The “Fair” Is the Enemy of the Good: 
Ortiz v. Fibreboard Corporation and 
Class Action Settlements

George M. Cohen*

This article examines the Supreme Court’s decision in Ortiz v. Fibreboard Corporation, which struck down a massive asbestos class action settlement as inconsistent with the requirements of Rule 23, in particular the requirements for a mandatory class action based on a limited fund under Rule 23(b)(1)(B). Although agreeing with the Court’s decision, the article criticizes the Court for relying too much on abstract principle rather than directly responding to the pragmatic concerns raised by the dissent. The article considers the incentives of Fibreboard, its insurers, the claimants and their lawyers in the negotiations leading up to the settlement and argues that Fibreboard could not settle its coverage dispute with its insurers without also resolving the asbestos claims themselves. The article then examines the group settlements that Fibreboard entered into before negotiating the class settlement and shows how these settlements could have facilitated a collusive class settlement. With respect to the Court’s limited fund analysis, the article shows how a more detailed appreciation of the background could have improved the Court’s reasoning. First, the article shows why there could not have been a limited fund. Second, the arti-

* Edward F. Howrey Research Professor of Law, University of Virginia. I signed an amicus curiae brief filed in the Supreme Court by a group of legal ethics, civil procedure, and constitutional law scholars in support of the objectors to the settlement, but was not otherwise involved in the Ortiz case (cited in note 136). I thank Susan Konik for her ever insightful guidance and warm support, and Larry Ribstein, Larry Walker, Rhonda Wasserman, and an anonymous referee for very helpful comments on earlier drafts.

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cle argues that the Court’s analysis of “extraclass” conflict was too narrow, while its analysis of “intraclass” conflicts was too broad. Third, the article examines the failure of the class settlement to exhaust Fibreboard’s assets and relates that failure to Fibreboard’s obligations to the asbestos claimants. Fourth, the article explains why the Court should have paid more attention to a companion class action settlement to Ortiz. The article concludes by arguing that courts should continue the task set by Ortiz of developing a meaningful law of class action settlements and in doing so should pay more attention to the details of the deals they oversee.

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The battle between principle and pragmatism is an old and recurring one in law, and in life. Like all great clashes, it is ultimately irresolvable. Each camp can claim its victories, though each victory contains the seeds of its undoing by the other side. The victor in any particular dispute tends to be the side that paints the most convincing picture of the alternative world, the opportunity costs, the road not taken. Pragmatism tends to win when its proponents succeed in portraying principle as empty symbolism, naive idealism, or shrill self-righteousness. Principle tends to win when its proponents succeed in portraying pragmatism as masking smug arrogance or opportunistic self-interest. Principle also prevails when it can beat pragmatism at its own game, by demonstrating that the principled right seems most likely to lead to the pragmatic good. In these cases, there is no conflict.

In Ortiz v. Fibreboard Corporation,¹ the Supreme Court for the second time in three years handed a victory to principle in the arena of mass tort class action settlements. As it did in Amchem Products, Inc. v. Windsor,² the Court rejected a massive asbestos class action settlement for failing to comport with the requirements of Rule 23³ despite claims that the settlement was not only necessary but also substantively and procedurally fair, if not the best that could be achieved. The Court upheld in both cases the general principle that Rule 23 requires structural protections for absent class members that class action settlements and their proponents must respect. More specifically, the Court in Ortiz held that for a class action settlement to qualify as a "limited fund," the settlement proponents must prove the limits of the fund by more than their agreement; must protect class members from the class counsels' conflict of interest in settling the claims of their clients outside the class; must create separately represented subclasses for serious conflicts of interest among class members; and must justify the failure to exhaust the entire fund. The rule of law exists in the class action setting, the Court essentially says, despite the enormous pressures to bend, skirt, or ignore the rules.

Just how important a victory Ortiz represents, however, depends on how strongly the lower courts commit themselves to the principles Ortiz articulates and defends. The fact that the Court found it necessary to revisit class action settlements so soon after Amchem shows just how strong the force of pragmatism is in this arena. Yet against this powerful force, the Court in several ways demonstrates

¹ 119 S Ct 2295 (1999).
³ Fed R Civ P 23.
a weak commitment to the principles it articulates. Three justices in a separate concurrence agree with the dissent’s purely pragmatic conclusion that the class action settlement was a good deal, putting a majority of the Court on record for that conclusion. Moreover, despite the Court’s reliance on principle to resolve the case, the majority opinion’s reasoning contains less of the ringing rhetoric of principle than the half-hearted hedging of pragmatism. Most troubling, the majority completely ignores the effect of a companion class action settlement that threatens to undermine the holding of Ortiz and render its principles empty.

This Article argues that the Supreme Court in Ortiz correctly rejected the settlement, but that it missed an opportunity to ground this principled conclusion in a pragmatic willingness to face the world as it is. To do this, the Court needed to tell a more convincing story that the settlement put forward by the proponents was not a necessary compromise—indeed that it was a bad deal—and that doing it the right way would be both feasible and better. I will try to develop such a story. After briefly summarizing the case and the opinions, I begin by analyzing the bargaining positions of the settlement proponents and by examining how the prior negotiations and settlements may have affected the class settlement. I argue that the Court unfortunately ignored how these prior settlements could have facilitated a collusive agreement against the interests of the absent class members. Next, I consider and reject the factual and legal basis of the exigency argument the dissent relies on so heavily to explain and justify the settlement. I then examine the various components of the Court’s limited fund analysis and try to show how a richer understanding of the settlement context would have strengthened the Court’s rejection of the limited fund claim. Finally, I briefly discuss the companion class action that the Court ignores and explain why the Court should have taken it into account.

Ultimately, I hope that a detailed examination of the circumstances surrounding the Ortiz settlement will answer those who would criticize the Court’s principles by repeating Voltaire’s famous

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4 Professor Issacharoff similarly criticizes Ortiz for a “retreat to rules formalism” because the Court explicitly grounded its holding on the formal requirements of Rule 23, rather than in constitutional requirements of due process. A due process approach, which Issacharoff finds implicit in Ortiz and Amchem, would evidence a stronger commitment to principle. Samuel Issacharoff, Governance and Legitimacy in the Law of Class Actions (forthcoming, 1999 Supreme Court Review).

5 Ortiz, 119 S Ct at 2323-24 [Rehnquist concurring] [stating that “[w]ere I devising a system for handling these claims on a clean slate, I would agree entirely with the dissent . . . . But we are not free to devise an ideal system for adjudicating these claims.”] [emphasis added].
maxim, and will help the participants in the class action world, who live and prosper by this maxim, to view Ortiz as a line in the sand, rather than one more tool for burying their heads in it.

I. THE ORTIZ CASE: FROM FOREGONE CONCLUSIONS TO FOREGONE OPPORTUNITIES

A. Background Facts and Procedural History

This section provides a minimal chronology of the essential facts necessary for understanding the settlement and the opinions. Subsequent sections discuss further factual details as they become relevant.

Fibreboard manufactured a variety of products containing asbestos from the 1920s until 1971. The first product liability suit involving asbestos was filed against Fibreboard in 1967, and Fibreboard has been dealing with these suits ever since. By the early 1990s, Fibreboard faced current and future asbestos claims in the hundreds of thousands, the aggregate value of which far exceeded Fibreboard’s assets, with two big exceptions. The exceptions were two comprehensive general liability insurance policies issued by Pacific Indemnity Company from 1956 to 1957 and by Continental Casualty Company from 1957 to 1959. The policies had limits of $1 million per occurrence and $500,000 per claim but, Fibreboard alleged, no aggregate limit. In 1979, Fibreboard filed a declaratory judgment action in California state court (the “coverage case”) seeking to hold Continental and Pacific responsible for indemnifying Fibreboard for all asbestos claims by claimants exposed to Fibreboard asbestos products prior to 1959. The coverage case remained unresolved throughout the 1980s and into the 1990s and, according to the settlement proponents, provided the motivation and alleged justification for the eventual class action settlement.

While the coverage case was pending, Fibreboard attempted to resolve its liability to asbestos claimants by making settlements tied to Fibreboard’s insurance. In 1988, Fibreboard began its Structured Settlement Program (SSP) for claimants who were exposed to asbestos before 1959, and whose claims were thus arguably covered by

the insurance policies. Under the SSP, Fibreboard paid 40% of each settlement in cash up front and deferred payment on the remaining 60% of the settlement, making it contingent on Fibreboard's successful resolution of the coverage case. Fibreboard increased settlement values over prior levels to compensate claimants for the risk of nonpayment of the contingent portion. In December 1988, Fibreboard and Continental entered the Interim Agreement, under which Continental agreed to fund the cash portion of the SSP settlements, as well as defense costs for Fibreboard up to an annual cap, in return for Fibreboard's agreement to drop any bad faith claim against Continental in the coverage case and to cooperate in the disposition of pre-1959 claims.

The SSP defense cost funding proved to be inadequate, however, and in June 1990 Fibreboard reached its annual defense cost cap under the Interim Agreement. Continental refused to pay defense costs beyond the agreed cap, or to negotiate a complete settlement of the coverage case, even though Fibreboard had a few months earlier won a complete victory in the California trial court on the coverage case. While the insurers appealed the coverage case decision, Fibreboard began the Assignment Settlement Program (ASP) in 1991. Under the ASP, Fibreboard settled pre-1959 asbestos claims without paying any money up front, by assigning to claimants Fibreboard's rights to recover against Continental at fixed settlement values higher than the settlement values under the SSP. Fibreboard engaged in these ASP settlements without Continental's consent. Fibreboard filed another declaratory judgment action in California state court to resolve the propriety of making such settlements on the ground that Continental had breached its duty to defend under the policy (the assignment case). The trial court in the assignment case ruled in June 1992 that Fibreboard could make the ASP settlements, and Continental appealed.

After initiating the ASP settlements, Fibreboard began to negotiate with a group of asbestos plaintiffs' lawyers about the possibility of a "global settlement." Although early negotiations toward this end were not successful, they did lead to a large assignment settlement in December 1992 with one of the negotiating plaintiffs' law

7 By "global settlement," the negotiators meant a settlement that would resolve the claims of all those who had been exposed to Fibreboard asbestos but had not yet settled or litigated claims to judgment against the company. These claims would encompass "future" claims, including both claims that claimants could presently bring and claims that claimants could not presently bring because they had not yet gotten sick. Global asbestos settlements had been encouraged by the federal Multi-District Litigation panel, which had transferred 30,000 asbestos cases pending in federal district courts to Judge Weiner in the Eastern District of Pennsylvania in July 1991.
firms, Ness Motley. In January 1993, Fibreboard sued Continental in the Eastern District of Texas seeking approval of this Initial Ness Motley Agreement. The next month, Continental joined the global settlement negotiations for the first time, and after another month, Judge Robert Parker appointed Judge Patrick Higginbotham of the Fifth Circuit as Settlement Facilitator. Soon thereafter, Fibreboard and Continental reached the April 9 Agreement under which Fibreboard agreed to stop making assignment settlements without Continental’s consent; Continental agreed to use its best efforts to achieve a mandatory (non-opt-out) global class action settlement agreement funded entirely by insurance money; and Continental agreed to “work with” Fibreboard to renegotiate and pay prior SSP and ASP settlements.

On August 5, 1993, after Judge Higginbotham had allegedly limiting the class settlement to “future” claims because a single settlement was “too complex,” Fibreboard, Continental, and Ness Mot-

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8 The Eastern District of Texas had been the venue for a 1990 asbestos class action suit filed under Rule 23(b)(1)(B) against a number of defendants, including Fibreboard. Linscomb v. Pittsburgh Corning Corp., Civil Action No. 1:90cv5000 [ED Tex 1990]. Ron Motley and Joseph Rice of Ness Motley were put on the Steering Committee for that class action and Motley was designated as one of the coordinating counsel for the plaintiffs. This may be the first time Ness Motley was involved in asbestos litigation against Fibreboard. See In re Asbestos Litigation, 90 F3d 963, 977 [5th Cir. 1996].

9 Judge Parker, now an appellate judge in the Fifth Circuit, was a leading figure in the ongoing attempt by the federal judiciary to deal with the asbestos caseload, and an advocate of aggregating and consolidating asbestos claims as a solution. He chaired a subcommittee of the Judicial Conference responsible for asbestos litigation and was a member of the Ad Hoc Committee on Asbestos Litigation appointed by Chief Justice Rehnquist in 1990. The Ad Hoc Committee had issued a report in 1991 advocating large aggregations of asbestos claims in class actions. See John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum L. Rev. 1343, 1389-91 (1995) ("Coffee, Class Wars").

10 Judge Higginbotham’s unusual role received little attention in the courts. Even Judge Smith, who dissented from the Fifth Circuit’s approval of the settlement, found that “[c]ertainly there can be no criticism of Judge Higginbotham’s role.” In re Asbestos Litigation, 90 F3d at 1014 n52 [Smith, J., dissenting]. Nevertheless, one could reasonably claim that Judge Higginbotham’s active participation in a settlement agreement whose legitimacy was likely to come before his colleagues on the Fifth Circuit might unduly influence these judges to uphold the settlement.


12 Ahearn v Fibreboard Corp, 162 FRD 505, 515 [ED Tex 1995]. Just what Judge Higginbotham meant by “future” claims is not entirely clear, and as discussed below, the class ultimately defined was not in fact limited to future claims. At the very least, Judge Higginbotham apparently meant to exclude from the class claims that had not been previously resolved, such as the disputed ASP settlements, as well as claims that had not yet been settled, but could be separately settled, namely the inventory
ley reached the Substitute Ness Motley Agreement. This Agreement settled substantially all of Ness Motley's pending inventory of asbestos claims at average amounts exceeding previous averages, but less than the average amounts in the Initial Ness Motley Agreement. Moreover, unlike the Initial Ness Motley Agreement, which was an ASP-type settlement, the Substitute Ness Motley Agreement was an SSP-type settlement: Ness Motley and its clients were to receive one-half of the settlement up front and one-half upon successful achievement of a global settlement or a victory by Fibreboard in the coverage case. The Substitute Ness Motley Agreement allegedly served as a model for settling the inventory claims of other plaintiffs' firms. A mere four days later, Judge Parker approved the Substitute Ness Motley Agreement as fair and reasonable, and further approved the appointment of Ness Motley and several other lawyers to act as negotiating counsel on behalf of a mandatory class of future claimants.\textsuperscript{13} Within two weeks, Continental and Pacific agreed on how they would allocate responsibility for any global settlement between themselves.

With the California appellate court set to hold oral argument in the insurers' appeal of the coverage case on August 27, 1993, Fibreboard, the insurers, and the putative class lawyers agreed in principle on a global class action settlement. The key term was the establishment of a $1.535 billion fund, of which Continental and Pacific would provide $1.525 billion and Fibreboard would provide $10 million, all but $500,000 of which would come from other insurance. The insurers also agreed to pay Fibreboard $475 million apart from the class settlement for Fibreboard to defend and pay all presently filed claims that had not yet been settled, making their total contribution $2 billion. The insurers renegotiated the previously settled claims separately. In addition, allegedly at the insistence of the plaintiffs' lawyers, Fibreboard and the insurers agreed to negotiate a backup agreement, the Trilateral Settlement Agreement. Under the Trilateral Agreement, the insurers and Fibreboard settled the coverage case whether or not the global class settlement received

\textsuperscript{13} The basis for Judge Parker's consideration and approval of the Substitute Ness Motley Agreement is not apparent. Continental, the defendant in the lawsuit filed to establish the validity of the Initial Ness Motley Agreement, acquiesced in the Substitute Ness Motley Agreement, ending the controversy before the court. At that time, the court did not have before it a proposed class action settlement, or similar settlement requiring court oversight for the protection of one of the parties.
court approval. If the global class settlement was not approved, the insurers agreed to buy out their full obligation to Fibreboard by providing to Fibreboard the same $2 billion that the insurers would pay under the global class action settlement.

On September 9, 1993, the putative class lawyers filed the Ahearn class action against Fibreboard in the Eastern District of Texas before Judge Parker. The complaint sought certification, for settlement purposes only, of a mandatory class action under Rule 23(b)(1)(B). The complaint defined the Global Health Claimants Class to include all persons with personal injury claims against Fibreboard for asbestos exposure who had not brought suit or settled their claims before August 27. The district court provisionally granted certification. On December 23, 1993 Fibreboard, the insurers, and class counsel for the Global Health Claimants Class reached the Global Settlement Agreement, which included the terms previously agreed to in principle.

14 The class was defined to include:
   (a) All persons (or their legal representatives) who prior to August 27, 1993 were exposed, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member or any other person), to asbestos or to asbestos-containing products for which Fibreboard may bear legal liability and who have not, before August 27, 1993, (i) filed a lawsuit for any asbestos related personal injury, or damage, or death arising from such exposure in any court against Fibreboard or persons or entities for whose actions or omissions Fibreboard bears legal liability; or (ii) settled a claim for any asbestos-related personal injury, or damage, or death arising from such exposure with Fibreboard or with persons or entities for whose actions or omissions Fibreboard bears legal liability.
   
   (b) All persons (or their legal representatives) exposed to asbestos or to asbestos-containing products, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member or any other person), who dismissed an action prior to August 27, 1993 without prejudice against Fibreboard, and who retain the right to sue Fibreboard upon development of a nonmalignant disease process or a malignancy; provided, however, that the Settlement Class does not include persons who filed suit and, for cash payment or some other negotiated value, dismissed claims against Fibreboard, and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignancy; and
   
   (c) All past, present and future spouses, parents, children and other relatives (or their legal representatives) of the class members described in paragraphs (a) and (b) above, except for any such person who has, before August 27, 1993, (i) filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) or (b) above in any court against Fibreboard (or against entities for whose actions or omissions Fibreboard bears legal liability), or (ii) settled a claim for the asbestos-related personal injury, or damage, or death of a class member described in (a) or (b) above with Fibreboard (or with entities for whose actions or omissions Fibreboard bears legal liability).

Ortiz, 119 S Ct at 2305 n5. I discuss some of the problems raised by this definition in Section II.D.

15 On that day, the same group also negotiated a Global Third-Party Claimants Settlement with representatives of a class of third parties who had potential contribution and indemnity claims against Fibreboard, and against whom Fibreboard had such
The Global Settlement Agreement required Fibreboard to put the insurance money into a trust from which the claimants would be paid. Claimants would be required to seek to settle with the trust. If settlement negotiations failed, claimants would then have to proceed to mediation, arbitration, and a mandatory settlement conference. Once that process was exhausted, claimants would be allowed to sue the trust in tort, subject to a limit of $500,000 per claim, with no punitive damages or prejudgment interest allowed. Claims resolved by litigation would be paid out over five to ten years; claims resolved without litigation would be paid out in three years. The Global Settlement Agreement also contained spendthrift provisions, which would limit the amount of the trust's assets that could be paid out in any given year. If the funds in a given year were insufficient to pay all claimants, the sicker claimants would get paid first, and deferred claimants would get priority over later claimants in the same sickness category.

On June 29, 1994, the insurers filed Continental Casualty Co. v. Rudd in the Eastern District of Texas. The complaint sought to certify mandatory class actions against the Global Health Claimant Class. Insurers sought declaratory and injunctive relief establishing that the Trilateral Agreement was fair and reasonable, and extinguishing the rights of class members against the insurers. Six months later, Judge Parker held an eight-day fairness hearing in Ahearn, followed the next spring by a fairness hearing in Rudd. On July 27, 1995, Judge Parker approved both the Ahearn and Rudd settlements.

The Fifth Circuit affirmed both judgments over the strong dissent

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claims. Although this article will not discuss that settlement, it had problems of its own. In particular, the named representative was Owens-Illinois, a third-party claimant with a strong interest in approving the settlement because it faced asbestos claims of its own and was hoping to enter into an Ahearn-type settlement itself. Not all third-party claimants were in the same position.

16 C.A. No. 6:94CV458 [ED Tex].
17 Suit was also filed against the Global Third Party Claimant Class, seeking declaratory and injunctive relief establishing that the Third Party Agreement was fair and reasonable.
18 The separate fairness hearings for Ahearn and Rudd and the sequential priority given to Ahearn should not obscure the fact that the two settlements were considered together. In fact, according to the report filed by court-appointed guardian ad litem for the class, Professor Eric Green, the threat of Rudd justified approving Ahearn, which was a better deal from the perspective of future claimants. Report of Guardian Ad Litem Eric D. Green, Ahearn v. Fibreboard Corp., No. 6:93-526 [ED Tex Feb 9, 1995].
19 Ahearn, 162 FRD at 505.
of Judge Smith. The objectors who had appealed the *Ahearn* settlement filed a certiorari petition, but the objectors who had appealed the *Rudd* settlement did not, making *Rudd* a final judgment. While the *Ahearn* petition was pending, the Supreme Court decided *Amchem* and vacated and remanded the Fifth Circuit's judgment in *Ahearn* for further consideration in light of *Amchem*. The Fifth Circuit reaffirmed its earlier judgment in a short per curiam opinion, again over Judge Smith's strong dissent. The Supreme Court reversed this judgment in *Ortiz*.

**B. The Majority Opinion: The Limits of Limited Funds**

*Ortiz* focuses on the requirements for a limited fund mandatory class action under Rule 23(b)(1)(B). The majority opinion, after quickly addressing some preliminary issues, begins by chronicling the history of class actions generally and limited fund class actions in particular. From this history, the majority gleams three "presump-

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20 *In re Asbestos Litigation*, 90 F3d at 993.
22 *In re Asbestos Litigation*, 134 F3d 668 (5th Cir 1998).
23 Rule 23 does not use the term "limited fund," but instead allows class certification where the requirements of subsection (a) are met, and the "prosecution of separate actions by or against individual members of the class would create a risk of . . . adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." Fed R Civ P 23(b)(1)(B). Subsection (a) allows a class action to be certified "only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Id at 23(a).
24 *Ortiz*, 119 S Ct at 2307-08. To call these issues preliminary is not to say they are unimportant. One issue concerned the justiciability of claims by claimants who had not yet suffered any injury. The Court puts this issue to the side on the ground that class certification requirements should be considered first. For criticism of the Court's failure to address this issue, see *The Supreme Court, 1998 Term, Leading Cases, Federal Jurisdiction and Procedure. Class Actions. Certification Requirements—Mass Tort Settlements*, 113 Harv L Rev 306, 307 (1999) ("Because the majority refused to determine whether the future claimants had standing to sue, and thus failed to clarify whether certification of a global class of future asbestos claimants will ever comport with the requirements of Article III, the decision may actually aggravate the transaction costs problem and reduce Congress's incentive to act."). The other issue concerns whether the class action met the general certification requirements of Rule 23(a) outlined in *Amchem*. The Court finds that the lower courts should have given this issue greater "attention," but the Court ultimately sidesteps this issue on the ground that the objections under Rule 23(a) "reappear" in the Court's analysis under Rule 23(b)(1)(B).
tively necessary” requirements\textsuperscript{25} for maintaining a limited fund class action. These requirements concern the size of the fund relative to the claims against it, the division of the fund among the various claimants, and the distribution of the fund to the claimants. First, “the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximums, [must] demonstrate the inadequacy of the fund to pay all the claims.”\textsuperscript{26} Second, the distribution of the fund must be equitable, which means both that all factually and legally similar claims must be included in the class action (extraclass equity), and that the claimants must get a relative share based on the strength of their claims (intraclass equity). Third, “the whole of the inadequate fund [must] be devoted to the overwhelming claims.”\textsuperscript{27} The Court then proceeds to analyze the Global Settlement in light of these presumptive requirements, and finds it lacking on all three grounds.

The Court first concludes that the fund was limited only by the parties’ agreement, which is insufficient to establish a limited fund. The Court holds that “the settling parties must present not only their agreement, but evidence on which the district court may ascertain the limit and the insufficiency of the fund, with support in findings of fact following a proceeding in which the evidence is subject to challenge.”\textsuperscript{28} Although the Court finds some uncertainty in the value of the potential liability faced by Fibreboard, the key problem the Court identifies is the lack of evidence on the limit of the insurance assets. The Court declares itself willing to consider the possibility that “independent valuation of the limit of the insurance asset . . . might have revealed assets of insufficient value to pay all projected claims if the assets were discounted by the prospects that the insurers would win the coverage cases.”\textsuperscript{29} But the Court finds that there was no such independent valuation because of the conflict faced by class counsel. This conflict arose because class counsel had a strong incentive to agree to any global settlement in the class ac-

\textsuperscript{25} Ortiz at 2312. In fact, the majority refuses to take so bold a step as to call them requirements; the majority refers to them only as “characteristics” and “traditional norm[s]” (or later “essential premises,” id at 2316), which there are “good reasons to treat . . . as presumptively necessary.” Id at 2312.

\textsuperscript{26} Id at 2311.

\textsuperscript{27} Id.

\textsuperscript{28} Id at 2316. The Court is not clear whether it means that the evidence must actually be subject to adversarial challenge, or simply that the evidence must be potentially subject to challenge. The difference is important because objectors, though present in Ortiz, are relatively rare in class actions generally. See, for example, Susan P. Konik & George M. Cohen, Under Cloak of Settlement, 82 Va L Rev 1051, 1105-09 (1996) (“Konik & Cohen, Under Cloak of Settlement”).

\textsuperscript{29} Ortiz, 119 S Ct at 2318.
tion to protect the fees they anticipated from their inventory settlements if a global class action settlement occurred.

Next, the opinion turns to the question of equitable distribution of the fund. As for extraclass equity, the Court finds inequity in the fact that the class did not include all similarly situated claimants. In fact, "in the very negotiations aimed at a class settlement, class counsel agreed to exclude what could turn out to be as much as a third of the claimants that negotiators thought might eventually be involved, a substantial number of whom class counsel represent." 30 The Court finds that separate treatment for the claimants in the inventory settlements did not mean equal treatment with the class members. Class claimants fared worse as a result of their having to accept payment over at best a three-year period rather than half of an above-average settlement amount immediately, and having to accept various limitations on their ability to achieve equivalent recoveries. In any event, "even ostensible parity between settling nonclass plaintiffs and class members would be insufficient to overcome the failure to provide the structural protection of independent representation as for subclasses with conflicting interests." 31 Thus, from either a substantive or procedural perspective, the class members and the separately settling claimants received inequitable treatment.

As for intraclass equity, the Court reasons that if claimants are sufficiently different and there is no obvious equitable distribution among them, such as a simple pro rata allocation, then the settlement must establish procedures, such as subclasses with separate representation, to resolve the claimants' conflicting interests. The Court finds that, at least with respect to two differences among class claimants, the conflicts were "well within the requirement of structural protection," 32 which the Global Settlement did not provide. The first important conflict was between holders of present claims, who preferred large early payouts, and holders of future claims, who preferred preservation of fund assets. 33 The second important conflict was between pre-1959 claimants, who had rights to the Fibreboard insurance, and post-1959 claimants, who did not. In response to the argument that the Global Settlement did not suffer from intraclass conflicts because it deferred allocation decisions to later negotiations, the Court finds that the "very decision to treat [the claimants] all the same is itself an allocation decision." 34 Finally, the

30 Id at 2319. The Court in the last quoted phrase is referring to the Substitute Ness Motley Agreement.
31 Id.
32 Id at 2320.
33 The Court had already identified this conflict. See Amchem, 117 S Ct at 2251.
34 Ortiz at 2320.
Court reiterates its *Amchem* holding that the common interest of class members in securing a settlement does not trump the failure to provide structural protections.

The final problem the Court identifies with the Global Settlement is its essential failure to use Fibreboard's noninsurance assets to compensate the class. The Court does not decide whether Fibreboard's retention of most of its noninsurance assets would alone doom the settlement, but it does express two concerns. First, "the arrangement seems irreconcilable with the justification of necessity in denying any opportunity for withdrawal of class members whose jury trial rights will be compromised, whose damages will be capped, and whose payments will be delayed."\(^{35}\) Second, "if limited fund certification is allowed in a situation where a company provides only a de minimis contribution to the ultimate settlement fund, the incentives such a resolution would provide to companies facing tort liability to engineer settlements similar to the one negotiated in this case would, in all likelihood, significantly undermine the protections for creditors built into the Bankruptcy Code."\(^{36}\) On the other hand, the Court raises but does not answer the question of whether, "if a settlement . . . saves transaction costs that would never have gone into a class member's pocket in the absence of settlement, may a credit for some of the savings be recognized [by the defendant] in a mandatory class action as an incentive to settlement?"\(^{37}\)

**C. The Dissent: “Let’s Not Bicker and Argue About Who Killed Who”**\(^{38}\)

Justice Breyer's dissent begins by describing special circumstances that in his view justified deference to the district court's judgment

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\(^{35}\) Id at 2321.

\(^{36}\) Id at 2321 n34.

\(^{37}\) Id at 2322. The majority opinion closes with responses to points raised by the dissent, which the next section discusses.

\(^{38}\) Monty Python and the Holy Grail (Python [Monty] Pictures Ltd 1974). The quotation comes from a scene in the movie in which Sir Launcelot receives a message from someone he perceives to be a damsel in distress (but is in fact an effeminate prince), being forced to marry against her will by her father, the king. Without a moment's reflection, Launcelot charges the castle, and proceeds indiscriminately to kill or wound a large number of unarmed wedding guests who happen to stand between him and the betrothed prince. Once Launcelot recognizes his mistake, he stops. The king, when he discovers that Launcelot is one of the influential Knights of Camelot, welcomes him as his special guest. In response to incredulous guests, who exclaim, "He's killed the best man!" and "He killed my auntie!" the king responds: "Please, please! This is supposed to be a happy occasion. Let's not bicker and argue about who killed who." For a transcript of the movie, see http://montypython.virtualave.net/text/grail.txt.
in approving the settlement. Breyer argues that courts must find some way to dispose of the large number of asbestos suits if Congress refuses to adopt a legislative solution, and that large class action settlements of the type reached in Ortiz may be the only realistic resolution of these suits. Breyer also contends that, because of their expertise in handling asbestos cases, district courts are in a better position to evaluate the fairness of these settlements than appellate courts. More specifically, Breyer emphasizes that the impending decision in the coverage case was important because it necessitated a quickly negotiated settlement agreement and justified the insurers' insistence on a non-opt-out class action. The right to opt out would give claimants an opportunity to see the resolution of the coverage case and opt out only if Fibreboard won, thus undermining the compromise represented by the settlement.

Next, accepting the majority's statement of the requirements for limited fund class actions, Breyer argues that the settlement satisfied all three requirements. First, the risk of Fibreboard's losing the coverage case made the insurance proceeds, along with Fibreboard's other assets, a limited fund, albeit a fund whose exact value was uncertain. The risk of the coverage case was demonstrated by expert testimony and by the premiums Fibreboard paid for settlements contingent on the outcome of the coverage case. And the Trilateral Agreement, which Fibreboard and the insurers negotiated independent of the plaintiffs' lawyers, fairly approximated the value of the insurance discounted by this risk. Because the Trilateral Agreement left Fibreboard exposed to tort suits, Fibreboard had an incentive to maximize the payment by the insurers. In any event, a "perfect valuation" of the insurance policies was not feasible given the time constraints.

With respect to the majority's second requirement, Justice Breyer maintains that class claimants received equitable treatment, both compared to claimants settling outside the class and among themselves. With respect to the extraclass conflict problem, Breyer accepts the district court findings that the separate inventory settlements were Judge Higginbotham's idea, and that class members would receive settlement values comparable to the inventory settlements. Moreover, Breyer argues that any lawyer qualified to be class counsel would have represented individual claimants against Fibreboard and that, given the need to reach a settlement quickly, requiring that "conflict-free" lawyers be found would create an unjustifiably rigid rule. As for the intraclass conflicts, Breyer argues that the common interests of the class members outweighed any conflicts, that the majority provides no principled criteria for deciding which conflicts are serious enough to require subclasses, and that the Tri-
lateral Agreement rendered irrelevant the distinction between pre-1959 and post-1959 claimants.

Finally, the dissent argues that the fact that not all of Fibreboard's assets were committed to the settlement fund should not be sufficient to overturn the settlement, for two reasons. First, the settlement made more money available to claimants than continued litigation would have. The dissent accepts the district court's finding the settlement would save expenses and fees, such as those for lawyers, doctors, consultants, and other expert witnesses, in an amount exceeding Fibreboard's net worth. Second, keeping Fibreboard alive as a going concern was better than slowly forcing Fibreboard into a costly bankruptcy, not only for plaintiffs and Fibreboard, but also for Fibreboard's employees, other creditors, and customers.

The Court responds to Justice Breyer's dissent in a short section at the end of its opinion. 39 The gist of the Court's response is that principle trumps pragmatism. 40 The Court insists that it is bound to follow Rule 23's requirements and that it may not create special

39 Ortiz, 119 S Ct at 2322-23.

40 Unfortunately, the Court generally avoids responding to the dissent on its own pragmatic terms, thereby yielding far too much ground to the dissent's position. Take two examples. First, in response to Breyer's argument in favor of deference to the expertise of district court judges, the Court could have pointed out that the district court might have self-interested motivations for approving the settlement, see, for example, Koniak & Cohen, Under Cloak of Settlement at 1122-30 [cited in note 28], including the fact that the district court might get so involved in the construction of the settlement that it loses the ability to make an impartial assessment of its merits, see In re Asbestos Litigation, 90 F3d at 1013-15 [Smith, dissenting].

Second, in response to Breyer's argument that no conflict-free lawyers existed to serve as class counsel, the Court could have noted that this argument is belied by the fact that the claimants lawyers found it necessary to hire Caplin & Drysdale "to represent them and assist them in handling certain highly complex tax, insurance, class action and commercial litigation issues that might arise in the negotiations and that they believed might be beyond their areas of personal expertise." Ahearn, 162 FRD at 514. Surely if the leading asbestos lawyers could not competently negotiate the settlement without the expertise of lawyers outside of the asbestos field or of nonlawyer experts who "provide[d] an estimated value for Fibreboard absent its asbestos liabilities and ... project[ed] future asbestos claims against Fibreboard," id, the court easily could have appointed nonasbestos lawyers as class counsel. After all, given the settlement's high degree of aggregation and limited differentiation of claims, how much asbestos expertise was really necessary? The district court found that class counsel "drew upon a substantial body of knowledge about Fibreboard that had been collected by them and by other plaintiffs' counsel," id, and found "it unlikely that counsel less intimately involved with Fibreboard's overall asbestos problem could have reached nearly so favorable a settlement for the Class," id at 525. But the district court does not specifically say how that expertise affected the settlement actually negotiated, or why this expertise would have been inaccessible to other lawyers who had not specialized in class action practice by, for example, hiring asbestos lawyers as consultants.
exceptions for mass torts or exigent circumstances. Thus, the fact that it might not have been possible to secure separate counsel in the required time frame does not justify relaxing the requirement of structural protections for class members. And the fact that the settlement might have made more money available to claimants than would otherwise be the case does not justify allowing Fibreboard to retain most of its assets if that otherwise conflicts with Rule 23. The Court’s one head-on response to a dissent contention is the Court’s rejection of the claim that the Trilateral Agreement established a value for the insurance assets independent of the conflicted interests of class counsel. The Court notes that it was class counsel who insisted on the Trilateral Agreement in the first place, and that the settlement value in the Trilateral Agreement was tied to the already negotiated Global Settlement, which class counsel did negotiate. Finally, the Court suggests two potentially harmful consequences of following the dissent’s position. First, allowing conflicted counsel to negotiate a settlement on behalf of a class could lead to the class receiving a “potentially significant fraction less” than the “maximum fund.” Second, if the Court allowed an exigency exception, the “economic temptations at work on counsel” would result in their claiming exigencies in too many cases.

II. AN ANALYSIS AND CRITIQUE OF ORTIZ

A. The Role of Liability Insurance and the Collusion Problem

The key to Ortiz is understanding the role that Fibreboard’s liability insurance played in the case. The settlement’s proponents contended that this insurance justified the class action settlement. In their view, the insurance, along with Fibreboard’s noninsurance assets, provided a limited fund that could quickly disappear absent a global settlement. The heart of the Court’s opinion correctly rejects these justifications, as discussed in subsequent sections. But the Court’s stance is largely reactive. In fact, not only was the uncertain insurance in Ortiz inadequate to justify special treatment of the class action settlement, but the contested insurance might actually have exacerbated the collusion problems present in class actions generally. This section discusses the unique problems posed by the presence of liability insurance, which will provide a useful backdrop to the subsequent discussion.

1. The participants’ bargaining positions

It is useful to begin by examining the participants’ bargaining positions in the negotiations leading up to the global class settlement.
Under the simplest classification, the participants with whom we can associate different bargaining positions are Fibreboard, the insurers, and the claimants and their lawyers. It should be immediately apparent that none of these participants is monolithic. Moreover, the conflicts and agency problems within the participants strongly affected the settlement negotiations. Nevertheless, the Court focused almost entirely on the claimants and class counsel. They are certainly a crucial part of the story, but not the whole story. Let us consider the three participants in turn.

Fibreboard faced potentially several hundred thousand present and future asbestos claims, whose value far exceeded Fibreboard's available noninsurance assets. The district court estimated Fibreboard's sale value free of all asbestos liabilities conservatively at $235 million. The district court did not estimate the value of present and future asbestos claims. But because it is easy to be swayed by the large numbers at issue in this case, it is worth having at least ballpark figures in mind. We can approximate Fibreboard's liability exposure by taking the total number of present and expected future asbestos claimants and multiplying that number by the average settlement value assuming Fibreboard had sufficient assets to pay all claims. Suppose the total number of current and future claimants is 500,000. If the average expected payout across all claimants was $20,000, then Fibreboard's total liability exposure would be $10 billion. Fibreboard's assets (as estimated by the district court) would be exhausted, however, by paying only around 12,000 of these claimants in full.

As a result of this asbestos liability exposure, Fibreboard's financial status verged on insolvency, depending on the outcome of the coverage case and the settlement negotiations. This fact is crucial for analyzing Fibreboard's bargaining position, because Fibreboard's managers, who staked out Fibreboard's bargaining position, may not have been acting in the best interest of all of Fibreboard's relevant constituents. Although Fibreboard's managers may have acted in the best interests of Fibreboard's shareholders, Fibreboard's precarious financial position created a classic corporate agency problem be-

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41 Id at 529. In 1997, Fibreboard was purchased for $515 million, casting some doubt on the district court's finding. Ortiz, 119 S Ct at 2317 n28.

42 The negotiating parties used a benchmark figure of 186,000 future claims against Fibreboard in negotiating the Global Settlement. The Ness Motley inventory settlement was estimated to involve 53,000 claimants. Ortiz, 119 S Ct at 2319. The court opinions provide no further estimate of the number of other claimants who were part of inventory settlements, but the class action notice estimated the number of pending claims against Fibreboard at 200,000. See Coffee, Class Wars at 1400 & n217 (cited in note 9).
cause of the potential conflict of interest between Fibreboard's shareholders and managers on the one hand, and Fibreboard's creditors, including asbestos claimants, on the other. Thus, Fibreboard's bargaining position may have been in the best interest of the managers and shareholders, but not in the best interest of the creditors. This bargaining position was to avoid bankruptcy and to minimize Fibreboard's noninsurance contribution to any settlement with asbestos claimants.

To achieve its goal of avoiding bankruptcy, Fibreboard probably needed a global class action settlement, whether or not it won the coverage case. Obviously, if Fibreboard lost the coverage case, it would not be able to pay all of its asbestos claimants. But even if Fibreboard won the coverage case, it might not be able to pay all of its asbestos claimants. Although if it won the coverage case Fibreboard would have access to effectively unlimited insurance, the insurance covered only the pre-1959 claimants, and Fibreboard's other assets might not be enough to pay the post-1959 claimants. The fact that Fibreboard might go bankrupt whether or not it won the coverage case does not mean that Fibreboard would be indifferent between winning and losing the coverage case. The only way Fibreboard would be able to survive would be to enter into a class action settlement (which could occur after the resolution of the coverage case) in which it used the insurance money to cover both the pre-1959 and the post-1959 claimants. And the only way that insurance money would be available was if Fibreboard did not lose the coverage case.

The district court found that, even if Fibreboard had won the coverage case, Fibreboard could not avoid bankruptcy, because it would still face claims by the post-1959 claimants. Although Fibreboard had in 1992 reached an agreement with Pacific, the Pacific II Agreement, under which Pacific agreed to pay a maximum of $360 million to Fibreboard that Fibreboard would use to pay post-1959 claimants, the district court found that the $360 million plus Fibreboard's noninsurance assets would not be enough to pay the post-1959 claimants' present and future claims. From these findings, the district court reasoned that the global class action settlement was superior to allowing the coverage case to be resolved. Ahearn, 162 FRD. at 529. But the district court did not provide any evidence of the value of the post-1959 claims. Moreover, the court's conclusion does not follow from its findings. The participants could presumably reach a global settlement after Fibreboard won the coverage case as well as before [at a higher total, of course]. And if post-1959 claimants could find their way into a global settlement before the resolution of the coverage case, there is no reason why they could not also be included in a post-coverage-case class action settlement. Alternatively, after Fibreboard won the coverage case, Fibreboard and the insurers could agree to a lump sum payment similar to the Trilateral Agreement, which Fibreboard could then use to pay post-1959 claimants. What the district court meant was that a global class settlement that covered the post-1959 claimants was better than a resolution of the coverage case that did not.
But although the availability of insurance money was necessary for Fibreboard to avoid bankruptcy, it may not have been sufficient. If Fibreboard could not shape the settlement to cover its exposure to the post-1959 claimants, it would indeed be indifferent between winning and losing the coverage case because it would go bankrupt either way. Thus, the possibility of bankruptcy whether or not Fibreboard won the coverage case heightened the conflict of interest problem Fibreboard’s managers faced in negotiating any settlement of that case. Because the maximum the insurers would have to pay, even if they lost the coverage case, was the full value of the pre-1959 claims, any settlement that covered the post-1959 claims would come out of the pockets of the pre-1959 claimants. Thus, Fibreboard’s managers did not have the incentive to make a decision in the best interests of all of Fibreboard’s claimants, with respect to either the global settlement terms or the coverage case. Nevertheless, this section takes Fibreboard’s bargaining position, as defined by its managers, as given and defers to subsequent sections the implications of the fiduciary obligations that Fibreboard’s managers may have owed to the creditors, and the conflict between the pre-1959 claimants and the post-1959 claimants.

The insurers sought to minimize the payments under their contracts with Fibreboard. Like Fibreboard they were in a sense less concerned about winning the coverage case than not losing it. If they won the coverage case, they would avoid liability to Fibreboard. They might still, however, be liable to many of the claimants, who under the law of many jurisdictions (including Fibreboard’s home state of California) would not be bound by any judgment in the coverage case because the claimants were not parties to that case, and who therefore could sue the insurers as third-party beneficiaries.

This analysis ignores any possible conflict between Continental and Pacific based on the applicable dates of their respective policies, or simply the need to divide the responsibility between them. Although this conflict is potentially significant, it does not seem to have played a major role with respect to the class action settlement. The insurers reached an agreement in August 1993 establishing their respective shares of responsibility, whether or not a settlement was reached in the coverage case. *Continental Casualty Co v Rudd*, C.A. No. 6:94CV458 [ED Tex Jul 27, 1995], Findings of Fact, ¶ 80. ["Rudd Findings of Fact"].

See Davis J. Howard, *Declaratory Judgment Coverage Actions: A Multistate Survey and Analysis and State Versus Federal Law Comparison*, 21 Ohio N.U. L. Rev 13, 31 [1994] ("Howard, *Declaratory Judgment Coverage Actions*"); *Shapiro v Republic Indemnity Co*, 341 P2d 289 [Cal 1959] (en banc) ("As third-party beneficiaries of the policy, plaintiffs then had an interest that could not be altered or conditioned by independent action of the insurer and the insured. . . . Nor can these rights be conclusively determined against the injured persons in an action to which they were not made parties.") See also note 109 and accompanying text.
once they obtained a judgment against Fibreboard.\textsuperscript{46} If the insurers lost the coverage suit, they faced liability for all of Fibreboard's outstanding and future personal injury asbestos judgments, but only for pre-1959 claimants. Moreover, in that case, these claimants could use issue preclusion against the insurers, as discussed below. The insurers would settle the coverage case, whether independently or as part of a class action settlement, only if they would pay less to Fibreboard and the claimants in such a settlement than they would if they lost the coverage case.

This bargaining position masks a fundamental difference between the negotiating positions the two insurers initially took—positions that are difficult to understand from simply the opinions and briefs. Pacific negotiated two agreements with Fibreboard under which it agreed to provide money to compensate post-1959 claimants, who had no plausible claim to the insurance money. On the other hand, Continental consistently refused to pay for post-1959 claimants until the final settlement. Moreover, Fibreboard seemed to look only to Continental to fund its ongoing asbestos cases, as well as the ASP settlements. Again, I defer to a subsequent section full discussion of the implications of this divergence of bargaining position between the two insurers.

If one could identify a single bargaining position for the claimants and their lawyers, it would be to maximize the total recovery available, both from the insurance and Fibreboard's other assets. But conflicts of interest among the claimants, among the lawyers, and between the claimants and their lawyers made a unified bargaining position a fiction. As for the claimants, some had lawyers representing them, either individually or as part of an "inventory" of claimants; others had no lawyer. The currently represented claimants and their lawyers would accept a class settlement only if it was better than what they could negotiate outside the class settlement. In addition, if the claimants include all those exposed to Fibreboard's asbestos, some of these people were seriously ill, others had only symptoms suggesting future illness, and others had no symptoms or illness at all. The currently ill sought immediate recovery, while the other claimants had an interest in ensuring that sufficient assets

\textsuperscript{46} See West Ann Cal Ins Code § 11580[b][2] (requiring all California liability insurance policies to contain a provision that "whenever judgment is secured against the insured ... in an action based upon bodily injury, death, or property damage, then an action may be brought against the insurer on the policy and subject to its terms and limitations, by such judgment creditor to recover on the judgment"); Zahn v Canadian Indemnity Co, 57 Cal App 3d 509, 129 Cal Rptr 286 [1976]. The Continental policies apparently contained the required provision. Brief of Fibreboard and Insurers, Ortiz v Fibreboard Corp, 1998 WL 601118, 25 n° [Sept 9, 1998] (Fibreboard Brief).
remained to allow them to recover in the future. Finally, the pre-1959 claimants had claims to the insurance; the post-1959 claimants did not. These groups of claimants had different interests in the resolution of the coverage case.

As for the lawyers, their primary interest was in maximizing their fees. This interest resulted in a conflict between those lawyers who represented current claimants and those who sought to negotiate on behalf of a potential class of claimants. While the putative class counsel would favor a broadly defined class to increase the total payment to the class and hence their fees, such a settlement could hurt the interests of the other lawyers. Lawyers representing claimants with valuable claims could see their clients’ recoveries reduced under a class settlement. Lawyers representing all current claimants, including those with inventories of claimants with wide variations in claim value, could see their fees capped or even eliminated under a class settlement.

Lastly, the interests of the putative class counsel potentially diverged from the interests of the class members they sought to represent. As is by now well known, the class counsel had an incentive to collude with Fibreboard against the interests of the class members by agreeing to accept higher fees in return for a lower recovery for the class.

2. The coverage case and the settlement problem

These bargaining positions can help reveal why the negotiations developed the way they did. Fibreboard was battling on two fronts: the coverage case and the asbestos claims. Consider the coverage case first. Fibreboard and the insurers had not settled because there was no apparent mutually beneficial settlement between them alone. To see why, we must examine how the coverage case differed from the standard economic model of litigation.\(^{47}\) Although the coverage case was a declaratory judgment action, one can think of it as effectively a damage action for an expected level of liability. The expected liability would be the average expected settlement value of Fibreboard’s pre-1959 claimants multiplied by the total number of such claimants. But unlike the standard model, that expected level of liability was not the true “stake” in the litigation for either Fibreboard or the insurers. For Fibreboard, the litigation was worth nothing unless winning would allow it to avoid bankruptcy. If Fibreboard could avoid bankruptcy by winning the coverage case, it would get to keep

its assets, but would have to turn over any further recovery to the asbestos claimants. If Fibreboard lost, it would have to file for bankruptcy and would lose its assets.

For the insurers, the cost of losing the coverage case was not their expected liability, for two reasons. First, the insurers could incur some of this expected liability even if they won the coverage case, as a result of individual and/or group lawsuits by pre-1959 claimants able to bring such suits. The potential for claimant suits regardless of the outcome of the coverage case would reduce for the insurers the benefits of winning the case. Offsetting this factor, the insurers faced additional costs from losing the coverage case because of the operation of nonmutual offensive collateral estoppel.\footnote{The usual incentive effect of nonmutual offensive collateral estoppel discussed in the economic literature is that it encourages the defendant to invest more in winning the first lawsuit than it would in a stand-alone case. These additional litigation expenditures in the first lawsuit lower the probability that the first plaintiff would prevail, and so reduce the first plaintiff’s minimum settlement demand. Preclusion also leads the defendant to take a tough initial bargaining position to establish a reputation for future negotiations. \cite{Hay_1993} \cite{Posner_1983} \cite{Hay_1993}. But in the context of the coverage case, especially after the insurers had already lost at trial and were appealing the adverse judgment, the insurers’ posited incentive to invest in the first case seems less important, as does their ability to establish a tough bargaining position. Rather the insurers’ incentive to settle would seem to dominate. \cite{Hay_1993}, \cite{Hay_1993}, \note{the possibility that a defendant might want to settle by paying “hush money” to prevent otherwise unprofitable claims from being brought}. \cite{Hay_1993} Suppose p is the probability that Fibreboard wins the coverage case (assumed to be the same subjectively for Fibreboard and the insurers), \(T_i\) is the insurers’ expected liability for pre-1959 claims if they lose the coverage case, \(T_i^*\) is the insurers’ expected liability (from claimant suits) if they win the coverage case (\(T_i^* < T_i\)), \(F\) is Fibreboard’s assets, \(E\) is the extra payment to claimants the insurers would have to pay as a result of nonmutual offensive collateral estoppel if they lose the coverage case, and \(C_i\) and \(C_i^*\) are the litigation costs of Fibreboard and the insurers respectively (\(I\) will ignore settlement costs for the moment). The condition for settlement is that the plaintiff’s expected net benefits from litigation are less than the defendant’s expected net costs from litigation. In terms of the variables just defined, a necessary but not sufficient condition for settlement to occur is:

\[
p T_i - C_i - (1 - p) F < p T_i^* + C_i + p E - (1 - p) T_i^*.
\]
The problem is the bankruptcy condition. The insurers had no incentive to agree to any settlement in the coverage case unless it made them better off than they would be if they lost the coverage case. Whatever this amount was, it was probably less than the total expected settlement value of all of Fibreboard’s asbestos claims. But any coverage case settlement for less than the total settlement value of the claims in the asbestos suits would leave Fibreboard’s assets at risk to further liability, which would likely exceed the value of the assets.\footnote{See Brief of Respondent Class Representatives, Ortiz v Fibreboard Corp. 1998 WL 601116, *11-12 [Sept 9, 1998] ("Brief of Class Representatives"). Using the variables defined in the previous note and defining $T$ as Fibreboard’s total asbestos exposure, the nonbankruptcy condition is:}

$$F > T - [pT_r + C_r + pE - (1 - p)T_r^*].$$

The expression in brackets represents the insurers’ expected costs of litigating the coverage case, and so the maximum they would be willing to pay to settle the case. The larger the value of that expression, the more likely Fibreboard would avoid bankruptcy. \footnote{Using the variables described in the previous footnotes, the example assumes $p = .5$, $T_r = T$ (Fibreboard’s total asbestos exposure) = 10, $F = .2$, $E = 0$, $C_r = 0$, and $T_r^* = 0$. The formula for Fibreboard staying out of bankruptcy then reduces to}

$$F > T - pT,$$
assumption that all asbestos claims were covered by insurance makes the likelihood of satisfying the nonbankruptcy condition even lower. For example, if the total expected value of the pre-1959 claims were $8 billion out of the total of $10 billion, the insurers would be willing to pay only $4 billion (assuming the same .5 likelihood of Fibreboard winning the coverage case), leaving Fibreboard with $6 billion in exposure, $1 billion more than if the insurance covered all asbestos claims.\textsuperscript{52} As for the other assumptions, the insurers' litigation costs and collateral estoppel effects would increase the amount the insurers would be willing to pay, but probably not by enough to satisfy the nonbankruptcy condition. Finally, the more the insurers' exposure to liability from claimant suits even if they won the coverage case, the less they would be willing to pay to settle the coverage case.\textsuperscript{53} Thus, the insurers probably had no incentive to give Fibreboard what it wanted.\textsuperscript{54} If true, that would explain why Fibreboard and the insurers had not reached a settlement.

There are several possible objections to the conclusion that Fibreboard and the insurers could not find a mutually satisfactory resolution of the coverage case on their own. One is that the analysis ignores the possible cost savings from a class action settlement in the

\begin{footnotesize}
\begin{itemize}
\item which implies } p > 1 - (F/T). If F = .2 and T = 10, so that F/T = .02, then p would have to be greater than 98\% for the expected coverage settlement to allow Fibreboard to survive. By contrast, if Fibreboard's assets were half of the total expected claims (F/T = .5), then p would only need to be greater than .5 for Fibreboard to survive a settlement.  
\item The nonbankruptcy condition would now become:  
\[ F > T - pT_i, \]
Which can be rewritten as  
\[ p > (T - F)/T_i. \]
If F = .2, T = 10, and T_i = 8, then p must exceed 1.225 for the condition to be satisfied, which is of course not possible. Moreover, if T_i is less than 8, the required p goes even higher.  
\item Recall that the nonbankruptcy condition with all the variables is:  
\[ F > T - [pT_i + C_i + pE - (1 - p)T_i^*], \]
which can be rewritten as  
\[ p > (T + T_i^* - F - C_i)/(T_i + E + T_i^*). \]
If T = 10, T_i = 8, F = .2, C_i = 2, T_i^* = 4, and E = 3, then p would have to exceed 79\% for the condition to be satisfied. If T_i (the value of the insured claims) was only 5, T_i^* was 3, and E was 2, then p would have to exceed 100\%, which is not possible.  
\item Thus, contrary to Justice Breyer's assertion in his dissent, Fibreboard had no incentive to settle for the maximum amount the insurers were likely willing to pay. Ortiz, 119 S Ct at 2329 (Breyer, dissenting). I discuss this point in more detail in note 122.
\end{itemize}
\end{footnotesize}
asbestos case. Suppose that by reducing the costs of evaluating, litigating, and administering payments, a class action settlement would significantly reduce the total expected liability from the amount under individual or smaller group settlements. The insurers might be willing to pay something more than their expected liability under a class action settlement to make sure that such a settlement in fact occurred. Suppose, for example, that Fibreboard's total liability exposure absent a class action is $10 billion, consisting of $4 billion in claim value and $6 billion in transaction costs. If a class action settlement would reduce transaction costs by $5 billion so that Fibreboard's total exposure would be reduced to $5 billion rather than $10 billion, the insurers might be willing to pay more than $2.5 billion (.5 times $5 billion) to settle the coverage case because without the class action settlement their expected liability would be $5 billion. If the insurers were willing to pay close to the full $5 billion to settle the coverage case in a class action, Fibreboard would survive.

But the possibility of cost savings probably did not change the incentives for settling the coverage case. For one thing, the cost savings under a class action settlement would have to be huge, and the insurers' bargaining position would have to be such that they would not be able to capture much of these cost savings in a settlement with Fibreboard.\textsuperscript{55} While the former condition is possible,\textsuperscript{56} neither

\textsuperscript{55} To illustrate, return to the simplest model in which the insurance covers all claims, litigation costs for the coverage case are 0, there are no collateral estoppel effects, and claimants could not sue the insurers if the insurers won the coverage case. Suppose that a class action settlement reduces the expected payouts from $T$ to $T'$, but that the insurers are willing to pay the same as before, $pT$, to settle the coverage case. Fibreboard would survive if $F > T' - pT$, which implies $p > (T' - F)/T$. If $T' = 5$, $F = .2$, and $T = 10$, Fibreboard would survive if $p > .48$ (that is, Fibreboard has better than around a fifty-fifty chance of winning the coverage case). If the cost savings were significant but more modest, say $T' = 7$ (a 30% reduction in costs), then $p$ would have to exceed 68% (that is, better than two-thirds) for Fibreboard to survive. Moreover, if the insurers were not willing to pay $pT$, but only some amount in between $pT$ and $p'T$, a higher probability would be necessary for Fibreboard to survive. At the extreme, if the insurers are willing to pay only $p'T$ (that is, they were able to capture the full cost savings), then Fibreboard would survive only if $p > 1 - F/T'$ (the same result as above, with $T'$ substituted for $T$). If $F = .2$, and $T' = 5$, so that $F/T' = .04$, then $p$ would need to be 96%. Thus, even huge cost savings would not likely improve the chances that a settlement in the coverage case alone would guarantee Fibreboard's survival.

\textsuperscript{56} For example, Justice Breyer in his dissent suggested that the class action settlement might reduce transaction costs from 61% of total defense payments to 15%. Ortiz, 119 S Ct at 2332 [Breyer, dissenting]; see also Ahearn, 162 FRD at 509 [citing RAND study finding that from 1983 to 1985 "only 37% to 39% of money paid by asbestos defendants went to victims, with 61% to 63% consumed by transaction costs"]). Suppose that the $10 billion exposure ($T$) includes transaction costs, so that
seems likely. More important, even if the insurers lost the coverage case, a class action settlement could still occur and achieve the cost savings. Thus, Fibreboard could not offer the insurers any cost savings for settling the coverage case that the insurers would not otherwise be able to achieve for themselves after losing the coverage case. That makes it especially unlikely that Fibreboard would have enough bargaining power to force the insurers in a coverage case settlement to compensate Fibreboard sufficiently to guarantee its survival. The insurers would have no incentive to offer more than $2.5 billion to settle the coverage case.

A second possible objection is that the insurers had a strong incentive to settle because they faced not only the prospect of paying the asbestos claims and administrative costs, but also punitive damages based on a bad faith denial of insurance coverage for the claims and the refusal to pay Fibreboard’s defense costs. But an insurer’s likelihood of prevailing on a bad faith claim is probably directly related to its likelihood of prevailing on the underlying claim. If the insurers had a reasonable chance of winning the coverage case, as the testifying experts concluded, the possibility of a bad faith judgment may have been too remote to affect settlement values enough to enable Fibreboard to survive.57

A third possible objection is that Fibreboard and the insurers could have settled the coverage case without specifying a maximum amount the insurers would have to pay. For example, Fibreboard and the insurers could have agreed that the insurers would pay 50% of the amount of any judgment against Fibreboard in any future settlement. But such an “open price” settlement would merely postpone the day of reckoning and would leave the insurers exposed to an uncertain amount of future liability. Thus, the insurers would not likely favor such a settlement.

the total value of the claims is only $3.9 billion [.39*10]. If transaction costs are only 15%, the same claim value of $3.9 billion could be achieved by a total payment (T') of only $4.6 billion [.85*.46 = 3.9]. The cost savings would be 54% [(10 - .46)/10 = .54]. More generally, T' = [.39/.85]T = .46T, and (T' - .46T)/T = .54. Under the formula in note 55, if the likelihood that Fibreboard would prevail in the coverage suit was greater than 44%, it could survive [p > (.46T - F)/T, T = 10, F = .2]. The RAND study figures are roughly comparable to the transaction cost estimates for Fibreboard made by the district court in Rudd: in 1990 Fibreboard incurred costs of $52 million and paid out recoveries of $45 million. Rudd Findings of Fact, ¶ 50 (cited in note 44). Thus, transaction costs were about 54% of total payout, somewhat less than the RAND study but still significant. Using the above formula, T' = [.46/.85]T = .54T, cost savings would be 46%, and p would have to be greater than 52% [p > (.54T - F)/T, T = 10, F = .2].

57 In fact, Fibreboard had released the insurers from any bad faith claims in the Interim Agreement in December, 1988, but that agreement expired in 1992.
Fibreboard and the insurers could have settled the coverage case with the very different goal of paying the claimants as little as possible. But it is hard to see why Fibreboard would pursue such a strategy, unless the insurers simply paid off Fibreboard’s managers to breach their fiduciary obligations to Fibreboard. Fibreboard would still be subject to the asbestos suits by the claimants, and would probably have to file for bankruptcy. Any side payments by the insurers to Fibreboard would have led to direct or collateral challenges to the settlement by claimants on the grounds of collusion and bad faith settlement.\textsuperscript{58} In fact, such challenges by the claimants were likely to occur no matter what the settlement in the coverage case was. Moreover, the threat of claimant challenges to any settlement in the coverage case regardless of the settlement amount actually strengthens the conclusion that Fibreboard and its insurers would not have been able to settle the coverage case on their own. The minimum settlement strategy was therefore not likely to make either Fibreboard or the insurers ultimately better off than taking their chances by litigating the coverage case to judgment.

Thus, Fibreboard and its insurers could not settle the coverage dispute in a way that would be satisfactory to both sides unless the claimants and their lawyers were part of the deal. But why didn’t Fibreboard simply allow a claimant class to intervene in the insurance coverage case?\textsuperscript{59} It was not in Fibreboard’s interest to do so, again assuming that Fibreboard’s interest is defined as the interest of its shareholders and managers rather than its creditors. Recall that the value of the post-1959 claims was probably enough to bankrupt Fibreboard.\textsuperscript{60} Moreover, future claimants might not be able to intervene in the coverage case because their rights to the insurance had not yet vested. Finally, the claimant class might not be satisfied with a recovery out of the insurance proceeds. The class could potentially settle with the insurers, then go after Fibreboard’s other assets. Thus, Fibreboard had no incentive to join a claimant class in the coverage case.

\textsuperscript{58} See, for example, Restatement [2d] Contracts § 311, cmt i.

\textsuperscript{59} In jurisdictions that have adopted the Uniform Declaratory Judgment Act, courts theoretically would be bound by section 11 of the Act, which provides that “when declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.” Unif Declaratory Judgments Act § II, 12 ULA 516 (1999). The Act has not been adopted in California, however. See Howard, Declaratory Judgment Coverage Actions at 13 n3 [cited in note 45]. And courts do not always strictly follow the Act’s joinder requirement. See id.

\textsuperscript{60} Ahearn, 162 FRD at 529.
3. The assignment settlements, the class action settlement, and the collusion problem

Stymied by the inability to reach a settlement in the coverage case, Fibreboard pursued a separate strategy by negotiating group settlements with present claimants and their lawyers. This section analyzes the structure of the SSP and ASP settlements and how these settlements could have influenced the ultimate class action settlement at issue in Ortiz. Although all the courts analyzing the Ortiz settlement recognized the importance of the SSP and ASP settlements, none fully understood the way they worked or the collusive possibilities they presented. My aim here is not to show that these collusive possibilities were in fact realized, but rather to argue that they should have been recognized and taken into account in evaluating the class action settlement. The basic point is that Fibreboard and the claimants' lawyers initially could have colluded against the insurers to inflate artificially the value of the ASP settlements by understating the probability that Fibreboard would win the coverage case. Subsequently, however, Fibreboard and the claimants' lawyers could have colluded with the insurers by using the same understated probability to justify an artificially low recovery for the class, while allowing those claimants settling outside the class to do better.

Under the SSP, Fibreboard, with Continental's acquiescence and participation, paid 40% of the settlement in cash and promised 60% contingent on Fibreboard's success in the coverage litigation. Under the ASP, Fibreboard, without Continental's permission, settled asbestos claims by paying no cash but simply assigning to the claimants all of Fibreboard's rights to recovery against the insurers. Two features of the ASP settlements made them potentially relevant to the coverage case problem and, interestingly, could facilitate a collusive class action settlement. The first feature was the size of the recoveries in the ASP settlements. If Fibreboard and the present claimants could increase settlement values through the ASP settlements, that could increase the opportunity cost to the insurers of not settling the coverage case and make them more willing either to settle that case or to participate in a class action settlement.

The second feature of the ASP settlements (present in the SSP settlements as well) was tying the claimants' recoveries to a favorable outcome for Fibreboard in the coverage case. This feature served several of Fibreboard's key goals. It maintained Fibreboard's control over, and enhanced the importance of, the resolution of the coverage case, which was Fibreboard's only bargaining chip in the class action
negotiations.\(^{61}\) In addition, it protected Fibreboard’s noninsurance assets from suits by the settling parties if Fibreboard won or settled the coverage case. The tying feature also benefited the insurers by reducing their potential liability to claimants in the event that the insurers lost the coverage case, which would increase what insurers would be willing to pay to settle the coverage case. Finally, the tying feature of the ASP and SSP settlements could facilitate a class action settlement by eliminating the settling claimants’ ability to threaten separate suits.

Consider first the possibility of using the ASP settlements to increase the payment the insurers would have to make if the insurers lost the coverage case, thereby increasing the insurers’ opportunity cost of not settling. The settlement amounts in the ASP and SSP settlements were higher than previously established settlement values. According to the district court the average recovery under the SSP was $5400, which was higher than previous settlement amounts, and the average recovery under the ASP was an even higher $11,400.\(^{62}\) Fibreboard justified these higher amounts on the ground that the new settlements provided less than full immediate recovery, with the remainder contingent on Fibreboard’s success in the coverage case. If the contingent settlements accurately reflected the risk of the coverage case, they would not have affected the insurers’ expected payout and therefore their incentives to settle the coverage case. Whether the claimants got paid fully in cash, partially in cash, or not at all in cash, they bore the risk of the coverage case. The only difference would be that while the previous settlements reflected this risk in the size of the up front payment, the contingent settlements gave the claimants more potential money, but made them bear the risk of the coverage case directly.

But if the ASP settlements accurately valued the risk of the coverage case, then why would the pre-1959 claimants agree to such settlements, which provided no immediate cash? What would those claimants get that they would not have in the absence of “fair” ASP settlements? If Fibreboard lost the coverage case, the claimants would get nothing under the ASP settlements and would be worse off than without the ASP settlements because they would lose any rights they might otherwise have had to sue the insurers directly as third party beneficiaries.\(^{63}\) On the other hand, if Fibreboard won the

\(^{61}\) Fibreboard made the claimants who accepted assignment settlements sign a contractual pledge that no negotiations would take place between those claimants and Continental without Fibreboard’s participation. *Fibreboard Brief* at *8 (cited in note 46).

\(^{62}\) *Ahearn*, 162 FRD at 513.

\(^{63}\) See note 46 and accompanying text.
coverage case, then under ASP the claimants would get exactly what they would have gotten had they not agreed to the settlement and simply waited to see what happened in the coverage case. Even if the claimants did not have the right to sue the insurers directly, they could simply sue Fibreboard, which would get indemnity from the insurers.

The claimants might, however, gain from the ASP settlements if Fibreboard colluded with the settling claimants against the insurers to inflate the settlement values beyond what would be reasonably justified by the risk associated with the coverage case. This is exactly what Continental alleged happened in the assignment case. Fibreboard entered into the ASP settlements, unlike the SSP settlements, without the insurers' consent. Fibreboard and the settling claimants could collude to inflate prior settlement values by overstating the underlying value of the claim or by understating the probability of Fibreboard winning or settling the coverage case. For example if the "true" probability \( p \) is .5 and the underlying claim value \( V \) is $10,000, so the expected value of the claim \( pV \) is $5000, then one could inflate the expected value of the claim to $50,000 either by asserting \( V \) is in fact $100,000 or by asserting that \( p \) is in fact .1. With the large numbers involved in the Fibreboard group settlements, it would not take a huge amount of such manipulation to get the insurers alarmed and upset by the ASP settlements.

For collusion against the insurers to work, Continental would have to be bound by settlements between Fibreboard and the claimants to which the insurers did not agree. The reason Continental might have been bound is that it refused to pay Fibreboard's defense costs for pending asbestos suits beyond the caps established in the 1988 Interim Agreement although these costs had escalated significantly. This refusal might have breached Continental's duty to defend Fibreboard against asbestos claims. The insurer must defend the insured against potential claims even if it ultimately turns out that the resolution of the claims against the insured results in no coverage under the insurance policy. Under the law of many states,

64 Id.
65 The Appendix provides a more detailed example of how the numbers might work.
66 Continental started paying Fibreboard's defense costs again in July 1992, one month after the California trial court ruled in favor of Fibreboard in the assignment case. Fibreboard had implemented the ASP in 1991.
67 See Horace Mann Ins Co v Barbara B, 846 P2d 792 [Cal 1993]; see generally Justin A. Harris, Note, Judicial Approaches to Stipulated Judgments, Assignments of Rights, and Covenants Not to Execute in Insurance Litigation, 47 Drake L Rev 853, 855 n.10 (1999) (collecting cases) ("Note, Judicial Approaches to Stipulated Judgments").
if an insurer breaches its duty to defend, the insurer may be held liable for any reasonable settlement reached by the insured and claimants.\textsuperscript{68}

Exposure in the ASP settlements beyond settlement values consistent with the actual risk associated with the coverage case could have helped bring the insurers to the bargaining table. Faced with this potential increased liability, the insurers had two choices. They could strike a deal with Fibreboard and the claimants’ lawyers now, conditioned on the renegotiation of the assignment settlement values back down toward their “true” discounted levels.\textsuperscript{69} Or the insurers could wait for resolution of the coverage and assignment cases and, if they lost both cases, they could try to challenge the ASP settlements as collusive or unreasonable. The latter strategy would be risky as well as costly. It would be difficult for Continental to prove that the ASP settlements were collusive on the ground that the probabilities had been so manipulated as to take the ASP settlements out of a reasonable range.\textsuperscript{70} Thus, the insurers chose settlement and renegotiation and joined the global class action settlement discussions.

With the insurers on board the global settlement negotiations, however, the settlement participants might have realized at some

\textsuperscript{68} 14 Couch on Insurance § 51.58 [2d rev ed 1999]. See Note, Judicial Approaches to Stipulated Judgments [cited in note 67]. California courts have been particularly active in this area. See, for example, Sunseri v Camperos Del Valle Stables, Inc, 185 Cal App 3d 559, 230 Cal Rptr 23 (1986) [noting that, where an insurer fails to defend an insured against a potentially covered claim, the insurer is bound to pay stipulated judgment between claimant and insured unless in a subsequent suit by the insured the insurer proves (1) no coverage or (2) fraud or collusion], Earth Elements, Inc. v. National Amer Ins Co, 41 Cal App 4th 110, 48 Cal Rptr 2d 399 (1995) [noting that, once an insurer has breached its insurance policy, the insured may elect to settle and then sue the insurer for the settlement amount].

\textsuperscript{69} Although the insurers had no right to renegotiate contracts between Fibreboard and the claimants, they were able to persuade Fibreboard and the claimants to renegotiate the contracts. The source of the insurers’ leverage may have been the risk that the insurers would win the assignment case, which they ultimately did.

\textsuperscript{70} California puts the initial burden on the claimant assignee to show that the settlement was reasonable, then shifts the burden to the insurer to prove that the settlement was fraudulent or collusive. Note, Judicial Approaches to Stipulated Judgment at 868-70 [cited in note 67]. Depending on how the courts interpret these burdens, the insurer could face a difficult time setting aside a settlement between the claimant and the insured. See, for example, Sanchez v. Truck Ins. Exch, 21 Cal App 4th 1778, 1786, 26 Cal Rptr 2d 812, 817 (1994) [referring to criteria for good faith settlement between insurer and claimant, including whether the settlement represents a “rough approximation of the damages which the plaintiff is likely to recover”]. The burden would be especially great if the settlements, though higher than previous settlements, were in fact reasonable because the baseline for previous settlements was unreasonably low to begin with.
point that they could use the previously negotiated, and artificially inflated, ASP settlements to achieve a purpose different from collusion against the insurers. The negotiators could use the inflated ASP settlement values to reduce the recovery of the class, at least if the class were limited to future claimants not separately represented. How? Recall that in the numerical example discussed above, a claim with an expected value of $5000 (.5 \times $10,000) could be inflated to a claim with an expected value of $50,000 either by directly inflating the undiscounted settlement value as $100,000 or understating the probability as .1. If the settlement proponents could claim that the implicit probability from the prior settlements was in fact .1, they could use that artificially lowered probability to justify to the court lower recoveries for the class. A court might accept the prior ASP settlements, along with the implicit probability suggested by those settlements, as resulting from "arms-length bargaining" and as accurately reflecting the litigation risk associated with the coverage case. In fact, the district court and the Supreme Court dissenters did just that. This potential scheme is another variation on the mass tort class action collusion problem. The insurers could use the artificially inflated ASP settlements to buy off Fibreboard, the present claimants and their lawyers, and class counsel in return for their acquiescing in a reduction of the settlement for the absent future claimants in the class. The ratchet designed to coerce the insurers

71 The implicit probability derived from the $5400 average SSP settlement and $11,400 average ASP settlement was around 25%. For a derivation, see the Appendix.

72 I have no direct evidence that the settlement proponents ever explicitly adopted a lower probability figure in the negotiations, or argued one to any of the courts considering the settlement. Discussions of prior settlement values appeared simply to involve average settlement values, pV, without breaking down those values into an undiscounted value and a probability.

73 See Ahearn, 162 FRD at 526 [noting that “the risk inherent in Fibreboard’s insurance dispute is . . . reflected in the fact that Fibreboard’s settlement average under its no-cash assignment settlement program was more than twice its [sic] settlement average under the 40% cash SSP”]. Moreover, Justice Breyer in his dissent seemed to accept the implicit probability determined by the average ASP and SSP settlements as representing the true probability, which presumably would justify its use in discounting the class settlement. According to Breyer:

The settlement value of previous cases also indicated that the insurance policies were of limited value. Fibreboard’s “no-cash” [ASP] settlements [which required a settling plaintiff to obtain recovery from the insurance companies] were twice as high on average as were its comparable 40% cash [SSP] settlements. . . . That difference, suggesting a 50% discount for 40% cash, in turn suggests that settling parties estimated the odds of recovering on the insurance policies as worse than 2 to 1 against. Ortiz, 119 S Ct at 2328 [emphasis added].

74 See Coffee, Class Wars at 1373-84 (cited in note 9) [describing collusive techniques that can be used to disadvantage future claimants in mass tort class action settlements].
now works in the insurers' favor. In essence, a lower p raises the recoveries of the separately settling SSP and ASP claimants but hurts the class recovery.

Of course, this scheme's success depends on the courts buying into such financial legerdemain. But courts' incentives generally to approve class action settlements to clear court dockets, as well as the lack of information that class action settlement proponents present to the courts, support my contention that the scheme could have worked. The lower court opinions in this case provide further corroborative evidence in their limited discussion of the basis for the global class settlement value. Whether through neglect or willful blindness, the courts seemed to misunderstand completely the relationship between the contingent settlements negotiated with the claimants outside the class and the class settlement. The courts seemed to argue that the higher contingent settlement values were good for the class, when in fact they were at best neutral and probably harmed the class.

Moreover, the lower courts' opinions ignored the figures that would seem to be the most relevant benchmarks for comparison, namely the renegotiated settlement values that Fibreboard, the insurers, and the assignment claimants agreed to. If the assignment settlements were not renegotiated all the way back down to the discounted settlement values that prevailed before the SSP, and if those renegotiated amounts had been used as the benchmark for the global class action settlement, then the class would have indeed benefited. The lower courts provide no evidence to support either proposition.

But even if the ASP settlements were not renegotiated all the way back down to prior values, that raises an additional, more troubling, possibility. The renegotiated amounts could have been a vehicle for the insurers to pay off the ASP claimants and their lawyers. The lawyers representing the contingent claimants would have been in

75 Coffee suggests that because of "close judicial supervision," the Ortiz settlement "did not involve the same glaring disparities as in Georgine [eventually renamed Amchem] between the terms received by the present claimants and those applicable to future claimants." Id at 1401 & n229. Coffee's focus, however, is on the individual settlements that class members might be able to get under the settlement, not the aggregate or average amount available to the class as a whole, which could well have proved inadequate to fund all claims at historical settlement values.

76 See, for example, Koniak & Cohen, Under Cloak of Settlement at 1122-30 (cited in note 28).

77 For example, the district court in Rudd found that the Global Settlement price "came from estimates of total claims—both insured and uninsured—and reasonable settlement values based on historical data, as driven upward by the SSP and, more significantly, by Fibreboard's assignment settlements." Rudd Findings of Fact ¶ 107 (cited in note 44) [emphasis added].
the best position to object to an unreasonable class settlement had their clients been included in it.\textsuperscript{78} In effect, the insurers could buy off their acquiescence in the class settlement by overcompensating them and their clients in the side settlements and keeping them out of the class, where they might have caused trouble. This scenario may help explain why Judge Higginbotham allegedly found that including the present claimants in the class action would be “too complex.”\textsuperscript{79} By excluding the contingent claimants from the class and making side payments to them, the proponents of the global class action settlement could push the settlement through without meddling interference from dissatisfied claimants and their lawyers.

Thus, the Fibreboard ASP settlements had the potential to accomplish a remarkable number of things, including: bringing the insurers to the negotiating table by unreasonably jacking up settlement values; facilitating a collusive class settlement by helping to justify an unreasonably low class recovery; and enabling side payments to the settling claimants and their lawyers outside the class, thus minimizing the possibility of objection to the global settlement. Most important from Fibreboard’s perspective, ASP settlements might have made the coverage case risk so great for the insurers, the separately settling claimants, and class counsel, that all of them had every incentive to support Fibreboard’s global settlement efforts as well as its attempts to get itself released from all liability.

The one thing Fibreboard’s ASP settlements did not do was buy complete peace for itself. Fibreboard eventually agreed to remain exposed under the Trilateral Agreement, which could turn out to be its Achilles heel. The problem for Fibreboard was that the insurers, although they apparently preferred the Global Settlement to the Trilateral Agreement, did not fare significantly worse under the Trilateral Agreement. And lawyers for present claimants left in the class wound up challenging the Global Settlement in Ortiz because they preferred the Trilateral Agreement. The Trilateral Agreement is a better deal for present claimants than the Global Settlement because it does not restrict early payouts to preserve money for future claimants. More important, the Trilateral Agreement is a better deal for the present claimants’ lawyers (other than class counsel) than the

\textsuperscript{78} See \textit{In re Asbestos Litigation}, 90 F3d at 1015 (Smith, dissenting) (“Thus, the class consists largely of people who are unlikely to monitor counsel’s performance or challenge the settlement.”).

\textsuperscript{79} See text at note 12. Judge Higginbotham’s role was that of mediator trying to get a deal done, not of guardian for the absent class members’ interests, nor of judge overseeing the settlement proceedings. His alleged suggestion most likely reflected his perceptions of the negotiating positions, not any legal conclusion about their legitimacy.
Global Settlement, because the Trilateral Agreement does not cap the lawyers’ fees for representing claimants in the future. This explains why the “members of the asbestos bar, with but one exception, endorsed the Trilateral Settlement Agreement.”

B. Of Sinking Ships, Falling Skies, and Hitched Wagons

The cornerstone of Justice Breyer’s dissent is the idea that the deal had to be done before the California appellate court issued its opinion in the coverage case because the “ship was about to sink.” The Court responds to this assertion not by attacking it head-on in the context of this case, but by countering that exigent circumstances—like settlements—do not justify relaxing the requirements of Rule 23 because it often will be easy for the parties to concoct exigencies. Although the Court’s principle is correct, the Court could have used this case to prove the point by demonstrating the emptiness of the exigency argument on its own terms.

The exigency argument has a surface plausibility. At the time the Global Settlement was being negotiated, a decision by the California appellate court in the coverage case was imminent. Moreover, the negotiating parties seemed to act as if this impending decision imposed a real deadline, though negotiating parties often impose artificial deadlines on themselves to motivate agreement. But upon closer inspection, the exigency argument begins to sound more like Chicken Little’s frantic cry. Even counsel for the settlement proponents backed off the exigency argument in his oral argument before the Court. To see the flaws in the exigency argument, we must

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80 Rudd Findings of Fact ¶ 108 (cited in note 44).
81 The full quotation is: “Within weeks after the parties’ settlement agreement, the insurance policies might well have disappeared, leaving most potential plaintiffs with little more than empty claims. The ship was about to sink, the trust fund to evaporate; time was important.” Ortiz, 119 S Ct at 2329 [Breyer, dissenting].
82 The Court’s sole response to the exigency argument is the following: “We believe that if an allowance for exigency can make a substantial difference in the level of Rule 23 scrutiny, the economic temptations at work on counsel in class actions will guarantee enough exigencies to take the law back before Amchem and unsettle the line between mandatory class actions under subdivision [b][1][B] and opt-out actions under subdivision [b][3].” Ortiz, 119 S Ct at 2323. Cf Reply Brief for Petitioners, Ortiz v Fibreboard Corp, 1998 WL 727536, *8 [Oct 13, 1998] (“What kind of rule of law is this—if you’re in a hurry, adequacy of representation doesn’t count?”).
83 Oral Argument of Elihu Inselbuch, Ortiz v Fibreboard Corp., 1998 WL 849388, *28 (“Inselbuch Oral Argument”) [asserting that “sooner or later [the coverage] issue would be litigated by—either in the insurance case in part in California or by individual members of this class who would test whether or not there was coverage . . . . Sooner or later.”]. “Sooner or later” was Mr. Inselbuch’s main theme—indeed mantra—in his oral argument: he repeated the phrase four more times. Id at *30, *34. This contrasts with the position class counsel took in their brief. Brief of Class Repre-
examine what effect the California appellate court’s decision would actually have, and on whom.

Any assertion that a decision against Fibreboard would have some preclusive or precedential effect on the claimants is contestable. The coverage case was pending in only a California intermediate appellate court. Regardless of the outcome there, the losing party could file a petition for rehearing or petition the California Supreme Court to hear the case. In fact, after the California appellate court largely affirmed the judgment in favor of Fibreboard, that is exactly what the insurers did. Alternatively, the California appellate court could have remanded one or more issues to the trial court for further proceedings. Finally, as discussed in the next section, even if the California appellate court’s decision wound up being a final judgment it would not have bound all the claimants under the ordinary rules of preclusion. That judgment could of course influence subsequent cases, even outside California, but that is not the same as having binding effect.

Aside from the fact that any decision by the California appellate court would not necessarily be final, if Fibreboard and the insurers had reported to the California court that negotiations to settle the coverage case were underway in conjunction with negotiations for a class settlement, and had asked for a stay in the proceedings pending the outcome of these negotiations, it is hard to believe that the court would have refused and rushed to judgment. The court might prefer settlement by the parties, especially when settlement enables it to avoid rendering a difficult and complex decision. Once again, this is exactly what happened. Fibreboard and the insurers moved to sever certain key insurance coverage issues unique to Fibreboard’s insurance pending a further report to the court on the progress of settlement. As of the time of the district court opinion and the Fifth Circuit affirmance in Ortiz, these claims were still not resolved. Per-

citations at *31-*32 [cited in note 50] ("Given the ‘severe deadline’ of the impending appeal in the coverage litigation, the settlement negotiations were charged with a ‘sense of urgency,’ and all parties ‘were driven to reach a settlement before’ that appeal could be heard.") [citations to record omitted].

In their brief, Fibreboard and the insurers argue that "[b]ecause any further review of the appellate court’s decision would be discretionary with the California Supreme Court, all parties needed to assume that the appellate court’s decision could be final." See Fibreboard Brief at *7 [cited in note 46] [emphasis added]. Although literally true, the statement does not explain why the parties found it crucial to reach an agreement before the appellate court even rendered its decision and before any petition was filed before the California Supreme Court. Perhaps the parties needed to assume finality only because that assumption would help create an impression of exigency that could make it more likely that the court would approve any settlement reached.
haps the California court would not have granted a stay unless negotiations had reached a fairly definitive stage, but it is not obvious why.

A better objection to the stay solution is the fact that the coverage case did not involve only Fibreboard's insurers. Some of the coverage issues being litigated were common to all the insurers. The California appellate court may well have refused to stay the entire litigation simply to await the outcome of negotiations that affected only Fibreboard's insurers. But it is hard to tell from the reported facts. A settlement by Fibreboard's insurers might have led to settlements by the other insurers as well. In any event, Fibreboard and the insurers could have made the stay request, as they did, after the resolution of the appeal. If the California appellate court had decided any of the common issues in favor of the insurers, the stay would have had to involve either a motion for rehearing or the petition for review by the California Supreme Court. But it still might have been possible.

Even if the California courts refused to stay the proceedings on their own, Fibreboard could have filed for bankruptcy and sought a stay of the coverage case proceedings if it thought the risk of an adverse judgment was too high. The fact that Fibreboard did not voluntarily file for bankruptcy reflected the belief of Fibreboard's managers that the threat of Fibreboard's winning the coverage suit was its only bargaining chip to insure its survival. Although a class of claimants might have achieved the same result by forcing Fibreboard into bankruptcy, Fibreboard could have resisted an involuntary bankruptcy petition by asserting that it was currently paying its debts as they became due. Claimants who had the biggest current

85 11 USC § 362(a)(3) [allowing stay of "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate"]). A debtor's interest in its liability insurance policy is considered property of the bankruptcy estate. *Tringali v Hathaway Mach Co*, 796 F2d 553 [1st Cir 1986]; *In Re Titan Energy, Inc*, 837 F2d 325 [8th Cir 1988]; *In Re The Minoco Group of Cos*, 799 F2d 517 [9th Cir 1986]. See also *A.H. Robins Co v Piccinin*, 788 F2d 994 [4th Cir 1986] (holding that automatic stay can apply to suits by tort claimants against liability insurer).

86 Under 11 USC §303(b)(1), the commencement of an involuntary bankruptcy proceeding requires a filing by three creditors, each of whom has a claim "that is not contingent as to liability or the subject of a bona fide dispute." Arguably, three claimants with current claims against Fibreboard and who had not settled them could be found to file an involuntary bankruptcy petition, though they might not get past the "bona fide dispute" limitation depending on the strength of their claims. See generally Lawrence Ponoroff, *Involuntary Bankruptcy and the Bona Fides of a Bona Fide Dispute*, 65 Ind LJ 315 [1990]. If the claimants got past the jurisdictional requirement of § 303(b)(1), they would be entitled to relief under an involuntary bankruptcy only if "the debtor [was] generally not paying such debtor's debts as such debts become due unless such debts were the subject of a bona fide dispute." 11 USC § 303(b)(1).
claims against Fibreboard had already accepted settlements contingent on the outcome in the coverage case.\textsuperscript{87} Thus, there was nothing “due” to them unless and until that case was resolved favorably to Fibreboard, in which event they would look to the insurers for payment rather than Fibreboard.

In fact, it was the contingent claimants, and their lawyers, for whom the resolution of the coverage case was most significant. These claimants had hitched their wagons to the insurance coverage, and so were uniquely at the mercy of Fibreboard, which controlled the resolution of the coverage case. But it hard to see why a class action settlement for other claimants is more justified because the contingent claimants were in danger of losing the bet they took on the coverage case, assuming their lawyers adequately represented them in taking that bet.\textsuperscript{88} Even if the interests of the contingent claimants were relevant to the legitimacy of the class settlement, the contingent claimants were probably more concerned about the delay in resolving the coverage case than about the imminent appellate court decision.\textsuperscript{89} The contingent claimants also had as much reason to be worried about the pending appeal in a separate California case, the assignment case, as they did about the resolution of the coverage case.\textsuperscript{90} Thus, if exigency is relevant at all to the class action settlement, it was relevant because it intensified the conflict of interest between the contingent claimants and the other claimants, a problem discussed in more detail below.

\textsuperscript{87} In fact, the potential threat of bankruptcy by these claimants could have helped motivate Fibreboard to propose the collusively high ASP settlements in the first place.

\textsuperscript{88} Referring to the ASP settlements as simply a “bet” on the coverage case outcome may be misleading. As discussed above, the whole purpose of the ASP settlements may have been to increase the odds that the insurers would participate in a class action settlement. Once the insurers joined the global settlement negotiations, the contingent claimants and their lawyers again had the incentive to increase their odds of recovery by facilitating the global class action settlement.

\textsuperscript{89} In fact, it was the delay likely to result from the coverage case, not its imminent resolution, that the district court used to justify upholding the settlement in \textit{Rudd}. According to Judge Parker: “Although the Coverage Case is before the California Supreme Court, there is no assurance it will terminate there. . . . The parties may face more years of exceedingly complex and expensive litigation before it is finally resolved. Without the Trilateral Settlement Agreement, claimants may be subjected to years of uncertain availability of insurance coverage.” \textit{Rudd Findings of Fact} ¶ 100 [cited in note 44].

\textsuperscript{90} \textit{Andrus v Fibreboard Corp}, No 614747-3 [Alameda Cty Sup Ct June 1, 1992], rev’d by \textit{Fibreboard Corp v Continental Casualty Co}, No A059716 [Cal App Oct 19, 1994].
C. Assume a Limited Fund

Many people are familiar with the old joke about the shipwrecked economist who, faced with the problem of how to open a can of food he has discovered, responds that the problem can be solved if one assumes a can opener. The limited fund theory, which occupies the bulk of the Court’s opinion in Ortiz, was an assumed can opener. Even the settlement’s proponents had abandoned the theory in their briefs and oral argument before the Court. The argument of the lower courts that approved the settlement and the dissent in Ortiz essentially boils down to the assertion that no settlement would have been reached if there were no limited fund; therefore there must be a limited fund. Although the majority opinion correctly rejects the limited fund assumption, it unfortunately takes the quixotic quest for the limited fund that “needs must be” more seriously than it should have.

1. The purpose of the limited fund doctrine, and the Court’s approach

To understand the dispute about whether a limited fund existed, we must identify the purposes of the limited fund doctrine and examine how the limited fund situation differs from a typical class action for money damages. The limited fund doctrine’s primary purpose, on which the Court focused in Ortiz, is to justify the use of a mandatory class action under Rule 23(b)(1)(B), in which class members have no right to opt out. But the existence of a limited fund is also relevant...

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91 For a description of the story and its relevance to economics, see A. Mitchell Polinsky, An Introduction to Law and Economics 1-5 (2d ed 1989).

92 The concession in the oral argument was explicit. Inselbuch Oral Argument at *43 (cited in note 83) (asserting that “we don’t argue that this is a limited fund. We argue that we are quite within the rule because of the risk of the individual litigations or the risk that they would bring to bear to the rest of the class.”). The briefs simply tried to argue that the requirements of Rule 23(b)(1)(B) were satisfied without attempting to argue that there was a limited fund. Brief of Class Representatives at *22, *26, n.17, *35 (cited in note 50); Fibreboard Brief at *24-30 (cited in note 46). In fact, the gist of the claim remains the same regardless of whether one puts the “limited fund” label on it or focuses on the underlying rationale for mandatory class actions like limited fund cases. This equivalence may explain why both the Court and Justice Breyer in dissent stuck with the limited fund theory. The Court does give the alternative theory brief mention, but only to conclude that the extraclass and intraclass conflict of interest problems preclude its application whatever its merits. Ortiz, 119 S.Ct. at 2321 n.33.

93 Arthur Allen Leff, Economic Analysis of Law: Some Realism About Nominalism, 60 Va L Rev 451, 482 (1974) (quoting M. Cervantes, Don Quixote, Part II Ch. XXXII [S. Putnam trans. 1949]) (comparing Posner’s world view in his Economic Analysis of Law to Don Quixote’s contemplating his Dulcinea as she “needs must be”).

94 See note 23 for the text of Rule 23(b)(1)(B).
to determining whether the class action satisfies the prerequisites for certification set forth in Rule 23(a). If a group of claimants seeks to recover against a fixed pot of money, and the value of this fixed pot of money is less than the total value of the claims, it makes sense to force all claimants into one class action and not let anyone opt out. Competing individual, group, and class actions create the risk that one or some combination of these actions might use up the whole pot, leaving nothing for the remaining claimants. The limited fund class action thus functions as a kind of limited bankruptcy action in which the fund takes the place of the bankrupt firm.

Limited fund class actions are distinguishable from typical class actions for money damages. The claimants in typical class actions do not pursue a fixed pot of money, but rather whatever assets the defendant has available. If the value of the defendant's assets exceeds the value of the claims, there is no reason based on these values alone either to allow the class action or to prohibit opting out of one. The various claimants could pursue many actions without any risk that any one or combination of them would exhaust the defendant's assets. Thus, if a class action is certifiable on grounds other than a limited fund, these grounds are generally compatible with allowing claimants to opt out. In class actions seeking damages, Rule 23(c)(2) mandates permitting opting out during a specified period for classes certified under Rule 23(b)(3), and the Supreme Court

95 The existence of a limited fund will usually satisfy at least the commonality requirement of Rule 23[a]. Recall that the Court bypassed an analysis of the settlement under Rule 23[a], which the Court focused on in Amchem, because the analysis under Rule 23(b)(1)(B) overlapped in significant ways. Ortiz, 119 S Ct at 2307-08; see also id at 2319 & n31. The point is important because it suggests that the much of the Court's reasoning in Ortiz applies to nonmandatory class actions as well as to mandatory class actions in which the right to opt out is of little practical use, as it might be to future claimants.

96 In the typical class action for money damages, plaintiffs seek certification under Fed R Civ Proc 23(b)(3), which requires that the subsection [a] prerequisites be met, and in addition that

the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

97 Rule 23(c)(2) provides: "In any class action maintained under subdivision [b][3], the court shall direct to the members of the class . . . notice [which] shall advise each member that . . . the court will exclude the member from the class if the member so requests by a specified date." Fed R Civ Proc 23(c)(2).
has held that at least in some cases the opt-out right is constitutionally required as a matter of due process. The right to opt out provides an important procedural safeguard protecting absent class members from collusion against their interests by the more active participants in the class action, including class counsel. The right belongs to absent class members; the class representatives may not bargain it away in a class action settlement.

Most class actions for money damages, like most civil actions, settle for an amount less than the alleged value of the claims. But this settlement value does not thereby create a "limited fund" justifying either the class action itself or a prohibition on opting out. The fact that the class representatives choose to compromise the class's claims in a settlement does not by itself preclude those permitted to opt out from pursuing their own claims to the fullest extent. If the mere settlement of a class action for money damages were sufficient to create a limited fund and prohibit opt-outs, then all damages class actions that settled before the right to opt out attached would become mandatory, and the right to opt out would vanish. Similarly, a defendant's refusal to settle or acquiesce in the certification of a class action because it finds the prospect of opt-outs too costly does not create a limited fund and a prohibition on opt-outs. In that case, the claimants could still pursue individual or consensual group litigation against the defendant without exhausting the defendant's assets. And allowing defendants to create a limited fund by stonewalling on a settlement or certification motion would lead most de-

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98 Phillips Petroleum Co v Shutts, 472 US 797 (1985). For discussion of some of the possible ways that the due process right recognized in Shutts might be limited see, for example, Coffee, Class Wars at 1447, 1451 [cited in note 9] (Shutts due process right may not apply to unknown future victims). The majority in Ortiz cites Shutts as supporting caution in expanding the boundaries of Rule 23(b)(2) too far. Ortiz, 119 S Ct at 2315. The majority refers to the fact that Shutts involved due process protections for out-of-state class members with claims for money damages, without deciding whether these protections are limited to such claims. Id. at n24.

99 See Samuel Issacharoff, Class Action Conflicts, 30 U Cal Davis L Rev 805, 821 (1997); Coffee, Class Wars at 1382-83 [cited in note 9] (noting that "the existence of substantial opt outs may be the best evidence that the original settlement was inadequate [and possibly collusive]"); id at 1450 ("The modern value of the right to opt out may lie more in its utility as a checking mechanism than in its ability to protect litigant autonomy.").

100 The inalienability of the opt-out right is a necessary implication of the proposition the Court established in Arnheim, namely that the parties to a class action settlement cannot contract around Rule 23's requirements. The use of inalienable rights to protect third parties from agreements to harm their interests made by others without their consent is widely recognized. See, for example, Margaret J. Radin, Market-Inalienability. 100 Harv L Rev 1849 (1987); Susan Rose-Ackerman, Inalienability and the Theory of Property Rights, 85 Colum L Rev 931 (1985).
fendants to do just that because the opt-out right generally imposes on defendants costs exceeding any benefits they might get.

The Court's opinion in Ortiz correctly recognizes that the alleged limited fund was merely a settlement value rather than a pre-existing pot of money. Absent the class action settlement itself, there was no limited fund. The only thing differentiating Ortiz from the typical class action was that the main asset Fibreboard had available to satisfy the class claims was the insurance proceeds from its policies with Continental and Pacific, which were potentially sufficient to satisfy all pre-1959 asbestos claimants. Limited life or fire insurance proceeds provide a classic example of a situation in which courts appropriately approve limited fund class actions. But the insurance proceeds in this case had—if Fibreboard's contention in the coverage case (accepted by the California trial court) was correct—no aggregate maximum. Thus, the potentially available insurance proceeds were effectively unlimited relative to the value of the covered claims. The insurance proceeds of course became limited as a result of the Global Settlement, but that is no different than any other class action settlement.

In response to the argument that the only limit on the insurance proceeds resulted from the settlement itself rather than a pre-existing pot of money, the dissent in Ortiz claims that the limit instead resulted from the pre-existing probability that the insurance companies would win the coverage suit against Fibreboard. According to the dissent, the Trilateral Agreement between Fibreboard and its insurers established this probability independently of the class action settlement. The majority's rebuttal is that this probability

101 Judge Smith made a similar point in his two dissents from the Fifth Circuit's judgments upholding the settlement before and after Amchem. In re Asbestos Litigation, 90 F3d at 1000 (Smith, dissenting) (arguing that "the only common fund in this case is the settlement proceeds," which is merely a "contrived" limited fund); In re Asbestos Litigation, 134 F3d at 672 (Smith, dissenting) (arguing that "rule 23[b][1][B] cannot reasonably be read to allow a 'limited fund' class where, as here, there is and was no 'fund' except that which was established by the settlement itself").

102 The assets of the insurers would of course limit the proceeds. But Continental in 1993 had over $19 billion in assets, and a surplus of $3.5 billion. 1994 Best's Insurance Reports 898.

103 According to Justice Breyer, "there was a significant 'risk' that the total assets available to satisfy the claims of the class members would fall well below the likely total value of those claims." Ortiz, 119 S Ct at 2326-27 (Breyer, dissenting); see also id at 2327 ("It was certain that the insurance policies' value was limited."); 2329 (arguing that "the fund was limited by the value of the insurance policies [along with Fibreboard's own limited net worth], and that limitation arose out of the independent likelihood that the California courts would find the policies valueless") (emphasis added).

104 Id at 2329 (Breyer, dissenting).
was not established independently of the settlement, but rather as part of the settlement, because the Trilateral Agreement was intimately connected to the class action settlement.\textsuperscript{105} Although the majority's conclusion is correct, the majority's reasoning suggests that if Fibreboard had established some "independent" evidence of the probability, the Court might have accepted the limited fund argument.\textsuperscript{106}

This suggestion is unfortunate. The majority would have been better off going back to the purpose of the limited fund doctrine. The relevant question is whether, if claimants were allowed to opt out of any class settlement, there would be a danger that some group of claimants could succeed in exhausting some pot of assets such that the claimants outside this group would be denied recovery. The answer is no. Had claimants been allowed to opt out of the Global Settlement, those claimants would still have been able to sue Fibreboard and its insurers for their full recoveries. There were only two possible scenarios in which claimants would arguably not be able to reach the full insurance assets, giving rise to a limited fund.\textsuperscript{107}

\textsuperscript{105} Id at 2322-23.

\textsuperscript{106} According to the majority, "settling parties must present not only their agreement, but evidence on which the district court may ascertain the limit and the insufficiency of the fund, with support in findings of fact following a proceeding in which the evidence is subject to challenge." Id at 2316. The majority concedes that an "independent valuation of the limit of the insurance asset . . . might have revealed assets of insufficient value to pay all projected claims if the assets were discounted by the prospects that the insurers would win the coverage cases." Id at 2318. But the majority is not entirely clear about whether such independent valuation would suffice to justify a limited fund mandatory class action in this case, because, as the dissent points out, there was in fact independent expert testimony, as well as the premiums paid in the assignment settlements, supporting the assertion that there was a significant risk that the insurers would win the coverage case. Id at 2328 (Breyer, dissenting).

\textsuperscript{107} There are two alternative limited fund scenarios based on the post-1959 claimants. First, because the post-1959 claimants had no legal rights to the insurance proceeds, if the value of their claims exceeded Fibreboard's assets, with respect to their claims Fibreboard could be viewed as a limited fund. Of course, no one ever suggested this theory, no evidence was presented about the value of the post-1959 claims, and as discussed above the evidence of Fibreboard's assets was questionable. But even if accepted, this theory would at most justify a mandatory class limited to post-1959 claimants whose sole recovery would be against Fibreboard's noninsurance assets. An alternative argument (also not made) would be that including the post-1959 claimants in the class made the insurance a limited fund because the claims against the insurance fund would now exceed the maximum the insurers would be obligated to pay, namely the full value of the pre-1959 claims. But if defendants could make a fund limited by insisting on making that fund available to claimants who would otherwise have no right to that fund, defendants could make any pool of assets a limited fund. I consider the conflict between the pre-1959 and post-1959 claimants in Section
First, Fibreboard could lose the coverage case appeal, in which case there would be no insurance proceeds and Fibreboard's assets would be the potential limited fund. Second, Fibreboard and its insurers could reach a settlement in the coverage case independently of and prior to the class action settlement, in which case Fibreboard's assets plus the insurance assets available from the prior settlement would be the potential limited fund. The questions are whether these scenarios were likely to occur, and if they did occur whether they would really have prevented opt outs from suing Fibreboard and its insurers for their full recoveries.

The questions are complicated by the need to consider a counterfactual (what would have happened had opt-outs from the class settlement been allowed) in a case in which there were two separate suits (the class action and the coverage case) involving three parties (Fibreboard, the insurers, and the class), and at least four possible outcomes (settlement or nonsettlement in the two cases). In the class action, the class was suing Fibreboard. In the coverage case, Fibreboard was suing its insurers. The following sections consider the various possibilities and conclude that none justifies the limited fund theory.

2. Fibreboard's risk of losing the coverage case and the limited fund theory

To simplify matters, let us start with a class action seeking damages in which there is no insurance involved and the defendant has sufficient assets to pay all the potential claims. Suppose that the claims against the defendant are legally uncertain and there is some reasonable probability that defendant would prevail at trial on some issue common to the class (for example, causation) if the claims were litigated. Surely no one would contend that the probability of the defendant's prevailing on this issue at trial, even if established "independently" of the class action settlement (say by the defendant's past litigation history on the legal issue involved in the class action), would convert the class action into a limited fund or any other mandatory class action. The reason is that absent the class action settlement, claimants could bring individual and class suits against the defendant without the risk that judgments for some would substantially impair the rights of others. Although there might be inconsistent judgments if the defendant tried the cases individually, incon-

II.E. This section ignores the conflict to focus on the limited fund arguments discussed in the Court opinions.
sistent judgments do not create a limited fund.\textsuperscript{108} Under ordinary rules of collateral estoppel, individual claimants would not be bound by judgments that the defendant won against other claimants in suits to which they were not parties.\textsuperscript{109} Any adverse precedent might disadvantage the individual claimants, but that would not justify a mandatory class action on limited fund grounds.

Now suppose that there is an insurance company involved, but that the claimants have direct contractual relationships with the insurance company and therefore direct causes of action against it. For example, suppose that Fibreboard had taken out on all of its employees a group disability insurance policy with individual but no aggregate maximum limit and that Fibreboard remained responsible for distributing the proceeds to its employees. The insurance company refuses to pay Fibreboard for a particular disability and Fibreboard in turn refuses to pay its employees. Fibreboard sues the insurer in a declaratory judgment action seeking a declaration of coverage, and the employees bring a class action against Fibreboard seeking damages. Would Fibreboard be able to argue a limited fund theory on the ground that an insurer might win a coverage case against Fibreboard, even if the probability of the insurer's winning could be established "independently" of the class action? No, because there is nothing mutually incompatible about each employee's suing Fibreboard and the insurer individually for his or her full losses.\textsuperscript{110} The key difference between this insurance arrangement and, say, a fire insurance policy, which could be a limited fund, is that Fibreboard's fire insur-

\textsuperscript{108} Nor do inconsistent judgments in and of themselves justify a mandatory class action under the other provisions of Rule 23. They would not "establish incompatible standards of conduct" for Fibreboard. Fed R Civ Proc 23(b)(1)(A). It is not "incompatible" for a defendant to pay some claimants and not others. And the prospect of inconsistent judgments would not "mak[e] appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed R Civ Proc 23(b)(2). The only injunctive relief potentially available would be a determination on causation, which in a suit for damages would not be "final."

\textsuperscript{109} See Parklane Hosiery Co v Shore, 439 US 322, 327 n7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard."). See also Blonder-Tongue Labs v University of Illinois Foundation, 402 US 313, 329 (1971).

\textsuperscript{110} As for preclusion law, the hypothetical example (not to mention Ortiz itself) bears a striking resemblance to the following illustration from the Restatement of Judgments:

A purchases medical insurance from I for B, an employee of A. The insurance policy requires a claimant to make claim within 30 days of incurring a covered expense. I refuses to pay benefits to B, contending B's claim was filed too late. A brings an action against I to require I to honor the claim. Judgment is for I. B is not precluded from bringing an action on the claim.

Restatement (2d) Judgments §56, illus 3.
ance policy would have a fixed maximum recovery independent of the number of employees injured in a fire. The liability insurance policy at issue in Ortiz, however, is more like the disability policy in this example. Liability insurance can be understood as being purchased for the benefit of tort creditors, at least for the purposes of ascertaining whether it should be viewed as a limited fund.

The only potential difference between the hypothetical example and Ortiz is that, in Ortiz, individual claimants do not have a direct contractual relationship with the defendant’s liability insurer. But that difference does not matter. Many of the claimants would be able to sue the insurers as third party beneficiaries, at least after obtaining a judgment against Fibreboard on their tort claims. They might also have been able to bring declaratory judgment actions against the insurers to establish coverage even before obtaining a judgment against Fibreboard if their injuries had been manifested. If claimants have rights against the insurers as third party beneficiaries, they would not be bound by any judgment against Fibreboard in the coverage case. And if the claimants would not be bound by

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111 The same is true for the dissent’s “trust fund” example. According to Justice Breyer: “A trust worth, say, $1 million [faced with $2 million in claims] is a limited fund, despite the possibility that a company whose stock it holds might strike oil and send the value of the trust skyrocketing. Limitation is a matter of present value, which takes appropriate account of such future possibilities.” Ortiz, 119 S Ct at 2327 [Breyer, dissenting]. Shares of stock held by a trust are, of course, finite and these shares must be divided among the claimants based on the stock’s current value, which by assumption is less than the value of the claims. If opt outs were allowed in that case, there is a risk that all of the shares of stock would be distributed before all the claimants recovered. The fact that the stock might increase in value at some future time is, indeed, irrelevant or, for believers in efficient capital markets, already accounted for in the stock’s market price.

112 See note 46 and accompanying text.

113 Class counsel in their brief asserted this proposition under California law. See Brief of Class Representatives at *24 n15 [cited in note 50] [citing cases and asserting this proposition]; id at *26 n17 (“The class could have . . . [sought a declaratory judgment that the insurers owed coverage on the class’s claims notwithstanding the coverage dispute.”). The cited case most supportive of this proposition is probably General Ins Co v Whitmore, 235 Cal App 2d 670, 674, 45 Cal Rptr 556 [Cal App 1965], in which an insurer brought a declaratory judgment action against the insureds and the claimants after the accident but before the claimants had filed suit against the insured. But see Griffith v. State Farm Mutual Automobile Ins Co, 230 Cal App 3d 59, 70 n7, 281 Cal Rptr 165, 171 n7 (1991) [distinguishing Whitmore and finding it does not stand for the proposition that “the rights of a third party claimant accrue upon the happening of the accident”].

114 See note 45 and accompanying text. See also Restatement [2d] Judgments § 56[1]: “When a contract between two persons creates an obligation in favor of another person as an intended beneficiary, a judgment . . . against the promisee in an action between him and the promisor does not preclude an action by the beneficiary on the obligation to him unless at the time the judgment was rendered the promisee had
a judgment against Fibreboard in the coverage case, there could be no limited fund created by Fibreboard’s losing that case.

Even if the claimants would be bound by a judgment against Fibreboard in the coverage case, or if as a practical matter an adverse judgment against Fibreboard would have severely hindered their ability to recover from the insurers, Fibreboard and the insurers did not wind up litigating the coverage case to a final judgment. They settled the case in the Trilateral Agreement. That raises the question whether the settlement of the coverage case somehow creates a limited fund, thus justifying a mandatory class action. As demonstrated in the following section, the answer again is no.

3. Settlement of the coverage case and the limited fund theory

To analyze the effect of the settlement of the coverage case on the existence of a limited fund, this section considers four possible scenarios and asks what would happen if the class action settlement permitted opt outs. First, the class action settlement might have preceded the resolution of the coverage case. Second, the coverage case settlement might have preceded the class action settlement. Third, the two settlements might have occurred simultaneously. Finally, neither the class action nor the coverage case might have settled.

a. Global Settlement Precedes Coverage Case Resolution. If the global settlement preceded the resolution of the coverage case, it is hard to see how the risk of the coverage case created a limited fund. Surprisingly, then, this possibility is the one the dissent relies on to argue in favor of a mandatory class action. As discussed above, the dissent claims that the imminent judgment in the coverage case motivated the class action settlement. Once the negotiators reached the Global Settlement, the same imminent judgment in the coverage case required that the Global Settlement prohibit opt-outs.

power to discharge the obligation.” See also id cmt a (“If the obligation to the beneficiary has not been discharged, upon the promisor’s failure to perform his promise he is liable both to the beneficiary and to the promisee. . . . Since the obligation to the beneficiary is distinct from that to the promisee, a judgment against the promisee does not terminate the claim of the beneficiary.”). Under general contract law, an injured claimant whose claim is covered by an insured corporation’s liability policy would qualify as "intended" beneficiary, Restatement [2d] Contracts §§ 302(1), whose rights under the insurance policy could not be discharged by the insured and the insurer once an insured loss occurred. Id at § 311 cmt e. The issue in this case would be whether the insured loss occurs on exposure to asbestos or only when an injury has manifested itself.

See sections I.C., II.B.
According to the dissent, the insurers needed a mandatory class action because if the resolution of the coverage case appeal occurred during the opt-out period, the class members could play wait-and-see, staying in the class if the insurers won the coverage case but opting out if Fibreboard won.

However, the fact that the insurance money might have been available only for a limited time has nothing to do with whether there was a limited fund. The dissent's argument for a mandatory class action is actually not a limited fund argument at all, but the reverse: the class action had to prohibit opt-outs because if it allowed them, class members might have had access to an unlimited fund. They would get this access by opting out and suing the insurers outside the class action if Fibreboard won the coverage case during the opt-out period.

In any case, the argument that the limited time frame justified a mandatory class action fails on its own terms because it ignores the fact that the negotiators reached the Trilateral Agreement, which settled the coverage case, contemporaneously with the Global Settlement. In fact, according to the record, the dissent had the story exactly backward. It was class counsel rather than the insurers who were concerned about the wait-and-see game. They were worried that if the insurers won the coverage case appeal before the court approved the Global Settlement, the insurers would scuttle or sim-

116 Ortiz, 119 S Ct at 2326. Just what this opt-out period would have to be is not entirely clear, especially in a case like Ortiz, in which perhaps the large majority of class members would not have been able to sue Fibreboard at the time of the settlement, and an unknown number of class members either did not yet exist or would have no way of knowing that they had a potential claim. I will not address in this paper the difficult question of what the opt out rights should be if a so-called futures class action is to be allowed at all. For a discussion of this issue, see Coffee, Class Wars at 1446-53 [cited in note 9]; George Rutherglen, Better Late than Never: Notice and Opt Out at the Settlement Stage of Class Actions, 71 NYU L Rev 258, 277-294 (1996) [arguing that class members should be allowed to opt out after a proposed settlement].

117 "If the class that entered into the settlement were an opt-out class, then members of that class could wait to see what the California court did. If the California court found the policies valid [hence worth many billions of dollars], they would opt out of the class and sue for everything they could get; if the California court found the policies invalid [and worth nothing], they would stick with the settlement." Ortiz, 119 S Ct at 2326 [Breyer, dissenting]. See also Fibreboard Brief at *18 [cited in note 46].

118 The dissent actually does not make this argument in the context of its limited fund discussion, but in a preliminary section discussing background features of the case. Nevertheless, it is somewhat troubling that the dissent ignores the tension between its asserted pragmatic justification for restricting opt outs [limited time] and its legal justification for restricting opt-outs [limited fund].

119 Brief of Class Representatives at *12-*13 [cited in note 50].
ply abandon the Global Settlement. That is why class counsel insisted on the Trilateral Agreement as a backup to the Global Settlement. The Trilateral Agreement left nothing for the insurers to wait and see. Moreover, if the Global Settlement had permitted opt outs, class counsel would have had exactly the same reason to insist on the Trilateral Agreement—to take away the insurers' incentive to play wait and see. Even under the dissent's scenario that it was the insurers who were worried about the wait-and-see game, the Trilateral Agreement would solve the problem. The Trilateral Agreement shows that the dissent's leap from the need for speed to a limited fund is based on a false assumption. Given the Global Settlement, the settlement proponents would have an incentive to settle the coverage case even if the Global Settlement had permitted opt outs. Such a class action settlement would not create, but rather eliminate, the possibility of a limited fund based on the insurer's winning the coverage case, other than the fund created by the coverage case settlement itself.

b. Trilateral Agreement Precedes Global Settlement. Ironically, the dissent uses the Trilateral Agreement, the adoption of which contradicts the dissent's asserted justification for a mandatory class action, to support its limited fund argument. The dissent contends that because the Trilateral Agreement settled the coverage case independently of the Global Settlement, the Trilateral Agreement provided objective evidence of the limited value of the insurance coverage. Evidently, just as the dissenting justices apparently believed there could be a Global Settlement without a Trilateral Agreement (which we have already seen is inconsistent with the reported facts), the dissenting justices apparently simultaneously believed that there could be a Trilateral Agreement without a Global Settlement. These beliefs are inconsistent, because if there could be a Trilateral Agreement without a Global Settlement, that undercuts the dissent's "need for speed" argument. What is the big hurry in approving the Global Settlement if the Trilateral Agreement alone could end the coverage case?

In fact, however, the Trilateral Agreement was not independent of the Global Settlement at all, but intimately tied to it, as the Court found, and as the very name "trilateral" implies. This was in fact Judge Smith's position in his dissent from the Fifth Circuit's approval of the Global Settlement. I believe this is one of the few areas in which Judge Smith is mistaken.

Class counsel rejected this implication in their brief and maintained that "trilateral" derived from the fact that the agreement was among Fibreboard and the two insurers. Brief of Class Representatives at *13 (cited in note 50). Interestingly, in an
Settlement that established the benchmark for the size of the insurers’ payment under the Trilateral Agreement. Class counsel would not accept the insurers’ paying less under the Trilateral Agreement than under the Global Settlement, because that would create the very incentive for the insurers to scuttle the Global Settlement that the Trilateral Agreement was meant to curb. The insurers would not accept paying more under the Trilateral Agreement than under the Global Settlement, because they had no incentive to pay the class claimants more than class counsel were able to negotiate on their behalf. The two agreements were inextricably linked not only in the amount of money the insurers would pay, but also because Fibreboard, which is left exposed to claimant suits under the Trilateral Agreement, would never have agreed to the Trilateral Agreement in the first place if there had been no Global Settlement, as demonstrated above in section II.A.2. The dissent uses Fibreboard’s disadvantaged position under the Trilateral Agreement to argue that “Fibreboard had every incentive to squeeze as much money as possible out of the insurance companies, thereby creating as large a fund as possible in order to diminish the likelihood that it would eventually have to rely upon its own net worth to satisfy future asbestos plaintiffs.” Ortiz, 119 S Ct at 2329 (Breyer, dissenting). According to the dissent, Fibreboard’s incentive to maximize the available insurance fund provides independent evidence of the settlement value of the insurance proceeds. Even if the dissent were correct that settlement value can create a limited fund, it is incorrect that Fibreboard had an incentive to maximize the settlement value under the Trilateral Agreement. Fibreboard would have such an incentive only if the insurance settlement would be sufficient to satisfy all claims, which is inconsistent with the claim of limited fund. Suppose the total value of class claims is $1000 and Fibreboard is worth $200. Fibreboard has an incentive to negotiate an insurance settlement of $1000, but that is not a limited fund because $1000 can fully compensate all claims. If the insurance settlement is between $800 and $1000, again there is no limited fund (the insurance assets plus Fibreboard’s assets exceed $1000), but Fibreboard would again have the incentive to get the maximum insurance settlement because every extra dollar of insurance offsets what Fibreboard has to pay. If, however, Fibreboard cannot negotiate an insurance settlement more than $800, there is a limited fund, but Fibreboard will be made insolvent no matter what the settlement is, so it does not have the incentive to maximize the insurance payment. If Fibreboard had an incentive to maximize anything, it was the likelihood that the court would approve the class settlement, so that it would avoid the potential liability under the Trilateral Agreement. This is the same flawed incentive that the Court correctly found biased class counsel.
a result, there is no need to consider whether a truly independent settlement of the coverage case would create a limited fund, justifying a mandatory class action.

c. Both the Coverage Case and the Class Action Settle. Having thus eliminated two of the four possible relationships between the class action and the coverage case, namely settlement of the class action without settlement of the coverage case, and settlement of the coverage case without settlement of the class action, we have two possibilities left, namely both the class action and the coverage case settling and both not settling. Consider first the joint settlement scenario, which actually occurred. Did this scenario create a limited fund? The Trilateral Agreement provides a fixed pot of money to resolve Fibreboard's asbestos claims, but the monetary aspect of the Trilateral Agreement did not kick in unless the Global Settlement failed to win court approval. On the other hand, the Trilateral Agreement purported to settle the coverage case between Fibreboard and its insurers whether or not the Global Settlement was rejected. Thus, one could argue that the Trilateral Agreement, rather than the Global Settlement, limited the available insurance proceeds under the Global Settlement, and created the limited fund.

The problem with this argument is that, because the monetary portion of the Trilateral Agreement did not kick in unless the Global Settlement failed, the Trilateral Agreement essentially collapses the two lawsuits back into one. The limited fund question arises only if the Global Settlement prevails because, with no class settlement, all claimants are in effect opt-outs. And if the Global Settlement prevails, the Trilateral Agreement settles the coverage case by essentially dropping it as moot. In that case, the Trilateral Agreement provides no pot of money independent from the Global Settlement that could potentially bind claimants who chose to opt out from the Global Settlement. The only limited fund is that created by the Global Settlement itself, which we have already seen is an insufficient basis for prohibiting opt-outs. Once again, any opt-outs, if allowed, would be able to sue Fibreboard and the insurers for their full damages, unhindered by the Global Settlement's limits.

Even if the Trilateral Agreement created a limited fund that is somehow independent of the Global Settlement, the result would be the same. If the class action allowed opt outs, the opt outs would be able to challenge the Trilateral Agreement, by assumption an independent agreement between Fibreboard and the insurers, in suits against Fibreboard and its insurers, on grounds of fraud and collu-
sion. In fact, as discussed in section II.A.2, the fear of such claimant suits was one of the factors hindering the settlement of the coverage case in the first place.

The insurers of course recognized the possibility of such claimant suits in response to the Trilateral Agreement. Their response was Rudder, the mandatory injunctive class action purporting to make the Trilateral Agreement binding on the claimant class by prohibiting any suits by class members against the insurers for claims related to asbestos coverage. Rudder, which the Supreme Court surprisingly does not mention, may be the only thing that supports the limited fund theory, because Rudder enjoins any class member from suing Fibreboard’s insurers, whether the Global Settlement or the Trilateral Agreement is in place.

Could Rudder have justified the use of the limited fund theory in Ortiz? The answer must be no. Like the Trilateral Agreement it seeks to enforce, Rudder is not independent of the Global Settlement but inextricably bound up in it. If anything, Rudder seals the interdependence by providing a link between the insurers and the class, thus completing the triad of agreements connecting all three parties. The Global Settlement settles the dispute between Fibreboard and the class; the Trilateral Agreement settles the dispute between Fibreboard and the insurers; Rudder settles the dispute between the insurers and the class. Rudder bolsters the conclusion that the Global Settlement, not the Trilateral Agreement, created the alleged limited fund. For Rudder to justify making the Global Settlement mandatory would allow the parties to eliminate the opt-out right by fiat simply because they did it in an agreement formally separate from the class action settlement. To see this, consider how the counterfactual would apply to Rudder. If the Global Settlement had allowed opt-outs, the class members would not be limited to the fund established by the Global Settlement. Nor would they be limited to the pot of money provided by the Trilateral Agreement because that pot of money was linked to the rejection of the Global Settlement. Yet Rudder as constituted would enjoin the opt-outs from suing the insurers anyway, which would severely limit the benefits of opting out for no justifiable reason. This suggests that if the Global Settlement

123 In re Asbestos Litigation, 90 F3d at 992 (discussing basis for suits by tort victims against tort defendant and its insurer for unfair or fraudulent settlement of insurance policy); Restatement (2d) Contracts § 311 cmt. i ("A release of the promisor [insurer] may be a fraud on the beneficiary or on other creditors [claimants] of the promisee [Fibreboard] if the promisee is insolvent and the release is made without fair consideration, or if the release is made with actual intent to hinder, delay or defraud creditors.").
had permitted opt-outs, Rudd itself would have allowed opt outs in the event that the courts approved the Global Settlement. But in that case, there would once again be no limited fund, because the opt outs would be able to sue the insurers.

d. Neither the Class Action Nor the Coverage Case Settle. Under each of the coverage case settlement scenarios considered so far, the limited fund argument fails because the only case in which a limited fund could possibly arise is an independent settlement of the coverage case before settlement of the class action, which was not plausible. But there is still one case left to consider: the possibility that if the right to opt out had been required in any class action settlement, the result would have been no settlement in either the class action or the coverage case. Once again, there are questions both whether this scenario is plausible and, if so, whether it would create a limited fund.

The district court accepted the insurers’ assertion that without a mandatory class action they would not have settled and therefore found that a mandatory class action was required. But why should the court have concluded that the insurance companies would have taken the risk of losing the coverage case if they had not been able or allowed to convince class counsel to bargain away the class’s opt-out rights? The insurers’ stated reason for wanting to eliminate opt-out rights was that they did not think they could accurately assess their liability exposure to the opt outs. The same assertion could probably be made about any class action, or at least any mass tort class action involving future claimants. Accepting this rationale for a limited fund, therefore, would eviscerate the right to opt out, just as would be accepting the rationale that the class action settlement creates the limited fund.

In any case, it is not clear why the difficulty of determining exposure to opt outs would be so crucial to the insurers’ decision to settle. Presumably an insurer cares only about the total payout for all claims, whether part of the class or not. The insurer must make a

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124 See, for example, Rudd Findings of Fact ¶ 72 (cited in note 44). In their brief before the Supreme Court, the insurers also suggested that they needed to have a mandatory class action because Fibreboard had had trouble negotiating a global class action “assignment” settlement with the claimants because of opt out problems. Fibreboard Brief at *10 (cited in note 46). But Fibreboard’s bargaining position was fundamentally different from that of the insurers. If in a settlement solely between Fibreboard and the claimants, opt outs could have continued to sue Fibreboard, its corporate survival would have been threatened. Thus, Fibreboard had good reason to oppose a class action settlement allowing opt outs. The same is not true of the insurers.
judgment about the number of likely claims and their average value in deciding what settlement offer to make in the class action. If opt-outs are allowed, the insurer must estimate the number of opt outs likely to occur, perhaps based on a percentage of total claimants. The insurer could then take one of several steps.\textsuperscript{125} First, it could reduce the settlement offered to the class.\textsuperscript{126} Second, it could insist that the class settlement provide more money to those most likely to opt out. Third, the insurer could condition the entire settlement on no more than a set number of opt-outs.\textsuperscript{127} Thus, as long as the class action settlement reasonably reflects these factors, then the insurer’s total payout should be similar regardless of whether opt-outs are allowed. But the reasonableness is the rub. Although an unreasonably low class settlement might result in a significant number of opt-outs, who might succeed in getting substantially higher recoveries than class members get, this does not reflect difficulty in valuation. Rather the insurer in this case knows the valuation all too well. It would just rather pay less to settle a class action with no opt-outs than one with opt outs.\textsuperscript{128} This justification for a limited fund is patently inadequate.

The higher cost to the insurers of a settlement that permitted opt outs would make the insurers more reluctant to settle, though whether it would in fact have led the insurers to roll the dice on the coverage case is anyone’s guess. That depends in part on what would happen if the insurers won the coverage case against Fibreboard. As already discussed, under preclusion law, the claimants who would have been able to sue the insurers directly as third party beneficiaries would not be bound by the coverage judgment, though they could be disadvantaged by the adverse precedent. Moreover, claimants might be able to argue that Fibreboard was effectively insolvent, and

\textsuperscript{125} See Coffee, \textit{Class Wars} at 1450 [cited in note 9].

\textsuperscript{126} This reduction could take into account the higher transaction costs that the insurer might incur as a result of nonclass litigation. But these transaction costs might be reduced by separate class actions or consensual aggregate litigation for opt-outs if are enough of them.

\textsuperscript{127} See, for example, Coffee, \textit{Class Wars} at 1465 n144 [cited in note 9].

\textsuperscript{128} The insurers in fact argued that the Global Settlement itself contained a “back-end opt-out” that provided sufficient protection to future claimants. Of course, if the Global Settlement “opt out” were really the equivalent of a true opt-out right, the insurers’ argument that it could not allow opt-outs because it could not accurately value the claims falls apart. However, as the Ortiz majority recognizes, the “back-end opt-out” was far inferior to a true opt-out because it “requires claimants to exhaust a variety of alternative dispute mechanisms, to bring suit against the trust, and not against Fibreboard, and it limits damages to $500,000, to be paid out in installments over 5 to 10 years, . . . despite multimillion dollar verdicts sometimes reached in asbestos suits.” Ortiz, 119 S Ct at 2315 n23.
therefore had an incentive to continue the coverage case rather than settle it, thereby unfairly prejudicing the claimants. On the other hand, if the insurers lost the coverage suit, they would be precluded from contesting any subsequent suits by opt outs if the trial court found that claimants could not have easily joined the coverage suit.\footnote{Parklane, 439 US at 328, 331; Blonder-Tongue, 402 US at 328-39; Restatement (2d) Judgments § 29; id at § 56 Reporter's Note ["If the promisee is successful in his action [against the promisor], the issues decided therein against the promisor are conclusive in favor of the beneficiary."] [citing cases]. According to a leading civil procedure treatise: "This means that each case is essentially a test case for the defendant but not for the claimants who are not parties. The result is a great disparity in litigating risks." Fleming James, Geoffrey C. Hazard, & John Leubsdorf, Civil Procedure 1.25 at 621 (4th ed 1992).} By depriving the insurers of the main benefits of winning the coverage case, and by raising the stakes of losing the coverage case, preclusion law probably would have provided a strong incentive for the insurance companies to settle the coverage case along with the class action, even if the class action had allowed opt-outs.

In sum, the limited fund argument must fail because as long as any potential opt outs would be able to sue the insurers for the full amount of their losses, not limited by any fixed pot of money, there is no justification under Rule 23(b)(1)(B) for requiring all claimants to stay in the class. In fact, the possibility of class claimants suing the insurance companies is exactly what the insurance companies feared and sought to prevent by attempting to make both Ortiz and Rudd mandatory. The insurance companies in Ortiz bargained for a (b)(1) class action, and used the impending coverage case decision as leverage. But allowing the insurance companies to bargain in this way would stand the limited fund rationale on its head. The insurance companies wanted the class actions to be mandatory so that their payout would be limited. Once they decided the maximum amount they were willing to pay to settle the class claims—which they later claimed, and the lower courts and the Ortiz dissenters accepted, as the limited fund\footnote{Ortiz, 119 S Ct at 2326 [Breyer, dissenting] ["[T]he district court found that the insurance policies plus Fibreboard's net worth amounted to a 'limited fund,' valued at $1.77 billion (the amount the insurance companies were willing to contribute to the settlement plus Fibreboard's value."] [emphasis added].}—they did not want to have to pay any more to opt outs. But a limited fund should justify a mandatory class action rather than vice versa. Furthermore, the probability that Fibreboard would lose the coverage case does not justify a limited fund class action. If any probability mattered, it was the probability that the parties would have settled anyway, even if the class action had allowed opt outs. By ignoring this probability, which was likely
significant, the Court may unwittingly have left the door open to future abuses of the limited fund theory.

D. Extraclass Conflicts: "The Old In-Out"\textsuperscript{131}

It is now well recognized that because the definition of a class is largely within the discretion of the lawyers who file the class action and the defendant, they may manipulate this definition and gerrymander the class to achieve their private goals at the expense of the interests of the class.\textsuperscript{132} In particular, the negotiators can remove from the class the class counsels' own clients, and then in a side settlement provide those clients and class counsel better terms than if the clients remained in the class, in return for class counsel's agreement to accept lower recoveries for the class.\textsuperscript{133} Indeed, the Court concludes that this happened in Ortiz, and therefore the proposed settlement did not satisfy the "extraclass equity" requirement for a mandatory limited fund class action, and would not have done so even if the excluded claimants and the class got "ostensible parity."\textsuperscript{134}

Although the Court was correct that allowing class counsel to gerrymander the class to exclude their clients created an impermissible conflict of interest that denied adequate representation to the class, the Court's narrow focus on class counsels' conflict with respect to their own clients may have obscured the bigger picture.\textsuperscript{135}

\textsuperscript{131} The phrase is one of the many linguistic creations (a skill not unknown to class action lawyers) in Anthony Burgess, \textit{A Clockwork Orange} vii, 39, 128, 170, 172, 175 (Norton, New Amer Ed 1987).


\textsuperscript{133} See \textit{Coffee}, \textit{Class Wars} at 1373 (cited in note 9) (arguing that class counsel and the defendant "have an incentive to trade a settlement of the plaintiffs' attorney's entire inventory [on terms favorable to the attorney] for a global settlement in a class action of all future claims [on terms favorable to the defendants]"). For a defense of the practice of excluding the class counsels' clients from the class, see Richard A. Nagareda, \textit{Turning from Tort to Administration}, 94 Mich L Rev 899, 960-67 (1996) ("Nagareda, \textit{Turning}").

\textsuperscript{134} Ortiz, 119 S Ct at 2319. The Court finds this conflict between claimants settling inside the class and those settling outside the class relevant in two other ways as well. First, the conflict and the incentives it creates support the conclusion that there was no objectively identified limited fund set at its maximum. Id at 2317-18. Second, the conflict is relevant to the determination of whether class counsel has provided "adequate representation," as required under Rule 23(a)(4) for all class actions, not just those involving limited funds. Id at 2318 (citing Amchem); id at 2320 n31 (stating that adequacy of representation concern in 23(b) parallels the inquiry under 23(a)(4)).

\textsuperscript{135} Justice Breyer chides the Court's approach to the extraclass conflict problem as unrealistic. He queries: "Does the majority mean to... set forth a rigid principle
What the claimants excluded from the class had in common was their current relationship with class counsel or another asbestos lawyer.\textsuperscript{136} In particular, the claimants placed outside the class included (but were not limited to) all those who had entered into SSP and ASP settlements.

The Court recognizes that the extraclass conflict in Ortiz extended beyond class counsel’s inventory clients and their separate deal. The Court raises the “fair question [of] how far a natural class may be depleted by prior dispositions of claims and still qualify as a mandatory limited fund class,”\textsuperscript{137} but leaves any resolution of that question for another day. The term “prior dispositions” is interesting and unfortunate. The term seems to lump the ASP and SSP settlements with all prior noncontingent settlements between Fibreboard and asbestos claimants. But the contingent settlements (and the reservation of rights settlements as well) were not full dispositions. Rather, the contingent settlements, creatures of Fibreboard’s insurance, existed in a kind of settlement limbo.

As discussed above,\textsuperscript{138} the contingent settlements unquestionably influenced the timing, scope, and terms of the class settlement.

\textsuperscript{136} Brief of Legal Ethics, Civil Procedure, and Constitutional Law Scholars as Amici Curiae in Support of Petitioners, Ortiz v Fibreboard Corp 15-23 (Aug 6, 1998) [“Brief of Scholars”]. In particular, although the class was described as a “futures” class, it included claimants who were currently ill and so had claims that could be presently brought (but had not been), and excluded claimants who had no current injury but had settled under a “reservation of right” to bring suit if and when an injury became manifest.

\textsuperscript{137} Ortiz, 119 S Ct at 2319. The meaning of “natural class” is unclear, but presumably it refers to all the people who would have related claims against a limited fund.

\textsuperscript{138} See Sections II.A.3, II.B.
First, the contingent settlement claimants, already having effectively been allowed to opt out of the supposedly mandatory class settlement, had no reason to resist the insurers' preference for locking in the class members to the class settlement. In fact, the contingent claimants had every reason to support any mandatory class settlement that the court was willing to accept, regardless of the terms, because any approved class settlement would trigger their recoveries. In particular, the contingent settlement claimants had an incentive to make sure that even claimants who would do better outside of the class action were nevertheless stuck in it.\footnote{The Fifth Circuit thought it was sufficient that "the present claimants had a substantial interest in a global settlement because such a settlement would secure their back-end payments under the Substitute Ness Motley Agreement. . . . [and] . . . that any class settlement [had to] be approved by the court and would face meticulous scrutiny." \textit{In re Asbestos Litigation}, 90 F3d at 979. The court did not consider the possibility that keeping the present claimants out of the class significantly lowered the likelihood of "meticulous scrutiny" through monitoring by class members.} Second, all of the lawyers for contingent settlement claimants, not just class counsel, had an incentive to at least tacitly collude with the insurers against the class by accepting superior side settlements for their clients placed outside the class in return for acquiescing in a lower class settlement. Third, the contingent settlement claimants and their lawyers, if anyone, had an incentive to push for a relatively quick resolution of the class action because of the imminent resolution of the coverage case appeal.

The settlement proponents did not deny that the contingent settlements affected the class settlement. But instead of accepting that the contingent claimants and the class members were in a zero sum game, or even a negative sum game resulting from collusion with the insurers, the settlement proponents argued that the contingent settlements somehow increased the recovery of the class members. Even if this claim were true, it would mean the conflict of interest was mitigated, not necessarily eliminated. But because the district court provided no information about the final renegotiated values of the contingent settlements [not all of which may have even existed at the time the Global Settlement was agreed to] or about how the inventory claims might compare to those of the class members, it is hard to find any support for the assertion that the contingent settlements increased the class recovery. And any such assertion would have to confront the fact that lawyers who could have put their clients into the class chose instead to settle separately,\footnote{It is particularly telling that not only the lawyers with inventories of present claimants took their clients out of the class settlement, but so did the lawyers who represented the "reservation of rights" claimants, who were future claimants, whose rights the class settlement was supposedly designed particularly to protect.} which sug-
gests either that the class settlement option was inferior, or that the lawyers were breaching their fiduciary obligations by pursuing their own interests in fees at the expense of their clients' interests.\textsuperscript{141}

Perhaps the Court was reluctant to reject the district court's finding that the contingent settlements aided the class settlement. But at least the Court could have made the point that unless the settlement proponents prove that the side settlements do in fact aid the class settlement, allowing them is inconsistent with the limited fund requirement of extraclass equity. Side settlements that do not increase the size of the class settlement are not essentially different from preferences in the bankruptcy context. And it is hard to articulate an equitable principle that justifies a priority for a certain group of claimants against an alleged limited fund simply because those claimants happen to be represented by lawyers.\textsuperscript{142}

E. Intraclass Conflicts: Taint Necessarily So

While the Court's analysis of the extraclass conflict problem can be criticized as unduly narrow, the Court's analysis of the intraclass conflict problem, or "equity within the class," is susceptible to the

\textsuperscript{141} The class settlement capped at 25\% of recovery the fees lawyers could recover in representing claimants in the administrative system set up by the settlement, as opposed to the 33\%-40\% recovery that the lawyers got from settlements outside the class action. Tidmarsh, Mass Tort Settlement at 66 (cited in note 11). If we assume the nonclass contingent fee is 40\%, and let the class settlement be C and the inventory settlement be I, the lawyer is indifferent between the two only if $.25C = .40I$, or $C = 1.6I$. That is, for an inventory recovery of $100, the lawyer would have to be able to get $160 in the class recovery to get the same $40 fee. The client, on the other hand, is indifferent between C and I only if $.75C = .60I$, or $C = .8I$. Thus, the client would be better off in the class if the class recovery exceeded $80, a mere half of what a self-interested lawyer would accept to put his client in the class.

\textsuperscript{142} Professor Nagareda has tried to offer such a justification for the side settlements in the Amchem settlement, which was an opt-out class rather than a mandatory class based on an alleged limited fund. He argues that the inventory claimants should have gotten more money than class claimants got in part to equalize their net recoveries with those of the class members. Nagareda, Turning at 964 (cited in note 133). As in Ortiz, the proposed class settlement in Amchem capped the fees for lawyers representing claimants in the settlement’s administrative regime. Although this concept of equity has appeal, it has troubling features as well. It rewards the lawyers who charge the highest fees and so provides an incentive for future lawyers to do so, while reducing the transaction cost savings from the class action. Certainly the ordinary settlement “market” does not work to equalize net recoveries. Moreover, the justification ignores the increased costs of court monitoring to prevent manipulation of the settlement values or breaches of fiduciary obligation such as described in the previous note, as well as the decreased benefits from the loss of lawyer monitoring of the class settlement. If it is desirable that lawyer fees for currently represented clients be preserved, it would seem possible to do that within the class action.
opposite criticism. Recognizing that the strict pro rata distribution found in traditional limited fund cases is not possible in a case like Ortiz, the Court holds that a mandatory class action settlement must at least "seek equity by providing for procedures to resolve the difficult issues of treating such differently situated claimants with fairness as among themselves."\textsuperscript{143} The only procedure the Court mentions is "division into homogenous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel."\textsuperscript{144} The Court singles out, as falling "well within the requirement of structural protection," conflicts between holders of present and future claims, and conflicts between those exposed to Fibreboard’s products before and after 1959.\textsuperscript{145} Although the Court concedes that "at some point there must be an end to reclassification with separate counsel,"\textsuperscript{146} the Court provides no guidance on why the particular conflicts mentioned are so serious, or on how to determine which other intraclass conflicts are serious enough to require procedural protection.

All class action settlements involve potentially conflicting interests among class members, and no class action settlement perfectly discriminates among class member recoveries based on all the possibly relevant differences in the value of the claims.\textsuperscript{147} But some conflicts are worse than others. There are basically two ways to distinguish serious class conflicts from more minor ones. First, one can look to market benchmarks, which exist at least for "mature" mass tort cases such as those involving asbestos. That is, one can look at whether settlements in individual or consensual group lawsuits tend to differentiate claims along a particular dimension. If they do, that is good evidence that the benefits of making such a differentiation exceed the costs. One can then see whether claimants in such non-class lawsuits tend to segregate along that dimension, for example by hiring different lawyers. If so, that supports subclassing in the class action context. Second, one can look for incentives that might lead a participant in the settlement negotiations to be biased in favor of some allocations over others.\textsuperscript{148} Subclassing might be an appro-

\textsuperscript{143} Ortiz, 119 S Ct at 2319.
\textsuperscript{144} Id.
\textsuperscript{145} Id at 2320.
\textsuperscript{146} Id.
appropriate response to allocations at risk of being tainted by such bias. These criteria support the Court’s conclusion in Ortiz that the in-traclass conflicts it identified were particularly troubling.

Consider first the conflict between pre-1959 and post-1959 claimants. The claimants exposed to asbestos post-1959 had no colorable claim to the Continental or Pacific insurance. The settlement values in the asbestos claims "market" reflected that fact. The settlement values for pre-1959 claimants were significantly higher than the settlement values for post-1959 claimants.\(^{149}\) So the first question must be what in the world post-1959 claimants are doing in a class action settlement funded almost entirely (99%) by insurance to which these claimants are not entitled. The answer is that Fibreboard [at least the shareholders and managers] could not tolerate having the post-1959 claims floating around, because they alone could be enough to bankrupt the company.\(^{150}\) So Fibreboard wanted to have the post-1959 claimants in any settlement, and to use insurance money to compensate those claimants.\(^{151}\)

Until the Global Settlement, however, separate treatment of pre-1959 and post-1959 claimants was a continuing feature of Fibreboard’s negotiations with its insurers and the claimants’ attorneys. In its negotiations with the insurers, Fibreboard took a bifurcated approach. With respect to Pacific, Fibreboard negotiated two agreements (Pacific I, later superseded by Pacific II) under which Pacific would pay a lump sum, contingent on the outcome of the coverage case, to enable Fibreboard to create a specific fund to pay post-1959 claimants.\(^{152}\) The reported facts do not reveal whether the Pacific Agreement fund incorporated an expected average settlement recovery for post-1959 claimants lower than the expected average settlement recovery for pre-1959 claimants, though it probably did.\(^{153}\)

\(^{149}\) Ortiz, 119 S Ct at 2303, n2 [citing In re Asbestos Litigation, 90 F3d at 1012-13 (Smith, dissenting)].

\(^{150}\) The Pacific II Agreement alone involved a maximum of $360 million. Claims for this amount would have been enough to bankrupt Fibreboard given the estimated sale value of the company of $235 million accepted by the district court.

\(^{151}\) The Fifth Circuit agreed, stating that “the class had no chance of persuading Fibreboard to agree to a settlement that did not address the claims by both [pre- and post-1959 claimants].” In re Asbestos Litigation, 90 F3d at 982.

\(^{152}\) Fibreboard and Pacific entered the Pacific I agreement in March 1991, around the time Fibreboard began the ASP program. Under Pacific I, Pacific agreed to pay $142 million to fund post-1959 claims. The Pacific II Agreement, reached one year later, increased the fund to a maximum of $360 million. Presumably, Pacific agreed to these amounts because they were less than or equal to Pacific’s expected liability to pre-1959 [covered] claimants.

\(^{153}\) Judge Smith in his dissent from the Fifth Circuit opinion reported that the average post-1959 settlement value in 1993 [after the Pacific II Agreement was negotiated] was $4000, compared to a $12,000 average settlement value for pre-1959 claimants.
With respect to Continental, Fibreboard offered the SSP and ASP settlements only to pre-1959 claimants.\textsuperscript{154} Although some law firms had both pre-1959 and post-1959 claimants in their “inventories,” and although post-1959 claimants eventually participated in the ASP inventory settlements, the post-1959 claimants simply got promises by Fibreboard to pay, contingent on the outcome of the coverage case.\textsuperscript{155} The initial attempt at a global settlement produced a tentative agreement in November 1991 that contemplated separate funds for pre-1959 and post-1959 claimants, and a proposal by Continental in March 1992 to settle only the pre-1959 cases. Even the Initial Ness Motley Agreement in December 1992 respected this dichotomy: the pre-1959 claimants were to get assignment settlements while the post-1959 claimants were to be funded only through the Pacific II Agreement.\textsuperscript{156}

This bargaining history helps to explain how post-1959 claimants became part of the global settlement. In particular, Pacific II practically guaranteed that result by committing Pacific to the concept of compensating post-1959 claimants with insurance money, not to mention to the class action settlement itself.\textsuperscript{157} As discussed in the next section, Fibreboard was not justified in pursuing this strategy. But even if Fibreboard had the right to pay the post-1959 claimants with money intended to benefit the pre-1959 claimants, why did

\textit{In re Asbestos Litigation}, 90 F3d at 1013 n49 [Smith, dissenting]. It might seem that the Pacific Agreement would have increased the settlement value of post-1959 claims by making more funds available to these claimants than before the agreement. But if the basis for the Pacific Agreement was simply to have the insurer's payment substitute for Fibreboard's noninsurance assets to which the post-1959 claimants were otherwise legitimately entitled, the settlement values would not increase because of the insurer's payment.

\textsuperscript{154} Ahearn, 162 FRD at 511.

\textsuperscript{155} Rudd Findings of Fact ¶ 58 [cited in note 44]. Continental later objected to the assignment settlements, which were negotiated as fixed sums for a particular law firm's inventory, in part because Continental claimed that Fibreboard was counting a “disproportionately high share of gross settlement amounts in each office-wide settlement agreement” as [covered] pre-1959 claims. Id ¶ 63. The reported facts do not state whether the post-1959 claimants received lower average settlement amounts in the inventory settlements.

\textsuperscript{156} Ahearn, 162 FRD at 514. The district court opinion does not discuss how the Substitute Ness Motley Agreement handled pre-1959 and post-1959 claimants. Although it is not stated in the reported facts, I assume that Pacific wound up paying for the recoveries of post-1959 claimants in the inventory settlements outside of the class action.

\textsuperscript{157} If there had been no class settlement and the insurers had lost the coverage suit, Pacific could have been subject to suits by pre-1959 claimants on a third-party beneficiary theory. Pacific could then wind up having to pay not only the post-1959 claimants because of Pacific II but also the pre-1959 claimants in full for having given their money to the post-1959 claimants.
the class settlement eliminate the segregated treatment of the two groups?\textsuperscript{158} The easy answer is that segregating the two groups was not in the interest of any of the settlement proponents because they all cared about only the aggregate settlement amount, not its distribution. But there may be more to it than that.

Unlike the extraclass conflict, in which the settlement proponents claimed that excluding the inventory claims from the class settlement increased the settlement pot for the class, there was no claim that including the post-1959 claimants in the class settlement increased the pot. Because the insurers would calculate the maximum amount they were willing to pay based on their potential liability exposure to the pre-1959 claimants only, every dollar that the pre-1959 claimants would receive from the class action settlement was taken out of the pre-1959 claimants' pockets. The Fifth Circuit's justification for that wealth transfer was that the pre-1959 claimants would be willing to pay to get the class settlement, which they would not get absent such payment.\textsuperscript{159} Even if this assumption were true (and it is not clearly true for every pre-1959 claimant or for such claimants as a group), that still leaves the questions of how much were they willing to pay and who should decide. Eliminating the distinction between pre-1959 and post-1959 claimants in the class settlement, and failing to identify separate funds from which they would be paid as previous settlements did, disguised the amount that the pre-1959 claimants were paying the post-1959 claimants to get the Global Settlement.\textsuperscript{160}

\textsuperscript{158} Justice Breyer's dissent deemed the conflict between pre-1959 and post-1959 claimants "not significant," referring to a finding of fact by the district court that the Trilateral Agreement, which preceded the decision not to differentiate between the two groups in the Global Settlement, eliminated the distinction. \textit{Ortiz}, 119 S Ct at 2331 (Breyer, dissenting). Aside from the dubiousness of claiming that the Trilateral Agreement was meaningfully independent of the Global Settlement, the argument is unconvincing on its own terms. The Trilateral Agreement could not distinguish between pre-1959 and post-1959 claims because it settled the coverage case, which could involve only pre-1959 claims.

\textsuperscript{159} \textit{In re Asbestos Litigation}, 90 F3d at 982.

\textsuperscript{160} The Fifth Circuit found the lack of allocation information to be a positive feature of the Global Settlement, distinguishing it from \textit{Amchem. In re Asbestos Litigation}, 134 F3d at 670. The Supreme Court rejected that distinction on the ground that the failure to distinguish between groups with conflicting interests in the settlement "is itself an allocation decision." \textit{Ortiz}, 119 S Ct at 2320. The Fifth Circuit's reasoning creates an incentive for class action settlement proponents to provide even less information about settlements than they already do, making evaluation of the settlement's reasonableness even more difficult. Cf \textit{Brief of Scholars} at 15 (cited in note 136) (criticizing as "ludicrous" the proposition that "counsel who provide less information and less certainty to absent class members regarding the amount of money they might receive under a settlement thereby render more adequate representation than counsel who provide more information and more certainty").
More troubling, however, is the fact that the elimination of the distinction between the pre-1959 and post-1959 claimants could have facilitated a collusive lowering of the total settlement amount. Suppose that the negotiations relied on the prior, differentiated settlement amounts for the two groups of claimants. If the settlement proponents falsely inflated the expected number of post-1959 claimants relative to pre-1959 claimants, the total settlement pot would decrease.\(^{161}\) Again, a technique that Fibreboard allegedly used to collude with claimants and their lawyers against the insurers in the ASP settlements could be inverted and turned against the absent class members.\(^{162}\)

The conflict between present and future claimants, while distinguishable in a number of respects from the conflict between pre-1959 and post-1959 claimants, shares some significant features as well. Outside of a class action, present claimants and future claimants must of course be separated. Many future claimants have no current cause of action, and therefore no claim to settle. Thus, future claims can be settled, if at all, only through a class action. The inclusion of present claimants in a supposed futures class comes from the interests of the settlement proponents. Fibreboard did not want to free potentially high-valued present claimants to go after its noninsurance assets, any more than it wanted the post-1959 claims floating around.\(^{163}\) Moreover, the only present claimants left in the class, as discussed above,\(^{164}\) were those not currently represented by a lawyer, and therefore most susceptible to exploitation. The fact that lawyers representing present claimants kept their own clients out of the class action provides a market justification for segregating the present and future claimants.

\(^{161}\) Take an example based on some of the reported figures in the case. Assume that the total number of class members is 186,000 and that the prior settlement values are $12,000 for pre-1959 claimants and $4000 for post-1959 claimants. Suppose further that there are 150,000 pre-1959 claimants and 36,000 post-1959 claimants. The total settlement value would be \((150,000 \times \$12,000) + (36,000 \times \$4000) = \$1.944\) billion. But if the settlement proponents agree to assert that there are only 100,000 pre-1959 claimants and 86,000 post-1959 claimants, the settlement value drops to \$1.544 billion. If the insurers wanted to pay no more than \$1.525 billion, all they had to do is solve the following equations: 12,000A + 4000B = 1.525 billion; A + B = 186,000, where A is the number of pre-1959 claimants asserted and B is the number of post-1959 claimants asserted. Solving the equations yields \(A = 97,625\) and \(B = 88,375\).

\(^{162}\) See Section II.A.3.

\(^{163}\) It is not clear from the reported facts why Fibreboard was willing to exclude from the class the "reservation of rights" claimants, who had settled for small amounts but retained the right to sue should a future malignancy develop.

\(^{164}\) See note 136 and accompanying text.
In sum, the reason the conflicts the Court identifies in Ortiz differ from the inevitable conflicts among class members is that they grow out of the same class definition problems discussed in the previous section on extraclass conflicts. Fibreboard and its insurers brought these conflicts to the class by insisting that the class be defined in particular ways that served their interests. That class counsel allowed this to be done amounts to inadequate representation.

F. Fibreboard’s Self-Preservation, the Agency Problem, and the Bankruptcy Alternative

The final issue the Court discusses is the one it says the least about, but is arguably the one that deserves the greatest attention. The Court frames the issue as whether in a limited fund class action the fund must be completely exhausted. The Court concludes that it does not need to decide this issue because the proposed settlement fails to satisfy the definitive limit and equity requirements. The Court recognizes the argument made by the district court, and endorsed by the dissent, that the defendant ought to be allowed to preserve its assets as an inducement to settle and save transaction costs in excess of these assets that never would have gone into the claimants’ pockets. Nevertheless, the Court expresses concern that “[w]ith Fibreboard retaining nearly all its net worth, it hardly appears that such a regime is the best that can be provided for class members.” The question is which alternative regime the Court has in mind.

One alternative regime is continued individual and consensual group litigation. If the defendant’s assets truly constitute a limited fund, however, this option is not viable, because the total claim value by definition exceeds the defendant’s assets. It is somewhat odd, then, that both the majority and the dissent in Ortiz focus on the nonclass litigation alternative to the proposed class settlement and the transaction costs associated with this alternative. Perhaps the reason is that, in Ortiz, the asserted limited fund was doubtful and the Trilateral Agreement, the negotiated alternative to the class settlement, could provide Fibreboard with sufficient capital to postpone bankruptcy for some time. After Ortiz, however, similar

\[165\] Ortiz, 119 S Ct at 2321-22.

\[166\] Id at 2321.

\[167\] Fibreboard in fact has not filed for bankruptcy. Its new parent corporation, Owens Corning, entered into long-term settlement agreements with more than 50 plaintiffs’ law firms in December 1998. These agreements established a National Settlement Program for paying Owens Corning asbestos claims, including those against Fibreboard in the event that the Supreme Court rejected the Global Settlement. Owens Corning’s general counsel has stated that she expects Fibreboard to settle more
cases cannot be brought as limited fund class actions and backup agreements to limited fund class actions that satisfy the Court's requirements probably will be rare. Given its reasoning earlier in the opinion, the majority presumably does not mean to suggest that the transaction cost savings from avoiding nonclass litigation could justify a limited fund class action when the other requirements for a limited fund class action are not met.  

Thus, when the claims' value exceeds the defendant's assets, the most likely alternative to a limited fund class action is bankruptcy. The Court recognizes that alternative, but legitimately worries that allowing class action defendants to keep practically all of their assets while asserting a limited fund theory could encourage too many class action settlements and so undermine the Bankruptcy Code's protections for creditors, most notably the absolute priority rule. Short of the legislative solution the Court urges, bankruptcy may be the best alternative means for resolving mass tort litigation in this situation. On the other hand, bankruptcy can be a very costly

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168 In rejecting the dissent's argument that Fibreboard should be allowed to retain its assets simply because the settlement "made more money available than any other effort would likely have done," the Court responds that "the settlement's fairness under Rule 23(e) does not dispense with the requirements of Rule 23(a) and (b)." Ortiz, 119 S Ct at 2323. On the other hand, the Court does note the following:

Although the transaction costs Fibreboard faced prior to settlement were at times significant, . . . given the exigencies of Fibreboard's contingent insurance asset, this case does not present an instance in which limited fund certification can be justified on the ground that such settlement necessarily provided funds equal to, or greater than, what might have been recovered through individual litigation factoring out transaction costs. Id at 2321 n35. Despite repeated readings, I have not been able to decipher the meaning of this statement.

169 For a recent report reaching this conclusion, see National Bankruptcy Review Commission, Bankruptcy: The Next Twenty Years, Final Report 341 [1997]. There is a growing literature comparing the relative advantages of bankruptcy and class actions for resolving mass tort cases. See, for example, Barbara J. Houser, Chapter 11 as a Mass Tort Solution, 31 Loyola LA L Rev 451 [1998]; Margaret I. Lyle, Note, Mass Tort Claims and the Corporate Tortfeasor: Bankruptcy Reorganization and Legisla-
option for creditors as well as for the debtor. Some scholars therefore have asked whether it might not be better for creditors and debtors to reach some mutually beneficial contractual arrangement outside of bankruptcy to save the transaction costs.\textsuperscript{171} Whatever the merits of these proposals generally, the mass tort class action situation would seem to present a poor case to test them because of the severe agency problem between class members and their representatives. Nevertheless, the Court apparently does yet not want to close the door entirely on this possibility. If limited fund class actions are allowed to serve this purpose, how might they be structured and what are some of the difficulties?

To begin with, if a limited fund class action is to provide an alternative to bankruptcy, the rule cannot be that the entire fund must be distributed to the class. That would leave the defendant in no better position than bankruptcy, and possibly in a worse position given the possibility of reorganization rather than liquidation in bankruptcy. Moreover, a full distribution rule would leave the defendant’s nonclass creditors worse off than they would be in bankruptcy. The defendant faced with such a requirement therefore almost certainly would file for bankruptcy and there could be no limited fund class actions in which the defendant’s assets comprise the fund.

Thus, the defendant must be allowed to keep some of its assets if limited fund class actions of the kind attempted in Ortiz are to avoid bankruptcy. But that leads once again to the questions of how much and who decides. Simply looking at the transaction cost savings is not sufficient because this is a bargaining surplus that must somehow be divided between the defendant and the claimants.\textsuperscript{172}


\textsuperscript{172} To take a simple example, suppose a defendant has a net worth of 1000 and there are 500 claims for 20 outstanding, which will cost the defendant 10 per case to litigate or resolve in bankruptcy. Thus, absent a class action settlement, the defendant’s entire net worth could be consumed by transaction costs that could total 5000. If a limited fund class action is allowed, can the defendant offer a settlement in which it agrees to pay all claimants .2, for a total of 100, and keep 900 to itself, simply because it has saved 5000 in transaction costs?
The relevant question would seem to be how much must the defendant be paid to encourage it to settle rather than file for bankruptcy.

One possible criterion would be to guaranty the defendant sufficient assets to avoid having to file for bankruptcy to satisfy the claims of its nonclass creditors. But that amount would be difficult to determine. Moreover, if this is the criterion, the defendant will always choose the class action over bankruptcy, regardless of the relative costs and benefits of each. An alternative criterion would be to allow the defendant to keep the assets it would likely keep as a result of a bankruptcy reorganization plus the transaction costs associated with bankruptcy. Thus, if and only if the class action saved on transaction costs over bankruptcy, the defendant would choose the class action. But again, it would be very difficult to determine what this amount would be. A court could opt for a simpler rule allowing the defendant to keep a certain percentage of its net worth, but how would it determine such a percentage, and how would it take into account a backup agreement such as the Trilateral Agreement? Should the fact that Fibreboard put all of its assets at risk in the event the class settlement failed "count" toward any percentage requirement?\(^\text{173}\) Moreover, is it clearly better to allow the defendant to keep a certain percentage of its net worth than to give claimants stock or a lien on the defendant's future earnings?

An alternative approach would focus not on the substantive criteria for how much of its assets the defendant should be allowed to keep in a limited fund class action, but rather on procedural solutions to the agency problems within the defendant. A well-known problem in corporate law is that, when a corporation is close to bankruptcy, creditors' interests may better represent the corporate entity than those of shareholders. At some point, managers should owe fiduciary duties to creditors rather than to shareholders.\(^\text{174}\) This agency problem within the corporation permeates almost all of the problems the Court discusses in Ortiz. The desire of Fibreboard's managers and shareholders to avoid bankruptcy led not only to Fibreboard's minimal contribution to the class settlement, but also to the delay in the settlement of the coverage case, the access of post-

\(^{173}\) For example, suppose the probability of the court's accepting the class settlement was .5. Fibreboard put $10 million of its assets (not counting the Continental and Pacific insurance, but counting other insurance of $9.5 million) into the class action settlement but put, say, $200 million of its assets (estimated) at risk if the Trilateral Agreement kicked in. So Fibreboard's expected payout would be (.5 \times 10) + (.5 \times 200) = $105 million. Should Fibreboard be given credit for that amount rather than the $10 million?

\(^{174}\) See, for example, Victor Brudney, Corporate Bondholders and Debtor Opportunism: In Bad Times and Good, 105 Harv L Rev 1821 (1992).
1959 claimants to the insurance money and the inclusion of this group in the class, and the possible buying off of class counsel and other lawyers in collusive side settlements.

The settlement proponents seemed to assume that Fibreboard could do just about anything to save itself from bankruptcy. One way to understand the Court's limited fund analysis is that it rejects that view. Instead the Court conditions class certification under Rule 23(b)(1)(B) not only on the adequacy of representation of the class by class counsel, but also on the defendant's fulfilling what amount to fiduciary obligations to its tort creditor claimants. Thus, for example, one could interpret the Court's reasoning to support the view that the defendant cannot contrive a limited fund to protect its assets and disadvantage the creditor claimants or pick and choose whom it wants to be in the class to achieve the same end.

How might this approach relate to the asset exhaustion requirement? At least in a case like Ortiz, in which the defendant's available assets consist largely of contested insurance policies, it is possible to view Fibreboard as acting as a kind of agent with respect to the claimants' claims against the insurers. One possibility would be to force Fibreboard to assign its rights under the Continental and Pacific insurance policies to a class of pre-1959 claimants, perhaps in return for their releasing any claims against Fibreboard. A second possibility would be to recognize that, since agents are often entitled to a commission, perhaps Fibreboard should be entitled to keep a percentage of the recovery.\textsuperscript{175} That would encourage Fibreboard to maximize the size of the settlement pie. The question of course is what the percentage should be. One somewhat arbitrary possibility is to give Fibreboard the same percentage class counsel get.

That raises another objection, however. One might reasonably ask why it would be necessary to make Fibreboard in effect a second class counsel \cite{Ortiz} by awarding it a contingency fee. That is, why focus on Fibreboard's incentives at all. If the other defects in the settlement were fixed, perhaps class counsel would have suf-

\textsuperscript{175} The majority noted in its response to the dissent that Fibreboard kept about 13% of the total fund putatively available \[(\$235 \text{ million}/\$1.525 \text{ million} + \$235 \text{ million})\]. Ortiz, 119 S Ct at 2323. If Fibreboard is an agent merely with respect to the Continental and Pacific insurance funds, and not its other assets, the contingency rate rises to 15% \[(\$235 \text{ million}/\$1.525 \text{ billion})\]. If Fibreboard was allowed to keep 3\% (the class counsel contingency fee under the Global Settlement) of the total recovery from Continental and Pacific, the class counsel contingency, it would keep \$46 million. Of course, if Fibreboard were allowed to keep a percentage of the total class recovery, it would not allow the side settlements. Thus, the class total would be significantly higher, allowing Fibreboard to keep much more. But the total fund would have to be almost \$8 billion for a 3\% commission to result in a \$235 million payment.
ficient incentive to insist on Fibreboard paying a higher amount in the settlement. The problem is that the class counsel's agency problem may not be so easily overcome. There is no equivalent of a class counsel fee in bankruptcy. Lawyers serving on a tort creditor committee receive no compensation other than what they are entitled to from their individual clients. Thus, a defendant could threaten to file for bankruptcy to deprive class counsel of fees they otherwise would earn in a class action settlement. Class counsel might then be too willing to allow the defendant to keep a significant proportion of its assets in a class action settlement rather than risk the defendant's filing for bankruptcy. It would be difficult for class counsel to determine at exactly what amount the defendant's threat to file for bankruptcy would become credible, and class counsel would have an incentive to err on the side of allowing the defendant to keep more. This bias against bankruptcy would of course be even more pronounced if the defendant also could engage in the standard class action collusion by agreeing to acquiesce in higher class counsel fees if class counsel allowed the defendant to keep a greater proportion of its assets. Putting the defendant on a contingency fixed in advance would remove the defendant's ability to bargain with class counsel over this proportion.

In sum, any relaxation of the exhaustion requirement in limited fund class actions to avoid the transaction costs of bankruptcy must be sensitive to the agency problems, not only within defendants but also between class counsel and the class, that lead to a bias against bankruptcy.

G. Do All Roads Lead to Rudd?

The critique thus far has dealt with the issues the Court chose to address in Ortiz. This section briefly shifts to an issue the opinion avoids. Although it is perfectly proper for the Court to leave unresolved difficult questions that are unnecessary to resolving the case before it, some issues are so inextricably bound up with the Court's holding that sidestepping them tends to undermine the holding itself. Such is the case with Rudd, which ostensibly binds the class whose certification the Court rejects in Ortiz to the Trilateral Agreement's resolution of the coverage dispute between Fibreboard and its insurers. Yet the Court says nothing about Rudd. Technically, this omission is understandable because no one sought certiorari in Rudd. But on grounds of both principle and pragmatism, the omission is nonetheless disturbing.

The money Fibreboard gets under the Trilateral Agreement is probably insufficient to resolve all future asbestos claims. Could a mandatory class action now be brought against Fibreboard on the ground that the Trilateral Agreement and *Rudd*, combined with Fibreboard’s assets, create a limited fund? By depriving the class members of the ability to sue Continental and Pacific for claims arising out of exposure to Fibreboard’s asbestos products, *Rudd* seems to provide the underpinnings of a mandatory class action on a limited fund theory. Putting aside the other possible objections that could be made to such a class action, it is troubling that, if *Rudd* justifies a mandatory class action against Fibreboard now, the holding in *Ortiz* is relatively meaningless, at least with respect to the Fibreboard case itself. The parties would have succeeded in creating a limited fund out of a settlement, the very thing the Court in *Ortiz* said could not be done.

Thus, *Rudd* should not be allowed to stand. Although ostensibly a declaratory judgment action against the claimant class, *Rudd* in effect forced the monetary settlements provided in the Global Settlement and Trilateral Agreement on the claimant class with no opportunity to opt out. If opt-outs had been allowed in *Rudd*, there would be no danger that multiple suits would exhaust some pot of assets. *Rudd* thus allows the insurers to achieve through the back door—a monetary settlement with Fibreboard and a class action against the claimants seeking “injunctive relief”—what they could not achieve directly in the class action suit brought by the claimants against Fibreboard.

Because no class members or representatives sought *certiorari* in *Rudd*, the only hope for class members to escape it would be in a collateral attack on the adequacy of representation. If ever a class action settlement justified collateral attack, *Rudd* is it. The reason

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177 The Court seems to leave open this possibility: "Whether a mandatory class could now be certified without the excluded inventory plaintiffs [whose settlements would appear to be final], or with properly represented subclasses, is an issue we need not address." *Ortiz*, 119 S Ct at 2331 n33.

178 See *Hansberry v Lee*, 311 US 32, 42-43 (1940) [noting that class members “not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present”]; *Phillips Petroleum Co v Shutts*, 472 US 797 [1985]. The Court in *Ortiz* cited the due process right protected by *Hansberry* as cautioning against excessive expansion of Rule 23(b)(1)(B). *Ortiz*, 119 S Ct at 2315.

179 Another troubling feature of *Rudd* is that the lawyers representing the Global Health Claimant Class in *Rudd*, were paid by insurers at an hourly rate. The court found that this arrangement did not create an impermissible conflict of interest, a conclusion in some tension with the Court’s analysis in *Ortiz* and Amchem. *Rudd Findings of Fact* ¶ 128 n25 [cited in note 44].
no one sought *certiorari* in *Rudd* is that the claimants who had the greatest interest in objecting to it were future claimants whose claims are not likely to arise for some time. These are precisely the claimants who were least likely to have been adequately represented in *Rudd*, and who did not, as *Ortiz* requires, get independent representation as a subclass.

**CONCLUSION**

Several conclusions emerge from the critique developed in the previous sections. Although the Court correctly rejected the settlement in *Ortiz* as failing to satisfy the requirements for a mandatory class action based on a limited fund, the Court missed or slighted key features of the deal. The bargaining positions of Fibreboard, its insurers, and the claimants' lawyers explain the failure of Fibreboard and its insurers to settle the coverage dispute independently of settling the underlying claims. The ASP settlements that Fibreboard crafted provided a potential vehicle for initially colluding with claimants against the insurers, and then colluding with the insurers against the class. The alleged need for a quick settlement was a fabrication. So too was the alleged limited fund, even if there had been more objective evidence of the risks associated with the coverage case. The extraclass conflicts extended beyond class counsel to all the lawyers who made inventory settlements contemporaneously with, but outside of, the class settlement. On the other hand, the intraclass conflicts between pre- and post-1959 claimants, and between present and future claimants, were particularly troubling because Fibreboard's interests exacerbated these conflicts, and the class settlement's treatment of the conflicts did not meet a market standard of reasonableness. The possibility of allowing a limited fund class action as a substitute for bankruptcy in which the fund is not exhausted raises complex questions concerning the fiduciary obligations of near-bankrupt defendants to their creditors, as well as the incentives of prospective class counsel to avoid bankruptcy too often. Finally, unless the courts rectify the Court's failure to address the companion *Rudd* settlement, that settlement threatens to leave *Ortiz* a Pyrrhic victory for principle.

Modern class action practice has been developing in a largely lawless environment, at least with respect to issues such as class formation, fiduciary obligations of class counsel, and the intersection of class action law with substantive law such as insurance, corporate, and bankruptcy law—the issues at the heart of *Ortiz*. *Ortiz*, like *Amchem* before it, represents an admirable attempt by the Supreme Court to bring meaningful law to class action practice. Some may
read Ortiz more broadly, as effectively killing off all mass tort class actions, or all settlement classes, or even class actions generally. Given the strong economic incentives for the class action participants to do these deals, they are likely to continue to try. Perhaps Congress will rise to the challenge posed by the concurrening justices and pass legislation such as the recently introduced Fairness in Asbestos Compensation Act.\footnote{Fairness in Asbestos Compensation Act of 1999, H R 1283, S.758 (106th Congress). After the bill was introduced in March 1999, the House Judiciary Committee held hearings on the bill in July 1999, followed by the Senate Judiciary Committee in October 1999, but no action on the bill has occurred since then.} But given Congress’ past history in this area, the strong opposition by the plaintiffs’ asbestos bar, and recent missteps such as Congress’s failed tobacco “settlement,” there is reason to be pessimistic on this front.

That means that class actions will survive and courts will continue to be their primary regulators. Ortiz does provide some useful guidance. Contract cannot conquer all, at least where the rights of absent parties are at stake. Courts must view decisions by biased participants suspiciously. Conflicts of interest must be addressed by separate representation. But this much should always have been obvious. If Ortiz is to succeed, the bigger lesson the lower courts must take from it is that they need to do a better job of identifying the structural features in particular class action settlements that justify presumptions of collusive behavior. To do that, they will need to pay more attention to the way these deals get done. Ortiz has helped start courts down this path. This article suggests further steps. We cannot forget, especially in the class action context, that while principle is often ennobling and pragmatism is often necessary, law is in the details.

**APPENDIX: AN ASP COLLUSION STORY**

To understand how Fibreboard-claimant collusion might have occurred, consider the SSP and ASP settlements. To keep matters as simple as possible, let us examine the four main variables.\footnote{I am ignoring, among other things, present value considerations for simplicity. I am also assuming risk neutrality. These assumptions do not affect the structure of the analysis, only the resulting values.} First, there is the average settlement value for asbestos claims, V, that would exist if the insurer were certain to pay, that is, ignoring the risk of the insurers winning the coverage suit (but including the risks of litigation between Fibreboard and the claimant). Because of the risk that the insurers might win the coverage suit, these asbestos claim settlement values were almost certainly discounted in settlements made even before the SSP and the ASP. As in the main text,
p is the probability that Fibreboard would win the coverage case.\textsuperscript{182} The discounted average settlement value is then $pV$. Finally, define the revised average settlement value under the SSP as $V'$ and the revised average settlement value under the ASP as $V^*$.

If we assume that the parties agreed on the values of $p$ and $V$ and agreed to increased settlement values $V'$ under the SSP solely because of the risk involved in the coverage suit, then the SSP settlement values, $V'$, should satisfy the following equation:

$$pV = .4V' + .6pV',$$

which can be rewritten as

$$V' = \frac{pV}{.4 + .6p}.$$  

The first equation describes the relationship between the previous (discounted) settlement values, $pV$ and the total SSP settlement value, $V'$. The equation simply says that $V'$ is that value that when divided into a 40\% cash component paid up front, and an additional 60\% of the settlement value discounted by the probability that Fibreboard would win the coverage case, equals the prior settlement values. Under the ASP, there is no cash component, so $V^* = V$. That is, a reasonable settlement under the ASP would be the undiscounted value of the asbestos claim; the claimant applies the discount mentally in deciding what the ASP amount is really worth because the claimant gets no money up front, and personally has to bear the risk that Fibreboard would lose the coverage case.

Suppose the reported $5400 average SSP recovery represents a "true" settlement value of $V'$, and that $p$ was agreed to be .5. Using the equation above, one can derive the underlying value of the average claim ($V$), which turns out to be $7560$. The discounted value, $pV$, would be $3780 (.5V)$, and $V'$ would be $5400 (pV/.7)$.\textsuperscript{183} Of the

\textsuperscript{182} Technically, the probability relevant for the SSP and ASP settlements includes the probability not only of Fibreboard's winning the coverage case, but settling it as well, because settlement of the coverage case would trigger the contingent portions of the SSP and ASP settlements. Again, I omit this feature for simplicity.

\textsuperscript{183} The following table shows how the values of $pV$ and $V$ vary with different values of $p$ for an assumed $V'$ of $5400$.

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<th>$p$</th>
<th>$pV$</th>
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<td>2484</td>
<td>24,840</td>
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<td>.2</td>
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$5400 SSP settlement, $2160 (40%) would be paid in cash immediately, and $3240 (60%) would be paid if the insurers lost the coverage case. But the value of the $3240 would have to be discounted by .5 (to $1620), so the expected value of the settlement would remain $3780 ($2160 + $1620), as it was before the SSP program. Under the ASP, $V^* = V = $7560 ($3780/.5).

The important point is that under the assumptions stated above, the three settlement values, $3780 for a present full settlement, $5400 for an SSP settlement, and $7560 for an ASP settlement all represent equivalent settlement values. Suppose, however, that Fibreboard and the claimants inflated the value of the settlement by understating the probability of Fibreboard winning or settling the coverage case. For example, suppose that Fibreboard and the claimants agree to use p = .4 as the basis for their settlements, knowing that the true p is .5. If we hold pV constant at $3780, that implies an increase in the average V (=V^*) from $7560 to $9450 ($3780/.4), and an increase in the average V' from $5400 to $5906. Note that a 20% drop in p yields a 9% increase in V', but a 25% increase in V*. Given the large number of claimants, even small differences get magnified substantially. If there are 200,000 present claimants, for example, the exposure of the insurers under this ruse would increase by $101 million under the SSP and by $378 million under the ASP.

To take the example one step further, suppose that Fibreboard and the claimants agree to assert that p is only 1/3. If we again hold pV constant at $3780, that implies an increase in the average V from $7560 to $11,340 (approximately the average amount allegedly claimed under the ASP), and an increase in V' from $5400 to $6260. Thus, a 33 1/3% drop in p from the true value of .5 yields a 16% increase in V', but a 50% increase in V (the value of the claim under the ASP). If there are 200,000 present claimants, the exposure of the insurers would increase by $172 million under the SSP and by $756 million under the ASP.

To see how the ASP settlements might facilitate the collusion, suppose the only two numbers the court reviewing the class action settlement knows are the $11,400 average ASP settlement and the $5400 average SSP settlement. Then the parties could present to the court the implicit value of p from the above formula. Plugging in the two values and solving for p yields a p of approximately

\[ p \approx 0.4 \]

184 The only other settlement figure mentioned by the district court is the $13,000 average price per claim negotiated under the Initial Ness Motley Agreement. Ahearn, 162 FRD at 514. This figure was apparently reduced to less than $10,000 per claimant in the final Ness Motley inventory settlement. See Coffee, Class Wars at 1401 (cited in note 9).
25%.\textsuperscript{185} Note that this value of \( p \) is not only lower than the "true" (assumed) value of .5, but it is even lower than the 1/3 value Fibreboard and the present claimants would have used to justify the $11,400 average value under the ASP.

Now consider the class claims. The average value of these claims was almost certainly substantially higher than the average value of the ASP and SSP settlements.\textsuperscript{186} The ASP and SSP settlements were typically made with law firms with large inventories of claimants, which would dilute average values for adverse selection reasons.\textsuperscript{187} A non-opt-out class could contain many more high-valued claims.\textsuperscript{188} Moreover, if we assume the future claimants are similar in degree of injury to past claimants, the future claimants will have a greater percentage of severely injured victims, whereas most of the severely injured "present" cohort claimants would have already settled their claims. Assume that the undiscounted average value of the class claims \( V \) is $28,000, so that under the previous assumption of \( p = .5 \), the "true" discounted value \( pV \) is $14,000.\textsuperscript{189} If, however, the col-

\textsuperscript{185} Solving for \( p \) in the formula yields \( p = .4V/(V-.6V) \). Plugging in \( V = 11,400 \) and \( V' = 5400 \) results in \( p = .26 \). If the value from the Initial Ness Motley Settlement Agreement ($13,000) is used for \( V \), then \( p \) drops to .22.

\textsuperscript{186} Recall that the average value \( (pV) \) for the inventory settlements discussed above was $3780 and even for higher values of \( p \) than .5 could not have exceeded the $5400 SSP average settlement value. But as discussed below, the average potential recovery under the class action was approximately $7000.

\textsuperscript{187} That is, claimants with the largest claims (at least knowledgeable ones) would be more likely to seek individual representation, or group representation with similarly large claimants rather than throw themselves into a large mass of claims. The law firms that made the inventory settlements, including Ness Motley, had relatively low-value, large-volume portfolios. See, for example, Coffee, \textit{Class Wars} at 1365 (cited in note 9) [noting that some asbestos plaintiffs firms are "characterized as 'boutique' firms that screen clients carefully and bring actions only on behalf of severely injured claimants for high damages, and other firms [are] known as 'wholesalers' who seek to represent a large number of claimants but invest little in individual case preparation"].

\textsuperscript{188} The class might not contain more high-valued claims because the class was probably made up disproportionately of people who were exposed more recently. Thus, their length of exposure to asbestos would be on average lower, which would result in less harm on average.

\textsuperscript{189} It is hard to know from the reported facts whether this average is a reasonable one. This discounted value is close to the $12,000 average 1993 settlement value for pre-1959 claimants reported by Judge Smith. See \textit{In re Asbestos Litigation}, 90 F3d at 1013, n.49 (Smith, J, dissenting). It is not clear how many of the estimated 186,000 future claimants would be pre-1959 claimants, however. Obviously the farther out into the future one gets, the more likely the bulk of the claimants will be post-1959. Some other evidence comes from the November 1991 negotiations between plaintiffs' counsel and Fibreboard in which the negotiators agreed to $278 million for post-1959 cases and $1.86 billion for pre-1959 cases. \textit{Ahearn}, 162 FRD at 514. If we could assume that there are 186,000 pre-1959 claimants that yields $10,000 per claim. But on the
lusive p of 25% is applied to discount the class claims in the settlement, then \( pV \) becomes $7000, a 50% drop in settlement value! In terms of dollar amounts, if there are 186,000 class members, the settlement value would drop from $2.6 billion to $1.3 billion, which is approximately the amount of the actual class settlement slated to compensate the claimants. The insurers would save $1.3 billion by using the collusive p to reduce their payments to future claimants.

But what about the Ness Motley Agreement? Would that have increased the class recovery? Not necessarily. The Initial Ness Motley Agreement was an ASP settlement, with an average claim value of $13,000. That agreement was eventually replaced by the Substitute Ness Motley Agreement, and SSP-type settlement, with an average claim value of approximately $9400. The Substitute Ness Motley Agreement did not exactly follow the prior SSP formula; rather it provided for 50% of the settlement in cash up front with the other 50% contingent on settlement of (or victory for Fibreboard in) the coverage case. Thus, if \( \hat{V} \) is the average settlement value under the Substitute Ness Motley Agreement, the revised formula is:

\[
\hat{V} = \frac{pV}{.5 + .5p}.
\]

If the actually negotiated figures represent "true" values, then \( V = 13,000 \) and \( \hat{V} = 9400 \). This implies \( p = .57 \). Alternatively, if the class claims and the Ness Motley claims are of similar value, then plugging the $7000 average class claim value (\( pV \)) into the formula yields an implied \( p \) of approximately .5, which is the true probability we have been assuming. Thus, if something like these figures were used to negotiate the class values, then one could argue, as the Fifth

\[
190 \text{ The negotiators evidently used this number in negotiating the global settlement. Ortiz, 119 S Ct at 2319.}
\]

\[
191 \text{ The final settlement was $1.535 billion, with $1.525 billion to be paid by the insurers. If the district court correctly estimated transaction costs at 15\%, that would mean that $.229 billion of the insurers' portion would go to transaction costs, leaving $1.525 billion minus $.229 billion or $1.296 billion to pay the 186,000 claimants. The average payment per claimant would therefore be $6968, or approximately $7000. Interestingly, $1.3 billion was also the offer the insurers made on August 22, 1993. Ahearn, 162 FRD at 516.}
\]

\[
192 9400 = 7000/(.5 + .5p). \text{ Solving for } p \text{ yields } p = .49.
\]
Circuit did, that the class benefited from the Ness Motley Agreement.\textsuperscript{193}

But this conclusion is based on several questionable assumptions. Most important, it assumes that the negotiated average values in the two Ness Motley Agreements are not artificially inflated. But it seems likely that the $13,000 figure was an inflated value like the other ASP settlements were, perhaps even more inflated.\textsuperscript{194} Suppose that the prior value of the average Ness Motley claim was $3250 \(pV\), implying \(V = 6500\) if \(p = .5\). The Initial Ness Motley Agreement might, however, have claimed that \(p = .25\) (the collusive value we assumed above), which would boost the settlement value to $13,000. If \(\hat{V}\) was negotiated as a discount off the inflated $13,000 figure, then ignoring the discount implicit in the original inflated figure is misleading, at least when making comparisons to the class claims that never were so inflated. Moreover, the analysis assumes that the true average value of the class claims \(pV\) is $7000, and is approximately the same as the Ness Motley average. But the $7000 figure might represent an unreasonable discount from the actual \(pV\) (for the class) of $14,000; that is, implicit in the $7000 (as in the $13,000 settlement figure in the Initial Ness Motley Agreement) is a \(p = .25\), based on the prior settlements as discussed above. Put simply, if the class claims are worth significantly more than the Ness Motley claims, treating them “the same” is unreasonable.\textsuperscript{195} Thus, the assertion that the high Ness Motley Agreement values helped the class is questionable.\textsuperscript{196} It is just as likely that the high Ness Motley Agreement values represented a payoff for acquiescing in a collusive agreement against the absent class members.

\textsuperscript{193} The Fifth Circuit contended that “the Substitute Ness Motley Agreement likely aided the global settlement by increasing the average value per claim.” \textit{In re Asbestos Litigation}, 90 F3d at 979.

\textsuperscript{194} See Tidmarsh, \textit{Mass Tort Settlement} at 61 n153 [cited in note 11] [noting that Continental paid higher than “average” claim under Substitute Ness Motley Agreement].

\textsuperscript{195} As part of the Substitute Ness Motley Agreement, Ness Motley agreed to recommend the settlement of all future claims on the same terms as the Substitute Ness Motley Agreement. Id at 61.

\textsuperscript{196} The conclusion discussed above that comparing the two Ness Motley agreements yields a \(p\) of approximately .5 is subject to another criticism. At the time the Ness Motley agreements were negotiated, it could be argued that the likelihood of a settlement had significantly increased, justifying a larger \(p\). The negotiating parties might not use the same discount for valuing the class claims, however.