

Class Action Newsletter

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Antitrust/Class Action Settlements

Eighth Circuit rejects parties' proposed recipients of *cy pres* distribution of settlement proceeds because other potential recipients' interests are more closely related to objectives of litigation: Judge William Riley, for the Eighth Circuit, rejected a district court's *cy pres* distribution of unclaimed settlement funds in an antitrust class action alleging airline ticket price fixing to the National Association for Public Interest Law (NAPIL), a public interest law firm, and ruled that instead the funds should go to travel agents in Puerto Rico and the U.S. Virgin Islands. This was the second time that the Eighth Circuit had rejected the district court's *cy pres* distribution in the same action. The class action antitrust lawsuit had been filed by travel agencies, travel agents and the American Society of Travel Agents (ASTA), against several major airlines, alleging that the defendants had colluded to place caps on commissions paid to travel agents. After the case settled in 1996, the district court rejected ASTA's proposal to distribute the unclaimed settlement funds to travel agents in Puerto Rico and the U.S. Virgin Islands and instead awarded the funds to several area law schools and charities. After the Eighth Circuit set aside the *cy pres* award, the trial court again rejected ASTA's repeated proposal, but this time awarded the funds to NAPIL. Again, the Eighth Circuit set aside the *cy pres* award and "emphasize[d] the importance of tailoring a *cy pres* distribution to the nature of the underlying lawsuit." As explained by the Eighth Circuit, a court will distribute unclaimed funds using the *cy pres* doctrine, which takes its name from the French *cy pres comme possible* ("as near as possible") and originated to save testamentary charitable gifts that would otherwise fail, for a purpose as near as possible to the underlying objectives of the lawsuit, the interests of the class members and the interests of those similarly situated. Thus, although the travel agencies in Puerto Rico and the U.S. Virgin Islands were not class members, they "were subject to the same allegedly unlawful caps," and "[a] *cy pres* distribution to these agencies would relate directly to the antitrust injury alleged in this lawsuit." In contrast, the court stated, "NAPIL cannot claim any relation to the substantive issues in this case." This case suggests that the courts may be more closely examining proposed *cy pres* distributions in connection with class action settlements to ensure that they are related as much as possible to the original purposes of the lawsuit. *In re Airline Ticket Commission Antitrust Litig.*, 307 F.3d 679 (8th Cir. 2002).

Antitrust/Consumer Class Actions

U.S. Supreme Court grants limited *certiorari* to appeal Second Circuit's reversal of trial court's dismissal of antitrust claims against local telephone companies:

U.S. Supreme Court to Rule on Whether and How Agent Orange Settlement May be Attacked on Collateral Review

The U.S. Supreme Court has again tackled, in *Stephenson v. Dow Chem. Co.*, the meaning of "adequacy of representation" in a mass tort settlement, this time in a case in which veterans who had been exposed to Agent Orange in Vietnam suffered injuries that did not manifest themselves until long after the settlement funds had run dry. The question the Court must answer is whether the claims of the *Stephenson* plaintiffs can be barred by the settlement where no provision was made to protect against the possibility that persons like the *Stephenson* plaintiffs might manifest injury after exhaustion of the settlement fund. The Court heard oral argument at the end of February, and will render a decision by the end of this term.

The *Stephenson* plaintiffs were not the first to claim injuries arising from exposure to Agent Orange during the Vietnam War. In the late 1970s, other plaintiffs filed virtually identical claims against the same defendants. After consolidations and transfers, the litigation landed in the Eastern District of New York, where Judge Weinstein certified a class in 1983. On the eve of trial, in 1984, the parties settled, agreeing that defendants would pay \$180 million into a settlement fund to be distributed to injured veterans and their families, to the "Agent Orange Class Assistance Program" and to indemnify defendants against future state court actions. Although the class included "persons who have not yet manifested injury" no payments were to be made for "death or disability occurring after December 31, 1994." In 1987, the Second Circuit affirmed the trial court's certification of the class and approval of the settlement.

In 1989 and 1990, other plaintiffs filed class actions against the same defendants in Texas state courts, alleging that their injuries manifested only after the 1984 settlement (the "*Ivy/Hartman* litigation"). The actions were removed to federal court and transferred to the Eastern District of New York, where Judge Weinstein held that the court had jurisdiction under the All Writs Act and dismissed the litigation on the grounds that the 1984 settlement barred these plaintiffs' claims. In 1993, the Second Circuit affirmed Judge Weinstein's decision.

The third time was the charm for plaintiffs. Daniel Stephenson sued the same defendants in federal court in the Western District of Louisiana, alleging that he had not been diagnosed with cancer until 1998 — four years after the original settlement fund had run dry. After the case was transferred to Judge Weinstein, he granted defendants' motion to dismiss on the grounds that plaintiffs' claims were barred by the 1984 settlement. This time, based on *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), the Second Circuit disagreed with the district court and allowed plaintiffs' claims to proceed notwithstanding the

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As discussed in the Fall 2002 newsletter, the Second Circuit held in August 2002 that local telephone companies are subject to class action antitrust claims brought by consumers challenging the companies' failure to open their local networks to competitors. Just recently, on March 10, 2003, the U.S. Supreme Court granted *certiorari* limited to the following question: "Did the Court of Appeals err in reversing the District Court's dismissal of respondent's antitrust claims?" The case will be argued and decided in the Supreme Court's upcoming October term. ***Verizon Comm. v. Law Offices of Curtis Trinko, _U.S._, 123 S. Ct. 1480 (2003).***

Consumer Class Actions/Arbitration

U.S. Supreme Court grants *certiorari* to determine whether the Federal Arbitration Act, 9 U.S.C. § 1 (the "FAA") et seq., prohibits class action procedures from being superimposed onto an arbitration agreement that does not provide for class action arbitration:

In a case brought by homeowners alleging violations of certain statutory provisions regulating home improvement financing, the Supreme Court of South Carolina held in August 2002 that class-wide arbitration is permissible even when the arbitration agreement is silent as to such arbitration, if it would serve efficiency and equity and would not result in prejudice. The court analyzed the two approaches taken by other courts, one by the federal appellate courts and the other by the California courts. The federal courts, and in particular, the Seventh Circuit, have held that the federal courts lack authority to order class-wide arbitration under Section 4 of the FAA, 9 U.S.C. § 4, relying mainly on previous decisions refusing to order consolidation of arbitration when the agreement is silent, and holding paramount the duty to enforce an agreement as written by the parties above the public policy favoring expeditious resolution of claims. The California courts, on the other hand, have distinguished consolidations from class actions on the grounds that in a consolidated arbitration a party may be forced into a dispute with another in the absence of any contractual relationship, before an arbitrator he had no voice in selecting and by a procedure he had not agreed to, whereas in a class action, the plaintiffs are all parties to an agreement with the defendant. The California courts ultimately concluded that the decision should be made on a case-by-case basis. The Supreme Court of South Carolina chose the California approach in the absence of any controlling precedent, relying on independent state grounds of contract interpretation to read the silence in the agreement against the drafter (here Green Tree), and to provide those with small individual claims but significant collective claims a meaningful avenue for relief, as well as to serve judicial economy. The U.S. Supreme Court has granted *certiorari* and oral

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1984 settlement. See *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001).¹ Defendants successfully petitioned for *certiorari* from the Supreme Court.

Stephenson continues the dialog the Supreme Court began in *Amchem and Ortiz*, in which the Court considered attempted class-based settlements of asbestos claims. In those cases, the Supreme Court held that the commonality, adequacy, typicality, predominance and superiority requirements of Rule 23 cannot be ignored at the settlement stage. In particular, those cases specifically held that the obligation to establish adequate representation of the plaintiff class requires, at a minimum, separate counsel for future claimants whose interests in the fixed settlement fund will conflict with the interests of persons currently manifesting injury whose ripe claims will eat away at that fund. Following the Supreme Court's lead, the Second Circuit ruled that the *Stephenson* plaintiffs are exempt from the Agent Orange settlement because they — as claimants who sustained injury after the scheduled expiration of the settlement trust fund in 1994 — were not adequately represented in the 1984 settlement because there had been neither separate counsel for future claimants such as the *Stephenson* plaintiffs nor provision made to protect future claimants from exhaustion of the settlement fund. The Supreme Court granted *certiorari* in *Stephenson* on two questions: whether absent class members are precluded from relitigating the issue of adequacy of representation through collateral attack on a settlement; and whether, if such collateral attack is possible, adequacy of representation should be determined as of the time of the original litigation or at the time of the collateral attack.

Stephenson brings to a head the issue of whether it will ever again be possible to settle future claims in mass tort cases. At first blush, *Amchem* and *Ortiz* appear to preclude any settlement that seeks to bar future claims, as did the Agent Orange settlement (which was reached before *Amchem* and *Ortiz*). Were that the case, there would seem to have been no reason for the Supreme Court to grant *certiorari* since a *Stephenson*-type settlement would be unlikely ever to occur again. But *Amchem* and *Ortiz* did not address how a challenge to adequacy of representation could or should be brought, since those cases came up on direct review. Moreover, those cases say only that at a minimum, future claimants must be represented by separate counsel.

¹ A jurisdictional issue also arose in this action. Another plaintiff, Joe Isaacson, sued defendants in New Jersey state court after he was diagnosed with non-Hodgkins lymphoma. Defendants removed the case to federal court, after which it was transferred to Judge Weinstein. Judge Weinstein found, and the Second Circuit affirmed, that the district court had jurisdiction under the All Writs Act, 28 U.S.C. § 1651. As discussed in this newsletter, however, the Supreme Court has just held, in *Syngenta Crop Protection, Inc. v. Henson*, 123 S. Ct. 366 (2002), that the All Writs Act does not confer jurisdiction on the federal courts where there is no federal question or diversity jurisdiction. This aspect of the Second Circuit's opinion in *Stephenson*, therefore, is no longer good law. In fact, during the oral argument in *Stephenson*, plaintiffs' attorney acknowledged that Mr. Isaacson's case would have to be remanded to state court in light of *Syngenta*.



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argument was set for April 22, 2003. If the Supreme Court affirms the South Carolina decision, it may be necessary to draft such consumer arbitration clauses to include an express prohibition of class action arbitration if it the intention to limit arbitration to individual claims. *Bazzle v. Green Tree Fin. Corp.*, 351 S.C. 244, 569 S.E.2d 349 (2002), cert. granted, 123 S. Ct. 817 (2003).

Employment Discrimination/Common Fund Fee Award

Parties to a class action brought under a fee-shifting statute cannot condition a settlement agreement on the court's approval of a specific measure of attorneys' fees:

In another opinion from the Ninth Circuit, this one written by Judge Marsha Berzon, the court reversed and remanded the district court's approval of a class action settlement on two separate grounds. First, the parties should not have negotiated and agreed to the amount of attorneys' fees between themselves and then conditioned the court's approval of the settlement upon approval of those fees, since such an agreement raises the specter that class counsel sold out the class to obtain higher attorneys' fees. Rather, they should have agreed upon the total amount of the common fund and then class counsel should have applied to the court for a fee award from the fund. The court then could have determined the fee award using either the statutory fee approach (lodestar) or common fund principles (lodestar with an appropriate multiplier). Second, it was inappropriate for the court to approve significantly higher damage awards to the named plaintiffs and certain other plaintiffs identified by class counsel as having actively participated in the litigation. The record suggested that the real reason for the disparity in damages may have been these individuals' pre-settlement promise to class counsel to contribute to counsel's costs. In dissent, Judge Stephan Trott stated that the record did not show any actual collusion between class counsel and Boeing, that numerous experts, including the Rev. Jesse Jackson, endorsed the agreement, and that, in light of the clear value of the settlement to African-American employees working at Boeing, the agreed-upon attorneys' fees were appropriate. *Staton v. Boeing Corp.*, 313 F.3d 447 (9th Cir. 2002).

Multi-District Litigation/Stay of Attempted Parallel Settlement

A federal judge presiding over a consolidated multi-district class action pending in Miami issues an order staying an attempt by one of the defendants to dispose of the claims pending against it through settlement of a separately instituted federal court class action: The multi-district proceeding (the "Managed Care" case), which was brought on behalf of a nationwide class of

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They do not define what else, if anything, is required to pass muster under Rule 23 and constitutional due process.

Settlement of future claims in a manner consistent with the due process rights of future claimants potentially would entail requirements beyond separate representation for future claimants. For instance, the plaintiffs in *Stephenson* suggest the following additional requirements under Rule 23 and due process: (1) notice of certification providing a right to opt out; (2) notice of certification specifically addressed to future claimants; (3) notice of settlement informing future claimants of their right to contest adequacy of representation; and (4) delivery of notice of entry of judgment personally to future claimants. Plaintiffs further suggest, however, that notice to future claimants may never be constitutionally adequate — why would a future claimant pay any attention to any notice when, by definition, he has not been injured? Significantly, much of the oral argument before the Supreme Court addressed the issue of notice. Moreover, the majority opinion in *Amchem* went so far as to state that although the Court need not rule on the sufficiency of the notice, "we recognize 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." *Amchem*, 521 U.S. at 628. It is, therefore, possible that the Supreme Court will rule that notice to future claimants can never comport with due process and, therefore, would bar all settlements of future claims. But even if the Supreme Court does not go that far and simply agrees with plaintiffs' suggested additional requirements for notice, such settlements (*i.e.*, requiring settlement of future claims on a notice and opt out basis) will likely be much less attractive to defendants.

Even in the absence of any ruling on these issues, any decision on collateral review may significantly increase the difficulties in settling future claims. First, it would be surprising if the Supreme Court decides to prohibit all collateral review of class action settlements barring future claims. To bar such collateral review would arguably render *Amchem* and *Ortiz* dead letter since any future claimant who is not aware of his claim before any appeal deadlines have elapsed would not have challenged the adequacy of representation, thereby allowing a settlement to stand that should have been prohibited.²

²The potential results of such a rule are illustrated in the recent Supreme Court of Vermont's decision in *State v. Homeside Lending, Inc.*, 2003 WL 367449 (Vt. 2003), arising out of an Alabama state court decision that became the poster-child for class counsel run amok with court approval (discussed in this newsletter). Although this case did not involve the problem of adequate representation of future claimants, procedurally the case arose on collateral review by a Vermont state court of an Alabama state court's approval of a class-wide settlement that resulted in some class members paying more in attorneys' fees than they recovered from the settlement. After thoroughly castigating the class plaintiffs' lawyers for selling out the class for the sake of their own fees, the court acknowledged the disagreement over whether adequacy of representation can be challenged by collateral attack. The court agreed with the Second Circuit's decision in *Stephenson* to allow such an attack, because "adequacy of representation is 'the quintessence of due process in class actions.'" Without collateral review, this settlement would have been allowed to stand.



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health care providers, alleges improper claims settlement practices by managed health care plans offered by defendants CIGNA Corporation; Aetna, Inc.; Humana; Foundation Health Systems; United Healthcare; and Prudential. In September, Judge Moreno of the U.S. District Court for the Southern District of Florida issued an order certifying the provider class to pursue its claims against the managed care defendants. See *In re Managed Care Litig.*, 209 F.R.D. 678 (S.D. Fla. 2002) (analyzed in the Fall 2002 *Mintz Levin Class Action Newsletter*). One of the defendants, CIGNA, also was a defendant in a state court class action pending in Madison County, Illinois, *Timothy N. Kaiser, et al., v. CIGNA Corporation, et al.*, Case No. 02 1179-GPM (S.D. Ill.) (“*Kaiser*”), that alleged similar claims against CIGNA under state law. A national class had also been certified in *Kaiser*. After Judge Moreno’s certification of the provider class in the *Managed Care* case, plaintiffs in *Kaiser* amended their complaint to add federal claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961, *et seq.*, and the Employee Retirement Income Security Act (ERISA), 15 U.S.C. §§ 1001, *et seq.*, that were identical to the federal claims in *Managed Care*. CIGNA then removed *Kaiser* to federal court, at which point the *Kaiser* plaintiffs and defendants jointly presented a proposed settlement to a federal judge sitting in the Southern District of Illinois. The proposed settlement would have entered final judgment binding on a provider class that would include the members of the class certified in the *Managed Care* case. The *Managed Care* plaintiffs, upon learning of this attempt to settle claims asserted in their case, requested that Judge Moreno issue an injunction to stop the settlement pursuant to the federal All Writs Act, 28 U.S.C. § 1651, which permits a federal court to enjoin other federal court actions where necessary to prevent interference with the enjoining court’s exercise of its jurisdiction. Judge Moreno granted the motion. In an opinion noteworthy for its judicial invective, Judge Moreno rejected CIGNA’s argument that the All Writs Act should only be used by a court to protect a settlement, not to prevent one, stating that such extraordinary relief was appropriate in light of “the underhanded maneuvers CIGNA took to obtain this settlement agreement.” The opinion goes so far as to say that CIGNA “snookered both this Court and Judge Murphy in Illinois in an obvious attempt to avoid this Court’s jurisdiction.” In particular, the court found that CIGNA failed to apprise Judge Murphy that the *Managed Care* case was pending. Further, CIGNA did not comply with rules of the Judicial Panel on Multidistrict Litigation that obligated CIGNA to apprise Judge Moreno promptly of the pendency of subsequently filed “tag along” federal court actions such as *Kaiser* until after filing of the settlement papers in *Kaiser*. Judge Moreno found

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Moreover, even if a future claimant knew that he might have a future claim, such claims present standing problems under Article III that the Supreme Court has not even begun to address. Settlement opponents in *Amchem* and *Ortiz* argued that the parties could not settle “exposure-only” claims — claims asserted on behalf of persons who had been exposed to asbestos, but had not yet manifested symptoms of asbestos-related disease — because such claimants lacked standing under Article III in that they had not suffered any injury.³ The Supreme Court did not address this argument then (saying that class certification issues should be addressed before standing issues), but the *Stephenson* plaintiffs advance that very same argument now, and the Court may address it here. Ultimately, if Article III bars future claimants from seeking direct review and the Supreme Court rules in *Stephenson* that they cannot seek collateral review, future claimants would be unable to argue that a settlement does not comply with *Amchem* and *Ortiz*. Such a result would nullify *Amchem* and *Ortiz*, making it seem likely that the Supreme Court will allow some sort of collateral review of settlements of future claims.

From a defendant’s perspective, allowing such collateral review would make settlements virtually useless as a way of buying peace for all time. Even if a settlement passes muster on direct appeal, it would always be open to collateral attack. And if the standard of review on collateral attack is *de novo* review, settlements that stick would be that much more difficult to structure.

Some recent high-profile mass tort cases will also likely face these problems. For instance, in the suit against McDonald’s for teenage obesity resulting from fast food, the trial court allowed a small window for plaintiffs to amend their complaint. If the plaintiffs do manage ever to state a claim, the question of future claimants may present problems: would someone who is not yet obese, but later becomes obese or who is obese but does not suffer any injury until years later, be a class member and bound by any judgment or settlement?

Likewise, a recent article in *The New York Times* reported on the ethical quagmire presented by class counsel representing plaintiffs in asbestos litigation who accepted \$20 million as a fee from the defendant’s parent corporation for brokering a settlement agreement between the plaintiffs and the defendant. The defendant, Combustion Engineering, filed for bankruptcy and its parent intends to set up a trust from the assets to pay current and future claims of asbestos-related injury. Whether *Amchem*,

³Even in the absence of disease, in some cases plaintiffs may be able to bring a claim for fear of developing cancer. But in *Stephenson*, state law in the plaintiffs’ home states (Louisiana and New Jersey) barred both *Stephenson* and *Isaacson* from bringing such a claim. And the Supreme Court has just recently held, in *Norfolk & Western Railway Co. v. Ayers*, 123 S.Ct. 1210 (2003), that under the Federal Employers’ Liability Act (FELA), a worker already suffering from asbesto-sis resulting from work-related exposure to asbestos can recover damages for fear of developing cancer, but affirmed that without any actionable disease no such damages can be recovered. Thus, in many cases people will not have any actionable claims until they have suffered physical injury, which may not occur until long after settlements have been reached or settlement funds have run dry.

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it likely that CIGNA's maneuvers were intended to procure conflicting orders from the two courts in the hope that such conflict would prevent the *Managed Care* court from interfering in the *Kaiser* settlement. In light of such conduct, Judge Moreno deemed it appropriate to issue the requested order staying the separate settlement proceedings in *Kaiser* and facilitate the continued consolidated resolution of all of the managed care claims in a single proceeding. This case, much like the decisions rejecting an attempted collusive settlement of the H&R Block tax refund class action (see analysis below), exemplifies courts' increasing reluctance to countenance attempts by defendants to circumvent existing class actions through collusive settlement class actions instituted by counsel of the defendants' choosing. *In re Managed Care Litig.*, 236 F. Supp. 2d 1336 (S.D. Fla. 2002).

Products Liability/Removal of Class Action

U.S. Supreme Court rules that the All Writs Act does not furnish removal jurisdiction: Chief Justice William Rehnquist, writing for the U.S. Supreme Court, held that the All Writs Act, 28 U.S.C. § 1651, did not provide removal jurisdiction in a class action asserting solely state law claims relating to the manufacture and sale of an insecticide where (apparently) there was no diversity jurisdiction. The state court action had been stayed when the plaintiff intervened and participated in the settlement of a similar federal court action. Although the federal court settlement required the dismissal of the state court action, the state court allowed the action to proceed based on plaintiff's counsel's incomplete representation of the terms of the federal court settlement. The Supreme Court rejected the defendants' argument that removal of the state court action was necessary to prevent the frustration of the federal court's order requiring its dismissal. In so doing, the Supreme Court resolved a circuit split and reiterated that the statutory procedures for removal are to be strictly construed. Since the All Writs Act does not confer jurisdiction on the federal courts, it cannot confer the jurisdiction necessary to support removal and, therefore, cannot be used to avoid the statutory requirements of removal. Before this decision, there had been a trend in some circuits towards liberalizing the removal of state law claims to federal court. *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 123 S. Ct. 366 (2002).

Securities/Standing to Appeal Fee Award

An absent class member lacks standing to appeal an allegedly excessive fee award because he failed to submit timely claim against common fund created by securities fraud class settlement: Judge Alex Kozinsky, for the Ninth Circuit, held that an unnamed class member

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Ortiz and now *Stephenson* will allow such a settlement is unclear, even leaving aside the obvious questions of whether class counsel fulfilled his fiduciary duties in representing the class.

In facing these seemingly intractable problems, the Supreme Court in *Stephenson* will likely once again plead for legislative relief. In *Amchem*, the Supreme Court described the asbestos-litigation crisis arising from millions of Americans suffering injuries with latency periods of as long as 40 years, referring to the prescient 1991 report of a United States Judicial Conference Ad Hoc Committee on Asbestos Litigation that stated, in part, "future claimants may lose altogether." The Supreme Court in *Ortiz* again bemoaned the crisis, stating, "the elephantine mass of asbestos cases...cries out for a legislative solution." And in *Norfolk & Western Railway Co.*, the Court once again noted the crisis, but also noted that the Court cannot "reconfigure established liability rules because they do not serve to abate today's asbestos litigation crisis." Such a remark strongly suggests that in *Stephenson* the Court will not strain to interpret the requirements of Rule 23 and due process in order to alleviate the problems associated with settling mass tort litigation. Thus, a legislative solution may indeed be the only way to provide compensation for those claiming injury from asbestos, toxic chemicals and fast food, while at the same time allowing defendants some mechanism through which they can buy peace.

Vermont Decision Holds that Vermont Residents are Not Bound by Alabama Class Action Settlement

In a follow-on to a case that became the poster-child for class counsel run amok with court approval, the Supreme Court of Vermont has allowed the State of Vermont to proceed with a lawsuit collaterally attacking a nationwide class action settlement approved by an Alabama state court. *State v. Homeside Lending, Inc.*, A.2d_, 2003 VT 17 (2003). The original class action began in 1991, when plaintiffs Carl and Deborah Hoffman sued defendants in Alabama state court, alleging that defendants, as mortgagees, had required plaintiffs, as mortgagors, to maintain escrow accounts to cover real estate taxes, insurance and other assessments in excess of the amounts allowed by the mortgage contract. The parties ultimately settled with court approval. Pursuant to the settlement, the escrow payments would be lowered and class members would receive interest on the excess amounts improperly held in escrow. The settlement also included an award of attorneys' fees — which were estimated to total between \$8 and \$11.7 million — calculated as a percentage of the putative economic benefit conferred on the class as a whole — the amount by which escrows were reduced — to be taken directly from the class members' escrow accounts. As the settlement was implemented, it became apparent that some class members would end up paying more in attorneys' fees than the "economic benefit" realized from



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who did not file a timely claim against a common fund, as required by a settlement agreement, lacks Article III standing to appeal the fee award. The defendant had settled a securities fraud class action by establishing a \$30 million common fund; class counsel sought approval of \$2 million in fees from the common fund. The settlement agreement required class members to submit claim forms to receive their proportionate share of the common fund. The appellant, however, refused to submit a claim form, and instead appealed both the settlement and the fee award. He ultimately resolved his objection to the settlement with the defendant, but his appeal from the fee award remained. Judge Kozinski ruled that the appellant lacked Article III standing to sue, which, among other things, requires that a favorable decision will provide redress. As a general rule, class members who participate in a common fund settlement have standing to appeal the fee award, because a favorable decision will result in decreased attorneys' fees, which in turn will result in a higher recovery for the class. Here, however, the appellant had chosen not to participate in the common fund and, therefore, was precluded from sharing in any reduction of attorneys' fees. Accordingly, a favorable decision would not provide appellant with any redress. This case makes clear that even after *Devlin v. Scardelletti*, 122 S. Ct. 2005 (2002) (holding that unnamed class members may appeal a settlement even if they did not intervene in the district court), there are still limits on who may appeal. Indeed, as Judge Kosinski succinctly stated, "his complaint now relates only to [class counsel's] fee — a fee he didn't pay, in connection with a settlement that he forsook. His lack of standing should be apparent." Judge Kosinski also made clear his impatience with the appellant, stating that finding standing here would not in any way rein in class action plaintiffs' attorneys, but rather would simply allow "self-appointed Samaritans to rove the legal campagna, appealing fee awards that no party with any actual stake in the outcome cares to dispute." *Knisley v. Network Assoc.*, 312 F.3d 1123 (9th Cir. 2002).

Settlement/Reasonable Settlements

On remand from Seventh Circuit, federal trial court judge rejects proposed settlement of income tax refund loan class action as inadequate in light of collusion between plaintiffs and defendants and failure to account for likelihood of success of parallel pending class action: In a pair of noteworthy decisions, federal courts in the Seventh Circuit and the Northern District of Illinois rejected an attempt to strike a collusive settlement of a national class action concerning allegedly wrongful practices relating to the advance income tax refund loan program run by H&R Block. The parties had filed a settlement class action in federal court in

the settlement. The Vermont attorney general sued, alleging that defendants had violated state law in implementing the settlement, largely by deducting the attorneys' fees from the escrow accounts of Vermont mortgagors. Defendants moved to dismiss, arguing that class members and, therefore the State of Vermont, could not collaterally attack the Alabama judgment. The Supreme Court of Vermont disagreed, finding that the Alabama state court did not have personal jurisdiction over Vermont class members and, therefore, its judgment was not entitled to full faith and credit. First, the court distinguished *Phillips Petroleum Co. v. Shutts*, in which the U.S. Supreme Court held that notice to class plaintiffs, an opportunity to opt out and adequate representation by the named plaintiffs sufficed to confer personal jurisdiction over out-of-state class members. In contrast to *Shutts*, the absent class members here could not "sit back and allow the litigation to run its course," because they were as a practical matter defendants in that they could ultimately be liable for attorneys' fees. Second, the class notice was misleading in its description of the attorneys' fees, stating only that the fee request would not exceed one-third of the economic benefit conferred, but not stating that individual class members faced a risk that their payments for attorneys' fees could be greater than their individual benefit from the settlement. Third, there was inadequacy of representation by both the named plaintiffs and class counsel. The named plaintiffs received an incentive payment of \$2,500, which was far grater than the benefits they received from the settlement, so that they had no incentive to protect the interests of absent class members. And the inherent conflict of interest between the class and class counsel was exacerbated by other factors. Among these was the definition of the economic benefit to the class: class counsel defined the benefit as the amount of money released from escrow plus interest, but the benefit was in reality only the loss of the use of that money, not the loss of the money itself, because ultimately that money would be returned to the mortgagors. Thus, the economic benefit to the class was improperly inflated, thereby inflating the attorneys' fees. Moreover, since the attorneys' fees were taken directly out of the class members' escrow accounts based on a calculation of average benefit, some class members wound up paying more in fees than they realized from the settlement, but this method would at the same time provide class counsel with a simple and guaranteed method of collecting fees. Finally, since plaintiffs were paying the attorneys' fees, defendants had no economic interest in how those fees would be calculated or paid, and they agreed not to oppose the fee request. Thus, no adversarial process tested this request. The court concluded its opinion by characterizing this settlement as a "drive-by" class action for which Alabama is notorious, noting that the Alabama court had exercised "too little control and supervision" and refusing "to visit the resulting injustice on our citizens."

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RECENT DEVELOPMENTS

Chicago on behalf of a nationwide class of H&R Block customers who had received the refund loans. The claims in the Illinois case were similar to those advanced in a pending Texas state court class action in which a national plaintiff class had already been certified. There was evidence that defense attorneys had invited the plaintiffs' lawyers in the Illinois case, who had no pending actions against the defendants, to bring a new action for purposes of settling the claims advanced in the Texas action. Although potential damages in the Texas action were estimated to be as high as \$2 billion, the initial Illinois settlement compromised the claims of the nationwide class for \$25 million. A federal judge in Illinois approved the settlement as reasonable. On appeal, the Seventh Circuit reversed, finding that the trial judge had failed to meet his Rule 23(e) obligation because he had not adequately evaluated whether the settlement was a reasonable compromise of the claims in light of the pending action in Texas. Judge Posner, writing for the panel, stated that the federal judge in Illinois who approved the settlement was obligated to attempt to quantify the expected value of the litigation to the class in the Texas action whose claims would be foreclosed. Further, the particular circumstances under which a new lawsuit was filed for purposes of settling claims that were the subject of an existing action required investigation by the trial judge to ensure that there had not been a collusive "reverse auction" — the practice of selecting the weakest of competing plaintiffs' counsel in parallel actions in order to structure a favorable, yet preclusive settlement. Because the trial judge had made neither inquiry, the settlement did not satisfy the requirements of Rule 23(e). On remand to the trial court, a new judge, Judge Elaine Bucklo, rejected the proposed settlement. After extensive findings on the record concerning the collusive dealings between the defendants and their hand-selected plaintiffs' counsel in the Illinois action, Judge Bucklo found that such plaintiffs' counsel could not and did not adequately represent the interests of the plaintiff class. Further, plaintiffs' counsel did not sustain their burden to show that the settlement was fair, having failed to take sufficient discovery to support their evaluation of the claim's merits or to address why parallel claims asserted in the Texas action should not succeed. Pursuant to Judge Bucklo's order, the Illinois counsel could not continue to represent the plaintiff class. Taken together, these decisions reject the "reverse auction" method of settling a class action, and suggest that federal judges will have to apply a heightened level of scrutiny to any settlement class action instituted to dispose of claims that are the subject of a separate pending class action. ***Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 279 (7th Cir. 2002), on remand, *Reynolds v. Beneficial Nat'l Bank*, ___ F. Supp. 2d ___, 2003 WL 1877416 (N.D. Ill. Apr. 15, 2003).**

Tobacco Class Actions/Verdicts

Illinois state court judge enters \$10.1 billion verdict against Philip Morris in case concerning deceptive marketing of "light" cigarettes: On March 21, 2003, Judge Nicholas G. Byron of the Madison County (Ill.) Circuit Court entered judgment against

Philip Morris in the amount of \$10.1 billion on behalf of a class of persons who purchased Marlboro Lights and Cambridge Lights cigarettes in Illinois from 1971 through 2001. The claims, tried to Judge Byron without a jury, were brought under the Illinois Consumer Fraud Act, 815 Ill. Consolidated Stat. § 505/1, which does not permit trial by jury. Plaintiffs alleged that Philip Morris had deceptively marketed Marlboro Lights and Cambridge Lights as "light" cigarettes that were low in tar and nicotine and, therefore, less harmful to consumers. The judge credited plaintiffs' evidence that Philip Morris knew that such cigarettes were not less harmful because smokers tended to consume the cigarettes so as to obtain the same level of nicotine that was delivered by regular cigarettes, thereby making the express and implied representations that smokers would ingest less tar and nicotine deceptive. Judge Byron concluded that all persons who bought Marlboro Lights and Cambridge Lights relied in some way on the deceptive representation that they would garner some health benefits from smoking those brands of cigarettes rather than some other brand of cigarettes, thus resulting in common issue of fact that made class certification appropriate. Based on market survey information from a plaintiff's expert to the effect that Marlboro Light smokers placed the value of the claimed health benefits of Marlboro Lights at 92.3% of the price of the cigarettes, Judge Byron awarded actual damages of \$7.1 billion, which is 92.3% of the value of the sales of Cambridge Lights and Marlboro Lights in Illinois over the 20 year class period. Judge Byron then awarded \$3 billion in punitive damages, payable to the State of Illinois and provided that 25% of the compensatory damages would be awarded to plaintiffs' counsel. After proceedings concerning the posting of a bond, Philip Morris has indicated that it will appeal this decision. ***Price v. Philip Morris Inc.*, Cause No. 00-L-112 (Ill. Circuit Ct., Mar. 21, 2003).**

Amendment of Rule 23/Sample Class Action Notices

The Federal Judicial Center has posted on its Website two sets of sample plain language class action notices, one for a settlement of a securities class action and the other for a settlement of an asbestos class action: Proposed amendment to Fed. R. Civ. Proc. 23(c)(2)(B) (to take effect on December 1, 2003, unless rejected or modified by the U.S. Supreme Court or the Congress), requires that a class notice "concisely and clearly describe in plain easily understood language" the nature of the action, the class definition, the class claims, issues or defenses, the right to appear, the right to be excluded and the binding effect of a class judgment. To illustrate how attorneys and judges could comply with the new rule, the U.S. Judicial Conference's Advisory Committee on the Federal Rules of Civil Procedure requested that the Federal Judicial Center — the research and education agency for the federal courts — prepare these sample notices. The samples are based on empirical research and were subjected to extensive review by various experts and ordinary citizens. **The forms can be found by going to <http://www.fjc.gov> and clicking on "Class Action Notices Page."**

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