Syllabus

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SUPREME COURT OF THE UNITED STATES

Syllabus

ORTIZ ET AL. *v.* FIBREBOARD CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 97–1704. Argued December 8, 1998– Decided June 23, 1999

Respondent Fibreboard Corporation, an asbestos manufacturer, was locked in litigation for decades. Plaintiffs filed a stream of personal injury claims against it, swelling throughout the 1980's and 1990's to thousands of claims for compensatory damages each year. Fibreboard engaged in litigation with its insurers, respondent Continental Casualty Company and respondent Pacific Indemnity Company, over insurance coverage for the personal injury claims. In 1990, a California trial court ruled against Continental and Pacific, and the insurers appealed. At around the same time, Fibreboard approached a group of asbestos plaintiffs' lawyers, offering to discuss a "global settlement" of Fibreboard's asbestos liability. Negotiations at one point led to the settlement of some 45,000 pending claims, and the parties eventually agreed upon $1.535 billion as the key term of a "Global Settlement Agreement." Of this sum, $1.525 billion would come from Continental and Pacific, which had joined the negotiations, while Fibreboard would contribute $10 million, all but $500,000 of it from other insurance proceeds. At plaintiffs' counsels' insistence, Fibreboard and its insurers then reached a backup settlement of the coverage dispute in the "Trilateral Settlement Agreement," under which the insurers agreed to provide Fibreboard with $2 billion to defend against asbestos claimants and pay the winners, should the Global Settlement Agreement fail to win court approval. Subsequently, a group of named plaintiffs filed the present action in Federal District Court, seeking certification for settlement purposes of a mandatory class that comprised three groups– claimants who had not yet sued Fibreboard, those who had dismissed such claims and retained the right to sue in the future, and relatives of class members– but excluded claimants who had actions pending against Fibreboard or who had filed and, for negotiated value, dismissed such claims, and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignancy. The District Court allowed petitioners and other objectors to intervene, held a fairness hearing under Federal Rule of Civil Procedure 23(e), ruled that the threshold Rule 23(a) numerosity, commonality, typicality, and adequacy of representation requirements were met, and certified the class under Rule 23(b)(1)(B). In response to intervenors' objections that the absence of a "limited fund" precluded Rule 23(b)(1)(B) certification, the District Court ruled that both the disputed insurance asset liquidated by the $1.535 billion global settlement, and, alternatively, the sum of the value of Fibreboard plus the value of its insurance coverage, as measured by the insurance funds' settlement value, were relevant "limited funds." The Fifth Circuit affirmed both as to class certification and adequacy of settlement. Agreeing with the District Court's application of Rule 23(a), the Court of Appeals found, *inter alia*, that there were no conflicts of interest sufficiently serious to undermine the adequacy of class counsel's representation. As to Rule 23(b)(1)(B), the court approved the class certification on a "limited fund" rationale based on the threat to other class members' ability to receive full payment from Fibreboard's limited assets. This Court then decided *Amchem Products, Inc.* v. *Windsor*, 521 U. S. 591, vacated the Fifth Circuit's judgment, and remanded for further consideration in light of that decision. The Fifth Circuit again affirmed the District Court's judgment on remand.

Held:

1. This Court need not resolve two threshold matters before proceeding to the nub of the case. First, petitioners call the class claims nonjusticiable under Article III, saying that this is a feigned action initiated by Fibreboard to control its future asbestos tort liability, with the vast majority of the exposure-only class members being without injury in fact and hence without standing to sue. While an Article III court ordinarily must be sure of its own jurisdiction before getting to the merits, *Steel Co.* v. *Citizens For Better Environment*, 523 U. S. 83, 88–89, a Rule 23 question should be treated first because class certification issues are "logically antecedent" to Article III concerns, *Amchem*, *supra*, at 612, and pertain to statutory standing, which may properly be treated before Article III standing, see *Steel Co.*, *supra*, at 92. Second, although petitioners are correct that the Fifth Circuit on remand fell short in its attention to *Amchem* in passing on the Rule 23(a) issues, these points are dealt with in the Court's review of the certification on the Fifth Circuit's "limited fund" theory under Rule 23(b)(1)(B). Pp. 11–13.

2. Applicants for contested certification of a mandatory settlement

class on a limited fund theory under Rule 23(b)(1)(B) must show that the fund is limited by more than the agreement of the parties, and has been allocated to claimants belonging within the class by a process addressing the conflicting interests of class members. Pp. 13–30.

(a) In drafting Rule 23(b), the Civil Rules Advisory Committee sought to catalogue in functional terms those recurrent life patterns which call for mass litigation through representative parties. Rule 23(b)(1)(B) (read with subdivision (c)(2)) provides for certification of a class whose members have no right to withdraw, when "the prosecution of separate actions . . . would create a risk" of "adjudications with respect to individual [class] members . . . 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." Among the traditional varieties of representative suits encompassed by Rule 23(b)(1)(B) is the limited fund class action. In such a case, equity required absent parties to be represented, joinder being impractical, where individual claims to be satisfied from the one asset would, as a practical matter, prejudice the rights of absent claimants against a fund inadequate to pay them all. Pp. 13–19.

(b) The cases forming the limited fund class action's pedigree as understood by Rule 23's drafters have a number of common characteristics, despite the variety of circumstances from which they arose. These characteristics show what the Advisory Committee must have assumed would be at least a sufficient set of conditions to justify binding absent members of a Rule 23(b)(1)(B) class, from which no one has the right to secede. In sum, mandatory class treatment through representative actions on a limited fund theory was justified with reference to a "fund" with a definitely ascertained limit that was inadequate to pay all claims against it, all of which was distributed to satisfy all those with claims based on a common theory of liability, by an equitable, pro rata distribution. Pp. 19–23.

(c) There are good reasons to treat the foregoing characteristics as presumptively necessary, and not merely sufficient, to satisfy the limited fund rationale for a mandatory class action. At the least, the burden of justification rests on the proponent of any departure from the traditional norm. Although Rule 23(b)(1)(B)'s text is open to a more lenient limited fund concept, the greater the leniency in departing from the historical model, the greater the likelihood of abuse in ways that are apparent when the limited fund criteria are applied to this case. The prudent course, therefore, is to presume that when subdivision (b)(1)(B) was devised to cover limited fund actions, the object was to stay close to the historical model. This limiting construction finds support in the Advisory Committee's expressions of understanding, which clearly did not contemplate that the mandatory class action codified in subdivision (b)(1)(B) would be used to aggregate unliquidated tort claims on a limited fund rationale. The construction also minimizes potential conflict with the Rules Enabling Act, which requires that rules of procedure "not abridge, enlarge or modify any substantive right," 28 U. S. C. §2072(b). See, *e.g.*, *Amchem*, *supra*, at 613. Finally, the Court's construction avoids serious constitutional concerns, including the Seventh Amendment jury trial rights of absent class members, and the due process principle that, with limited exceptions, one is not bound by a judgment *in personam* in litigation in which he is not a party, *Hansberry* v. *Lee*, 311 U.S. 32, 40. Pp. 23–30.

3. The record on which the District Court rested its class certification did not support the essential premises of a mandatory limited fund class action. It did not demonstrate that the fund was limited except by the agreement of the parties, and it affirmatively allowed exclusions from the class and allocations of assets at odds with the concept of limited fund treatment and the Rule 23(a) structural protections explained in *Amchem*. Pp. 30–44.

(a) The certification defect going to the most characteristic feature of a limited fund action was the uncritical adoption by both courts below of figures agreed upon by the parties in defining the fund's limits. In a settlement-only class action such as this, the settling parties must present not only their agreement, but evidence on which the district court may ascertain the fund's limits, with support in findings of fact following a proceeding in which the evidence is subject to challenge. Here, there was no adequate demonstration of the fund's upper limit. The "fund" comprised both Fibreboard's general assets and the insurance provided by the two policies. As to the general assets, the lower courts concluded that Fibreboard had a then-current sale value of $235 million that could be devoted to the limited fund. While that estimate may have been conservative, at least the District Court heard evidence and made an independent finding at some point in the proceedings. The same, however, cannot be said for the value of the disputed insurance. Instead of independently evaluating potential insurance funds, the courts below simply accepted the $2 billion Trilateral Settlement Agreement figure, concluding that where insurance coverage is disputed, it is appropriate to value the insurance asset at a settlement value. Such value may be good evidence of the maximum available if one can assume that parties of equal knowledge and negotiating skill agreed upon the figure through arms-length bargaining, unhindered by any considerations tugging against the interests of the parties ostensibly represented in the negotiation. No such assumption may be indulged in here, since at least some of the same lawyers representing the class also negotiated the separate settlement of 45,000 pending claims, the full payment of which was contingent on a successful global settlement agreement or the successful resolution of the insurance coverage dispute. Class counsel thus had great incentive to reach any global settlement that they thought might survive a Rule 23(e) fairness hearing, rather than the best possible arrangement for the substantially unidentified global settlement class. See *Amchem, supra,* at 626–627. Pp. 30–36.

(b) The settlement certification also fell short with respect to the inclusiveness of the class and the fairness of distributions to those within it. The class excludes myriad claimants with causes of action, or foreseeable causes of action, arising from exposure to Fibreboard asbestos. The number of those outside the class who settled with a reservation of rights may be uncertain, but there is no such uncertainty about the significance of the settlement's exclusion of the 45,000 inventory plaintiffs and the plaintiffs in the unsettled present cases, estimated at more than 53,000. A mandatory limited fund settlement class cannot qualify for certification when in the very negotiations aimed at a class settlement, class counsel agree to exclude what may turn out to be as much as a third of the claimants that negotiators thought might eventually be involved, a substantial number of whom class counsel represent. The settlement certification is likewise deficient as to the fairness of the fund's distribution among class members. First, a class including holders of present and future claims (some of the latter involving no physical injury and claimants not yet born) requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel. See *Amchem, supra,* at 627. No such procedure was employed here. Second, the class included those exposed to Fibreboard's asbestos products both before and after 1959, the year that saw the expiration of Fibreboard's Continental policy, which provided the bulk of the insurance funds for the settlement. Pre-1959 claimants accordingly had more valuable claims than post-1959 claimants, the consequence being a second instance of disparate interests within the certified class. While at some point there must be an end to reclassification with separate counsel, these two instances of conflict are well within *Amchem*'s structural protection requirement. Pp. 36–41.

(c) A third contested feature that departs markedly from the limited fund antecedents is the ultimate provision for a fund smaller than the assets understood by the Fifth Circuit to be available for payment of the mandatory class members' claims. Most notably, Fibreboard was allowed to retain virtually its entire net worth. Given this Court's treatment of the two preceding certification deficiencies, there is no need to decide whether this feature would alone be fatal to the global settlement. To ignore it entirely, however, would be so misleading that the Court simply identifies the issue it raises, without purporting to resolve it at this time. Fibreboard listed its supposed entire net worth as a component of the total (and allegedly inadequate) assets available for claimants, but subsequently retained all but $500,000 of that equity for itself. It hardly appears that such a regime is the best that can be provided for class members. Whether in a case where a settlement saves transaction costs that would never have gone into a class member's pocket in the absence of settlement, a credit for some of the savings may be recognized as an incentive to settlement is at least a legitimate question, which the Court leaves for another day. Pp. 42–44.

134 F. 3d 668, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, THOMAS, and GINSBURG, JJ., joined. REHNQUIST, C. J., filed a concurring opinion, in which SCALIA and KENNEDY, JJ., joined. BREYER, J., filed a dissenting opinion, in which STEVENS, J., joined.