

**MINOR DEFENDANTS' VIEWPOINT
OF THE CLASS ACTION:
THE NEW WAVE OF ASBESTOS LITIGATION**

I. INTRODUCTION

A. A Rising Tide Lifts All Ships

In the event that U.S. District Court Judges Weiner and Reed ultimately certify the *Carlough* matter as a class action pursuant to Fed. R. Civ. P. 23(b)(3), there will be huge changes in the way in which this litigation has been handled to date. All defendants will find themselves in uncharted waters. Minor, peripheral defendants, already used to having some of their options foreclosed by decisions made by others, will likely find themselves in a situation where they have less control than before the filing of this action. No defendant can remain unaffected by the changes that will transpire if this action is allowed to proceed. Accordingly, each defendant will have to decide for itself how to respond to this matter, but some response seems imperative. Whatever decisions are reached should be made quickly.

Time and tide wait
for no man.

Proverb

B. How Long is Your Tether? Or, Will the Rising Tide Sink Your Ship?

1. *Financial considerations will, of course, be paramount in any decision reached by a minor defendant.* The Center for Claims Resolution has stated that it anticipates its Stipulation of Settlement to encompass the

expenditure of approximately \$1 Billion Dollars over a ten-year period. Each minor defendant must approximate the future costs of the litigation to determine whether it can continue along the same course, whether it should attempt to slip into the wake of CCR's class action, or whether it should chart a new course.

2. *Legal tenacity - playing with the big boys.* Any minor defendant must understand that a decision to move either with or against the class action will necessarily entail involvement with some high priced law firms who are playing for extremely large stakes. It is predicted that the legal tenacity with which both sides of the class action will fight to sustain their positions will be unprecedented. Accordingly, any minor defendant should be careful to chart a course that will prevent it from being swamped with having to respond to countless motions, briefs and hearings on some extremely complex issues.

II. THE SUBSTANCE OF THE WAVE

A. Sustainable - "In class actions necessity makes due process."

A leading legal scholar wrote those words in 1960. The author was then a Professor of Law at the Columbia Law School and the Reporter of the New York Advisory Committee on Practice and Procedure. It was, of course, none other than the Honorable Jack B. Weinstein, who is presently well known to us all as the U.S. District Court Chief Judge for the Eastern District, and sometimes Southern District, of New York. Judge Weinstein is clearly one of the most innovative activists on any bench when it comes to attempting to resolve "mass torts" through the utilization of

The true creator is necessity, who
is the mother of our invention.
Plato, *The Republic*

bold and imaginative approaches. Judge Weinstein's present involvement with the restructuring of the Johns-Manville bankruptcy is certainly not his first foray into attempting to imaginatively resolve extremely complicated matters involving thousands of claimants. *Findley v. Blinken*, 129 B.R. 710 (E.&S.D. N.Y. 1991). *In re Joint Eastern and Southern Districts Asbestos Litigation*, 120 B.R. 648 (E.&S.D. N.Y. 1990).

Following backwards in time Judge Weinstein's involvement with asbestos class actions, we find *White v. Eagle-Picher Industries, Inc.*, 134 F.R.D. 32 (1990), wherein Judge Weinstein held that Eagle-Picher's motion for the certification of a class consisting of all persons who then had, or might at any time in the future have, a claim against E-P, should be granted. The District Court ruled that it possessed the power to enjoin pending state cases against a manufacturer (within the exception to the Anti-Injunction Act for "injunctions necessary in aid of jurisdiction," and under the All-Writs Act), which permitted the courts to certify national class actions and to stay pending federal and state cases brought on behalf of class members, viewing its action authorized either as an affirmative grant of power to the courts or an exception to the Anti-Injunction Act. So ordering, the Court went on to stay all suits against Eagle-Picher nationally. Before this matter was resolved, Eagle-Picher Industries, Inc., filed for protection under Chapter 11 of the Bankruptcy Code. This filing, likewise, precluded any appellate review of the Eagle-Picher limited fund class action.

Any port in a storm.

Proverb

A thorough discussion of Judge Weinstein's rulings in the "Agent Orange" litigation is contained within *In re "Agent Orange" Product Liability Litigation*, MDL No. 381, 818 F.2d 145 (1987). The Second Circuit, in affirming Chief

Judge Weinstein's class certification was obviously uncomfortable, if not outrightly squeamish. In that particular case Weinstein had not only certified the class, but had also forced a settlement of all plaintiffs' cases which had not been opted out, and then had granted summary judgment for the defendants in all of those plaintiffs cases which had been opted out. The Second Circuit found itself having to chart a course between Scylla and Charybdis, recognizing that unwinding this *fait accompli* would be a nightmare. The Second Circuit went a long way to assure everyone that it perceived the *Agent Orange* matter to be unique. Noting that the Advisory Committee Notes to Rule 23(b)(3) provide that mass tort cases are "ordinarily not appropriate" for certification, it went on to suggest that the benefits of a class action, even in the instant case, had been "greatly exaggerated." Additionally, it noted, but for the military contractor defense, the paucity of common issues of law. Third, it noted the discrepancies in the strengths of the plaintiffs' cases impaired the ability of representative parties to protect the interest of the class and, therefore, caused inefficient use of judicial resources. 818 F.2d at 164-165. It also noted

[t]he drum beating that accompanies a well publicized class action claiming harm from toxic exposure and the speculative nature of the exposure issue may well attract excessive numbers of plaintiffs with weak to fanciful cases.

Id., at 165. Nonetheless, it allowed the class, and its settlement, to stand, noting further

[u]nlike litigations such as those involving DES, Dalkon Shield and asbestos, the trial is likely to emphasize critical common defenses applicable to the plaintiff's class as a whole.

Id., at 166.

Necessity turns a lion into a fox.
Persian Proverb

Plainly, Chief Judge Weinstein is not shy in attempting to structure such classes.

B. Not Sustainable - All Other Law

1. *Historically, class action suits in asbestos litigation have not been approved by the courts.* The Eleventh Circuit in *In re Temple*, 851 F.2d 1269 (1988), issued a writ of mandamus ordering the district court to vacate an order certifying a class action against Raymark Industries, Inc. In a collusively filed action, Raymark moved the United States District for the Northern District of Georgia to certify a mandatory class for the purpose of consolidating all present and future asbestos-related personal injury actions brought against it. Raymark argued that the certification was justified primarily because the corporation had limited assets pursuant to Rule 23(b)(1)(B). Relevant excerpts from that opinion are as follows:

Initially, we note that any certification of a mandatory class in a mass tort case, especially one predominantly involving issues of liability and compensation, must be reviewed with utmost scrutiny. Such certification clearly implicates the Anti-Injunction Act.

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Because we vacate the court's order on other grounds, we do not decide whether the Anti-Injunction Act has been violated. However, we note that the principles of comity are implicated by the district court's disregard for the sovereignty of the state court systems enjoined.

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The "necessary to aid its jurisdiction" proviso has been construed extremely narrowly.

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Not only does not the district court's order implicate federal/state relations, it clearly violates the individual constitutional rights of the petitioners.

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Finally, the district court's own findings raise grave doubts as to the propriety of certifying a class of "all persons ... who have or who will have in the future claims against

Raymark Industries, Inc. for damages ... resulting from exposure to asbestos." Rule 23 requires that for class certification to be appropriate there must be "commonality" and "typicality." That is, there must be "questions of law and fact common to a class [and] the claims or defenses of the representative parties are typical of claims or defenses of the class." Fed.R.Civ.P. 23(b)(1)(B).

The district court noted that Raymark and its predecessor in interest had manufactured and sold such different sorts of items as "cloth, tape, gaskets, packings, brakelinings, and clutch facings." (Order at 2). It also listed at least four separate maladies caused by asbestos: "pleural changes, asbestosis, lung cancer, or mesothelioma." (Order at 9). Although the record on commonality and typicality of the class is sparse, the district court's order on its face encompasses a potentially wide variety of different conditions caused by numerous different types of exposures. We have no indication that claimants' experiences share any factors other than asbestos and Raymark in common. See *Dalkon Shield*, 693 F.2d at 852-54 (discussing inappropriateness of class action device for mass product liability actions); *Yandle v. PPG Ind., Inc.*, 65 F.R.D. 566, 570-71 (E.D.Tex.1974) (denying class certification to workers in asbestos plant on lack of commonality grounds where employees worked at different positions, were employed for different periods of time, and asserted different theories of recovery); *In re Asbestos School Product Liability Litigation*, 606 F.Supp. 713, 714 (J.P.M.L. 1985) (denying motion to consolidate asbestos claims brought by school districts because common questions of fact did not predominate). See also Advisory Comm. Note to 1966 Rev. of Rule 23(b)(3), 39 F.R.D. 69, 103 (stating mass accidents resulting in injuries to numerous people are generally inappropriate subjects of class actions). The district court's summary findings of commonality and typicality of the variety of claims presented are clearly erroneous.

851 F.2d at 1271-73.

Despite this rather strong ruling from the Eleventh Circuit, Raymark took another shot at having a national limited fund class actified. *See, Waldron v. Raymark Industries, Inc.*, 124 F.R.D. 235 (N.D. Ga. 1989). U.S. District Court Judge Vining ruled that this collusively filed class action should not be certified. Finding that the barriers to the certification of the class were "insurmountable" the court did not reach the issue of whether Raymark's assets constituted a limited fund pursuant to Rule 23(b)(1)(B). Judge Vining found that a mandatory class would be violative of the constitutional rights of those persons who have insufficient contacts to allow the court to exercise personal jurisdiction over them. Additionally, the court agreed with the Eleventh Circuit's expressions of doubt that such a mandatory class action could be maintained in the face of the Anti-Injunction Act, 28 U.S.C. § 2283, which provides

A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by act of Congress, or when necessary to aid its jurisdiction, or to protect or effectuate its judgments.

As noted above, Judge Weinstein ruled that his certification of the Eagle-Picher limited fund class was not violative of the Anti-Injunction Act as it was "necessary to aid [the court's] jurisdiction.

2. *Notes of the Advisory Committee Relating to Rule 23.* Subdivision (a) of Rule 23 states the prerequisites for maintaining any class action in terms of numerosity, questions common to the class, and the desired qualifications of the representative parties. These are *necessary* but not *sufficient* conditions for a class action. Subdivision (b) describes the additional elements which in varying situations justify the use of a class action.

Rule 23(b)(1)(B) can be utilized only where there is plainly a fund insufficient to satisfy all of the claims.

The Advisory Committee Notes relating to subdivision (b)(3) suggest that in situations to which this subdivision relates, class action treatment is not as clearly called for as in other situations. It suggests that this subdivision relates to situations where a class action would achieve economies of time, effort, and expense, and promote uniformity, *without sacrificing procedural fairness*.

In order to utilize subdivision (b)(3) the court is required to find questions common to the class predominate over questions affecting individual members. A "mass accident" is ordinarily not appropriate for a class action. *Cf. Weinstein, Revision of Procedure: Some Problems in Class Actions*, 9 Buffalo L. Rev. 533, 469 (1960). That common questions predominate is not itself sufficient. Even when a number of separate actions are proceeding simultaneously, experience shows that the burdens on the parties and the courts can sometimes be reduced by arrangements for avoiding repetitious discovery of the like.

To reinforce the point that the court with the aid of the parties ought to assess the relative advantages of alternative procedures for handling the total controversy, subdivision (b)(3) requires, as a further condition of maintaining the class action, that the court shall find that that procedure is "superior" to the others in the particular circumstances.

A non-exhaustive list of those factors to be considered by the court is in Rule 23. The court is to consider the interest of individual members of the class in controlling their own litigations and carrying them on as they

see fit. In considering the interest of individuals, the court should determine whether they have a high degree of cohesion and whether the prosecution of the action through representatives would be unobjectionable. The court should also consider the burden that separate suits would impose on the party defending the class, or upon the court calendars. Also, the desirability of concentrating a trial in a particular forum and the problems of management must be considered.

Lastly, the Advisory Committee Notes are fairly detailed with respect to the notice provisions contained in Rule 23. It is *suggested* that notice under subdivision (d)(2) may be particularly useful and advisable in subdivision (b)(3) cases, so as to permit members of the class to object to the representation. Further, under subdivision (c)(2), notice *must* be ordered to give the (b)(3) class members an opportunity to opt out.

Both the mandatory notice provisions and the discretionary notice provisions have been designed to fulfill the requirements of due process to which the class action procedure is of course subject. Notice should be accommodated to the particular purpose, but is available fundamentally for the protection of the members of the class or otherwise for the fair conduct of the action, and should not be used merely as a device for the undesirable solicitation of claims.

All of the foregoing considerations are expressed in the Advisory Committee Notes.

III. OPTIONS FOR PERIPHERAL DEFENDANTS

It must be noted at this point that many courts are attempting to fashion unique structures to resolve what the judiciary has come to call the "asbestos crisis." These efforts have been consistent, intentional and imbued with differing degrees of due process. For example, the Supreme Court of New Jersey has fashioned two separate bodies of product liability law - one for asbestos and one for every other product. *See, Beshada v. Johns-Manville Products Corp.*, 90 N.J. 191, 447 A.2d 539 (1982); *Feldman v. Lederle Laboratories*, 189 N.J. Super. 424, 460 A.2d 703 (1983). Of course, asbestos products were likewise beyond the penumbra of the tort reform legislation adopted in New Jersey. *See, Stevenson v. Keene Corporation*, 131 N.J. 393, 620 A.2d 1047 (1993). In Maryland the Court of Appeals has proposed amending their civil rules to provide for the entry of a final judgment, notwithstanding the pendency of cross-claims. Once again, the proposed amendment, "Entry of Final Judgment in Asbestos Actions," will apply *only* to asbestos cases. Given the obvious willingness of some courts to deviate from the path of *stare decisis* in the context of asbestos litigation, it is certainly possible that this ill-designed and leaky craft called the "Futures Class" may be able to survive the rocky shoals of jurisprudence and miraculously arrive at its home port intact. In that circumstance it may be better to be aboard, rather than an onlooker. Accordingly, the following assumes the futures/settlement class will be approved.

A. Do Nothing - Ignore the Wave

1. *Will the wave leave all the other defendants awash in a sea of confusion?* The extremely complex issues which are involved with the *Carlough* matter may very well have the effect of staying the litigation until matters are sorted out before U.S. District Judges Weiner and Reed in the Eastern District of Pennsylvania. Motions are presently pending before the Eastern District:

- - to decertify the class;
- - to dismiss the named individual plaintiffs for failure to state a claim;
- - to dismiss the class action for lack of subject matter jurisdiction;
- - to create subclasses;
- - to disqualify class counsel;
- - for the recusal of Judge Weiner;
- - to dismiss for a lack of case or controversy;
- - to allow the taking of discovery;
- - for a discovery plan;
- - for a scheduling order;
- - for leave to file an amicus brief opposing the class on the grounds that the settlement class would increase demands on Texas's publicly-funded social welfare system;
- - to decertify the class as it pertains to merchant seamen;
- - to intervene and/or to participate as amicus curiae.

Additionally, there has been a complaint filed in the State of West Virginia, *Gore, et al. v. Amchem Products, Inc., et al.*, Cir. Ct. of Monongalia County, Civil Action, No. 93-C-195, filed March 17, 1993, asking the Circuit Court to certify a futures class of all persons exposed to any of the CCR defendants' products in the State of West Virginia. This raises the interesting question of whether a futures class certified by a state court would be allowed to opt out *en masse* from a futures class in a federal court purporting to have national scope.

Ultimately, the resolution of these issues will greatly affect the decisions which a minor defendant will make with respect to the class.

2. *Will it leave all the other defendants high and dry, i.e., vulnerable, gasping for air as the plaintiffs comb the beach looking for the last morsels of sustenance?* This certainly is another distinct possibility. It may well be that the principal effect of the class upon minor defendants is the fact that there will be fewer visible defendants in any future filed claim. As defendants have fallen by the wayside by having entered either Chapter 11 or Chapter 7 bankruptcy proceedings, there has been no noticeable reduction in the plaintiffs' demands.

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B. Fight the Wave

1. *Intervention.* Clearly, any minor defendant has sufficient interest under Rule 24(a)(2) to be able to intervene as a matter of right. The requirements for being able to intervene as a matter of right are:
 - a. that the application for intervention be timely filed;
 - b. that the applicant have a sufficient interest in the litigation;
 - c. that the interests of the intervenor may be affected or impaired as a practical matter by the disposition of the action; and
 - d. the interests of the intervenor are not adequately represented by the existing parties.

Of these four criteria, only timeliness and sufficiency of interest seem to warrant further discussion. It would seem, since only conditional certification has so far taken place (and that happened so quickly as to

virtually preclude any prior intervention), that the court would be ill-advised to deny any minor defendant's motion to intervene as untimely. Interests which any minor defendant may seek to protect by intervention include its rights under the laws of the various states for contribution against any of the settled defendants. It is clear from a cursory review of Part XIII of the Stipulation of Settlement that all defendants' contribution rights may be significantly affected by the proposed settlement.

Permissive intervention pursuant to Rule 24(b) allows intervention at the discretion of the court when an applicant's claim or defense and the main action have a question of law or fact in common, and the intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. Again, it seems clear that common questions of fact and law are both involved in the adjudication of the propriety of the certification of the proposed settlement class. The presence of a minor defendant intervenor would certainly not significantly expand, delay, or prejudice the adjudication of the rights of the original parties.

2. *Objection.* While some minor defendants may choose to object to the certification of this proposed futures/settlement class, it appears that their interests are being well represented by the various objections filed on behalf of certain plaintiffs. It is anticipated that the plaintiffs' firms who are not denominated as "class counsel" will carry this banner sufficiently well to adequately represent the interests of objecting minor defendants.

C. Ride the Wave

1. **Some of the arguments in favor of participation in this endeavor to expand the law are as follows:**
 - a. The establishment of a settlement class would afford a minor defendant the opportunity to negotiate absolutely future costs attributable to its asbestos litigation. A case flow rate could be established on both a monthly and annual basis with a cap placed upon the dollar amounts of settlements.
 - b. There should be a concomitant reduction in attorneys' fees, since counsel would only have to continue defending existing cases, rather than open files, answer complaints, and engage in discovery. Of course, there should be significantly fewer trials.
 - c. Claims would necessarily be limited to those involving plaintiffs with actual prolonged occupational exposures to asbestos-containing products and who are actually suffering from asbestos-related diseases. By itself, limiting the claimants to those with legitimate claims will mean far fewer claims than is presently the case.
 - d. Much higher visibility will attach to those defendants who do not attempt to participate in some way in the class action. While the reasonable assumption would be that the plaintiffs would necessarily reduce their demands, since fewer defendants would continue to be involved in the litigation, experience has not shown this to be so.

2. *Hop aboard someone else's craft.*

a. CCR

A review of the Stipulation of Settlement, and the various panels and mechanisms established thereby, would lead a casual observer to conclude that, in the event the *Carlough* class action is ultimately certified and such certification is affirmed by the appellate courts, CCR may be willing to market the services it will provide pursuant to the settlement agreement to other minor defendants. This conclusion may be completely ill-founded, but it appears that this possibility at least exists.

b. Consortium of peripheral defendants

There is also the possibility that a group of minor defendants could join together to file an action similar to that filed by the plaintiffs and the CCR defendants. Obviously, the negotiations between the various minor defendants would be extremely complex and would require a good deal of give and take on behalf of all participants. Nonetheless, it would seem that this is one option which should at least be discussed by all of the minor defendants who are not named defendants in the *Carlough* matter.

3. *Riding it on your own.*

a. With a settlement

Another possibility is that any minor defendant could approach one of the nationally renowned plaintiffs' firms to negotiate a settlement of all future claims, not dissimilar to, but far simpler than, the settlement entered into between Motley, Locks, and CCR. If such an agreement could be reached on terms amenable

to both sides, then a complaint naming only that single minor defendant could be filed requesting the certification of a futures class against only that particular defendant.

b. Without a settlement

Any minor defendant could have filed against it a complaint requesting the certification of a futures class naming only that minor defendant. However, there would then remain the possibility that the ultimate resolution of this case could be economically unacceptable, even devastating, to the minor defendant.

There is a tide in the affairs of men
Which, taken at the flood, leads on to fortune;
Omitted, all the voyage of their life
Is bound in shallows and in miseries.
On such a full sea are we now afloat;
And we must take the current when it serves,
Or lose our ventures.

Wm. Shakespeare, *Julius Caesar*,
Act IV, Scene II