Law Review*).

joke to those who will be worn down and worn out, in pocketbook and in spirit, by the endless pitched battles of a war of attrition funded by corporate defendants who can afford to spend millions for a defense and not a penny for compensation.<sup>53</sup>

Why am I talking about consumer law in a mass tort symposium? Because we are all consumers. The products that injure us, as well as the products whose virtues are misrepresented, or for which we are overcharged, are predominantly mass-produced, mass-marketed, and fungible. This is true in the area of pharmaceutical and medical devices, the two main arenas in which the controversies of mass tort litigation—with the notable exception of the asbestos disaster—have been waged. We no longer take a prescription devised by our family doctor to the local druggist who concocts and dispenses it. The medical devices with which we are implanted are no longer the custom-designed, handcrafted prostheses of the polio era. Drugs are mass-marketed not just to doctors, but directly to the public in full-page advertisements that run in *People*, *Time*, and other general interest magazines. Direct advertising of mass-produced pharmaceuticals may soon make the “learned intermediary” doctrine obsolete.<sup>54</sup> Over 18 million prescriptions for the popular “Fen-Phen” diet drug combination were written in 1996.<sup>55</sup> Between one and two million American women have been implanted with mass-produced breast implants.<sup>56</sup> When one size is touted as fitting all, and all are urged to become one size, it is little wonder that the first juncture at which

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53. Of course, the federal courts were far from silent on this topic. Over 55 years ago, the Seventh Circuit held that

[t]o permit the defendants to contest liability with each claimant in a single, separate suit, would, in many cases give defendants an advantage which would be almost equivalent to closing the door of justice to all small claimants. This is what we think the class suit practice was to prevent.

*Weeks v. Bareco Oil Co.*, 125 F.2d 84, 90 (7th Cir. 1941).

54. The “learned intermediary” doctrine provides that a drug manufacturer is relieved of tort liability if adequate warning of the potential hazards of the product is given to the physician. See Jeffrey E. Grell, *Restatement (Third) of Torts, Section 8(D): Back to the Future of the Learned Intermediary Doctrine*, 19 *HAMLIN L. REV.* 349 (1996).

55. See Jane E. Brody, *Obesity Drugs: Weighing the Risks to Health Against the Small Victories*, N.Y. TIMES, Sept. 3, 1997, at C1; *Fen-Phen Study Sparks Concern: Experts Address Some of the More Common Questions*, ORANGE COUNTY REG., July 16, 1997, at E1.

56. See John Schwartz, *Breast Implants Require Later Surgery, Study Finds; Follow-up Procedures Reported for Limited Problems*, WASH. POST, Mar. 6, 1996, at A3. No one is sure of the precise number because none of the manufacturers kept track of who—or how many—received these devices.

manufacturer defendants recall the individuality of their customers is when they invoke it to oppose class certification.

Perhaps it is most fitting that plaintiffs increasingly resort to state courts as their battlegrounds of choice for their claims against corporate defendants. Although the law recognizes corporations as persons and makes no distinction between the human and the corporate, and although corporations enjoy perpetual existence and an accumulation of capital unmatched by mere humans, it was not always so. Modern limited-liability corporations are creations of the mid-to-late nineteenth century.<sup>57</sup> They are creatures of state charter—not federal law—and exist at the state's sufferance. As a principle of law, courts must make no distinction between humans and corporations as equal persons before the law: every jury receives this instruction in every trial involving a corporate defendant.<sup>58</sup>

However, *how* this equality is implemented to achieve justice between these two very different categories of persons is in the ambit of the equity jurisdiction employed by every court. That corporations dread the states who gave them life, and that corporations have fueled a massive outcry against the notion of nationwide classes in state courts, is the ultimate irony. State-chartered corporations act nationally and internationally. State courts to whom they owe their existence should be free to certify nationwide classes of individuals with claims against them. Only then will the equitable precepts of economy, efficiency, equal access, and empowerment be fulfilled.

It was a California court, one hundred years ago, which noted the equitable heritage of California's class action statute and employed it to resolve a most difficult problem, exclaiming: "Indeed, equity fears no difficulty."<sup>59</sup> Likewise, equity should not allow, in this

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57. See, STEPHEN B. PRESSER, *PIERCING THE CORPORATE VEIL* § 1.02 (rev. ed. 1997); Oscar Handlin & Mary F. Handlin, *Origins of the American Business Corporation*, 5 J. ECON. HIST. 1, 3 (1945).

58. See, e.g., H. ALSTON JOHNSON, III, 18 LOUISIANA CIVIL LAW TREATISE, CIVIL JURY INSTRUCTIONS § 2.01 (1994).

You must deliberate on this case without regard to sympathy, prejudice, or passion for or against any party to the suit. This means that the case should be considered and decided as an action between persons of equal standing in the community. A corporation or an insurance company is entitled to the same fair trial at your hands as a private individual. All persons stand equal before the law, and are to be dealt with as equals in a court of justice.

*Id.*

59. *Wheelock v. First Presbyterian Church*, 119 Cal. 477, 484, 51 P. 841, 844 (1897) (imposing equitable resolution of dispute among warring seceding factions of Presbyterian church); see also *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 302

presumably more advanced age, the theoretical existence of "nuances" of multiple states' laws to preclude the unitary adjudication of common issues of fact, when in fact a review of those states' laws, as implemented by those states' courts, reveals virtually identical jury instructions.<sup>60</sup> Equity simply requires courage.

This courage exists today in the federal as well as in the state courts. *Amchem*, properly interpreted, should empower more federal judges to act on the courage that should accompany life tenure. That courage is fully supported by the equitable heritage of the class action and the judges' power to invoke it. This courage must be employed in the personal injury arena, as well as in cases of financial or non-injury consumer fraud and product defect. The need is just as strong, the inequality between the individual plaintiffs and the corporate defendant is just as daunting, and the potential for injustice is even more pronounced. Every court should be free to be persuaded, as was Judge Brimmer in *In re Copley Pharmaceutical, Inc.*,<sup>61</sup> to refuse to decertify a nationwide tort claimant class despite an appellate ruling in *Rhone-Poulenc*.<sup>62</sup> Judge Brimmer, consciously or not, echoed the words of the California Supreme Court in *Vasquez*,<sup>63</sup> and of

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(1853) ("The rule is well established, that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others . . .").

60. The "nuance," a fundamental particle of academic legal writing even smaller and more elusive than its physics counterpart, the neutrino, is not detectable at the jury instruction level, at which the law is applied by finders of fact to reach a just result. Product liability jury instructions fully compatible with the laws of all states fill a single slim volume. See RONALD W. EADES, *JURY INSTRUCTIONS ON PRODUCTS LIABILITY* (2d ed. 1993). Courts, like the Alabama state court in *Ex parte Masonite Corp.*, 681 So. 2d 1068 (Ala. 1996), that have actually reviewed nationwide surveys of pattern jury instructions and directed the litigants to provide specific instructions for use in the liability and damages phases of multistage class actions, have sustained the class status of such cases, concluding that juries may be properly and thoroughly instructed on the operative law of all states.

Fortunately, there is appellate as well as trial-level case law that affirms the feasibility of such classwide trials. See, e.g., *In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir.), cert. denied, 479 U.S. 852 (1986). Most recently, Judge Spiegel of the Southern District of Ohio recertified a nationwide product liability/personal injury class, through the utilization of subclasses based upon a structural analysis of the commonalities and distinctions among the laws of the states on strict product liability and negligence. The case is set for classwide trial on common issues in late 1997. See *In re Teletronics Pacing Sys., Inc.*, 172 F.R.D. 271 (S.D. Ohio 1997), appeal dismissed sua sponte and mandamus denied (6th Cir., June 11, 1997).

61. 161 F.R.D. 446 (D. Wyo. 1995).

62. 51 F.3d 1293 (7th Cir. 1995).

63. 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971).

Supreme Court Justices Douglas, Brennan, and Marshall in *Eisen*,<sup>64</sup> and presaged the language of *Amchem* by stating:

After hearing hours of debate from those opposing and favoring class certification, one attorney from behind the bar offered the most persuasive argument for the superiority of class certification. He simply stated that he represented only six plaintiffs and that none of them had very large claims. This counsel then argued that without class certification neither he nor his clients had the resources to have their day in court against a large defendant like Copley. The Court, too, believes that no plaintiff with a legitimate claim for a jurisdictional amount should be eliminated from federal court because he does not have the resources to litigate, and concludes that class certification is a superior method of adjudication.<sup>65</sup>

May it be ever so.

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64. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). In a partially dissenting opinion issued the same year as *Vasquez*, Justice Douglas, joined by Justices Brennan and Marshall stated:

I think in our society that is growing in complexity there are bound to be innumerable people in common disasters, calamities, or ventures who would go begging for justice without the class action but who could with all regard to due process be protected by it . . . . The class action is one of the few legal remedies the small claimant has against those who command the status quo. I would strengthen his hand with a view of creating a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth.

*Id.* at 185-86 (Douglas, J., dissenting in part).

65. *In re Copley Pharm.*, 158 F.R.D. at 492.