NOS. 03-3401 and 03-3402 (consolidated)

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

IN RE DIET DRUGS (Phentermine/Fenfluramine/Dexfenfluramine) PRODUCTS LIABILITY LITIGATION

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
Sheila Brown, et al. v. American Home Products Corporation
Civil Action No. 99-20593
MDL DOCKET NO. 1203
PTO 2929

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CERTIFICATE OF INTERESTED PERSONS

1. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liability Litigation*; MDL Docket No. 1203; in the United States District Court for the Eastern District of Pennsylvania, Philadelphia Division.

2. The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

***Appellants:**

No. 03-3401: Clara Clark, Linda Smart, and all other similarly situated opt-out class members represented by Fleming & Associates, L.L.P.

No. 03-3402: Hariton & D'Angelo, LLP and Napoli, Kaiser, Bern & Associates, LLP, on behalf of themselves, claimant James Axford and similarly situated class members represented by the Hariton and Napoli Firms

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STATEMENT OF RELATED CASES

Pursuant to 3D CIR. LOC. R. 28.1(a)(ii), Appellants state that Nos. 03-3401 and 03-3402 are the only appeals taken from PTO 2929. Two other appeals, Nos. 03-3650 and 03-3741 (consolidation requested), have been taken from PTO 2958, denying the disqualification of class counsel. (JA3:702-17 (PTO 2958); 8:2676-2718 (hearing, 08/06/03)).

Additional appeals have been taken from other district court orders in the MDL 1203 diet drug litigation and are pending before this Court. Appellants are aware of the following such appeals:

02-2345
02-3529
02-3941
02-4020, 02-4021 and 02-4074 (consolidated; individual briefing)
02-4022
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This Court's previous decisions with respect to MDL 1203 are reported at: 30 Fed. Appx. 27, 2002 WL 272351 (3d Cir. Feb. 26, 2002); 282 F.3d 220 (3d Cir. 2002); 275 F.3d 34 (3d Cir. 2001) (table); and 263 F.3d 157 (3d Cir. 2001) (table).

JURISDICTIONAL STATEMENT

The district court (Bechtle, J.), assigned to preside over the MDL 1203 diet drug litigation, asserted jurisdiction over the litigation under 28 U.S.C. §§ 1332 and 1407, and approved a class action settlement. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liability Litig.)*, 2000 WL 1222042 *33 (E.D. Pa. Aug. 28, 2000). (JA3:467-69 (PTO 1415)).

This Court has jurisdiction over the appeal under 28 U.S.C. § 1291. The appeal is timely: PTO 2929 was signed on July 22, 2003, and entered on July 24, 2003. The notice of appeal in No. 03-3401 was filed on August 11, 2003, and an amended notice on August 21, 2003. The notice of appeal in No. 03-3402 was filed on August 11, 2003.

STATEMENT OF THE ISSUES[1]

1. Whether the district court erred in holding absent class members barred from collaterally challenging a class action settlement, where the class members contended they had not been adequately represented at the time of certification and approval of the settlement, and could not as a matter of law have been provided with adequate notice.

2. Whether the district court erred in holding absent class members adequately represented, when the class was plagued with the same kinds of intra-class conflicts and problems with notice that doomed the class actions in *Georgine, Amchem,* and *Ortiz.*

[1] The above issues were presented in Appellants' filings in support of their joint motion to determine inadequacy of representation for opt-out class members. (Docket Nos. PP #302770 (05/12/03); #203790 (05/20/03); #203831 (06/09/03). The issues were also raised in the hearing, held June 18, 2003. (JA8:2625-75).

STATEMENT OF THE CASE

Arising from the MDL 1203 diet drug litigation, this appeal involves a collateral challenge to the fen-phen settlement, brought by Appellants Clara Clark, Linda Smart, and James Axford, as well as certain of their counsel, on behalf of thousands of other absent class members. Appellants contend that their due process rights were violated because they were not adequately represented at the time the class was certified and the settlement was approved, and that they were not provided with sufficient notice. Therefore, they argue, they are not bound by the terms of the Settlement Agreement.

Specifically, the appeal addresses the propriety of Memorandum and Pretrial Order (PTO) No. 2929 (PTO 2929) (JA1:1-14), in which the district court held that the class members were per se forbidden from collaterally attacking the fen-phen settlement; and, alternatively, that their claims failed on the merits. The court so held despite the presence in the fen-phen settlement of the same kinds of intra-class conflicts and notice problems that had doomed the settlements in *Georgine, Amchem,* and *Ortiz*.[2] Appellants maintain that both holdings are legally erroneous.

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[2] In those cases, as well as in other decisions, the Supreme Court and this Court have repeatedly held a class action settlement not binding upon absent class members unless it was negotiated and approved consistent with due process. Further, the same Courts have held that class members are not required to come forward during the settlement process but may later collaterally attack the settlement when a court or party seeks to enforce it against them.

On May 12, 2003, Appellants filed a motion in the district court contesting the adequacy of their representation by class counsel at the time the class was certified and the fen-phen settlement was approved. (Docket No. PP #302770 (05/12/03). The motion by absent class members Clark and Smart was joined by thousands of additional class members represented by 106 law firms. (Docket Nos. PP #203790 (05/20/03); 203831 (06/09/03).

It is undisputed that fen-phen causes a variety of different medical conditions — some relatively minor and others life threatening. The conditions often become progressively worse with time. For example, at the time of certification, some class members suffered from acute medical conditions; others had "FDA positive" valvular heart disease (VHD) with the prospect of progressive worsening; and others were asymptomatic.

But as a result of class counsel's settlement negotiations with Wyeth, the subclasses were not structured on the varying medical conditions of class members — a fact that inevitably generated serious intra-class conflicts. Rather, subclass lines were inexplicably drawn based on whether class members knew they had one broad medical condition — "FDA Positive" valvular heart disease — as of a certain date. Therefore, as the subclasses were structured, neither class members' many other medical conditions nor the medical spectrum encompassed within an "FDA Positive" diagnosis, were accommodated through separate representation.

Nor were subclasses created to account for class members' differing incentives, *i.e.*, conflicts between sick class members who sought immediate financial benefits to compensate them for present injuries, and other class members, unaware of any substantial injuries at the time, who sought medical monitoring and future benefits.

After Appellants' motion and all subsequent briefing (Docket Nos. PP # 203770 (05/12/03); 203790 (05/20/03); 203828 (06/06/03); 203831 (06/09/03); 203840 (06/10/03)), the district court held a hearing on June 18, 2003. (JA8:2625-75). Its order denying Appellants' motion, PTO 2929, was issued July 22, 2003, and entered on July 24. (JA1:1-14).

The district court held that the absent class members' collateral challenge was precluded because "the issue of adequate representation here was carefully and fully litigated at a Fairness Hearing and then decided by Judge Bechtle in his well-reasoned and exhaustive opinion in PTO 1415." (JA1:10). The court concluded that "[a]bsent some extraordinary circumstances not present here, there must be finality to challenges to class action settlements." (*Id.* at 11).

The district court also rejected Appellants' motion on the merits, characterizing it as a disguised attempt ("the real aim of the current motion") to seek punitive damages in violation of the Settlement Agreement. (*Id.*). In denying the motion, the court concluded that "the right to exercise an intermediate or back-end opt-out did not describe any class member or the medical and physical

condition of any class member at the time the settlement was being negotiated." *Id.* "While movants are unhappy that the intermediate and back-end opt-out rights do not allow a class member to sue for punitive damages, that does not mean that there was inadequacy of representation of a particular subclass at the time of the settlement." (*Id.* at 12). "[I]f a class member wanted to pursue punitive damages, he or she could have exercised an initial opt-out." (*Id.* at 13).

Accordingly, the judgment should be reversed.

STATEMENT OF FACTS

1. The Serious Diseases Caused By "The Fens"

This Court is familiar with the background of the fen-phen litigation and settlement from its decision in *In re Diet Drugs*, 282 F.3d 220 (3d Cir. 2002).[3] Beginning in 1989, Wyeth (formerly known as American Home Products, (JA4:871 (Agreement)) manufactured and marketed a pair of appetite suppressants under the trade names Pondimin and Redux. Until removed from the market in 1997, the "fens" (as they are called) were prescribed alone or in combination with a third drug, phentermine. Approximately six million Americans took the fens from 1995 to 1997 alone. (JA3:398-400 (PTO 1415)).

[3] That appeal, unlike this one, did not involve a challenge to the adequacy of representation.

The litigation arose because the fens cause serious, and sometimes fatal, diseases. Epidemiological studies have determined that the drugs cause valvular heart disease, a condition that produces valvular regurgitation in which blood "regurgitates" backward through diseased heart valves. Of particular importance to this appeal, VHD is a "progressive" condition — *i.e.*, it gets worse over time. As the district court found, "once significant valvular regurgitation exists, it tends to beget more severe regurgitation in a significant subset of patients." (JA3:418 (PTO 1415; *see also id.* at 424, 430, 435, 500)). That finding is supported by the record.[4] Further, in a pending consolidated appeal (Nos. 03-2025, 03-2063, 03-2072) from the approval and implementation of the Sixth Amendment to the Settlement Agreement, Wyeth and class counsel acknowledged that VHD is progressive (recognizing that there will be "[p]ersons who . . . have less severe heart valve conditions that progress to those more serious levels") (Wyeth brief at 5; filed 07/30/03).

2. The Fen-Phen MDL Settlement

Across the country, some 18,000 lawsuits and more than 100 class actions had been filed against Wyeth and others based on the deleterious health effects of the fens. (JA3:401-02 (PTO 1415)). The Judicial Panel on Multidistrict litigation

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[4] In addition to the record from the fairness hearing (*e.g.*, JA5:1591, 1593-94, 1641 (hearing, 05/02/00)), other studies are in the record. (JA4:981-1086).

transferred the pending federal cases to the Eastern District of Pennsylvania. *In re Diet Drugs*, 990 F. Supp. 834 (J.P.M.L. 1998) (MDL Docket No. 1203).

In October 1999 negotiations between Wyeth and class counsel resulted in a complaint proposing a consolidated settlement class action in *Brown v. American Home Products Corp.*, No. 99-20593. (JA3:405-08, 436 (PTO 1415); 5:1514-78; *Brown* complaints)). The *Brown* amended complaint encompasses almost all claims of all persons arising from ingestion of the fens. (JA5:1545-46).[5]

Wyeth and class counsel immediately entered into a proposed settlement and executed a Settlement Agreement (JA4:718-875).[6] The district court granted preliminary approval and conditionally certified a nationwide class under FED. R. CIV. P. 23(b)(3). (JA3:384-93, 408 (PTOs 997, 1415)). After hearings on fairness and adequacy conducted in May 2000 (JA5:1579-1700; 6:1701-2477), the court approved the settlement in PTO 1415. (JA3:394-556). Separate settlements with Wyeth led to withdrawal of all appeals from the approval. *See* 275 F.3d 34 (3d Cir. 2001).

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[5] The fen-phen settlement does not apply, of course, to persons who exercised their initial opt-out rights under Rule 23. Such initial opt outs are not part of the class action settlement. (JA3:450-51 (PTO 1415)).

[6] To date, the Settlement Agreement has been amended six times, from November 18, 1999 to January 10, 2003. (JA4:718 (Agreement)). This brief refers to the operative terms of the Agreement as amended.

The fen-phen settlement provides certain financial and medical monitoring benefits. The principal financial benefits are reserved for "Matrix Level" conditions, which are forms of FDA Positive VHD. (JA4:760-76 (Agreement); JA3:442-44 (PTO 1415)).

Like all settlements, the one in this case reflects the trade-offs that inevitably arise from the competing interests of the parties. In two-party litigation, that process presents no special risks. But class action settlements involving heterogeneous classes create the special problem that trade-offs must be made between different class members. As *Georgine*, *Amchem, Ortiz*, and similar cases make clear, that dilemma is avoided by appointing subclass counsel to represent cohesive subgroups of class members. This appeal arises because that approach to subclassing was entirely absent in this case.

Although the *Brown* class is divided into five subclasses (JA3:436-37 (PTO 1415)), those subclasses are not defined based on class members' medical conditions. Instead, they are defined according to (a) whether class members knew that they suffered from FDA Positive VHD as of September 30, 1999 (the Subclass Date), and (b) how long class members ingested the fens.

Class members are divided principally between subclass one and subclass two.[7] As class counsel explained at the fairness hearing, the defining characteristic of subclass one is that "people . . . don't know whether they are FDA Positive or not." (JA5:1628 (hearing, 05/02/00)). All class members who were diagnosed as FDA Positive by the Subclass Date were placed in subclass two. Almost everyone else was placed in subclass one.

Because subclass one includes essentially all persons who did not already know they were FDA Positive (even if they were suffering from FDA Positive valve disease but were unaware of that fact), the subclass is incontestably sprawling. It includes persons who were not sick at all; those suffering from every possible medical condition caused by the fens, such as trace illnesses that cause no medical impairment; and individuals with moderate and serious FDA Positive valve disease.

Subclass two comprises persons who knew they were FDA Positive. Therefore, although arguably more cohesive than subclass one, subclass two is nonetheless heterogeneous because, as noted, class members still suffered from an array of medical conditions, from mild to very serious.

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[7] Subclasses one and two are further subdivided based on how long the class members ingested the drugs. In each subclass, one representative was named on behalf of persons who took the fens for sixty-one days or more, and a second representative for those who took the fens for sixty days or less. (JA3:436-37 (PTO 1415)).

The settlement also creates a third subclass with its own class representative. Subclass three is composed of those members of subclass one who were diagnosed with a condition known as "mild mitral regurgitation" (a particular form of FDA Positive VHD), generally by January 3, 2003, the end of the Screening Period. (JA4:730 (Agreement); 3:437, 440 (PTO 1415)).[8]

The disparate nature of the subclasses is further exacerbated by the relentlessly progressive nature of fen-phen related diseases. The many class members who were seriously ill with valvular heart disease (*i.e.*, Matrix level VHD) at the time the settlement was negotiated — who were included in both subclasses — had an interest in receiving immediate payment. The many class members who were moderately sick had an interest in balancing present payments with ongoing medical monitoring. And the many members who were mildly sick or not sick at all — but who faced the prospect of more serious disease — had an interest in the availability of generous medical monitoring.

As demonstrated above, the agreement approved by the district court is filled with trade-offs that suggest that the interests of many class members were represented inadequately or not at all. The value assigned to some claims is very

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[8] The lack of confidence in the settlement negotiations is evidenced by the fact that the original class representatives for subclasses one and three expressed their dissatisfaction with the settlement and were removed from the case. (Docket No. Paper #888 (04/20/00) at 15).

low. For example, in *Lovett v. AHP* (a Texas state case), a plaintiff was awarded $23 million, based in large part on a finding that Wyeth's conduct merited punitive damages. The plaintiff's claim in that case — a mild aortic valve injury with a preexisting mitral valve prolapse — would receive a total of $6,000 in benefits under the settlement, all for medical monitoring. (Docket No. Paper #888 (04/20/00) at 12-13).

There are other examples. For instance, persons with an elevated pulmonary artery pressure (but less than the PPH minimum of 60 mm Hg at rest, as measured through Doppler echocardiography) (JA4:731-33 (Agreement)), who would have a claim under state law, have their rights extinguished under the terms of the Settlement Agreement. The settlement also does not account for class members' varying rights under the laws of different states, which take divergent approaches to issues such as the proof of fault and the availability of punitive damages. (JA3:333-37 (PTO 865)) (in the district court's opinion, residents of states like Louisiana and Kentucky that do not recognize pure medical monitoring claims would need to be excluded from *Jeffers* medical monitoring class).

Class members who were not acutely injured as of the time of the settlement had substantially less reason to support the settlement at all, because they were already the beneficiaries of a nationwide medical monitoring class action (in the *Jeffers* case) that the district court has previously certified. (JA3:307-47

(PTO 865); 3:403-04 (PTO 1415)). *Jeffers* guaranteed plaintiffs the ability to detect any deterioration in their medical condition and the right, if their injuries worsened, to bring separate lawsuits. But the *Brown* class representatives negotiated an arrangement that subsumed and extinguished *Jeffers*. (*Id.* at 436-38).

Similar trade-offs are apparent in the Settlement Agreement's terms providing some class members opportunities to litigate their claims in court through the exercise of "intermediate opt-out" or "back-end opt-out" rights. (JA4:779-84 (Agreement)).[9] Both provisions address later-discovered injuries. Intermediate opt-out rights are available to members of subclass one who learned they are FDA Positive between the Subclass Date (*i.e.*, September 30, 1999) and the end of the Screening Period (generally, January 3, 2003, *id.* at 735), but who had not accepted medical monitoring benefits under the settlement. (*Id.* at 779-81). Back-end opt-out rights are available to class members who are diagnosed as FDA positive without a Matrix level VHD condition before the end of the Screening Period and who subsequently develop a Matrix Level condition, but who did not claim Matrix benefits under the settlement. (*Id.* at 781-84).

Additional trade-offs were necessarily made regarding the substance of the intermediate and back-end opt-out rights. Those class members may only bring

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[9] The original Settlement Agreement provides for a further "financial insecurity opt-out," triggered only if Wyeth fails to comply with its funding obligations. (JA3:453 (PTO 1415); 4:750-51 (Agreement)).

claims for FDA Positive VHD (or in the case of the back-end opt out, mild mitral regurgitation), notwithstanding that they may have far broader claims under state law. Downstream opt-outs may not seek punitive or exemplary damages or consumer fraud damages. They may not make claims for medical monitoring. Nor may they invoke any previous verdicts or judgments as res judicata or collateral etoppel. Joinder of separate claims is also restricted. In exchange, Wyeth is prohibited from invoking the statute of limitations as a defense in the suit. (JA4:779-84 (Agreement)).[10]

3. The District Court's Ruling: No Collateral Attacks on Inadequacy of Representation

Appellants moved in the district court for a ruling that the settlement was negotiated and approved without due process and accordingly is not binding as to them.[11] (Docket No. PP #203770). In PTO 2929, the court held that Appellants

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[10] In reality, the settlement has been a cruel hoax for victims of the fens whose injuries have become progressively worse. Class members gave up punitive damages claims and other rights in exchange for the settlement's streamlined Matrix administrative procedure, a promise that has never materialized. (*See* JA3:609-32 (PTOs 2662, 2663), two orders dealing with Matrix claims procedure). Two consolidated appeals are presently pending from PTOs 2662 and 2663 (Nos. 02-4502, -4614, -4615, -4617, 03-1007; 02-4613, -4616, 03-1006).

[11] This is the first of two such collateral attacks filed in the district court. A hearing on the second, regarding inadequacy of representation for PPH victims, was held on October 10, 2003. (JA8:2738-2860). No ruling has been issued as of the date this brief was filed.

were prohibited from raising their claims; and, alternatively, that Appellants' claims failed on the merits. (JA1:1-14).

The district court ruled as a matter of law that, if a court has determined during the fairness and adequacy proceedings that the settlement complies with the terms of FED. R. CIV. P. 23 (including sufficient notice and the use of any required subclassing), any later collateral attack on the settlement is forbidden. "Absent some extraordinary circumstances not present here, there must be finality to challenges to class action settlements." (*Id.* at 11).

The district court deemed the Supreme Court's seminal decision in *Hansberry v. Lee*, 311 U.S. 32 (1940), to be not "particularly relevant," because *Hansberry* "was decided long before Rule 23 . . . was promulgated with all its protections," such that in *Hansberry* there was "no notice to absent class members and thus no opportunity to be heard." (*Id.* at 8). The court went on to distinguish *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), which involved a **post-**Rule 23 settlement, as a case in which there was a "conflict between the[] subgroups" seeking present and future benefits but a "lack of separate representation for each." (*Id.* at 10). According to the court, this case presents no such "futures problem" (*id.*), a conclusion that ignores its earlier holding (and evidence at the fairness hearing (JA5:1591, 1593-94, 1641)) that VHD is a progressive condition. (JA3:418 (PTO 1415)).

The district court concluded that no collateral attack may be filed because it had already deemed the settlement, and the process by which it was reached and approved, to comply with Rule 23: "At the Fairness Hearing adequacy of representation was thoroughly explored." (JA1:5). Further, there was "an extensive and sophisticated notice campaign approved by the court." (*Id.* at 8.) Given that Appellants had notice but did not exercise their right to "an initial opt out," it is "too late in the day for movants to claim that they have been denied adequate representation." (*Id.* at 11).

Addressing the merits in only three paragraphs, the district court held in the alternative that, "[e]ven if movants are not precluded from challenging the adequacy of representation of opt-out class members at this late date, their motion is without merit." (*Id.*). The court found it decisive that no person could have represented the interests of intermediate or back-end opt-outs in the course of settlement negotiations because no person exercised those rights until well after the settlement was consummated. (*Id.* at 11-12). Further, the court concluded, Appellants were not adversely affected by these "opt-out" provisions, which conferred a benefit on class members rather than a burden. (*Id.* at 12). Finally, the district court explained that the terms of the settlement reflected valuable trade-offs between the parties: the "limitation on punitive damages protects all class members against the risk of not recovering any benefit" through the exhaustion of

the settlement fund; and intermediate and back-end opt-outs received the benefit of "Wyeth's waiver of the statute of limitations." (*Id.* at 13).

This appeal followed.

SUMMARY OF ARGUMENT

The district court's holdings are both wrong as a matter of law and should be reversed. Its conclusion that Appellants as absent class members do not have the right to bring this collateral attack against the constitutionality of the settlement is clearly contrary to controlling precedent. The Supreme Court settled the right to bring such a challenge in *Hansberry v. Lee,* 311 U.S. 32 (1940), and it reaffirmed that such a right exists after the enactment of Rule 23 in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). Indeed, this Court has recognized that the right to institute a collateral attack is "integral to the constitutionality of the class action procedure." *In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 769 (3d Cir. 1989), *cert. denied*, 493 U.S. 821 (1989).

The district court's holding on the merits — to which it devoted only three paragraphs — is equally indefensible. The settlement in this case violates the principle articulated by this Court in *Georgine*, and affirmed by the Supreme Court in *Amchem*, that due process is violated when the diverse interests of a

heterogeneous nationwide class of persons with diverse medical claims are not separately represented.

Here, the subclass representatives were tasked with pursuing (and ultimately trading off) the interests of individuals with wildly differing medical conditions and divergent rights under state law. But the subclasses did not cure the intra-class conflicts because they were based on class members' knowledge of whether, as of a certain date, they had one broad class of illness (FDA Positive VHD). Persons who were not sick at all, mildly sick, or suffering from serious disease indisputably had competing interests in securing present payments versus long-term benefits. Yet they were all represented by the same person. And the conflicts between the interests of these class members are obvious on the face of the settlement, which provides markedly different benefits to persons who suffer from different conditions, some of whom have their rights to recovery extinguished altogether.

The district court's rationale for nonetheless ruling against Appellants on the merits lack merit. It is no answer that, at the time the settlement was negotiated, no person could have been named as a representative of persons who would later exercise an intermediate or back-end opt-out right. The relevant point is that the settlement was not negotiated by persons appointed to represent persons with distinct injuries, some of whom were far more likely than others to exercise an opt-

out. In any event, the court could have appointed a trustee and/or counsel to represent persons who would exercise such an opt-out.

It is similarly no answer that members of the subclasses were equally ignorant of their medical conditions and thus, so far as each of them knew, equally likely to suffer from any particular disease as a result of the fens. In reality, many class members knew their medical condition; they were not ignorant. Subclass two included all persons who knew they had one of the diverse conditions included within the label "FDA Positive VHD." Subclass one included all persons who knew they had any medical condition other than FDA Positive VHD. But in any event, the only relevant point is that the attorneys representing the subclasses had the impossible task of pursuing the irreconcilable interests of their clients, who had very different medical conditions (and thus very different interests in the outcome of the settlement negotiations), even if each of them did not personally already know what disease they had contracted.

Finally, it makes no difference that the settlement provides some class members the option of exercising an intermediate or back-end opt-out right as a benefit. Any number of such "opt-outs" might have been negotiated by class counsel not operating under a conflict. It is sufficient to trigger the protections of the Due Process Clause that those included in the *Brown* settlement include significant restrictions on the rights of class members, who may not pursue

punitive damages, invoke res judicata, or pursue a variety of claims they otherwise would possess under state law.

STANDARD OF REVIEW

The district court did not make any findings of fact. Its decision rested on two purely legal holdings. First, Appellants are forbidding from collaterally attacking a class action settlement. Second, Appellants' challenges lack legal merit. These holdings are reviewed de novo. *Brytus v. Spang & Co.*, 203 F.3d 238, 244 (3d. Cir. 2000).

ARGUMENT

I. The District Court Erred As a Matter of Law in Holding that Appellants Were Forbidden from Collaterally Attacking the *Brown* Settlement

A. The District Court's Holding that Collateral Attacks are Forbidden Conflicts With a Uniform Line of Authority

The district court's first, glaring error was its holding that class members are barred by res judicata from collaterally challenging the adequacy of representation findings contained in PTO 1415, its earlier order approving the class action settlement. (JA1:8-11). This decision flies in the face of the Supreme Court's clear holding in *Hansberry v. Lee,* 311 U.S. 32 (1940), as well as that of this Court in *In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760 (3d Cir. 1989), *cert. denied*, 493 U.S. 821 (1989), that due process requires that absent class members be entitled to collaterally attack a settlement on the grounds of

inadequate representation. Indeed, as this Court said in *Real Estate*, the availability of collateral attack is "integral to the constitutionality of the class action procedure." 869 F.2d at 769.

In *Hansberry*, the Supreme Court held a class action judgment non-binding on absent class members pursuant to just such a collateral attack. It observed that class action lawsuits present a limited exception to the general rule, grounded in longstanding Anglo-American jurisprudence and required by the Due Process Clause of the Fifth and Fourteenth Amendments, that "one is not bound by a judgment *in personam* in a litigation in which he is not designated a party or to which he has not been made a party by service of process." 311 U.S. at 40 (citing *Pennoyer v. Neff*, 95 U.S. 714 (1877)). The exception is justified by the requirement that absent class members be adequately represented by class representatives; thus, the Court ruled, absent adequate representation, due process would be violated by binding absent class members to the judgment. *Id.* at 41.

In the decision below, the district court held:

> We do not find *Hansberry* to be particularly relevant to the pending motion. In that case, there was no notice to absent class members and thus no opportunity to be heard. Moreover, it was decided long before Rule 23 of the Federal Rules of Civil Procedure was promulgated with all its protections, including the requirement of adequate representation and notice.

(JA1:8). In reaching its extraordinary conclusion that *Hansberry* is no longer good law in the Rule 23 era, however, the district court completely ignored and flatly contravened this Court's 1989 holding in *Real Estate. Real Estate* involved a Rule 23 class action that included all its attendant procedural protections, including notice to absent class members and a determination of adequacy of representation. In *Real Estate*, this Court held:

> Ever since *Hansberry v. Lee* was decided in 1940, **collateral attacks have been considered to be a necessary part of the class action scheme**. Rather than threatening the vitality of the class action mechanism, the fact that some plaintiffs will be able to extricate themselves from class action judgments if subsequent courts find them to be inadequately represented is integral **to the constitutionality** of the class action procedure. *See Hansberry,* 311 U.S. at 45 (stating that it would violate due process to bind an inadequately represented absent party to a prior judgment).

869 F.2d at 769 (emphases added). This Court also cited a policy justification in favor of allowing collateral attacks: doing so preserves judicial efficiency. District courts handling complex multidistrict litigation are thus not forced to resolve all possible issues regarding adequacy of representation at the time of class certification, an alternative that might utterly bog down the litigation: "As well as hearing the class action itself, the class action court would also become the

repository of all of the potentially numerous and burdensome adequacy challenges." *Id.* at 770.[12]

The continued vitality of *Hansberry*, and the bizarreness of the district court's conclusion that it is no longer "particularly relevant," is further demonstrated by the fact that the Supreme Court has continued to follow it. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848 n.24 (1999) ("reiterat[ing] the constitutional requirement articulated in *Hansberry v. Lee*, 311 U.S. 32 (1940)"); *Richards v. Jefferson County*, 517 U.S. 793, 800 (1996) (quoting *Hansberry*, 311 U.S. at 43).[13] As Justice Ginsburg has explained, "[i]n the class-action setting,

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[12] In *Real Estate*, the Court vacated an injunction issued by the district court, which had approved a settlement in a multidistrict class action suit, against a state court proceeding brought by some of the class members. The Court held that the district court lacked personal jurisdiction over the plaintiffs in the state suit because they lacked minimum contacts with the forum. The Court has later limited the application of its personal jurisdiction holding in cases in which the class settlement allowed absent members to opt out. *See Carlough v. Amchem Prods.*, 10 F.3d 189 (1993). This limitation, the rationale for which is that failure to opt out constitutes consent to personal jurisdiction, was specifically anticipated in *Real Estate*. *See* 869 F.2d at 770. It is irrelevant to this case, in which the issue is not personal jurisdiction but adequacy of representation. *Real Estate*'s unequivocal holding that *Hansberry* remains good law, and that the availability of collateral attack is a requirement of due process, remains the law of this Circuit.

[13] Similarly, in *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985), the Court held that "the Due Process Clause of course requires that the named plaintiff **at all times** adequately represent the interests of absent class members." *Id.* at 812 (emphasis added). Contrary to the district court's holding, this language makes clear that what is required is adequacy **in fact**, not merely the availability of **procedures** for determining adequacy, such that the existence of Rule 23 cannot obviate the Constitution's requirements. Without the availability of collateral

adequate representation is among the due process ingredients that must be supplied if the judgment is to bind absent class members." *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 388 (1996) (Ginsburg, J., concurring in part and dissenting in part). "Final judgments [thus] remain **vulnerable to collateral attack** for failure to satisfy the adequate representation requirement. **A court conducting an action cannot predetermine the res judicata effect of the judgment; that effect can be tested only in a subsequent action.**" *Id.* at 396 (emphases added).

Numerous decisions of other courts of appeals similarly demonstrate the constitutional necessity of collateral attacks on class action judgments. As the Second Circuit has stated, a "[j]udgment in a class action is not secure from collateral attack unless the absentees were adequately and vigorously represented." *Van Gemert v. Boeing Co.*, 590 F.2d 433, 440 n. 15 (2d Cir. 1978), *aff'd*, 444 U.S. 472 (1980). More recently, the Second Circuit held that "the propriety of a collateral attack such as this is amply supported by precedent." *Dow Chem. Co. v. Stephenson*, 273 F.3d 249, 258 (2d Cir. 2001), *aff'd by an equally divided Court*, ___ U.S. ___, 123 S. Ct. 2161 (2003). Nor can a prior finding of adequate representation prevent a collateral attack: "Plaintiffs do not attack the merits or finality of the settlement itself, but instead argue that they were not proper parties

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attack, there would be no means of testing whether, at the time of the proceedings leading to an initial adequacy finding, absent class members were in fact adequately represented.

to that judgment. If plaintiffs were not proper parties to that judgment, as we conclude below, res judicata cannot defeat their claims." *Id.* at 259. *See also Williams v. Gen. Elec. Capital Auto Lease, Inc.,* 159 F.3d 266 (7th Cir. 1998) (addressing due process considerations of prior class action settlement on collateral attack); *Twigg v. Sears, Roebuck & Co.,* 153 F.3d 1222, 1226 (11th Cir. 1998) ("Before the bar of claim preclusion may be applied to the claim of an absent class member, it must be demonstrated that invocation of the bar is consistent with due process, and an absent class member may collaterally attack the prior judgment on the ground that to apply claim preclusion would deny him due process."); *Crawford v. Honig,* 37 F.3d 485, 488 (9th Cir. 1994) (finding that when absent class members were not adequately represented in a post-settlement modification of a class-wide injunction, "res judicata did not bar them from collaterally attacking the [modification] proceedings") (citation omitted)). And the Fifth Circuit addressed the issue succinctly:

> To answer the question whether the class representative adequately represented the class so that the judgment in the class suit will bind the absent members of the class requires a two-pronged inquiry: (1) Did the trial court in the first suit correctly determine, initially, that the representative would adequately represent the class? and (2) Does it appear, after the termination of the suit, that the class representative adequately protected the interest of the class? The first question involves us in a **collateral review** of the . . . [trial] court's determination to permit the suit to proceed as a class action with [the named plaintiff] as the representative, while the second

> involves a review of the class representative's conduct of the entire suit—an inquiry which is not required to be made by the trial court but which is appropriate in a collateral attack on the judgment . . . .

Gonzales v. Cassidy, 474 F.2d 67, 72 (5th Cir. 1973) (emphasis added).

Commentators have similarly explained that notwithstanding the existence of Rule 23, due process entitles absent class members to collateral attack on class action judgments. *See* Restatement (Second) of Judgments § 41, Comment a, p. 394 (1982) ("the represented person may avoid being bound either by appearing in the action before rendition of the judgment or by attacking the judgment by subsequent proceedings"); 1 Herbert B. Newberg & Alba Conte, NEWBERG ON CLASS ACTIONS § 1625, at 16-133 (3d ed. 1992) (explaining that Rule 23 "does not disturb the recognized principle that the court conducting the action cannot predetermine the res judicata effect of the judgment" and that "[d]ue process of law would be violated for the class judgment" to be held binding "unless the court applying res judicata could conclude that the class was adequately represented in the first suit"); Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation In Class Suits*, 79 TEX. L. REV. 383 (2000); Henry Paul Monaghan, *Antitrust Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148 (1998).

Nor is it significant that Appellants had the right to opt out of the *Brown* settlement. Adequate representation is a fundamental constitutional guarantee, and

an opt-out right is no substitute for it. *See Matsushita*, 516 U.S. at 397 (Ginsburg, J., concurring in part and dissenting in part) ("due process demands more than notice and an opportunity to opt out; adequate representation, too . . . is an essential ingredient. Notice . . . cannot substitute for the thorough examination and informed negotiation an adequate representative would pursue."). Indeed, no amount of findings as to the fairness of a settlement can cure the problems posed by inadequate representation. *See id.* at 397-98 ("An adequate representative, . . . vigorously prosecuting an action without conflict and bargaining at arms-length, may present different facts and a different settlement proposal to the court than would an inadequate representative.") (internal quotation marks omitted).

In short, the district court's holding that plaintiffs were not entitled to bring a collateral attack directly contradicts binding precedent of the Supreme Court and this Court. It therefore should be reversed.

B. The Notice Provided to Class Members Does not Save the Settlement

The district court found it significant that extensive efforts were undertaken to notify members of the *Brown* class of the settlement. (JA1:8-9). But notice is always provided under Rule 23, and it does not extinguish the due process rights of absent class members. The provision of notice is a separate requirement that cannot excuse inadequate representation. *See Stephenson*, 273 F.3d at 26 n. 9 ("Because we have already concluded that these plaintiffs were inadequately

represented, and thus were not proper parties to the prior litigation, we need not definitively decide whether notice was adequate.").

The district court ignored that meaningful notice was impossible for Appellants and other class members who did not fully appreciate the seriousness of their injuries prior to the close of the initial opt-out period. Because of the progressive nature of VHD, it was not reasonable to require a class member to make an intelligent and informed decision regarding whether to opt out from, or object to, the settlement. As this Court explained in *Georgine*, "[p]roblems in adequately notifying and informing exposure-only plaintiffs of what is at stake in this class action may be insurmountable." 83 F.3d at 633. "[C]lass 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 633.

The Supreme Court similarly recognized the "[i]mpediments to the provision of adequate notice," especially for persons who do not yet manifest health problems. *Amchem*, 521 U.S. at 628. "Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out." *Id.* Indeed, the Court went so far as to note "the gravity of the question

whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous." *Id.*

Due process and Rule 23(c)(2) require that notice be tailored to allow an absent class member to "make a rational judgment on whether to exclude himself from the action." 7B CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1787, at 220 (1986). And the MANUAL FOR COMPLEX LITIGATION (THIRD) § 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."

"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." NEWBERG ON CLASS ACTIONS § 1.23, at 1-55. Unsurprisingly, numerous courts have rejected class actions involving "futures" plaintiffs. *E.g.*, *Scott v. University of Delaware*, 601 F.2d 76, 89 (3d Cir. 1979), *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."); *Shults v. Champion Int'l Corp.*,

821 F. Supp. 520, 524 (E.D. Tenn. 1993) ("No settlement that precludes future, unknown causes of action can be considered fair, reasonable, or in the best interests of the class as a whole."), *dismissed*, 35 F.3d 1056 (6th Cir. 1994); *Yandle v. PPG Indus., 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: "due process considerations ... permeate the decision of whether or not to certify a class" including absent future plaintiffs); *Freeman v. Motor Convoy, Inc.*, 68 F.R.D. 196, 200 (N.D. Ga. 1975) (ruling that a class action could not include prospective job applicants and warning that "an overbroad framing of the class may operate to deprive absent members of due process"); Note, *The Inclusion of Future Members in Rule 23(b)(2) Class Actions*, 85 COLUM. L. REV. 397, 397 (1985) ("the 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"); *id.* at 398 n.7 ("future members cannot be included in (b)(3) actions"); *id.* at 403 ("The drafters of Rule 23 did not anticipate the inclusion of future members in class action suits. Indeed,

upon close examination it is clear that Rule 23(a)'s prerequisites for class certification cannot be meaningfully applied to future members to protect their due process rights.").

II. The *Brown* Settlement Violates Appellants' Right to Due Process

The district court's alternative holding on the merits, to which it devoted only three paragraphs, is no more defensible than its holding that Appellants were forbidden outright from bringing this collateral attack. (JA1:11-13). The court ignored entirely class counsel's role in creating the disabling intra-class conflicts of the *Brown* class. Its grounds for sustaining the settlement as consistent with due process in reality do no more than demonstrate that trade-offs were made among the rights of class members without adequate representation.

A. *Georgine, Amchem* and *Ortiz* Prove the Inadequacy of Representation in This Case

The present case is governed by this Court's decision in *Georgine*, which the Supreme Court affirmed in *Amchem*, as well as by the Supreme Court's decision in *Ortiz*. Those cases hold that due process is satisfied by the settlement of a single federal nationwide class action composed of millions of highly individualized personal injury claims brought by a heterogeneous group of claimants. The vastly diverse interests among different groups of plaintiffs means that such a class cannot satisfy the requirement of adequacy of representation.

As this Court observed in *Georgine*, "[s]ome class members suffer no physical injury or have only asymptomatic [lung] changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma." 83 F.3d at 626. "[T]he course of each plaintiff's future is completely uncertain. . . . [S]ome plaintiffs may ultimately contract mesothelioma, some may get asbestosis, some will suffer less serious diseases, and some will incur little or no physical impairments. . . . 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 have incentives that align with those of absent class members." *Id.* at 632. The Supreme Court opined that adequacy of representation "tends to merge with the commonality and typicality criteria of Rule 23(a)." *Amchem*, 521 U.S. at 626 n.20. The Court found that differences among class members spawned disabling intra-class conflicts: "[i]n significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future." *Id.* at 626; *see also Ortiz*, 527 U.S. at 855-58 (finding impermissible conflict between plaintiffs exposed to asbestos during period manufacturer was fully insured, and those exposed later); *Barnes v. American Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998) ("[A]ddiction, causation, the defenses of comparative and contributory

negligence, the need for medical monitoring and the statute of limitations present too many individual issues to permit certification. . . . These disparate issues make class treatment inappropriate.").

Central to the holdings of both the Supreme Court in *Amchem* and of this Court in *Georgine* was the inherently individualized nature of a products liability damages action, despite the well known signature illnesses of asbestos exposure. In *Amchem*, the Supreme Court held that "the sprawling class the District Court certified" could not satisfy the adequate representation requirement of Rule 23. 521 U.S. at 622. The Supreme Court reached that conclusion despite a plethora of factual findings drafted by the settling parties and entered by the district court cataloging every conceivable justification for the settlement class action. The Court did not stop to determine whether any of those findings was clearly erroneous, nor did it see the need to remand the proceeding to the district court for further fact finding:

> We do not inspect and set aside for insufficient evidence district court findings of fact. Rather, we focus on the requirements of Rule 23, and endeavor to explain why those requirements cannot be met for a class so enormously diverse and problematic as the one the District Court certified.

Id. at 622 n.17.

B. The Subclasses Did Not Cure the Conflict in This Case

The *Brown* settlement cannot constitutionally be applied to bind Appellants because it was negotiated and approved in violation of Appellants' right to due process under *Georgine* and *Ortiz*. During the negotiations and at the time of certification, there was a vast disparity among members of the *Brown* subclasses, producing conflicting interests. One aspect of the disparity arises from the different medical conditions, and differing applicable legal regimes. Indeed, in the parallel *Jeffers* proceeding, Wyeth itself had highlighted the class members' divergent circumstances and interests. Thus, the representatives of subclasses one and two were charged with representing diverse clients (who suffered from greatly varied medical conditions) and whose legal claims varied considerably in strength (as a result of different legal regimes).[14]

The subclasses were furthermore infected with the same "futures" problem that invalidated the settlements in *Georgine* and *Ortiz*. As the district court itself had recognized earlier, "many actions [were] brought by plaintiffs without present

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[14] Wyeth noted: (1) differences in the class members' duration of, amounts of and combinations of the drugs ingested; (2) Wyeth's varying knowledge of alleged side effects and the changing contents of warning labels over the times of ingestion; (3) differences in the prescribing physicians' knowledge, conditions and warnings under which the drugs were prescribed; (4) differences in applicable state law; (5) differences among class members involving pre-existing injuries or non-diet drug related conditions; and (6) differences in affirmative defenses available to Wyeth against individual class members. (JA3:326-27 (PTO 865)).

injury, requesting legal or equitable relief in the form of medical monitoring or refunds of purchase prices." (JA3:351 (PTO 884)). Some class members suffered from acute medical conditions and were interested in immediate payouts. Others had FDA positive or Matrix level conditions but faced the prospect of progressive worsening. Still others were asymptomatic and accordingly had a keen interest in ensuring that downstream opt-out rights were as broad and unrestricted as possible. They had a strong incentive in ensuring that they could avail themselves of res judicata and collateral estoppel in their opt-out suits against Wyeth and could seek punitive damages as well. They had an interest in medical monitoring, medical research, and other investments for the future. *See Georgine*, 83 F.3d at 630-31; *Ortiz*, 527 U.S. at 854-56. By contrast, class members who were already acutely injured at the time of certification and settlement were less interested in such investments. Their focus was simply on maximizing immediate payouts from Wyeth.

The district court's assertion that "there was no 'futures' problem," (JA1:10), ignores the court's own repeated finding in approving the settlement that heart valve injury is a progressive condition. (JA3:418, 435 (PTO 1415)). And, as noted above at 9 n.4, there is also substantial medical evidence corroborating the progressive nature of the condition. The worsening of valve damage over time creates the very real problem that many of the less severely injured class members

at the time of certification nonetheless had a substantial interest in preserving their ability to recover substantial damages awards against Wyeth in the future, while class members who were already severely injured at the time of certification favored maximum payouts immediately.

Despite these obvious, substantial conflicts, the settlement was not negotiated by class counsel assigned to represent each of the groups of class members with divergent interests. Instead, the distinction between subclasses one and two was made based on the utterly irrational line of the class members' knowledge of whether, by the Subclass Date, they had one broad class of disease: FDA Positive VHD. Thus, subclass one — the subclass of class members who lacked that knowledge — contained the entire breadth of conditions that are caused by fen-phen: tens of thousands of people with no impairment at all, tens of thousands of people with minor impairments, and tens of thousands of people with more serious injuries.

The identical problem infected subclass two. The persons who knew they suffered from FDA Positive VHD still suffered from a wide variety of conditions. That is apparent from the fact that the settlement itself only recognizes some of those conditions — so-called Matrix level conditions — as sufficient to generate a cash payout. Thus here, as in *Georgine*, "the settlement makes numerous decisions on which the interests of different types of class members are at odds." 83 F.3d

at 630. The counsel assigned to represent each subclass were inevitably in the position of trading off the interests of some of their clients.

The trade-offs that subclass counsel made among the rights of their disparate clients are obvious on the face of the settlement. For example, the rights of persons with certain injuries are extinguished altogether. Substantial state law rights were also sacrificed in the provisions addressing intermediate and back-end opt-outs. Class members in states with more favorable remedies — such as medical monitoring rights — received no enhancement for their claims. The district court itself, in rejecting Appellants' motion, noted that the ban on seeking punitive damages by intermediate and back-end opt-outs was a "trade-off," (JA1:10), which the court justified as necessary to preserve Wyeth's assets for the benefit of the class as a whole. (*Id.* at 13).[15]

Appellants accordingly are not bound by the *Brown* settlement under *Georgine*, *Amchem*, and *Ortiz*, decisions that rest on elementary, structural principles underlying the due process clause. That governing precedent cannot be distinguished based on supposed factual differences between asbestos and fen-phen

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[15] The court was mistaken about the need for a restriction on punitive damages; the settlement's monies are provided by a settlement trust which has already been funded by Wyeth. (JA4:741-48 (Agreement)). But the court was correct that the ban on downstream opt-outs' seeking of punitive damages was a sacrifice imposed on Appellants by other class members who were less interested in preserving Appellants' rights to bring subsequent lawsuits in the tort system.

litigation. Indeed, in *Georgine* this Court acknowledged that class action treatment was aided by the fact that the central question of the harmfulness of asbestos exposure is "essentially settled." 83 F.3d at 630.

III. The District Court's Alternative Reasons for Rejecting Appellants' Claims Lack Merit

Notwithstanding the foregoing, the district court rejected the merits of Appellants' claims on two grounds. First, the court held that, because no class members had exercised an intermediate or back-end opt-out right at the time the settlement was negotiated, it was impossible to appoint class members to represent the interests of those persons. But that fact does not excuse abandoning the effort to create subclasses that reflect the diverse interests of the class. The various members of the subclasses had greatly differing medical conditions and thus greatly differing prospects of ever becoming eligible (or exercising their eligibility) for one of these "opt-outs." For example, persons in subclass one who were not sick at all during the settlement negotiation were extremely unlikely to qualify because they were very unlikely to satisfy the prerequisite that they progress by the end of the Screening Period to an FDA Positive condition.

Even under the district court's view, however, it could have considered the appointment of trustees or other mechanisms to protect the interests of persons who would later be in a position to exercise intermediate and back-end opt-outs. (JA5:1628-31 (hearing, 05/02/00)). The court's insistence on the need to name

particular class representatives is deeply ironic, because after the proposed *Brown* settlement was announced, the original representatives for subclasses one and three resigned and subsequently contacted attorneys to express their dissatisfaction with the settlement. (Docket No. Paper #888 (04/20/00) at 15). Thus, as it turned out, the eventual representatives for subclasses one and three did not serve as named plaintiffs during the negotiations leading to the settlement. If anything, the district court's concern over the naming of particular class representatives should have underscored the absence of adequate representation in this case.

The subclasses in this case — which were based on whether the class members knew they had FDA Positive VHD — also cannot be defended on the ground that class members were equally ignorant of their medical conditions and thus, so far as each of them knew, equally likely to suffer from any particular medical condition. Preliminarily, each of the class members was not equally ignorant. Many class members knew their medical condition. Members of subclass two, for example, knew their medical conditions, which could take the form of greatly differing forms of FDA Positive VHD. Many members of subclass one knew their medical condition as well, because it included all persons who knew they had a condition that did not rise to the level of FDA Positive VHD, including because they were not sick at all. Yet the representatives of subclasses

one and two were required to pursue the diverse and competing interests of persons with very different medical conditions.

But in any event, the ignorance of some subclass members is no excuse for not complying with due process. The relevant point is that counsel who negotiated the settlement on behalf of the each subclass were well aware that their clients had very different interests. There was no choice but to trade off the interests of the clients in the course of reaching a settlement.

The second ground offered by the district court for rejecting Appellants' claims on the merits was that the *Brown* settlement raises no inadequacy problem because the settlement's terms providing intermediate and back-end opt-out rights constitute a benefit rather than a burden for class members. (JA1:12). The relevant point is that, as noted, the opt-out provisions inevitably involved compromises in the rights of discrete groups of class members who did not receive the distinct representation of their interests that the Due Process Clause requires.

It is decisive that both of the opt-out provisions carry significant restrictions that indisputably worked to the disadvantage of certain class members. These provisions do not, as the district court asserted, "allow[] for the autonomy of individual class members to pursue their own destiny." (*Id.*). An intermediate opt-out right is not available at all to members of subclasses two and three. An opt-out class member is prohibited by these provisions from invoking res judicata and

collateral estoppel against Wyeth and is barred from seeking punitive or multiple damages, which are a strong incentive for Wyeth to have resolved claims for fair value in timely fashion, as the history of settlements demonstrates. The class member is also limited to asserting a legal claim based on the medical condition that the Settlement Agreement defines as "FDA Positive" (JA4:728-29) (or in the case of the back-end opt out, mild mitral regurgitation). If a class member accepts the $3,000 or $6,000 medical monitoring benefit payment, he or she loses the right to opt out even if the medical payments, lost earnings and other costs may exceed these amounts. The intermediate and back-end opt out rights thus do not cure the intra-class conflict in this case. To the contrary, they underscore the conflict because Appellants had a strong interest in minimizing the restrictions imposed as part of downstream opt-out rights, while acutely injured class members were willing to accept downstream restrictions in exchange for higher immediate payouts.

CONCLUSION

For the foregoing reasons, Appellants are not bound by the *Brown* settlement. Those class members who believe they were adequately represented at the time of certification are free to remain in the settlement and accept benefits from Wyeth in exchange for the extinguishment of their claims. Those class members who can show that they were not adequately represented, however, may

not constitutionally be bound to the settlement, and Wyeth cannot have any legitimate reliance interest in barring the claims of such plaintiffs. *See Dow Chem. Co. v. Stephenson*, 273 F.3d 249, 259 (2d Cir. 2001) *aff'd by an equally divided Court*, ___ U.S. ___, 123 S. Ct. 2161 (2003) ("[S]uch collateral review would not, as defendants maintain, violate defendants' due process rights by exposing them to double liability. Exposure to liability here is not duplicative if plaintiffs were never proper parties to the prior judgment in the first place."). This Court should reverse PTO 2929.

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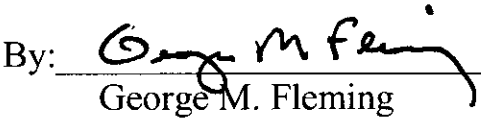
By: 
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CERTIFICATE OF SERVICE

I certify that two copies of the Consolidated Brief of Appellants have been provided to all parties, as described below on October 14, 2003.

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CERTIFICATE OF COMPLIANCE

1. The undersigned certifies that this brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because the brief contains 8,981 words, exclusive of the exempted portions in FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface and typestyle requirements FED. R. APP. P. 32(a)(5) and 32(a)(6) because the brief has been prepared in proportionally spaced typeface using Microsoft Word 2000 in Times New Roman 14-point type for text and footnotes.

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CERTIFICATE OF ADMISSION

Pursuant to 3D CIR. LOC. R. 28(3)(d), the undersigned certifies that at least one of the attorneys whose names appear on the brief is a member of the bar of this Court.

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