COURT APPOINTED MDL COUNSEL: WHO THEY REPRESENT, WHO THEY DON'T REPRESENT AND WHO THEY SHOULD REPRESENT

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I. INTRODUCTION

I write this paper to highlight certain constitutional infirmities that arise when in the context of mass tort multi state litigation, courts fail to do all they can to minimize attorney client and intra-class conflict, and specifically, fail to ensure that the attorneys they appoint to the Plaintiffs Management Committees (PMC) to manage the litigation for the plaintiffs are representative of the various, frequently divergent, interests of individual litigants and classes of litigants involved in litigating the claims.

Mass torts now commonly involve individual litigants pursuing claims for bodily injury, as well as classes of claimants pursuing claims for medical monitoring and consumer fraud claims for reimbursement of ascertainable losses such as the costs of prescriptions pursuant to state consumer statutory protection laws. These often overlapping and competing claims are now pursued in state and federal courts and have led to efforts at cooperation between state and federal

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courts and sometimes result in competition and conflict between state and federal judges: See Toward A Cooperative Strategy For Federal And State Judges In Mass Tort Litigation, Francis F. McGovern 148 U. Pa. L. Rev. 1867 (June 2000).

Often, the competition between lawyers, litigants and yes judiciary lead to Machiavellian duels between lawyers in different states involving federal and state forum shopping and/or orchestration of filing lawsuits in several jurisdictions to create a fictional need for assignment to a single federal MDL judge for those cases in the federal system.

Several state courts are also now organizing state wide MDL's aggregating claims arising out of a mass tort before a single judge.

The present situation is often one of dueling between lawyers with large inventories of claims, judges, class action lawyers and individual litigant lawyers in numerous jurisdictions with defendants counsel often actively assisting and trying to aid the plaintiffs lawyers and litigants most amenable to the sweetest deal from the defendants perspective. See for example Matsushita Electric Industrial Co. v. Epstein, 516 U.S. 367 (1996).

This competition often leads to efforts at shutting down the litigation by finding a willing judge or forum where the class actions and individual claims can all be morphed into a global

resolution of the entire mass tort including future claims of even those yet to be born.

All too often completely lost sight of is a major reason for the civil justice system - to compensate the injured, reimburse the defrauded, and deter tort feasors who choose greed and stockholders interests over that of protecting consumers and users of products from injury and fraud. All too often the courts strongest interest in approving a settlement is clearing its docket and gaining prestige as the court that supervised the settlement of a complex class action, subsuming the goal of adequately protecting the rights of the injured and defrauded public. See Dueling Class Actions by Rhonda Wasserman, 80 B.U.L. Rev. 461 (April 2000).

Judges in the interest of resolving the complexity of this type of litigation have been given powers to select the lawyers who will ultimately manage the litigation for the plaintiffs. In the federal system, these lawyers are referred to as the MDL Committee, the PSC or now the PMC, the Plaintiffs Management Committee.

It is often this court selected committee which ultimately is sought out by the defendants or takes upon themselves the right to settle the mass tort usually by some type of class action resolution, combining all the diverse interests into one global settlement class or group of sub classes. The subclasses

are a new prerequisite aimed at passing the muster of recent Supreme Court decisions.

Relying on the logic of Amchem v. Windsor, 521 U.S. 591 (1997) and Ortiz v. Fibreboard Corporation, et al., 119 S. Ct. 2295 (1999), I will argue that the failure, by courts, to minimize class conflict and the further failure to follow and institute strict procedural guidelines regarding the creation and operation of the PMC so as to assure adequate representation of all interests of the class and individual litigants will and have caused violations of the due process rights of the individual litigants and classes of litigants. Ultimately this failure diminishes respect for the judges and lawyers involved as well as respect for our system of justice.

In Part II of this paper, I will give a brief summary of the criteria that need to be met in order to certify and bring a class action lawsuit. Part III will address some of the conflicts inherent in this type of litigation and how courts, in the past, have traditionally handled and addressed these difficulties. Part IV will discuss the role of steering committees and will highlight how the failure of courts to closely monitor appointment to and operation of the PMC will result in due process infirmities due to attorney and class conflicts, all of which can jeopardize resolution of the

litigation and rights of the individuals and classes who they are obligated to protect. Finally, part V of this paper will offer some steps that can be taken to help cure these deficiencies, and further, to maximize attorney accountability to the classes of litigants and individual litigants.

II. THE CLASS ACTION LAWSUIT

The 1966 amendment to Rule 23 of the Federal Rules of Civil Procedure gave rise to what we now consider to be the modern class action lawsuit. Under amended Rule 23(a), in order for a court to certify a class, the class must exhibit: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. See Fed. R. Civ. P. 23(a). The numerosity requirement directs a court to make a finding that joinder of all potential claimants would be impractical. Fed. R. Civ. P. 23(a)(1). Commonality requires that the contentions of class members share common questions of law or fact. Fed. R. Civ. P. 23(a)(2). Typicality requires the class representatives' claims to be substantially similar to the claims of the other class members. Fed. R. Civ. P. 23(a)(3). Adequate representation requires that the class representative fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23(a)(4).

Further, to certify an opt-out class for damage claims, a court must find, under Rule 23(b)(3), that common questions of law or fact predominate over individual issues and that "a class

action is superior to other available methods for the fair and efficient adjudication of the controversy". Finally, Rule 23(e) requires the court to scrutinize the fairness of any class action settlement.

III. CONFLICTS POSED BY REPRESENTATIVE LITIGATION

"It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in litigation in which he is not designated a party." Hansberry v. Lee, 311 U.S. 32, 40 (1940). This "deep rooted tradition that everyone should have his own day in court," 18 Charles Wright, Arthur Miller, Edward Cooper, Federal Practice and Procedure § 4449 at 417 (1981), serves to establish what we consider to be the rudiments of due process, namely, (1) notice, (2) control over one's case, and (3) the opportunity to be meaningfully heard. See also Phillips v. Shutts, 472 U.S. 797, 808 (1985).

Despite these essential guarantees, the class action lawsuit serves as a quasi-exception to this general rule of American jurisprudence since the right to control and litigate one's case is fundamentally abrogated. As a result, class actions generate numerous due process pitfalls, not least of which involve the various conflicts that can and frequently develop between class members, attorneys and the class they represent. These potential conflicts are especially prevalent when individual plaintiffs suffer different types of injuries.

Conflicts generally arise in two shapes: (1) those occurring intra-class; and (2) those that emanate between the class and its attorneys. Both types have been well documented by courts and in the academic literature. See, e.g., Amchem v. Windsor, 521 U.S. 591 (1997); Ortiz v. Fibreboard Corporation et al., 119 S. Ct. 2295 (1999); In Re Agent Orange, 818 F.2d 216 (2d Cir. 1987); In Re Diet Drugs, No. 98-20594, slip op. (E.D. Pa. Sept. 27, 1999); Coffee, Class Action Accountability: Reconciling Exit, Voice and Loyalty in Representative Litigation, 100 Colum. L. Rev. 370 (2000); Silver and Baker, I Cut You Choose: The Role of Counsel in Allocating Settlement Proceeds, 84 Va. L. Rev. 1465 (1998); Roth, Mass Tort Malignancy: In the Search for a Cure, Courts Should Continue to Certify Mandatory, Settlement Only Class Actions, 79 B. Univ. L. Rev. 577 (1999).

A. Intra-class Conflicts

In the first group, conflicts arise because the circumstances which caused the injuries and the potential worth of the claims vary. For example, where the class purports to represent claimants from multiple states, perhaps even all fifty (50) states, differing legal standards will make some claims more valuable than others. See, e.g., Leiter, National Survey of State Laws, ch.35, tbl. 35 (3d ed. 1999) (documenting different standards for contributory and comparative negligence across the fifty (50) states); Tyler & Cooper, Blinded By the Hype: Shifting

the Burden When Manufacturers Engage in Direct to Consumer Advertising of Prescription Drugs, 21 Vt. Law Rev. 1073, 1078 & n.9 (1997) (noting that not all states apply the learned intermediary doctrine in failure to warn cases involving prescription drugs); Zabel & Eyres, Conflict-of-Law Issues in Multistate Product Liability Class Actions, 19 Hamline L. Rev. 429, 440 (1996) (noting varying burdens of proof across states for punitive damage claims). Some states may recognize claims for medical monitoring, others may not. Some states may recognize certain affirmative defenses that others do not. And statutes of limitations may vary from state to state. See, e.g., Georgine v. Amchem Products, Inc., 83 F.3d 610, 626 (3d Cir. 1996). As a result, there may be a strong argument that where differing state standards affect the respective value of various claims, class action lawsuits need to be divided into subclasses on a state by state basis. See Castano v. American Tobacco Company, 84 F.3d 734, 735 (5th Cir. 1996) ("the variations in state law may swamp any common issues and defeat predominance" requirements) (citations omitted); Stewart v. Avon Products, Inc., 1999 U.S. Dist. LEXIS 17616, *14-15 (E.D. Pa. Nov. 15, 1999) (noting that the class action "might prove unmanageable, as the law of as many as 50 states may have to be interpreted").

Another reason claims vary in value is due to the fact that the type, severity, and etiology of the injuries may differ. As

a result, in order to avoid conflict, classes may have to be further subdivided and independently represented based on injury type. The failure to implement these types of subdivisions may otherwise result in de-certification.

For example, in In Re Diet Drugs, No. 98-20594, slip op. (E.D. Pa. Sept. 27, 1999), a group of claimants alleged various injuries, including primary pulmonary hypertension ("PPH") and valvular heart disease, following their ingestion of the prescription diet drugs fenfluramine, dexfenfluramine, and phentermine, alone or in combination. On September 1, 1998, the MDL and class action steering committees (they overlapped) filed a class action complaint, naming Sharyn Wish, as the class representative against defendant Interneuron Pharmaceuticals, Inc., the entity responsible for sublicensing Redux. Redux is a generic brand name for dexfenfluramine. The Honorable Louis C. Bechtle of the Eastern District of Pennsylvania conditionally certified the class. Thereafter, the PMC and defendant, Interneuron, reached a tentative settlement for which they sought court approval. In considering the matter, the court decided to de-certify the class, due to various reasons, including, on the grounds that there were too many inconsistent and competing claims to sustain the class. Specifically, the court held:

> [T]hose class members asserting injury claims who only ingested Redux have far different claims than those class members who ingested Pondimin as well as Redux, at least as it pertains to their ability to recover from Interneuron. A

> class member who only ingested Redux would have an interest in ensuring that those class members whose injuries are possibly attributable to Pondimin, rather than Redux, do not diminish the available compensation from the limited fund.

In Re Diet Drugs, supra at 21.

> [Further, the] class members have competing interests in that each desires to preserve the assets of the limited fund for themselves. Although these concerns will arise in every limited fund class, the class definition here presents factual issues which exacerbate the problem to a degree that cannot be corrected by the claims administration process.... [I]n this case, there are varying injuries and some class members' injuries could be attributable to either Pondimin or Redux. Thus, an individual causation analysis would be required to prevent those with injury caused by Pondimin from diminishing the funds available from Interneuron. These competing interests are not protected in a class action wherein Wish is the sole class representative. Furthermore, the court cannot envision a class administration system which would provide the sort of adversarial process required to fully protect those interests.

Id. at 26-27. Thus, In Re Diet Drugs presents an example of how intra-group conflict will result in de-certification of a potential class action.

A special problem arises in the context of grouping claimants with presently manifested injuries with those whose injuries are slow or may not have even yet developed at the time the class action is being brought, litigated, or settled. These claimants are frequently referred to as "future claimants."

1. The Futures Dilemma

A futures claim "is one based on an event that has already occurred (such as exposure to a toxic material), but whose consequences will not become clear enough to support a

legal claim until some time after the statute of limitations (measured from the date of the event) has expired." Wood, Commentary of the Futures Problem, by Geoffrey C. Hazard, 148 U. Pa. L. Rev. 1933, 1933 (2000). See also Hazard, The Futures Problem, 148 U. Pa. L. Rev. 1901, 1903 (2000).

Numerous courts have considered the problem of including futures as claimants in class action lawsuits. For example, in Georgine, the Third Circuit was faced with certification of a class, which included futures, exposed to asbestos. Considering the difficulties of including futures in the class, the Court noted:

> The futures plaintiffs especially share little in common, either with each other or with the presently injured class members. It is unclear whether they will contract asbestos-related disease, and if so, what disease each will suffer. They will also incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories.

Id.

Complicating matters, for some, manifestation of the injury could take months or years or might never even transpire. Further, the severity of the injury that may develop, at some point, down the road, may, at the time of class certification, be completely unknown. For instance, returning to the context of asbestos-exposed plaintiffs, some of the claimants may contract mesothelioma, some may develop asbestosis, and some may suffer lesser or no injuries at all.

Once again, considering this problem, the Third Circuit noted in Georgine:

> Given these uncertainties, which will ultimately turn into vastly different outcomes, the futures plaintiffs share too little in common to generate a typical representative. It is simply impossible to say that the legal theories of named plaintiffs are not in conflict with those of the absentees or that the named plaintiffs are not in conflict with those of the absentees or that the named plaintiffs have incentives that align with those of absent class members.

Id. Following this logic, it is clear, then, that conflict is bound to exist in a class that groups futures with those individuals claiming injury today. And as one academician has stated, if

> recovery is maximized today, then people who are not yet hurt will be disadvantaged relative to the total victim pool. 'Exposure-only' plaintiffs have an interest in obtaining relief for the entire range of injuries or having recovery maximized at a later time. If both groups of claimants form a single class, the resulting conflicts may make it noncertifiable.

Bianchini, The Tobacco Agreement that Went Up in Smoke: Defining the Limits of Congressional Intervention into Ongoing Mass Tort Litigation, 87 Calif L. Rev. 703, 723 (1999).

Further confounding the issue for some futures is that causation may prove a tougher task since the science evidencing a causal connection may be nascent or completely undeveloped. An example of this can be seen in the fen-phen litigation. There, American Home Product claimed (and the PMC appear to have not disputed) that there was no competent, scientific evidence of any long latency period or slow progression for heart valve injury or

any other injury resulting from the ingestion of the diet drugs. See Brown v. American Home Products Corporation, Memorandum and Pretrial Order dated August 28, 2000 opinion by Judge Bechtle C.A. No. 99-20593. Yet, contrary to these arguments, published epidemiological papers suggest that there may be a latency period for the development of valvular heart disease for some patients exposed to fenfluramines.[1] With regard to possible other undetermined heart, pulmonary or neurological injury, 1999 science often provided no adequate answers. Clearly, then, there was a conflict between present and future claimants regarding progression and latency. Additionally, the position taken by the PMC also generated conflicts between these lawyers and certain members of the class, a problem to which I will now turn. The court viewed these claims as without future merit possibility - and provided no remedy if future science establishes new disease entities or new views related to progression and latency. (Rheumatic fever is known to produce injuries to the heart many, many years later in life - could this be true of Redux and Pondimin?) Should the risk fall on these potential future claimants or the company that created the concern, American Home? If the risk is non existing as the company claimed and the PMC

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[1] Ryan, D. H.; Bray, G.A.; Helmke, F.; Sander, G.; Voloufova, J.; Greenway, R.; Subramaniam, P.; and Glancy, D.L. "Serial echocardiographic and clinical evaluation of valvular regurgitation before, during and after treatment with fenfluramine or dexfenfluramine and mazindol or phentermine." Obesity Research; 7:4:313-322.

and class counsel appear to have not disputed,, then why should these people have this potential concern wiped out by the settlement? It should be of no concern to the defendant if it is a non-existent possibility!

B. Conflict between Class and Attorney

In the second group of conflicts, those arising between the class and class counsel, self-interested attorneys may very well opt for an early settlement to obtain a windfall in attorney fees, without giving due care to the concerns of the class and its members. See In Re Agent Orange, 818 F.2d 145 (2d Cir. 1987) (voiding agreement where certain members of management committee would receive three times as much as their initial investment in view of its potential for creating conflict between the class and class counsel).

Alternatively, class counsel, who represent a number of individual plaintiffs, may encounter a defendant willing to pay a higher sum to settle the individual claims in order to secure a less attractive settlement figure for the class as a whole. See, e.g., Erichson, Mass Tort Litigation and Inquisitorial Justice, 87 Geo. L. J. 1983, 2002 (1999).

Perhaps, even less insidiously, class attorneys may seek an early settlement simply given that they may be more risk-aversive than some plaintiffs they represent. After all, class action lawsuits are cost intensive. Counsel may have advanced large

sums of money and time toward litigation of the lawsuit. Understandably, then, they may very well seek to settle a lawsuit, albeit prematurely, to safeguard their recovery, even though, in so doing, they disregard the best interests of the class or sub-class they purport to represent.

Accordingly, courts have generally required the employment of rigorous scrutiny to ensure that settlements reached are fair. See, e.g., Amchem, supra, Ortiz, supra, Hanlon v. Chrysler Corp., 150 F.3d 1011, 1021 (9th Cir. 1998); Walker v. Liggett, 175 F.R.D. 226 (S.D. W. Va. 1997).

Returning, for a moment to the *diet drug* litigation, in which the PMC and American Home Product agreed to a schedule, minimizing and in some instances eliminating the rights of any potential claimants due to purported lack of competent, scientific evidence. Objectors to the settlement claimed that a potential conflict of interest between the PMC lawyers and these particular claimants' interests was confirmed by 50,000 opt-outs and resignations and substitutions for 3 of the 5 sub-class plaintiffs.[2] It appears that sub-classes of claimants needed separate legal representatives who could argue on behalf of and

[2] Who may have resigned or been replaced because some orally objected to the settlement - the court gives no information in the opinion about the reasons for the resignation and/or substitution for 3 of the 5 sub-class plaintiffs and dismissed the objections. Brown supra

negotiate their claims.[3] What caused the conflict? It is only possible to speculate, but it could be that the PMC was not interested in financing a project to develop the evidence to prove that there can be a latency period between taking the drugs and developing these types of injuries or simply to benefit their present clients interests over these competing interests, or it was just not possible to prove these claims with 1999 science. Another reason may have been because some of these claims were small in financial value and tenuous scientifically. Therefore, the lawyers representing the classes did not want to hold up or crater a settlement benefiting many with potentially more serious and more easily provable scientifically supportable injuries.

These types of conflicts appear to be of the type that prompted the Supreme Court to reject certification in the recent

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[3]Judge Bechtle in his order of August 28, 2000 approving the diet drug global settlement in Brown v. American Home Products, U.S.D.C., E.D., Pa. No. 99-20593 disagrees with the view that sub-classes were required in the diet drug litigation under Amchem and Ortiz equating the disparity between groups of claimants as akin to the Eight Circuit's view in Petrovic v. Amoco Oil Co., 200 F. 3d 1140 (8th Cir. 1999) as supporting his view that there was no need in Brown to have sub-classes.

> "[i}f the objectors mean to maintain that a conflict of interest requiring subdivision is created when some class members receive more than other class members in a settlement, we think that argument is untenable. It seems to us that almost every settlement will involve different awards for various class members. Indeed, even if every class member were to receive an identical monetary award in settlement, the true compensation would still vary from member to member since risk tolerance varies from person to person."

One of the questions for the appellate courts is was he right in failing to establish sub-classes e.g. sub-classes of (1) people with potential claims for pulmonary hypertension; (2) neurotoxic injuries; (3) consumer fraud class claims not subject to federal jurisdiction. See In re: LIFEUSA HOLDING, INC., LifeUSA Holding, Inc., 242 F.3d 136, 2001 WL 213975 (3rd Cir. Pa.)

Amchem and Ortiz decisions. The diet drug trial court believed the representation of these interests adequately protected. These questions may be decided by a higher court if an appeal reaches the Third Circuit or Supreme Court. (They may not if no objectors press an appeal)

C. The Amchem and Ortiz Cases

The two major and most recent Supreme Court cases dealing with the issue of conflict in the context of class action lawsuits are Amchem, supra and Ortiz, supra. These two cases significantly raise the degree of scrutiny a court is required to make in order to approve a mass tort, class action settlement.

On June 25, 1997, the Court issued its opinion in Amchem. In Amchem, a group of asbestos manufacturers and plaintiff attorneys proposed a complex opt out global scheme for compensating a class of individuals with asbestos related injuries. The United States District Court for the Eastern District of Pennsylvania conditionally certified the class and held fairness hearings on the proposed settlement. Despite objections from various parties that their interests were not adequately considered, the lower court refused to establish subgroups, certified the class, and approved the settlement. On appeal, the Third Circuit reversed and vacated the certification. Focusing extensively on the adequacy of representation prong contained in Rule 23(a)(4) and finding that the interests of the

class were not adequately protected by the terms of the proposed settlement, the Supreme Court affirmed the Third Circuit's ruling. Specifically, the high Court focused on how members of the class who had detectible forms of cancer were treated more favorably than those who had pleural thickening but no signs of malignancy. In that regard, the Court stated:

> Although the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency... [W]here differences among members of a class are such that subclasses must be established... no authority... permits a court to approve a settlement without creating subclasses... The class representatives may well have thought that the Settlement serves the aggregate interests of the entire class. But the adversity among subgroups requires that members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups.

Id. at 627. (Citations omitted). Thus, adequate representation of a large class that includes both present and future claimants will only be found where the interests of the claimants, and of all subgroups, are sufficiently considered and protected.

Ortiz presented similar issues. There, the Supreme Court rejected a $1.5 billion non opt out class action settlement of 186,000 asbestos claims made against Fibreboard Corporation. In large degree, the Court again focused its analysis on conflicts, both those transpiring between class representatives and those among the plaintiffs' attorneys. Although in upholding the certification, the Fifth Circuit tried to distinguish Ortiz from

Amchem on several bases, including that the Ortiz settlement treated both present and future claimants alike, the Supreme Court nevertheless reversed and vacated certification. In so doing, the Court found that, as in Amchem, separate subgroups should have been created for claimants with and without presently manifested illnesses. Separate subgroups should have also been devised for individuals based on whether their exposure to asbestos occurred before versus after the expiration date of certain insurance policies since the availability of insurance would have affected the value of their individual claims.

Thus, an approved structural cure to problems pertaining to conflicts of interest involve splitting the plaintiffs into different subgroups as dictated by the various interests they present. See also In Re: Diet Drugs, supra at 20-21 (discussing the need to create class subgroups based on injury type manifested from consumption of dangerous diet drugs); In re Telectronics Pacing System, Inc., 168 F.R.D. 203, 221 (S.D. Ohio 1996) ("The plaintiffs must come forward with the exact definition of each subclass, its representatives, and the reasons each subclass meets the prerequisites of Rule 23(a) and (b). Furthermore, the variations in state law must guide the Plaintiffs' creation of subclasses."). This requirement may be particularly acute where future claimants are grouped with present claimants, and attorneys who negotiate for both "do so

only at the peril of being charged with collusion, conflict of interest, and self-dealing." Mullenix, Back to the Futures: Privatizing Future Claims Resolution, 148 U. Pa. L. Rev. 1919, 1923 (2000).

Further, the Ortiz Court emphasized need for closer scrutiny of potential conflicts where there was a potential for gigantic fees since, "with an already enormous fee within the counsel's grasp, zeal for the client may relax sooner than it would in a case brought on behalf of one claimant." Id. at 2317 & n.30.

IV. MULTI-DISTRICT LITIGATION

In 1968, Congress created multi-district litigation ("MDL") by which cases were aggregated for pre-trial purposes. In mass tort MDL's, plaintiffs will generally retain individual lawyers prior to the aggregation of the cases to prosecute their respective actions. Thereafter, at the commencement of the lawsuit, courts regularly appoint a group of attorneys to steering committees to act as lead counsel and to control the pre-trial phase of litigation.

As various courts and commentators have noted, PMC's have profound power to shape both the course and end result of the lawsuit. See, e.g., In Re Boesky, 948 F.2d 1358, 1364 (2d Cir. 1991) (delineating the broad authority of lead counsel in class actions to direct the litigation, including presenting settlements to court for approval); Curtis and Resnik,

Contingency Fees in Mass Torts: Access, Risk, and the Provision of Legal Services When Layers of Lawyers Work for Individuals and Collectives of Clients, 47 Depaul L. Rev. 425 (1998). Despite the PMC's significant influence, there are neither statutes nor rules which govern the procedures by which courts may make these PMC appointments. Further, there is scant case law which has considered some of the constitutional implications involved in attorney appointment to steering committees and the permissibility of having PMC lawyers both control the litigation and also serve as class counsel, an all too frequent occurrence.

In fact, the history of lead counsel designation can be summarized as follows:

> Initially, informal networks of lawyers began by selecting their own leaders - an approach supported by the first Manual for Complex Litigation...("Lead counsel are chosen by the groups of parties having a common interest," and in "'exceptional circumstances'" or when parties fail to choose, the court may do so). By the mid-1980's... the Manual for Complex Litigation advised judges to oversee the appointment of steering committees for plaintiffs' attorneys... In the 1995 edition, the Manual outlined four categories of lawyers: "[l]iaison counsel: charged with essentially administrative matters, such as communications between the court and other counsel" and who need not be a lawyer, "[l]ead counsel: charged with major responsibility for formulating (after consultation with other counsel) and presenting positions"; "[t]rial counsel: [who] serves as a principal attorney for the group at trial"; and "[c]ommittees of counsel,' such as steering committees: "formed to serve a wide range of functions."

Resnik, Curtis and Hensler, Individuals Within the Aggregate: Relationships, Representation, and Fees, 71 N.Y.U. L. Rev. 296, 401 n.13 (1996) (citations omitted).

However, as to whom to designate or what process to observe in constituting the steering committee, the manuals were silent. As a result and with little guidance, courts adopted their own methodology. Some used auctions, selling off positions and attorney roles to the highest bidder. See, e.g., In Re Oracle Securities Litigation, 132 F.R.D. 538 (N.D. Cal. 1990); In Re Wells Fargo Securities Litigation, 156 F.R.D. 223 (N.D. Cal. 1994). Other courts made selections seemingly based on popularity or beauty contests of sorts or simply by virtue of their familiarity with repeat mass tort players. Amazingly, courts rarely considered the due process implications of their selections, and as a result, have failed to guarantee that all various subgroups of the class are competently represented by the PMC. This, despite the fact that the logic of Amchem and Ortiz would suggest that the PMC must be structured in such a way as to obviate class conflicts. Inter-claimant tradeoffs are inherent in PMC representation, and therefore, each constituency must be separately advocated for.

A stark instance of conflict can be seen in the breast implant litigation wherein the steering committee was predominantly composed of attorneys who sued only the manufacturers of the breast implants. In the course of the litigation, the PMC refused to allow individual attorneys who had sued manufacturers and plastic surgeons to conduct doctors

depositions relevant to the issue of plastic surgeon liability. This presented a conflict because their decision not to permit such discovery may have prejudiced the interests of a subgroup of the class. Moreover, an appearance of impropriety surfaced since it looked as though the PMC's decision was not based on the interests of the plaintiffs but rather from concerns for their own potential liability as a result of having not sued the implanting surgeons. See, e.g., Kayes v. Pacific Lumber Co., 51 F.3d 1449, 1465 (9th Cir), cert denied, 516 U.S. 914 (1995) (holding that where there is even "[t]he appearance of divided loyalties," Rule 23(a)(4)'s "adequacy of representation" requirement remains unmet).

Thus, the failure to address conflicts in appointment to the steering committee itself *could* present the irreconcilable due process problems about which Amchem and Ortiz have warned.

Further, courts rarely provide rules or a governing process by which the PMC's must operate. As a result, there is little authority to guide the operation of the PMC during litigation. Inevitably, horse-trading occurs without any court oversight. See Resnick, Money Matters: Judicial Market Intervention Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation, 148 U. Pa. L. Rev. 2119, 2152 (200) (discussing how lawyers jockey for control in MDL litigation). This inevitably benefits some sub-classes to the detriment of others and causes

attorneys to periodically run afoul of their ethical obligations.[4] This problem is compounded by the fact that these MDL committees often by reason of their position, become the settlement negotiators for a global litigation resolution usually through some type of class action settlement vehicle. As this metamorphoses develops, the MDL committees interest in securing the highest fees and the class members interest in attaining the greatest recovery often diverge. See Dueling Class Actions supra. This often leads to:

1. Lack of adequate information being provided to class members regarding their best interests such as whether to opt out, whether they need independent counsel because their rights are being traded away for another class members benefit and a whole plethora of additional conflicts, too numerous to list but often obvious.

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[4] Almost all rules of professional conduct have provisions similar to Rule 1.7 of the Pennsylvania Rules of Professional Conduct. Rule 1.7 provides:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client... unless (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after full disclosure and consultation.

(Emphasis added).

2. Absence of an adversarial proceeding is often the result of these settlements placing the court in a poor position to uncover any potential conflicts between class counsel and the class or among class members to otherwise assess the fairness of the proposed settlement.

3. The court itself is often conflicted to support its court appointed plaintiffs' counsel's positions. In effect taking sides when impartiality and careful scrutinizing action is required. The court is at perhaps its most weakened point of truly being able and interested in protecting the rights of those who most need its protection because there are no longer two adversaries appearing before an impartial judge. It is often two adversaries joining together with the courts support and unsaid approval, all too often to snuff out the rights of newly arisen adversaries i.e. those who don't like the deal whose rights have been traded away or diminished.

4. Simply passing the fairness hearing off to another judge and giving plaintiffs an opt out right as was done in Amchem is not enough to cure these problems.

At the very least, there should be substantial judicial oversight of the appointments and the operations of the

committees themselves. Sub-classes established by what may be an already conflicted Steering Committee should be looked at as suspect under these circumstances particularly when the Steering Committee defines the sub-classes, then chooses the sub-class plaintiffs and/or their counsel.

V. STRUCTURAL SOLUTIONS

Before discussing any proposed remedies, I should note that it may very well be impossible to ensure, that at all times, the interests of everyone involved, that is, the interests of thousands and/or potentially hundreds of thousands of plaintiffs and their attorneys, are completely harmonious. In fact, rarely is it the case that, in any lawsuit, interests are entirely congruent. Nevertheless, I believe the following proposals, at the very least, should go a long way toward protecting the due process rights of claimants.

Accordingly, the first recommendation that I propose is for courts to ensure that all discrete subgroups of a class have an adequate voice on the steering committee. Due to the important interests involved, selections should take place only following a hearing so that the court can properly identify the subgroups which need representation.

I should note that I am not alone in making this suggestion. See, e.g., Vairo, Georgine, the Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims Resolution,

31 Loy. L.A.L. Rev. 79, 163 (1997) ("There are a number of ways to balance individual autonomy and the group and satisfy Justice Ginsburg's concerns about the adequacy of representation. There could be a steering committee of lawyers, each responsible for a subclass. For example, an additional subclass should be comprised of those who want to opt out at the time the settlement agreement is reached to assure adequate notice to this potential group and to make certain the court fully understands the possible infirmities in the settlement that led to this view point. These subclasses ought to be determined by the court after an expert analysis of the claims identifies the different types of injuries and proof problems. Techniques such as focus groups or claimant meetings could be used to identify claimant wishes."); 2 Newberg on Class Actions s 9.35 (3d Ed. 1992) ("When there are potential conflicts anticipated among the plaintiffs..., the court should appoint multiple lead counsel or should carefully limit the authority of lead counsel."); Resnik, Curtis and Hensler, Individuals Within the Aggregate: Relationships, Representation, and Fees, 71 N.Y.U. L. Rev. 296, 390 (1996) ("In a world of multiple principals, attention should be turned to multiple agents. Instead of going in the direction of collapsing agent and principal or centralizing lawyering in the hands of a few, we urge consideration of expanding and differentiating roles among the many agents.") Erichson, Mass Tort Litigation and

Inquisitorial Justice, 87 Geo. L. J. 1983, 1999 (1999) ("What is clear from the Supreme Court's rejection of the Amchem settlement class action is this: if parties want to use settlement class actions to resolve mass torts, they must avoid problems by defining classes and subclasses with precision, and they must avoid adequacy of representation problems by ensuring that groups with divergent interests, such as present and future claimants, are represented by separate counsel."); Glickstein, Veidemanis, and Boston, Non-Federal Question Class Actions Prosecution & Defense Strategies, 612 PLI/Lit 315, 319 (1999) (Courts must "strictly construe[] the circumstances under which courts must create subclasses and appoint separate counsel to represent their interests."). Notably, this logic, of course, applies equally to both "opt out" and limited fund classes as Amchem was a Fed. R.C.P. 23(b)(3) "opt-out" class action and Ortiz was a Fed. R.C.P. 23(b)(1)(B) mandatory "limited fund" case. Simply telling people they can opt out is a totally inadequate answer to these due process concerns.

And while creating more subclasses may make litigation more costly and difficult to manage, as one commentator has noted:

> [I]n a mature litigation in which the landscape is littered with the bankrupt bodies of many major defendants, the balkanization of a large class of toxic tort victims into several subclasses seems to be a prescription for heightened conflict as opposed to efficient resolution. Increased efficiency, however, is not the only reason to pursue a lawsuit. Indeed, the possibility that subclasses might decrease the efficiency of the class action should not be

> reason enough to abandon their use. It is true that providing separate representation for differing interests might make [litigation or] settlements more difficult to achieve. The added challenge to negotiation, however, will increase the likelihood that [the pretrial phase or the terms of a] settlement ... will be equitable for all claimants. In addition, [appellate] courts may be more receptive to [litigation procedures or] to settlements in which subclasses receive separate representation.

Roth, Mass Tort Malignancy: In the Search for a Cure, Courts Should Continue to Certify Mandatory, Settlement Only Class Actions, 79 B. Univ. L. Rev. 577, 606-607 (1999).

An analogy to this proposed solution can be drawn from the world of bankruptcy, where parties endeavor to ensure that the creditors committees are composed of the varying interests of the various groups or parties involved. See, e.g., In Re Dow Corning Corporation, 194 B.R. 121 (E.D. Mich.), rev'd on other grounds, 212 B.R. 258 (1997).

In Re Dow Corning involved a chapter 11 case of breast implant manufacturers. Motions were filed by various creditors and claimants, seeking appointment of additional committees due to claims of inadequate representation. The court ruled that various interests were not adequately represented and re-constituted the claimants committee accordingly. In reflecting on what "adequate representation" entails, the court stated:

> [A]dequate representation exists through a single committee as long as the diverse interests of the various creditor groups are represented on and have participated in the committee. Although the existence of adequate representation will always require a case-by-case determination, these comments can be synthesized into a

> statement that provides a greater assistance to a court making this determination: For a particular group of creditors to be adequately represented by an existing committee, it is not necessary for the committee to be an exact reflection of that committee's designated constituents. Instead, adequate representation exists if the interests of that particular group of creditors have a meaningful voice on the committee in relation to their posture in the case. To determine that a committee adequately represents creditors, a court must consider all relevant factors against the backdrop of this broad definition. Though they may be in slight variance with established case law, the following non-exclusive factors are the most pertinent: (a) the nature of the case; (b) identification of the various groups of creditors and their interests; (c) the composition of the committee; and (d) the ability of the committee to properly function.... Consequently, courts look to see whether conflicts of interest on the committee effectively disenfranchise particular groups of creditors.

Id. Outside the bankruptcy context, a similar analysis should govern appointment to PMC's.

Second, thereafter, courts must monitor the PMC to ensure that, at all phases during the course of the litigation, the committee reflects the interests of the various constituencies of the class. See, e.g., Boucher v. Syracuse Univ., 164 F.3d 113, 118 (2d Cir. 1999) (quoting Barnes v. American Tobacco Co., 161 F.3d 127, 140 (3d Cir. 1998) (courts are "'required to reassess their class rulings as the case develops'"); In Re Agent Orange, 818 F.2d at 140 ("The court may reconsider [its decision to certify a class], by decertifying, modifying the definition of the class, or creating subclasses in light of future developments in the case."); Woe v. Cuomo, 729 F.2d 96, 107 (2d Cir. 1984) ("It is often proper... for a district court to view a class

action liberally in the early stages of litigation, since the class can always be modified or subdivided as issues are refined for trial."); Richardson v. Byrd, 709 F.2d 1016, 1019 (5th Cir. 1983) ("The district judge must define, redefine, subclass... as appropriate in response to the progression of the case from assertion to facts."); Doe v. Karadzic, 2000 WL 322774 (S.D.N.Y., Mar. 28, 2000) (same); Wellman v. Dickinson, 79 F.R.D. 341, 348 (S.D.N.Y. 1978) (separate firms would be appointed to act as liaison counsel if interests of classes digressed).

Third, the Court should help compile rules that govern the operation of the PMC in order to prevent collusion among some PMC attorneys to the detriment of others. Presently, most courts do not involve themselves in the operation of the PMC. This may be based on the assumption that the attorneys on the PMC have similar interests, that is, to maximize recovery against the defendants. But as we have already seen, frequently, the subclasses have very distinct interests which may cause splintering and pit plaintiffs' attorneys against one another. Accordingly, some rules need to be installed at the very beginning of the litigation so that the PMC has regulations which govern its operations. Otherwise, situations may develop where particular attorneys of a sub-class collude with others to the detriment of competing sub-groups. (Litigation by PMC should not be based on the t.v. show "Survivor"). It could very well be the

case that courts need to divide and assign specific parts of the litigation among several attorneys so that no one attorney and his or her ad hoc law firm gain too much power and control over the litigation. For example, a court could impose a rule that there are attorneys who conduct certain aspects of discovery. There may be other attorneys who are placed in charge of settlement negotiations.

Fourth, in terms of how to designate subclass counsel, it may very well make sense to appoint attorneys who have a large inventory of individual cases that fall within the subclass criteria as well as attorneys who have significant individual cases. In that way, subclass counsel have an economic incentive to maximize the recoveries for their specific subclasses. As further motivation, rather than simply share in a general settlement fund following approval of some type of settlement, the amount of fees awarded to class counsel should ultimately be tied to the amount of recovery they obtain on behalf of the individual subclasses they represent. Such a coupling should restore some adversarial flavor to the settlement negotiations which would further help to deter collusion among the steering committee attorneys who, with a large settlement in their grasp, may ignore the interests of their particular subclasses in order to reap a portion of the general fund, sometimes gigantic in nature. See, e.g., In re Lease Oil Antitrust Litigation, 186

F.R.D. 403, 425 (S.D. Tex. 1999) (lawyers paid out of settlement award negotiated for subclass); In re FPI/Agretech Sec. Litig., 105 F.3d 469, 473-74 (9th Cir. 1997) (declining to enforce a fee-sharing agreement between class counsel on the grounds that such agreements create perverse incentives). See also Coffee, Class Action Accountability: Reconciling Exit, Voice and Loyalty in Representative Litigation, 100 Colum. L. Rev. 370, 405 (2000) ("Ideally, the attorney for the subclass should be compensated based on the recovery to the subclass--not based on the recovery to the class as a whole. Such a rule enforces Amchem's statement that the representative must understand that its role is to negotiate for the subclass and not the class as a whole; .... Because such a rule aligns the attorney's self-interest with the interests of the attorney's clients, the attorney will logically seek to maximize the allocation of the recovery to the attorney's subclasses."). And failing implementation of these suggestions, at the very least, attorney's fees including caps on fees should be negotiated after court approval of the settlement for the class. See In Re Prudential, 148 F.3d 283, 335 (3d Cir. 1998). See also Resnick, Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation, 148 U. Pa. L. Rev. 2119, 2180-2181 (2000) (arguing that fees and costs be negotiated following settlement of the plaintiffs' claims).

Fifth, when interests become irreconcilable, the power to terminate representation or reject a settlement by opting out needs to be safeguarded, made meaningful, and further expanded.[5] Currently, plaintiffs have the right to opt out under Fed. R. Civ. P. 23(b)(3). See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985). However, presently, there is no recognized right to opt out in Fed. R. Civ. P. 23(b)(1) or 23(b)(2) class actions. See 1 Newberg & Conte, Newberg on Class Actions § 1.22 (3d ed. 1992) (discussing due process implications of non-opt out class action lawsuits). This right needs to be extended across the board for all types of class action lawsuits.

Moreover, there must be an opportunity to opt-out after the settlement fairness hearing. Otherwise, plaintiffs are forced to make their opt-out decision prior to a full debate regarding the proposed merits of the suggested settlement. It would appear that, with all too much apparent frequency, claimants are forced to make such a Hobson's choice. See, e.g., Lazy Oil Co. v. Witco. Corp., 166 F.3d 581 (3d Cir. 1999) (settlement agreement entered some fourteen (14) months after the opt-out deadline had passed); See also Brief of Objectors, Vicki Dunn et al. to proposed class action settlement in In Re Diet Drugs, Civ. Action

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[5]For example, see the Sixth Circuit's Opinion of July 19, 2000 in Telectronics Pacing Systems Inc., Accufix Atrial "J" Leads Products Liability Litigation, Beckert v. TPLC Holdings Inc., et al. Nos. 99-3476/3477/3478/3479/3480, 6th Cir., overturning the $57 million Telectronics pacemaker lead limited fund settlement because it improperly excluded solvent parent corporations and did not allow claimants to opt out.

No. 99-20593 (E.D. Pa.) (objecting to the opt-out dates as giving rise to uninformed decision-making for would-be claimants). Accordingly, at the very least, opt-out dates should follow the fairness hearing. In addition this would encourage and enable potential opt-outs to participate in the fairness hearing and enable the court to be more fully aware of potential infirmities in the settlement. (Some courts prohibit opt-outs from being objectors or participating in the fairness hearings - as was the case in the diet drug settlement)

Additional problems regarding opt-outs arise in the context of future claimants. In many toxic-tort class-actions, the plaintiffs and/or their spouses may not even be aware of some type of toxic tort exposure at the date of opting-out. Georgine, 83 F.3d at 633.

> Problems in adequately notifying and informing exposure-only plaintiffs of what is at stake in this class action may be insurmountable.... Many, especially the spouses of the occupationally exposed, may have no knowledge of the exposure."
>
> Second, class members who know of their exposure but manifest no physical disease may pay little attention to class action announcements. Without physical injuries, people are unlikely to be on notice that they can give up causes of action that have not yet accrued.

Id. at 632-633. See also 7B Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1787, at 220 (1986). The Manual for Complex Litigation (3d) § 30.45, at 244 (1995) warns that "persons who may not currently be aware that

they have a claim or whose claim may not yet have come into existence...cannot be given meaningful notice," and their opt-out rights may be "illusory."

Accordingly, either additional opt-out opportunities must be given to them or they must be excluded from the class altogether. See 1 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 1.23, at 1-55 (3d ed. 1992) ("For class members who cannot currently identify themselves for purposes of protecting their interests with respect to a class action purportedly commenced on their behalf, an opt-out right within a court-designated period of time... is of no beneficial use."). Unsurprisingly then, some courts have even refused to certify classes involving future plaintiffs. See, e.g., Scott v. University of Delaware, 601 F.2d 76, 89 (3d Cir.), cert. denied, 444 U.S. 931 (1979)("[W]e do not think that future faculty members, whose possible claims are only speculative and can only be formulated in a highly abstract and conclusory fashion should provide, and possibly be prejudiced by, membership in the class which [the plaintiff] seeks to represent."); Yandle v. PPG Industry, Inc., 65 F.R.D. 566, 572 (E.D. Tex. 1974) (denying Rule 23(b)(3) class certification, in part on the ground that, "because of the nature of the injuries claimed, there may be persons that might neglect to 'opt out' of the class, and then discover some years in the future that they have contracted asbestosis"); Foster v. Bechtel Power Corp., 89

F.R.D. 624, 627 (E.D. Ark. 1981) (ruling that future plaintiffs could not be included in a Rule 23(b)(2) class). See also Note, The Inclusion of Future Members in Rule 23(b)(2) Class Actions, 85 Colum. L. Rev. 397, 397 (1985) ("[T]he inclusion of future members in class actions is inconsistent with both the explicit requirements and the theoretical underpinnings of Rule 23, thus posing a serious threat to the due process rights of future members.").

On a note related to opt-out issues, during the fairness hearing, parties and their attorneys must be encouraged to come forward to participate, debate, and fully explore all the proposed merits and deficiencies of the settlement. See, e.g., Resnick, Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation, 148 U. Pa. L. Rev. 2119 (2000) (arguing for courts to treat fairness hearings as adjudicatory proceedings). Thereafter, when the opt-out notice is sent to class members, the notices should be drafted in such a way so that both the positive and the unfavorable provisions of the settlement are fully delineated. For example, in the recent Texas case of Lovett v. AHP, the plaintiff sustained a mild aortic valve injury from fen-phen medication and had a preexisting mitral valve prolapse. The jury awarded the plaintiff $23 million dollars against the defendant, American Home Products. Under the settlement plan

proposed by the defendants and the PMC, Ms. Lovett's claim would only be worth $6,000.00 in medical benefits. Yet, these types of facts may never be revealed to class members. Only by divulging this type of information will claimants be able to engage in fully informed decision-making regarding opting-out.

Sixth, as part of the court's scrutiny of the proposed settlement, a court should look to ensure that the subclasses actually had vigorous, independent representation. For example, the actual conduct of the attorneys for each subclass should be studied. If class counsel opted a majority of his or her cases out of the settlement,(the court should also examine the type of cases opted out by class counsel and assure itself that they are significantly different injuries and/or claims from those being left in the settlement) this should create a rebutable presumption that the settlement was inadequate. Additionally, there should be participation by the class representative in the settlement negotiations. See, e.g., In re California Micro Devices Sec. Litig., 168 F.R.D. 257, 268 (N.D. Cal. 1996). A court could even solicit input and the opinions from class members by sending out questionnaires regarding their perceptions of the fairness of the settlement. In fact, some limited discovery into settlement negotiations could be permitted to monitor for zealous advocacy by each subclass counsel on behalf of his or her sub-group. For example, sub-class counsel could be

deposed regarding their opinions on the substantive value of the settlement, input received by class representatives and members, and other pertinent settlement details. In some instances the court could appoint an independent Master to monitor the negotiations to assure the court that they were free from collusive horse trading of the rights of those the court must protect.

In a well, thought out paper, Professor Resnick argues for a series of measures which include judicial oversight of negotiations, fee negotiations to occur after the conclusion of remedial negotiations for claimants, turning fairness hearings into adjudications, mandating disclosures of all fee-sharing agreements and "side agreements to enhance the ability [of the courts] to monitor aggregates' lawyers," and judicial inquiries into "the financing of the litigation and the organizational structure of the lawyering units to learn whether subclass lawyers ... have reasons to be loyal to a subgroup of clients and the degree to which their own fiscal and professional well-being turns on being a team player within a lawyer cohort." Resnick, Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation, 148 U. Pa. L. Rev. 2119, 2180-2190 (2000).

As Professor Resnick notes, judges have a particular incentive to engage in this type of oversight "given the high

degree of visibility of mass torts and the allegations of ethical breaches" so that they do not become accused of facilitating a patronage system of repeat mass tort players. Id. at 2188-2189.

VI. CONCLUSION

In this paper, I have endeavored to highlight those constitutional problems that arise when courts fail to do all they can to minimize conflict that arises in the course of class action litigation. One obvious area that has received little attention has been the criteria used in the appointment of attorneys to PMC's and the process which governs their operation. Indeed, willy-nilly appointments and ad-hoc management, without considering the frequently, divergent interests of the class, sub-classes, and individual claimants as a whole, will cause classes to suffer the same fate of decertification that ensued in Amchem and Ortiz. As a result, prior to appointment, courts should hold hearings so as to identify subgroups of the class and the lawyers who can best serve them. This should be done with an eye toward minimizing conflicts, both within the class and between plaintiffs and class counsel. Additionally, as it may be the case that the interests of previously aligned groups will, at some point, diverge, courts will need to continually evaluate the composition of the steering committee and reconstitute it so that no constituency is ever disenfranchised. The process governing the operations of the PMC's must be instituted very

early on to ensure adequate representation of all sub-groups. Finally, the interests of counsel and the sub-class they represent must be tied together. This can be done by making attorney's fees dependent on sub-class recovery. By deferring to the state judiciary major areas of the settlement and litigation such as supervision and approval of medical monitoring and consumer fraud class settlements, the chance of achieving a settlement that is both fair and passes Supreme Court muster will be significantly advanced. By taking these types of steps the due process rights of the individuals, comprising the class, will be more fully protected and corporate and individual misconduct will be deterred.