

No. 96-270

In the Supreme Court of the United States

OCTOBER TERM, 1996

AMCHEM PRODUCTS, INC., ET AL.,

Petitioners

v.

GEORGE WINDSOR, ET AL.,

Respondents

**On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit**

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

When the parties to a putative class action enter into a settlement, must the district court nevertheless pretend that every legal and factual issue in the case will be contested, and ignore the existence of the settlement, in determining whether class certification is appropriate under Federal Rule of Civil Procedure 23.

**PARTIES TO THE PROCEEDING AND
RULE 29.6 STATEMENT**

The petitioners in this case are Amchem Products, Inc., A.P. Green Industries, Inc., Armstrong World Industries, Inc., Certainteed Corporation, C.E. Thurston & Sons, Inc., Dana Corporation, Ferodo America, Inc., Flexitallic, Inc., GAF Building Materials, Inc., I.U. North America, Inc., Maremont Corporation, Asbestos Claims Management Corporation, National Services Industries, Inc., Nosroc Corporation, Pfizer Inc., Quigley Company, Inc., Shook & Fletcher Insulation Company, T&N plc, Union Carbide Corporation, and United States Gypsum Company. The other parties to the proceeding and petitioners' parent companies and nonwholly owned subsidiaries are set forth at Pet. App. 292a-317a.

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-66a) is reported at 83 F.3d 610. The opinion and order of the district court granting the preliminary injunction (Pet. App. 67a-87a) are reported at 878 F. Supp. 716. The opinion and order of the district court approving the settlement and certifying the class (Pet. App. 88a-276a) are reported at 157 F.R.D. 246.

JURISDICTION

The judgment of the court of appeals (Pet. App. 277a-282a) was entered on May 10, 1996, and a timely petition for rehearing was denied on June 27, 1996 (Pet. App. 283a-288a). The petition for a writ of certiorari was filed on August 19, 1996, and was granted on November 1, 1996. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

RULE INVOLVED

Pertinent provisions of Federal Rules of Civil Procedure 1 and 23 are set forth as an addendum to this brief.

STATEMENT

This case involves the settlement of a nationwide class action encompassing hundreds of thousands of individual asbestos personal injury claims and more than one billion dollars in prospective settlement payments. The court below characterized the settlement as “arguably a brilliant partial solution to the scourge of asbestos that has heretofore defied global management in any venue.” Pet. App. 18a.

The Third Circuit nonetheless vacated the settlement. It held that where the parties to a putative class action enter into a settlement, the court must pretend that the settlement does not exist and apply the class certification criteria of Federal Rule of Civil Procedure 23 “as if the case were going to be litigated.” Pet. App. 19a. The district court thus must decide whether to certify a class in a hypothetical case, rather than in the case actually before it.

This peculiar approach is flatly inconsistent with the language, history, and purposes of Rule 23. The plain terms of the Rule focus the certification inquiry on the *actual* status of the proceeding. The history establishes that the Rule was meant to reject the very sort of abstract and impractical approach embraced by the court of appeals. And the clear purposes of the Rule — which was designed to advance interests of efficiency, economy, and fairness — will be frustrated by the decision below. It is hardly surprising, therefore, that the Third Circuit's approach has been rejected by every court of appeals to consider the question and by numerous district courts. The Third Circuit's rule, if endorsed by this Court, would require a radical change in long-settled class action practice, would make numerous beneficial class action settlements impossible, and would burden courts and litigants with a vast increase in litigation.

1. *Background and Settlement Negotiations.* This lawsuit and its settlement arose out of the nation's well-documented asbestos litigation crisis. Hundreds of thousands of cases have been filed; some 150,000 cases are pending in federal and state courts today; and new cases continue to flood the courts at a staggering and even accelerating pace (in 1995 alone, over 50,000 new claims were filed against some asbestos defendants). See SEC Form 8-K, Owens Corning Corp., June 20, 1996, at 4-5.

The Judicial Conference Ad Hoc Committee on Asbestos Litigation, appointed by Chief Justice Rehnquist, found in 1991 that “the situation has reached critical dimensions and is getting worse.” It summarized the nature of the problem as follows:

[D]ockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.

Report at 3, quoted in *In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415, 419 (J.P.M.L. 1991).

The Judicial Conference Committee further concluded that “[t]he transaction costs associated with asbestos litigation are an unconscionable burden on the victims of asbestos disease,” citing a RAND Corporation finding that, “of each asbestos litigation dollar, 61 cents is consumed in transaction costs * * *. Only 39 cents were paid to the asbestos victims.” Report at 13 (footnote omitted). These tremendous costs diminish the funds available to compensate future plaintiffs: “[u]nfairness results because of the excessive transaction costs and the finite resources available to pay meritorious claims. This situation demands immediate remedy.” *Id.* at 14.

Moreover, as courts have recognized, the “[r]esults of jury verdicts are capricious and uncertain” in asbestos cases — to the point where “asbestos litigation often resembles the casinos 60 miles east of Philadelphia, more than a courtroom procedure.” *In re School Asbestos Litig.*, 789 F.2d 996, 1001 (3d Cir.) (citation omitted), cert. denied, 479 U.S. 852 (1986). As the district court found, the tort system’s severe problems in handling asbestos claims continue unabated today. Pet. App. 240a.

Against this background, the parties to the asbestos litigation were repeatedly urged by the federal judiciary and other concerned parties to seek an “all-encompassing” settlement. Pet. App. 111a, 270a-271a. In 1991, at the request of eight district judges, the Judicial Panel on Multidistrict Litigation (“MDL Panel”) transferred all federal asbestos personal injury cases to the Eastern District of Pennsylvania for pretrial proceedings in hopes of fostering settlement of the “asbestos mess” (771 F. Supp. at 424). After that transfer, leaders of the plaintiffs’ asbestos bar and counsel for all of the major asbestos defendants tried to achieve such a settlement (Pet. App. 113a).

When those efforts deadlocked, the twenty companies that are petitioners here decided to “continue the discussions” with the co-chairs of the plaintiffs’ MDL Steering Committee, who had been elected by the committee members and appointed by the district court (Pet. App. 113a, 115a). As the district court found, the defendant companies began negotiations with these counsel “based

on their reputation and experience in the asbestos litigation,” and because they “had and have the knowledge and credibility necessary to negotiate on behalf of future asbestos victims in any global settlement effort.” *Id.* at 179a.

The negotiations themselves were “difficult, lengthy, and time-consuming,” and “protracted and vigorous” (Pet. App. 116a, 118a), continuing for an entire year (*id.* at 115a). “The negotiations included a substantial exchange of information” between class counsel and the twenty defendant companies, including “confidential data” showing the defendants’ historical settlement averages, claims numbers, and insurance resources. *Id.* at 116a-117a. “Virtually no provision” of the settlement “was not the subject of significant negotiation,” and the settlement terms “changed substantially” during the negotiations. *Id.* at 116a. In the end, the negotiations produced a settlement that, the district court determined based on its detailed review of the process, was “the result of arms-length adversarial negotiations by extraordinarily competent and experienced attorneys.” *Id.* at 271a; see generally *id.* at 109a-118a.

2. *The Terms of the Settlement.* The 106-page settlement as finally negotiated covers all persons who have been occupationally exposed to asbestos products supplied by petitioners but who had not filed their own asbestos personal injury lawsuits before this case was initiated, a class that includes hundreds of thousands of persons. Pet. App. 268a. The settlement establishes medical criteria that qualify a claimant for compensation if he or she develops an asbestos-related cancer or breathing impairment (such as asbestosis). *Id.* at 120a-136a. For people who meet those criteria, the settlement waives all defenses and provides immediate monetary compensation that varies with the severity of the condition and tracks prior tort system settlements by the defendant companies.

Pet. App. 136a-139a. Claims for compensation will be resolved by a claims resolution system in far less time than in the tort system, and with far lower transaction costs. *Id.* at 268a. In the first ten years alone, the settlement will pay out up to \$1.3 billion to as many as 100,000 class members. *Id.* at 269a.

There is another important benefit offered by the settlement to class members who meet the medical criteria for immediate compensation. In the tort system, over 90% of asbestos lawsuits settle with the plaintiff executing a “full” release, whereby the plaintiff “releases all claims for any future asbestos-related injury, including [any subsequently developed asbestos-related] cancer.” Pet. App. 155a.¹ Under the settlement, by contrast, a claimant who, for example, receives compensation for asbestosis will receive additional compensation if and when cancer develops. *Ibid.* The district court found that this right to additional compensation is “of great benefit to class members.” *Ibid.*

Class members who do not meet the medical criteria receive non-monetary benefits that, as the district court found, have “significant value.” Pet. App. 174a. These benefits include (1) tolling the statute of limitations, such that class members “will no longer be forced to file premature lawsuits or risk their claims being time-barred”; (2) waiver of defenses to liability; (3) payment of their claims, if and when they become sick, pursuant to the settlement's compensation standards, which avoids “the uncertainties, long delays and high transaction costs [including attorneys' fees] of the tort system”; (4) “some assurance that there will be funds available if and when they get sick,” based on the finding that each defendant “has shown an ability to fund the payment of all qualifying claims” under the settlement; and (5) the right to additional compensation if cancer develops. *Id.* at 173a-174a. This package of benefits, the district court found, compares favorably to the tort system, “where non-

¹ In some States, moreover, a claimant who sues on a non-malignant claim may not subsequently sue for cancer. See, e.g., *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1136-1137 (5th Cir. 1985) (applying Texas law); *Joyce v. A.C. & S., Inc.*, 785 F.2d 1200, 1203-1205 (4th Cir. 1986) (applying Virginia law).

impaired claimants usually settle their claims for small amounts and a full release of all claims for any future asbestos-related injury, including cancer.” *Id.* at 175a.²

As the district court concluded, the settlement terms establish the kind of claims resolution system envisioned by the Ad Hoc Committee appointed by Chief Justice Rehnquist to study the asbestos litigation crisis. Pet. App. 112a, 270a. The settlement also has been endorsed as fair and reasonable by the AFL-CIO and its Building and Construction Trades Department, which represent a “substantial percentage” of class members. *Id.* at 247a. The AFL-CIO has a role in monitoring implementation of the settlement. *Id.* at 158a.

3. *Initial District Court Proceedings.* The complaint in this case, styled as a class action under Fed. R. Civ. P. 23(b)(3), asserted present causes of action for all class members. For those who had already manifested an asbestos-related disease (such as asbestosis or cancer), the complaint asserted various causes of action and sought money damages for that disease. For those who had been exposed to asbestos but who had not yet manifested any asbestos-related disease, the complaint asserted causes of action for medical monitoring, emotional distress, increased risk of cancer, and conspiracy, and sought both money damages and medical monitoring.

² The non-impaired class members who receive these benefits fall into two groups: those whose asbestos exposure has resulted in cellular injuries that can be seen on chest x-rays, but have not resulted in physical impairment (“pleural” claimants), and those who have suffered cellular injuries that are not visible on x-rays (“exposure-only” claimants). See Pet. App. 127a-129a; *Carlough v. Amchem Prods.*, 834 F. Supp. 1437, 1454-1455 (E.D. Pa. 1993).

Id. at 95a.³

The district court conditionally certified the class for settlement purposes only. Pet. App. 96a. Subsequently, the court approved a plan to give notice to the class. *Georgine v. Amchem Prods., Inc.*, 158 F.R.D. 314, 314-336 (E.D. Pa. 1994). Class members were informed of the terms of the settlement and were afforded an opportunity to opt out of the class. Pet. App. 218a-219a.

The district court also held that it had subject matter jurisdiction over the lawsuit (834 F. Supp. at 1445-1468). The court first rejected the objectors' claim that the non-impaired plaintiffs lacked the injury in fact required by Article III. *Id.* at 1446-1456. Relying on numerous precedents, it held that “exposure to a toxic substance constitutes sufficient injury in fact to give a plaintiff standing to sue in federal court” (*id.* at 1454 (footnote omitted)).⁴ This is particularly true for persons exposed to asbestos, the court found, in view of the

³ Numerous States recognize these causes of actions. See, e.g., *Burns v. Jaquays Mining Corp.*, 752 P.2d 28 (Ariz. App. 1987) (medical surveillance); *Deitsch v. Tillery*, 833 S.W.2d 760 (Ark. 1992) (emotional distress); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993) (fear and medical monitoring); *Meyerhoff v. Turner Constr. Co.*, 210 Mich. App. 491, 495 (1995) (medical monitoring); *Ayers v. Jackson Township*, 525 A.2d 287 (N.J. 1987) (medical monitoring); *Askey v. Occidental Chem. Corp.*, 477 N.Y.S.2d 242 (N.Y. App. Div. 1984) (medical monitoring); *Lavelle v. Owens-Corning Fiberglas Corp.*, 507 N.E.2d 476 (Ohio C.P. 1987) (emotional distress); *Simmons v. Philadelphia Asbestos Corp.*, 543 Pa. 664 (1996) (medical surveillance); *Hansen v. Mountain Fuel Supply*, 858 P.2d 970, 980 (Utah 1993) (medical monitoring).

⁴ *Id.* at 1450-1456 (citing, e.g., *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 74 (1978); *In re “Agent Orange” Prod. Liab. Litig.*, 996 F.2d 1425, 1434 (2d Cir. 1993), cert. denied, 510 U.S. 1140 (1994); *Helling v. McKinney*, 509 U.S. 25 (1993)); see also Pet. App. 94a n.2 (citing *In re UNR Industries*, 20 F.3d 766, 770 (7th Cir. 1994), cert. denied, 115 S. Ct. 509 (1994)).

medical evidence that such exposure immediately produces physical harm to lung tissue. 834 F. Supp. at 1454-1455.⁵

The objectors further contended that non-impaired plaintiffs could not in good faith allege damages in excess of the \$50,000 jurisdictional amount. The district court disagreed, holding that “the kind of factual injuries alleged by the [non-impaired] plaintiffs—physical, monetary, and emotional injuries—plainly support a claim to more than \$50,000.”⁶

⁵ The district court also rejected the objectors' claim that this action fell outside Article III because it was a “feigned” or “collusive” suit. See 834 F. Supp. at 1462-1466. Citing numerous precedents, the court found that the plaintiffs and the defendants “are true adversaries” whose interests are “profoundly adverse to each other,” and that the proposed settlement “represents a compromise of a genuine dispute.” *Id.* at 1465. The court went on to hold that the case is not moot because the “proposed settlement * * * is contingent on the approval of the court.” *Ibid.*

⁶ *Id.* at 1459, citing, e.g., *In re “Agent Orange” Prod. Liab. Litig.*, 996 F.2d at 1434; *In re A.H. Robins Co.*, 880 F.2d 709, 723-725 (4th Cir.), cert. denied, 493 U.S. 959 (1989); *In re Joint Asbestos Litig.*, 129 B.R. 710, 793-794 (E.D.N.Y. 1991), aff'd in pertinent part & vacated on other grounds, 982 F.2d 721, 734 (2d Cir. 1992), modified on other grounds, 993 F.2d 7 (1993). Some objectors renewed their claim of an insufficient amount in controversy, arguing that the testimony of the non-impaired named representatives renounced their claim to present compensation. The district court, however, found that these plaintiffs had simply testified “to the effect that they support the deferral of compensation to themselves and other non-impaired class members.” Pet. App. 93a-94a n.2. The district court thus rejected the objectors' contention, stating that “the fact that a plaintiff settles his or her claim for less than the jurisdictional amount, or chooses to defer receipt of cash compensation, does not deprive a federal court of diversity jurisdiction.” *Ibid.*

Every aspect of the proposed settlement was sharply contested by the objectors. The district court permitted extensive pre-hearing discovery and held a five-week hearing on the fairness of the settlement; the propriety of class certification, including the adequacy of the representation of the class; and the other issues raised by the objectors.

Five months later, the district court issued a thorough decision, including more than 300 specific findings of fact (Pet. App. 103a-223a), rejecting the objectors' contentions and holding that (1) the requirements for class certification are met in light of the parties' settlement (*id.* at 223a-233a); (2) class counsel had no conflict of interest and provided vigorous representation of the entire class (*id.* at 249a-262a); and (3) the settlement is fair (*id.* at 115a-176a, 234a-248a). The court also reaffirmed its prior holdings that it had subject matter jurisdiction and that the notice to the class satisfied Rule 23 and due process (*id.* at 93a & n.2, 263a-267a).

4. *The Class Certification Determination.* Rule 23 establishes two sets of inquiries that a district court must undertake before certifying a class action. The first, contained in subsection (a), applies to all class actions and directs the court to assess whether “the class is so numerous that joinder of all members is impracticable”; “there are questions of law or fact common to the class”; “the claims or defenses of the representative parties are typical of the claims or defenses of the class”; and “the representative parties will fairly and adequately protect the interests of the class.” The second set of inquiries, contained in subsection (b), varies depending upon the type of class being certified. Here, the class was certified under Rule 23(b)(3), which requires a court to find “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 district court found that each requirement was satisfied.

a. Numerosity. The court found that “[a]lthough the exact size of the class is unknown, it is undisputed that there are many tens of thousands of class members.” Pet. App. 103a. “Given the size of the class,” the district court concluded, “joinder of the class members' claims would be impracticable.” *Id.* at 225a.

b. Predominance of Common Questions. The court concluded that the commonality element of Rule 23(a) and the predominance element of Rule 23(b)(3) were satisfied because

[t]he members of the class have all been exposed to asbestos products supplied by the defendants and all share an interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system. Whether the proposed settlement satisfies this interest and is otherwise a fair, reasonable and adequate compromise of the claims of the class is a predominant issue for purposes of Rule 23(b)(3).

Pet. App. 226a.

c. Typicality of the Representative Plaintiffs' Claims. The district court stated that “[A] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.” Pet. App. 227a (citation omitted). In the settlement context, the typicality element “requires proof that the interests of the class representative and the class are commonly held for purposes of receiving similar or overlapping benefits from a settlement.” *Ibid.* (citation omitted). Here, the court found that “the

representative plaintiffs hail from a variety of jurisdictions and represent a wide range of occupations, medical conditions, and exposure to the CCR defendants' [asbestos] products.” Pet. App. 105a. The court also found that the class members share an interest in maximizing recovery for each medical condition. *Id.* at 230a-231a. It thus concluded that “the claims of the representative plaintiffs are typical of the claims of the class for purposes of Rule 23(a).” *Id.* at 227a.

d. *Superiority to Other Methods of Adjudication.* Based on its factual findings regarding the fairness of the settlement, the court concluded that “the proposed settlement will provide class members with fair compensation for their claims while reducing the delays and transaction costs endemic to the asbestos litigation process as it occurs presently in the tort system. Thus, for purposes of Rule 23(b)(3), the proposed class action settlement is superior to other available methods for the fair and efficient resolution of the asbestos-related personal injury claims of class members.” Pet. App. 227a-228a (citation omitted).

e. *Adequacy of Representation.* In determining that the representative parties would “fairly and adequately protect the interests of the class” (Fed. R. Civ. P. 23(a)(4)), the district court considered several issues.

Consistency of Interests. The district court found that:

there is no antagonism of interest between persons in various categories, or between persons with and without currently manifest asbestos conditions. First, the assets of the defendants do not constitute a limited fund, and so Class Counsel was able to negotiate compensation schedules for varying diseases without competition between medical categories for the same dollars. Further, representative plaintiffs with no currently manifest asbestos condition, or with only non-impairing pleural changes, may in the future develop a condition in any one or more of the compensable medical categories. These representative plaintiffs, through Class Counsel, therefore have a strong interest that recovery for *all* of the medical categories

be maximized because they may have claims in *any*, or several categories.

Pet. App. 230a-231a (emphasis in original) (citations omitted).

Skill and Experience. The district court found that class counsel were “unquestionably experienced, highly respected leaders of the plaintiffs’ asbestos bar” (Pet. App. 258a) and were “extraordinarily competent” (*id.* at 271a). Indeed, the objectors admitted “that they were not challenging the qualifications or experience of Class Counsel.” *Id.* at 258a.

Alleged Conflict of Interest and Collusion. Based on extensive factual findings, the district court rejected the objectors’ argument that class counsel had a conflict of interest in representing the class because they also represented and negotiated settlements for non-class members who already had asbestos personal injury lawsuits on file in the courts. Pet. App. 179a-189a.

The court also rejected the objectors’ contention that “the settlement in this class action was the product of collusion” (Pet. App. 204a) because class counsel allegedly received premium settlements in the pending non-class cases (so-called “inventory” settlements) in exchange for acquiescing in less favorable settlement terms for class members. Based on the evidence submitted at the hearing, including the report of a special master, the court found that the “inventory” settlements “were generally consistent with the historical settlement averages for comparable settlements with [defendants], were not inflated, did not include a premium paid to Class Counsel in exchange for the [class action] settlement, and were not the product of collusion” (*id.* at 213a). The district court likewise noted that petitioners entered into similar “inventory” settlements on comparable terms with numerous other plaintiffs’ counsel *not* affiliated with class counsel. *Id.* at 182a.

5. Notice. The district court held that the notice provided to class members satisfied the requirements of Rule 23 and the Due Process Clause. Pet. App. 216a-223a, 263a-267a. The court-approved plan to provide notice of the settlement was implemented at a cost of over \$7 million and included hundreds of thousands of individual notices, a wide-ranging television and print campaign, and significant additional efforts by 35 international and national unions to notify their members. *Id.* at 218a-219a. Every notice emphasized that an individual did not currently have to be sick to be a class member. 158 F.R.D. at 333. In the end, the district court was “confident” that Rule 23 and due process requirements were satisfied because, as a result of this “extensive and expensive notice procedure,” “over six million” individuals “received actual notice materials,” and “millions more” were reached by the media campaign. Pet. App. 272a.⁷

6. Fairness of the Settlement. Pointing to the evidence adduced at the hearing, which included the 25-year record of asbestos litigation — “probably the most mature mass tort litigation in this country” (Pet. App. 115a) — the district court determined, based on detailed factual findings (*id.* at 115a-176a), that each of the primary provisions of the settlement was “fair and reasonable to the class” (*id.* at 241a). Thus, the court found, among other facts, (1) that the settlement agreement’s medical criteria will provide compensation to “substantially all [persons] with asbestos-related

⁷ The district court reaffirmed (Pet. App. 263a) its prior rejection (158 F.R.D. at 334-336) of the objectors’ contention that exposure-only claimants could *never* be provided with constitutionally-adequate notice. The court found, among other facts, that “after more than 20 years of extensive litigation, over 15 bankruptcies (many with extensive notice), and massive publicity about asbestos, persons who have had occupational exposure to asbestos are aware of that exposure.” *Id.* at 334. The district court then held that “the objectors’ argument that notice cannot be provided as a matter of constitutional law is without foundation,” citing a number of federal decisions that have “approved notice to classes including persons with unmanifested injuries.” *Id.* at 335, 336, citing, *e.g.*, *In re “Agent Orange” Prod. Liab. Litig.*, 996 F.2d at 1435; *In re Joint Asbestos Litig.*, 129 B.R. at 834-837.

cancer or asbestos-related impairment” (*id.* at 125a); (2) that the compensation schedule is a “reasonable reflection of [petitioners'] historical settlement averages from the tort system,” (*id.* at 139a); and (3) that the settlement provides non-impaired claimants with benefits of “significant value” (*id.* at 174a) — including the guarantee of compensation in the event they get sick — in exchange for their deferral of immediate cash compensation. *Ibid.*; see also pages 5-6, *supra*. The court concluded with this view of the benefits of the settlement balanced against the treatment of asbestos claims in the tort system (Pet. App. 270a):

The inadequate tort system has demonstrated that the lawyers are well paid for their services but the victims are not receiving speedy and reasonably inexpensive resolution of their claims. Rather, the victims' recoveries are delayed, excessively reduced by transaction costs and relegated to the impersonal group trials and mass consolidations. The sickest of victims often go uncompensated for years while valuable funds go to others who remain unimpaired by their mild asbestos disease. Indeed, [these] unimpaired victims have, in many states, been forced to assert their claims prematurely or risk giving up all rights to future compensation for any future lung cancer or mesothelioma. The plan which this Court approves today will correct that unfair result for the class members and the * * * defendants.

The court subsequently enjoined class members from pursuing claims against the defendants outside of the settlement. *Id.* at 67a-87a.⁸ The parties have been operating under the settlement, processing and paying claims, for over two years.

⁸ Because a third-party insurance claim remained pending, the district court's order took the form of a preliminary (rather than a permanent) injunction.

7. *The Court of Appeals' Decision.* The objectors appealed the district court's preliminary injunction barring class members from instituting claims against petitioners. Their appeal did not challenge the district court's findings regarding the fairness of the settlement, but instead advanced a variety of constitutional contentions, including arguments based on due process, standing, and justiciability doctrines. The objectors also contended that the district court erred in granting the motion for class certification.

The court of appeals reversed, holding that the class certification violated Rule 23 and that the settlement therefore had to be invalidated. Pet. App. 57a-59a. The court of appeals did not overturn *any* of the factual findings underlying the district court's decision. Rather, the basis for the court of appeals' decision was its conclusion that the district court had to determine whether the criteria for class certification, as set out in Rule 23, were "satisfied without taking into account the settlement, and as if the action were going to be litigated." *Id.* at 39a. In so holding, the court relied and expanded upon its decision in *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir.) ("*GM Trucks*"), cert. denied, 116 S. Ct. 88 (1995). The court conceded that "the better policy" may be to take the settlement into account, but held that "the current Rule 23 does not permit such an exception." *Id.* at 19a; accord *id.* at 39a. Applying its new interpretation of Rule 23, the court of appeals then held that the class could not be certified for *settlement* because it could not have been *litigated* on a class basis. *Id.* at 39a-57a.

For example, the court of appeals concluded that the class does not satisfy Rule 23(b)(3)'s requirement that common questions of law or fact predominate over individual questions because class members had different types of exposure to asbestos and “[d]ifferences in amount of exposure and nexus between exposure and injury lead to disparate applications of legal rules, including matters of causation, comparative fault, and the types of damages available to each plaintiff”; moreover, “because we must apply an individualized choice of law analysis to each plaintiff’s claims, the proliferation of disparate factual and legal issues is compounded exponentially.” Pet. App. 41a (citation omitted). Thus, even though the settlement eliminated the possibility that *any* of these issues would be *tried*, the Third Circuit held that the class could not be certified because a hypothetical trial would be too cumbersome.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Third Circuit held that “each of [Rule 23’s] requirements must be satisfied without taking into account the settlement, and as if the action were going to be litigated.” Pet. App. 39a. That approach makes certification turn on a wholly artificial inquiry — whether the requirements of Rule 23 would be satisfied in the imaginary circumstance that the case were litigated — and entirely disregards the actual situation presented to the district court. The Third Circuit’s rule “require[s] a court to ignore important and relevant information that sits squarely in front of it when deciding whether to certify a settlement class.” *In re Asbestos Litig.*, 90 F.3d 963, 975 (5th Cir. 1996).

The Third Circuit’s novel interpretation of Rule 23, which conflicts with the uniform view of other courts, is wrong. Nothing in the Rule suggests that a court must ignore the existence of a settlement and apply the certification criteria to hypothetical litigation that assuredly *never* will occur. Nor does the Third Circuit identify any such language. To the contrary, the plain language of Rule 23(a) and (b) focuses on real rather than hypothetical or abstract features

of the case, and Rule 23(c)(1) expressly allows the district court to change its certification decision depending upon how the case *actually* develops.

The history of Rule 23 also makes clear that certification decisions must be based on the actual status of the case, including settlement. The drafters of the Rule expressly eschewed the kind of abstract, metaphysical approach taken by the court below, and instead adopted a functional and practical approach that — as both this Court and the Rules Advisory Committee observed — focuses on the “particular” facts of the case. In addition, the existence of a settlement is highly material to the purposes of each of the certification criteria set out in Rule 23.

The Third Circuit's approach, moreover, is flatly inconsistent with the principles used by the Court in construing the Federal Rules. Ignoring settlement violates the “background presumption” that a court must apply the Rules to the case actually before it, not to hypothetical controversies. The holding below also contravenes Rule 1's mandate that the Rules be construed to secure the “just, speedy, and inexpensive determination of every action.” The Third Circuit's ruling would preclude many and discourage virtually all class settlements, would deprive many plaintiffs of any remedy, and would accentuate the worst problems of the tort system.

On a proper application of Rule 23 that gives due weight to the settlement in this case, the district court's certification of the class was correct — and the court of appeals did not hold otherwise. The predominant questions in this case, which concern the benefits of the settlement for persons injured through occupational exposure to asbestos, are common to all class members. The named representatives' claims are typical because all members of the class now have the same interest in achieving fair compensation for persons injured by exposure to asbestos. Class representation was adequate in light of the skill and experience of class counsel, the arms-length nature of the negotiations, and the absence of any conflicting interests among members of the class. And it is patently clear that this class action is superior to myriad individual actions

characterized by delay, crushing transaction costs, and inconsistent results.

ARGUMENT

I. A DISTRICT COURT MUST CONSIDER THE ACTUAL FACTS OF THE CASE BEFORE IT — INCLUDING THE EXISTENCE OF A SETTLEMENT — IN APPLYING RULE 23'S CLASS CERTIFICATION CRITERIA.

Until the Third Circuit's 1995 decision in *GM Trucks*, the longstanding and consistent practice of the federal courts had been to take account of the fact of settlement in class certification decisions. As the Civil Rules Advisory Committee recently explained, that “is the law everywhere” other than the Third Circuit. Reporter's Draft Minutes, p. 198. Yet the court below offered no persuasive reason for its decision to abandon an eminently useful and manageable practice that has facilitated innumerable settlements on terms that courts have found to be fair to all class members. In fact, the Third Circuit's holding cannot be reconciled with the language, history, or purposes of Rule 23, nor with the principles that govern construction of all Federal Rules.

A. The Language Of Rule 23 Requires Consideration Of The Case Actually Before The Court, Not An Imaginary Litigation.

1. The language of Rule 23 is the starting point for construction of the Rule. See, e.g., *Business Guides, Inc. v. Chromatic Commun. Enterprises, Inc.*, 498 U.S. 533, 540-541 (1991); *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 123 (1989). But the court of appeals never identified any language in the Rule upon which its holding rests. Nor could it. Rule 23 makes clear that the certification inquiry must be directed to the *actual* status of the proceeding; the Rule nowhere suggests that the existence of a settlement must be ignored, or that the district judge must apply the certification criteria to hypothetical litigation that assuredly *never* will occur.

Thus Rule 23(c)(1), which applies to all class actions, states that a class certification decision “may be conditional, and may be altered or amended before the decision on the merits.” This provision expressly allows the district court to change its certification determination based on how the case *actually* develops. It can hardly be the case that, while developments that occur after the initial certification may be taken into account, developments (like settlement) that take place before certification may not be. Moreover, it would be most peculiar if some developments in the litigation could affect certification, but settlement — which is, after all, the most important and profound development bearing on the conduct of the litigation — could not. See generally *General Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982) (“[e]ven after a certification order is entered, the judge remains free to modify it in the light of *subsequent developments in the litigation*” (emphasis added)).

Other parts of the text of Rule 23 also focus the inquiry on the actual state of the issues in the case at the time of the certification decision. Rule 23(a)(2), for example, requires the court to determine whether “there *are* questions of law or fact common to the class,” *not* whether “there [*would be*] questions of law or fact common to the class [*if every issue in the case were litigated*]” (emphasis added). A district court thus may not find certification impermissible under this subsection because the plaintiffs *could* have (but declined to) advance claims that could not be litigated in a class setting. Rule 23(a)(3) similarly refers to the “claims or defenses *of* the representative parties” (emphasis added), which can only be read to refer to the claims or defenses that the representative parties are actually advancing in the case at the time of the certification decision. The language is not limited, as respondents suggest it should be, to claims “*alleged in the class complaint.*” Windsor Opp. 17 (emphasis added).

In fact, respondents' proposed reading of Rule 23 is nonsensical. The Federal Rules do not require detailed pleading (see Fed. R. Civ. P. 8); as a result, complaints and answers usually are general documents. They need not specify the elements that the plaintiff must establish to prevail on his or her claims, or how the plaintiff plans to prove those elements, or the details of the particular defenses that the defendant will advance in attempting to defeat those claims. The Court therefore has observed that the issues relevant to the certification decision “[s]ometimes * * * are plain enough from the pleadings [, but] * * * sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.” *Falcon*, 457 U.S. at 160. As a case develops, moreover, the defendant may choose to abandon potential defenses, or the plaintiff may decide not to pursue particular claims. Under respondents' approach, the district court presumably would be barred from taking account of these developments in making the certification determination. There is no justification in the Rule's language for such a bizarre result. And there is no principled distinction between those events and a settlement.

Indeed, this Court has observed that the commonality and typicality requirements of Rule 23(a) “serve as guideposts for determining whether *under the particular circumstances* maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.” *Falcon*, 457 U.S. at 157 n.13 (emphasis added). Needless to say, analysis of the “particular circumstances” of the case must involve consideration of whether the parties have settled.

The language of Rule 23(b)(3) — the provision of Rule 23(b) at issue in this case — also directs the court's attention to the *actual* features of the case before it. For example, Rule 23(b)(3) states that

“matters pertinent to the [court's certification] findings include” such things as “the difficulties *likely to be encountered* in the management of a class action” (Rule 23(b)(3)(D) (emphasis added)) and “the extent and nature of any litigation * * * *already commenced* by or against members of the class” (Rule 23(b)(3)(B) (emphasis added)). Likewise, the requirements that common issues “predominate” over individual questions and that the class action be “superior” to other methods for adjudicating the parties' controversy necessarily focus the court's inquiry on the actual circumstances of the case before it. Taken together, these factors “describe in practical and functional terms the occasions for maintaining class actions” (1 NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS § 1.10 at 1-26 (3d ed. 1992)), and require consideration both of the actual status of the case and of the *real* manageability problems that will be confronted by the district court — to which the fact of settlement is critical.

2. The court of appeals based its contrary conclusion “in large part on the fact that [t]here is no language in the rule that can be read to authorize separate, liberalized criteria for settlement classes.” Pet. App. 38a (quoting *GM Trucks*, 55 F.3d at 799).

But this statement misapprehends the issue. The fact that certification of a settlement class includes consideration of the settlement, and excludes consideration of issues the settlement has resolved, does not “liberalize” the certification inquiry. Instead — as required by the language of the Rule — it simply focuses the inquiry on the actual facts instead of on an imaginary case. As the leading commentator in this area has explained,

some courts, in approving class settlements * * * have observed that the class might not have been certified were it not for the proposed class settlement. *This observation does not mean that Rule 23 criteria were not applied strictly in these circumstances.* On the contrary, these tests were applied, and

the observation that a different ruling might have resulted in the absence of the settlement offer refers to the fact that Rule 23 criteria would have been applied in a different context and thus may have led to a different result. Class action determinations are made in the context of all the circumstances of the case as it is then postured.

2 NEWBERG ON CLASS ACTIONS, *supra*, § 11.27, at 11-54 to 11-55 (emphasis added).

3. A judicial consensus on the proper interpretation of particular language is powerful evidence of the meaning of that language. See, e.g., *Owen v. Owen*, 500 U.S. 305, 310-312 (1991). Here, the six other courts of appeals that have addressed the issue all have concluded that the existence of a settlement should be taken into account in applying the Rule 23 criteria.⁹ For example, the Fifth Circuit recently held that “a district court can and should” look at terms of a settlement in front of it as part of its certification inquiry and that doing so “enhances the ability of [the] district courts to make informed certification decisions.” *In re Asbestos Litig.*, 90 F.3d at 975. And the Fourth Circuit held: “If not a ground for certi-

⁹ E.g., *White v. National Football League*, 41 F.3d 402, 408 (8th Cir. 1994) (finding adequate class representation based upon “the settlement itself”), cert. denied, 115 S. Ct. 2569 (1995); *Malchman v. Davis*, 761 F.2d 893, 900 (2d Cir. 1985), cert. denied, 475 U.S. 1143 (1986); *Weinberger v. Kendrick*, 698 F.2d 61, 72 (2d Cir. 1982) (Friendly, J.) (parties may “compromise * * * class [action] issues” through use of classes certified for settlement purposes) (citation omitted), cert. denied, 464 U.S. 818 (1983); *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 633 (9th Cir. 1982) (approving class certification “[f]or purposes of the consent decree,” while professing “serious doubts * * * whether all aspects of this cause could have been litigated to a conclusion entirely within the class action mode”), cert. denied, 459 U.S. 1217 (1983); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 211 (5th Cir. 1981); *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 178 (5th Cir. 1979) (Wisdom, J.) (“it is altogether proper and consistent for a court to certify a class for settlement purposes, while it might have had more difficulty reaching this determination in a different context”) (citation omitted), cert. denied, 452 U.S. 905 (1981). See also *In re Dennis Greenman Secur. Litig.*, 829 F.2d 1539, 1543 (11th Cir. 1987).

fication per se, certainly settlement should be a factor, and an important factor, to be considered when determining certification.” *In re A.H. Robins Co., Inc.*, 880 F.2d 709, 740 (4th Cir.), cert. denied, 493 U.S. 959 (1989).

In addition, district courts in the First, Second, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits have certified a settlement class after declining to certify a litigation class or expressing doubt whether a litigation class could be certified.¹⁰ This

¹⁰ *In re First Commodity Corp. of Boston Customer Accounts Litig.*, 119 F.R.D. 301, 308-309 (D. Mass. 1987) (certifying a temporary settlement class and noting that although certifiability of a litigation class would have been a “competitive question” on the facts of the case, that “is an issue that the parties may properly seek to compromise and settle”); *In re Marine Midland Motor Vehicle Leasing Litig.*, 155 F.R.D. 416, 420, 426 (W.D.N.Y. 1994) (certifying settlement class while noting that Second Circuit had denied certification of a similar class for litigation purposes); *In re First Investors Corp. Sec. Litig.*, 1993 U.S. Dist. LEXIS 18044, at *14 (S.D.N.Y. Dec. 22, 1993) (certifying class “for settlement purposes only” while noting that there was “no guarantee” that class could have been certified for trial); *Chatelain v. Prudential-Bache Sec., Inc.*, 805 F. Supp. 209, 214 (S.D.N.Y. 1992) (same); *Smith v. Vista Org.*, 1991 U.S. Dist. LEXIS 10484, at *24 (S.D.N.Y. July 29, 1991); *In re Cuisinart Food Processor Antitrust Litig.*, 1983-2 Trade Cases ¶ 65,680 at p. 69,472 (D. Conn. 1983) (certifying settlement class even though “plaintiffs’ liaison counsel admitted * * * the risk that a [litigation] class would not [have been] certified is a substantial one”); *Desimone v. Industrial Bio-Test Labs., Inc.*, 83 F.R.D. 615, 620 (S.D.N.Y. 1979) (certifying settlement class even though the court had “twice denied certification” of the class for litigation purposes and noting that “[w]ere a trial to replace settlement, the chances are very slim that” the class could have been certified); *City of Detroit v. Grinnell Corp.*, 356 F. Supp. 1380, 1390 (S.D.N.Y. 1972) (certifying settlement class even though question of certifying a litigation class “is neither easy nor free from doubt”), *aff’d in relevant part and rev’d in part*, 495 F.2d 448 (2d Cir. 1974); *South Carolina Nat’l Bank v. Stone*, 749 F. Supp. 1419, 1428 (D.S.C. 1990); *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1390-91 (D. Md. 1983) (certifying settlement class even though court had twice denied certification of litigation class); *In re Chicken Antitrust Litig.*, 560 F.

Supp. 957, 960-961 (N.D. Ga. 1980) (certifying nationwide settlement class and approving settlement despite “serious doubts” that class could have been certified for litigation), aff’d, 669 F.2d 228 (5th Cir. 1982); *In re Armored Car Antitrust Litig.*, 472 F. Supp. 1357, 1373 (N.D. Ga. 1979) (same), aff’d in part and rev’d in part on other grounds, 645 F.2d 488 (5th Cir. 1981); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 158-60 (S.D. Ohio 1992) (relying on existence of settlement in certifying nationwide settlement class in heart valve tort litigation and distinguishing case in which certification was denied on ground that it “dealt with a proposed class action for litigation”); *In re Dun & Bradstreet Credit Serv. Customer Litig.*, 130 F.R.D. 366, 369, 371 (S.D. Ohio 1990); *In re “Bendectin” Prods. Liab. Litig.*, 102 F.R.D. 239, 240 n.4, 241 (S.D. Ohio) (certifying nationwide settlement class after denying certification of litigation class), rev’d on other grounds, 749 F.2d 300, 305 n.10 (6th Cir. 1984) (noting but not reaching this issue); *Arenson v. Board of Trade*, 372 F. Supp. 1349, 1353-54 (N.D. Ill. 1974) (certifying settlement class even though, absent the settlement, “it is quite possible that the plaintiffs’ class would not have been certified, causing the death of this * * * litigation”); Consent Decree in Full Settlement of Civil Action, *Wells v. Bank of America*, Civ. No. 71-409 CBR, at 3 (N.D. Cal. 1974) (cited in *Developments in the Law — Class Actions*, 89 HARV. L. REV. 1318, 1560 & n.130 (1976)) (approving bank-wide class settlement of employment discrimination suit notwithstanding prior refusal to certify bank-wide class for litigation because of problems proving individualized harm and measuring damages); *In re Petro-Lewis Sec. Litig.*, 1984-85 Fed. Sec. L. Rep. ¶ 91,899, at p. 90,470 (D. Colo. 1984) (certifying settlement class even though “there is doubt whether this action could be certified” for purposes other than settlement); *In re Four Seasons Securities Laws Litig.*, 58 F.R.D. 19, 32, 39 (W.D. Okla. 1972) (certifying class for settlement purposes in securities class action and noting that reliance issue, if litigated, could have “hopelessly fragment[ed] the proposed class”); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 311, 317 (N.D. Ga. 1993) (approving settlement of class certified for settlement purposes and noting that decertification might have been required if the action were litigated because, as the plaintiffs conceded, proof of damages by the class composed of millions of members would have been difficult); *Woodward v. NOR-AM Chem. Co.*, 1996 U.S. Dist.

overwhelming consensus in the lower courts, acquiesced in by Congress and the Rules Committee for twenty-five years, by itself justifies rejection of the Third Circuit's approach. See, e.g., *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 731-733 (1975); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200-201 (1974); *Missouri v. Ross*, 299 U.S. 72, 75 (1936).¹¹

LEXIS 7372, at *41 (S.D. Ala. May 23, 1996); *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. Sept. 1, 1994) (relying on existence of settlement in certifying nationwide settlement class in breast implant tort litigation); *Sanders v. Robinson Humphrey/American Express, Inc.*, 1990 Fed. Sec. L. Rep. ¶ 95,315, at p. 96,492 (N.D. Ga. 1990) (certifying class “for purposes of settlement only” after denying certification of litigation class, see 634 F. Supp. 1048 (N.D. Ga. 1986)).

¹¹ Leading commentators agree that settlement must be considered in applying the Rule 23 criteria. For example, the principal treatise in the field states that “it is altogether proper * * * for a court to certify a class for settlement purposes, while it might have had more difficulty reaching this determination in a different context” (2 NEWBERG ON CLASS ACTIONS, *supra*, § 11.27, at 11-55). That is because “[c]lass action determinations are made in the context of all the circumstances of the case as it is then postured.” *Id.* at 11-54 to 11-55.

B. The History Of Rule 23 Shows That District Courts May Not Ignore Settlements In Their Class Certification Decisions.

The history of Rule 23 also makes clear that class certification decisions should be based on the actual case before the district court, not a hypothetical litigation.

Representative suits in equity, the predecessors of the modern class action device codified in Rule 23, were developed as tools for convenient and efficient adjudication of repetitive claims; by avoiding a multiplicity of suits, the equitable class action device was thought to “save[] the parties from needless expense and vexation, economize[] the time of judges and jurymen, and free[] the dockets for the affairs of other litigants.” Chafee, *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297, 1297 (1932). See 7A WRIGHT, MILLER, & KANE, FEDERAL PRACTICE & PROCEDURE, § 1751, at 7-8 (1986); 1 NEWBERG ON CLASS ACTIONS, *supra*, § 1.06, at 1-17. Despite the practicality of this purpose, however, under pre-1966 class action procedures the propriety of a class action was determined by looking to “the abstract nature of the rights involved.” Amendments to Rules of Civil Procedure, Rules Advisory Committee Notes to Amended Rule 23, 39 F.R.D. 69, 98 (1966). That artificial and abstract analysis — which sought to categorize class actions as “true,” “hybrid,” or “spurious” — “proved obscure and uncertain” (*ibid.*), and it was replaced in 1966 by a rule that “substitute[s] functional tests for the conceptualisms that characterized practice under the former rule.” 7A WRIGHT, MILLER, & KANE, *supra*, § 1753, at 42; see *Snyder v. Harris*, 394 U.S. 332, 343 (1969) (Fortas, J., dissenting) (observing that the 1966 amendments of Rule 23 “replaced the metaphysics of conceptual analysis * * * by a pragmatic, workable definition of when class actions might be maintained”).

The Advisory Committee accordingly stressed that “[t]he amended rule describes in more practical terms the occasions for maintaining class actions.” 39 F.R.D. at 99 (emphasis in original). Addressing Rule 23(b)(3), for example, the Committee explained that certification is appropriate where “convenient and desirable depending upon the particular facts.” *Id.* at 102 (emphasis

added). The Committee added that courts, in resolving certification requests, should *disregard* “interests [that] may be theoretic rather than practical.” *Id.* at 104 (emphasis added). In light of this history, commentators uniformly agree that the Rule 23 approach is “functional” and is to be applied “practical[ly]” and “pragmatic[ly]” based on the peculiar facts of each case. See, e.g., Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 40 (1967) (Rule 23(b)'s emphasis on the “practicable” requires courts “to weigh the particular circumstances of particular cases and decide concretely what will work * * * in the individual situations”); 7A WRIGHT, MILLER, & KANE, *supra*, § 1778, at 528 (“the proper standard under Rule 23(b)(3) is a pragmatic one”); 1 NEWBERG ON CLASS ACTIONS, *supra*, § 1.10, at 1-26, 1-31. Thus, as Judge Wisdom wrote for the Fifth Circuit:

The hallmark of Rule 23 is the flexibility it affords to the courts to utilize the class device in a particular case to best serve the ends of justice for the affected parties and to promote judicial efficiencies. * * * Accordingly, it is altogether proper and consistent for a court to certify a class for settlement purposes, while it might have had more difficulty reaching this determination in a different context.

In re Beef Antitrust Litig., 607 F.2d at 177-178 (citation omitted).

The Third Circuit's rule, which applies the certification criteria to an abstract construct of hypothetical litigation while ignoring the real-world case before the court, resembles the pre-1966 class action procedures that Rule 23 was intended to eliminate. The amended Rule's focus on practicality — as well as the emphasis on the “particular facts” of the case — manifestly requires that the district court make the certification decision in light of the actual status of the case, including a settlement. See 2 NEWBERG ON CLASS ACTIONS, *SUPRA*, § 11.27, AT 11-55.

C. The Purposes of the Specific Certification Criteria Require Consideration of a Settlement.

The Purposes Of, and Interests Served By, the Pertinent Specific requirements of Rule 23 confirm that, in adjudicating a certification motion, a district court should take the parties' settlement into account.

Rule 23(a). The policies that underlie Rule 23(a) plainly are advanced by taking settlement into account in conducting the certification inquiry. For example, when considering Rule 23(a)(4)'s adequacy of representation requirement in a contested class action, the district court's decision necessarily cannot be anything more than an educated guess; the court cannot wait to see how well class representatives and class counsel ultimately will perform because the certification decision must be made “[a]s soon as practicable after the commencement” of the action. Fed. R. Civ. P. 23(c)(1). In contrast, when certification of a settlement class is sought, the district court simultaneously has before it the motion for certification and the agreed-upon final result in the action. Once the case is settled, “there [are] none of the imponderables that make the [class-action] decision so difficult early in [the] litigation.” *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 406 n.12 (1977) (bracketed material added by the Court) (citation omitted).

The district court therefore need not speculate about whether hypothetical, potential divergences of interest among class members might compromise the interests of the class during continued litigation that will never occur. Instead, the court can address the issue of adequate protection directly, by asking whether the settlement is fair and whether, during the settlement negotiations, the class representatives and class counsel “fairly and adequately protect[ed] the interests of the class.” Fed. R. Civ. P. 23(a)(4). As the Fifth Circuit explained, “[s]ettlements and the events leading up to them add a great deal of information to the court's inquiry and will often expose diverging interests or common issues that were not evident or clear from the complaint.” *In re Asbestos*, 90 F.3d at 975.¹²

¹² The existence of a settlement also eliminates the need to assess

The courts of appeals accordingly have long understood that

[i]t is, ultimately, in the settlement terms that the class representatives' judgment and the adequacy of their representation is either vindicated or found wanting. If the terms themselves are fair, reasonable and adequate, the district court may fairly assume that they were negotiated by competent and adequate counsel; in such cases, whether another team of negotiators might have accomplished a better settlement is a matter equally comprised of conjecture and irrelevance.

Corrugated Container, 643 F.2d at 212. Accord *In re Asbestos*, 90 F.3d at 975, 980-982 (relying on the terms of the settlement to determine that no intra-class conflicts existed); *White v. National Football League*, 41 F.3d 402, 408 (8th Cir. 1994) (“adequacy of class representation * * * is ultimately determined by the settlement itself”), cert. denied, 115 S. Ct. 2569 (1995). Hence, pretending that the case is going to be litigated not only adds nothing to the adequacy inquiry, but actually deprives it of the most probative evidence.¹³

whether class counsel and the class representative have the resources, willingness, and experience to see the litigation through discovery, trial, and any appeals. No legitimate interest of any kind is advanced by requiring district courts to undertake this inquiry when, in fact, the action is being settled. See 2 NEWBERG ON CLASS ACTIONS, *supra*, § 11.28, at 11-59.

¹³ For similar reasons, taking settlement into account advances the purposes of the commonality and typicality requirements of Rule 23(a). Indeed, the Court has recognized that those factors “tend to merge with the adequacy-of-representation requirement.” *General Tel. Co. v. Falcon*, 457 U.S. at 157 n.13.

Rule 23(b)(3). Rule 23(b)(3) is designed for actions in which “the particular facts” make class certification “convenient and desirable” by, among other things, “achiev[ing] economies of time, effort, and expense.” Advisory Committee Notes (1966 Amendment). Both the predominance and superiority requirements of Rule 23(b)(3) focus largely on avoidance of inefficiencies. A court must find that common questions predominate because “[i]t is only where this predominance exists that economies can be achieved by means of the class action device.” Advisory Committee Notes (1966 Amendment). Otherwise, “an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.” *Ibid.* The superiority requirement similarly is concerned with identifying the method of adjudication that offers “greater practical advantages.” *Ibid.*

Taking the fact of settlement into account directly advances these purposes. A settlement, of course, removes the danger that the proceeding will “degenerate into multiple lawsuits separately tried,” just as it removes all other inefficiencies that could arise from continued litigation. And immediate relief for the class through a settlement surely may be superior to alternatives, such as individual litigations, even where that would not be true of an unmanageable litigated class action. See Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 835 (1985) (certification of settlement class in mass tort litigation is appropriate because it may “prove `superior to other available methods” of adjudication).

Taking settlement into account likewise is important to the specific “matters” that the Rule expressly makes “pertinent to the [23(b)(3)] findings.” Rule 23(b)(3)(A) — “the interest of members of the class in individually controlling the prosecution or defense of separate actions” — asks the district court to balance any potential loss of autonomy for class members (the value of which can often be “theoretic rather than practical,” as the Advisory Committee cautioned) against the possible benefits of a class action. When the case is settled, the benefits are known, thus making the balancing in-

quiry far more concrete. Moreover, class members may opt out if they are dissatisfied with those benefits. See *In re Beef Industry Antitrust Litig.*, 607 F.2d at 175; *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 223 (5th Cir. 1981).

Consideration of settlement also advances the evident purpose of Rule 23(b)(3)(B), which directs the court to take into account “the extent and nature of any litigation concerning the controversy already commenced by or against members of the class.” When the parties have reached a settlement, class members' interest in further prosecuting any “already commenced” litigation will be substantially, if not wholly, eliminated. Finally, it would be senseless for a court to ignore settlement in applying Rule 23(b)(3)(C) and (D), which call the court's attention to “the desirability or undesirability of concentrating the litigation of the claims in the particular forum” and “the difficulties likely to be encountered in the management of a class action.” Settlement creates immediate advantages for the class action forum and eliminates any case-management difficulties that might arise from continued litigation.

D. The Principles That Govern Construction Of The Federal Rules Require Courts To Take Settlement Into Account.

The decision below also conflicts with the principles applied by this Court in construing the Federal Rules.

1. Just last Term, this Court recognized that the Federal Rules are written against certain “background presumption[s]” and that a party urging a position inconsistent with one of those presumptions “bears the responsibility of identifying some affirmative basis for concluding” that a particular Rule departs from that presumption. *United States v. Mezzanatto*, 115 S. Ct. 797, 803 (1995). The Court there held that the Federal Rules reflect a “presumption of waivability” that a party may overcome only with affirmative evidence. *Id.* at 802.

Here, the Third Circuit's rule runs afoul of the background presumption that a court applies the Federal Rules to the case actually before it, not to the case as the court imagines the parties *could* have litigated it. For example, this Court observed in *Mezzanatto* that courts routinely accept stipulations for the admission of otherwise inadmissible documents. 115 S. Ct. at 802. Yet the Federal Rules contain no express directive that courts must consider the parties' agreement instead of deciding whether to admit the evidence based upon objections the parties *might* have raised. Similarly, when parties agree not to raise substantive arguments, the court does not ignore that agreement and pretend that those issues remain in the case. See, e.g., *Waisome v. Port Authority of New York and New Jersey*, 948 F.2d 1370, 1374 (2d Cir. 1991).¹⁴ Thus, respondents “bear[] the responsibility of identifying some affirmative basis for concluding” (115 S. Ct. at 803) that a district court applying the certification criteria in Rule 23 should ignore the parties' agreement.

Respondents cannot identify any “affirmative basis for [so] concluding.” Indeed, the implications of the Third Circuit's holding that a district court may not consider the actual case before it are truly bizarre. Consider, for example, a class action that is instituted against a defendant alleging a cause of action that allows proof of liability on a class-wide basis, but requires the plaintiff to prove causation and damages on an individualized basis, and permits recovery of both compensatory and punitive damages. The require-

¹⁴ Of course, some sorts of stipulations are not binding on the courts. For example, parties may not stipulate to the resolution of legal issues, and in the class action context a settlement agreement is not effective without court approval. The question here, however, is whether a court must ignore a class action settlement that *satisfies* the fairness requirement.

ment of individualized proof of causation might pose a significant obstacle to certification of the case as a litigation class action. But suppose — prior to the district court's class certification decision — the class representatives and the defendant reach a fair agreement under which the defendant concedes causation, the plaintiff class waives its punitive damages claim, and the parties agree to a formula for the calculation of damages. The only issue remaining in the case would be the question of liability. Yet the Third Circuit would require the district court to ignore this extremely significant development, treat the case as if the partial settlement had not occurred, and deny certification because a hypothetical class that sought to litigate causation could not have been certified. There is no “basis” — affirmative or otherwise — in the Federal Rules for such a perverse result.

2. There is a second principle that is dispositive here: the Rules themselves state that they should “be construed and administered to secure the *just, speedy, and inexpensive determination* of every action.” Federal Rule of Civil Procedure 1 (emphasis added). Rule 1 establishes efficiency and fairness as the “touchstones” for interpreting the Rules. *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962).

The Third Circuit's construction of Rule 23 undeniably will frustrate both of these purposes. Indeed, that court itself acknowledged that it may be “better policy * * * to take settlement into account” in the certification decision. Pet. App. 19a. But the court of appeals went astray in believing that its observation was irrelevant to the proper construction of Rule 23. In fact, under the mandate of Rule 1, Rule 23 *should* be applied in a manner that provides a “convenient and economical means for disposing of similar lawsuits,” while “protect[ing] the interests of absentees.” *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 403 (1980) (citations omitted). See *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974).

a. Efficiency. “[P]ublic policy wisely encourages settlements” because they are an efficient means of resolving litigation. *McDermott, Inc. v. Amclyde*, 114 S. Ct. 1461, 1468 (1994). Consequently, the Federal Rules encourage and give district courts expansive powers to facilitate settlement. For example, Rule 16(a)(5) expressly identifies “facilitating the settlement of the case” as a proper purpose for a pretrial conference. See also Fed. R. Civ. P. 16(c)(9) (district court may take appropriate action at pretrial conference with respect to “settlement”). The Rules Advisory Committee observed that “[s]ince it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible.”

Rule 23, as applied everywhere but the Third Circuit, plainly promotes settlement. The Federal Judicial Center study found that 84% of the cases in which a class was certified ended in settlement; almost half of those settlements — 39% of all certified class actions — involved classes certified for settlement purposes only. Willging, Hooper & Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Changes*, 71 N.Y.U.L. Rev. 74, 112, 180 (1996). The Third Circuit rule, by contrast, would provide a significant deterrent to settlement in at least three ways.

First, the MANUAL FOR COMPLEX LITIGATION (THIRD) explains that decoupling class certification in the settlement context from class certification in the litigation context “permit[s] defendants to settle while preserving the right to contest [class certification] if the settlement is not approved.” *Id.* § 30.45, at 243. Under the test established by the Third Circuit, on the other hand, the district court will *have to* determine that a case in which a settlement has been reached could be *litigated* as a class action — and will have to

make specific findings justifying that conclusion (Pet. App. 19a). If the settlement ultimately falls apart or is disapproved, the defendant will face a certified *litigation* class, having conceded — for present and future cases — what “is often the most significant decision rendered in these class action proceedings.” *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980).

Faced with that prospect, a rational defendant who holds any hope at all of defeating class certification will refuse to consider settlement until it loses that issue, which often does not occur until after the parties have litigated for many months (or years). And even after the certification issue is finally determined, a defendant might continue to refuse to settle so as to preserve its right to appellate review. This means that the Third Circuit's rule “may render it virtually impossible for the parties to compromise class issues and reach a proposed class settlement before a class certification.” *In re Beef Antitrust Litig.*, 607 F.2d at 177-178 (quoting 3 NEWBERG ON CLASS ACTIONS § 5570c, at 476 (1977)).

Consequently, while the Third Circuit has *said* that it endorses the idea of a class for “settlement purposes” as a mechanism that “affords considerable economies to both the litigants and the judiciary” (*GM Trucks*, 55 F.3d at 794), it is simply not possible to reconcile the Third Circuit's ruling with the concept of a class for settlement purposes only.¹⁵

Second, the Third Circuit's approach would deter class action

¹⁵ Requiring the district court in every settlement case to determine whether the case could have been litigated also will impose significant additional burdens on the courts and the parties — such as the need to establish the manageability of litigating a case that in fact will never be tried.

settlements in cases involving securities, civil rights, and antitrust claims. These settlements frequently extend to both liability and damages, establishing a formula for distribution of settlement proceeds to the plaintiff class.

But the damages issues in these cases may be too varied for litigation on a class-wide basis, and thus the criteria for certification as a litigation class would not be met. See *MANUAL FOR COMPLEX LITIGATION (THIRD)* § 33.36, at 342; § 33.52, at 349-355 (noting in the securities and civil rights contexts that class actions may be tried on specified issues, such as the defendants' respective liabilities, while leaving for subsequent individual trials other issues, such as damages and individual defenses); Fed. R. Civ. P. 23(c)(4) Advisory Committee Note (“in a fraud or similar case the action may retain its ‘class’ character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims”).¹⁶

Under the Third Circuit's rule, these class-wide settlements as a practical matter would be impermissible. The parties would be allowed only to settle the issue of liability, with damages left for resolution in individual claims. But no defendant would enter into such

¹⁶ See, e.g., *Officers for Justice*, 688 F.2d at 621, 622, 633 (approving settlement class after partial litigation of employment discrimination claims and suggesting that the class could not have been certified for litigation of damages); *Griffin v. Harris*, 83 F.R.D. 72, 74 (E.D. Pa. 1979) (decertifying a Title VII class action with respect to damages because “significant individual issues * * * would have to be dealt with when determining the amount of damages each class member would be entitled to”); *In re Fine Paper Antitrust Litig.*, 82 F.R.D. 143, 154 (E.D. Pa. 1979) (certifying class in antitrust action but noting that “problems in proving damages” may preclude extension of certification to damages determinations), aff'd, 685 F.2d 810 (3d Cir. 1982), cert. denied, 459 U.S. 1156 (1983); *Butler v. Home Depot, Inc.*, 1996 WL 421436, *5-*6 (N.D. Cal. Jan. 25, 1996) (certifying Title VII class action as to liability but deferring class certification as to damages).

an open-ended admission of liability. Thus, settlements of this type likely would disappear under the Third Circuit's approach.

Third, the Third Circuit's interpretation would foreclose the use of class actions to settle mass tort cases, at a time when the number of tort filings in the federal courts is skyrocketing.¹⁷ The great majority of courts have ruled that such cases cannot be certified for classwide *litigation*, given the myriad individualized injury, causation, damages, and choice-of-law issues that arise in trying such claims. See, e.g., *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 & n.23 (5th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297-1302 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995); *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1081 (6th Cir. 1996).

Under the Third Circuit's interpretation of Rule 23, these cases therefore cannot be certified for a classwide settlement either. The federal courts instead will be required to resolve those claims on a case-by-case basis. That result is sure to accentuate the worst aspects of the tort system: "expense, delay, * * * crowding of dockets, divergent decisions on identical factual questions, and sometimes the insolvency of the defendants who are being sued." Rehnquist, Welcoming Remarks: National Mass Tort Conference, 73 *Tex. L. Rev.* 1523, 1524 (1995). Accord Edley & Weiler, *Asbestos: A Multi-Billion Dollar Crisis*, 30 *HARV. J. LEGIS.* 383, 392-397 (1993).

Asbestos litigation provides a case in point. As noted above (at pages 2-3), the Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation concluded that "[t]he transaction costs associated with asbestos litigation are an unconscionable

¹⁷ The Administrative Office of the United States Courts recently reported that "the number of personal injury/product liability cases filed nationwide climbed 125 percent from the 12-month period ending March 31, 1995, compared to the corresponding period in 1996." *The Third Branch* at 2 (July 1996).

burden on the victims of asbestos disease,” and “[c]lass action proceedings have the advantages of promoting efficiency and consistency and prevent whipsawing by defendants of plaintiffs’ claims as well as scrambles for the assets of limited funds.” *Id.* at 13, 22. The Third Circuit rule, which effectively precludes such proceedings, thus eliminates an invaluable procedure for efficient resolution of one of the most burdensome elements of the federal courts’ caseload.¹⁸

Although the court below recognized that the asbestos litigation problem previously had “defied global management in any venue” (Pet. App. 18a), it vacated a settlement that represents a unique opportunity to unburden the federal and state courts of the “scourge” of asbestos litigation. Unless the decision below is reversed, federal and state courts will be flooded with tens of thousands of new asbestos claims against petitioners. See *id.* at 108a (district court found new claims were filed against petitioners at the rate of 24,000 per year). There is over a two-year backlog of potential filings against petitioners built up over the period covered by the district court’s injunction.

b. *Fairness.* Construing Rule 23 to bar consideration of the fact of settlement also frustrates the second goal specified in Rule 1 — the fair resolution of claims.

The Third Circuit’s rule will deny relief to many plaintiffs. The large number of cases in which courts have taken account of a settlement in the certification decision, frequently expressing doubt whether the case could be litigated as a class action (see pages 22-25 & nn.9-10, *supra*), demonstrates that the Third Circuit rule would dramatically reduce the number of class action settlements in,

¹⁸ Indeed, the Third Circuit itself previously recognized that “increased use of settlement classes has proven extremely valuable for disposing of major and complex national and international class actions in a variety of substantive areas ranging from toxic torts (Agent Orange) and medical devices (Dalkon Shield, breast implant), to antitrust cases * * *.” *GM Trucks*, 55 F.3d at 778.

among other kinds of cases, consumer class actions, civil rights suits, and antitrust claims. Numerous plaintiffs who would have been beneficiaries of a class-wide settlement but for the Third Circuit's rule will instead be relegated to the economically prohibitive option of pursuing their individual claims independently.

For many aggrieved persons (victims of consumer fraud are a classic example), this result will mean no relief at all because they will be unable to afford the costs of litigation. See *Deposit Guaranty Nat'l Bank*, 445 U.S. at 339 (“[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device”); accord *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985); *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99-100 n.11 (1981). Other aggrieved persons may be able to pursue their claims independently, only to find recovery impossible because the defendant has been bankrupted by large actual and punitive damages judgments awarded to prior claimants. See, e.g., *In re Asbestos Prods. Liab. Litig.*, 771 F. Supp. 415, 420 (J.P.M.L. 1991); *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation*, at 29-30. In consequence, the Third Circuit's “ignore the settlement” approach may make it *impossible* for absent class members to obtain redress.¹⁹

¹⁹ In addition, as we have explained (at page 28, *supra*), consideration of the fact of settlement in the certification inquiry helps to ensure that the interests of absent class members are adequately represented by making it unnecessary for the court to speculate about the future performance of the class representatives.

E. The Third Circuit's Expressed Concerns About Fairness To Absent Class Members Provide No Justification For Its Ruling.

The court of appeals was plainly wrong in its concern that consideration of the settlement will “erode” Rule 23’s protections for absent class members. Pet. App. 36a-37a. Aside from its erroneous assumption that some “lower” certification standard would apply when settlement is taken into account (see *id.* at 37a), the court failed to explain how absent class members would be prejudiced. In fact, a district court that takes settlement into account is still obligated to conduct the certification inquiry specified in Rule 23. And no settlement may take effect unless the district court finds it fair under Rule 23(e). Basing the class certification decision on the case actually before the district court rather than a hypothetical construct therefore does not compromise any of the protections for absent class members. To the contrary, it is the Third Circuit’s approach — which withholds from the district court valuable information bearing on the results obtained by the class representatives and on whether hypothetical conflicts have been avoided — that disadvantages the class.

The court of appeals also worried that class counsel would be pressured to enter into inequitable settlements. See *GM Trucks*, 55 F.3d at 796-797. But that risk, which is present in all types of class actions, is specifically addressed by the searching review of the fairness of settlements required by Rule 23(e). See, e.g., *Weinberger*, 698 F.2d at 73; *In re Beef Antitrust Litig.*, 607 F.2d at 173-174. Indeed, the possibility of abuse is demonstrably *reduced* in the settlement context. Unlike plaintiffs in litigated class actions, class members in settlement classes are aware of the terms of the proposed settlement prior to certification. They accordingly will be able to challenge both certification and the settlement and, in a Rule 23(b)(3) class (like this one), to opt out of the class altogether. See *In re Beef Antitrust Litig.*, 607 F.2d at 175; *In re Corrugated Container Antitrust Litig.*, 643 F.2d at 223.

The Third Circuit's rule over-reacts to hypothetical dangers by imposing what amounts to an across-the-board prohibition of settlement classes. Rule 23 is characterized not by broad categorical prohibitions, but by a well-placed confidence in the ability of district courts to decide, case-by-case, whether a particular class was fairly and adequately represented and whether a particular proposed settlement is fair. For more than 20 years, numerous district courts have been exercising that authority in the context of settlement classes (see pages 22-25, *supra*) with *none* of the ill effects imagined by the Third Circuit. To the contrary, numerous disputes have been resolved fairly and efficiently in a manner that has minimized the burden both on the courts and on the litigants. There is simply no basis in law, and no justification, for the dramatic change in class action practice that would result from the broad-brush, extra-textual limitation upon district courts' discretion invented by the Third Circuit. See *McDonald v. Chicago Milwaukee Corp.*, 565 F.2d 416, 422 (7th Cir. 1977) (“[p]er se rules often represent the abdication of judicial discretion rather than its informed exercise”).

It is the Third Circuit's approach — and not, as the Third Circuit said, the settlement in this case — that is an inappropriate assumption of “legislative” (Pet. App. 20a) responsibilities by the judiciary.

II. TAKING THE SETTLEMENT INTO ACCOUNT, IT IS MANIFEST THAT THE DISTRICT COURT'S DECISION TO CERTIFY THIS CLASS WAS CORRECT.

The Third Circuit found class certification improper in this case because it believed that “the district court erred by relying in significant part on the presence of the settlement to satisfy the Rule 23(a) requirements of commonality, typicality, and adequacy of representation, and the Rule 23(b)(3) requirements of predominance and superiority.” Pet. App. 39a; accord *id.* at 39a-40a. But if the Rule 23 inquiry may take settlement into account, certification here assuredly was not an “abuse[] [of] discretion” (*Califano v.*

Yamasaki, 442 U.S. 682, 703 (1979)), and the court of appeals did not hold otherwise.

1. *Predominance of common questions of law or fact.*

When the settlement is taken into account, this case easily satisfies the Rule 23(b)(3) requirement that common questions of law or fact predominate over other questions affecting only individual class members.²⁰ The court of appeals' conclusion that the predominance requirement was not met turned entirely on its belief that litigation of the class would be unmanageable. See Pet. App. 40a-48a. But the disparate legal issues relating to liability, defenses, and damages that the Third Circuit thought might arise in litigation (see *id.* at 40a-42a) are irrelevant under the terms of the settlement. The defendants have waived all defenses. They also have obligated themselves to compensate all class members who demonstrate exposure to defendants' asbestos products and manifest an asbestos-related disease, applying a formula that takes into account the considerations that bear on recovery in the tort system. The legal and factual questions that remain therefore relate solely to the fairness of the settlement, as the district court concluded. Pet. App. 226a. See *In re Corrugated Container Antitrust Litig.*, 643 F.2d at 212; *Malchman v. Davis*, 761 F.2d 893, 900 (2d Cir. 1985), cert. denied, 475 U.S. 1143 (1986). See generally 2 NEWBERG ON CLASS ACTIONS, *supra*, § 11.28, at 11-58. Moreover, the fairness inquiry here raised questions that were common to the members of the class, including the fairness of the medical criteria and settlement payments, as well as the value of the benefits provided to class members in comparison to the uncertainties, long delays, and high transaction costs of the tort system.

²⁰ It therefore also necessarily satisfies the Rule 23(a)(2) requirement that “there are questions of law or fact common to the class.”

The court of appeals offered no justification for its belief that it is “impermissible” (Pet. App. 40a n.12) to treat the fairness of the settlement as a “common question” within the meaning of Rules 23(a)(2) and 23(b)(3). And no such justification is apparent. The Rule 23(e) inquiry into fairness is, as a matter of fact, the *only* question (other than class certification) before a district court that is presented with a class settlement. Focusing on that real world question is wholly consistent with the purpose of the predominance requirement, which is designed to “achieve economies of time, effort, and expense.” Fed. R. Civ. P. 23(b)(3), Advisory Committee Note. See also *Califano v. Yamasaki*, 442 U.S. at 701; page 30, *supra*. That purpose surely is served by certifying a concededly manageable settlement class in which the court must determine only whether the settlement was fair.

2. Typicality. “[T]ypicality of claims in a settlement class context requires proof that the interests of the class representative and the class are commonly held for purposes of receiving similar or overlapping benefits from a settlement.” 2 NEWBERG ON CLASS ACTIONS, *supra*, § 11.28, at 11-58. See *General Telephone Co. v. EEOC*, 446 U.S. 318, 330 (1980). Here, the interests of the class representatives are typical of those of all the claimants. The class representatives and other class members “share an interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system.” Pet. App. 226a. All the claimants also share a common injury: occupational exposure to the asbestos products supplied by defendants. *Ibid*. See 1 NEWBERG ON CLASS ACTIONS, *supra*, § 3.13, at 3-76 (“[A] plaintiff’s claim is typical if it arises from the same * * * course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.”) See also *Falcon*, 457 U.S. at 159 n.15.

Although the Third Circuit acknowledged that “the named plaintiffs include a fairly representative mix of futures and injured plain-

tiffs,” it found that the representatives' claims were atypical of the class claims because of “the underlying lack of commonality and attendant conflicts,” including conflicts *among* the non-impaired plaintiffs themselves. Pet. App. 53a. But when the settlement is taken into account, it is evident that there is no lack of commonality.²¹ The Third Circuit's related belief (*ibid.*) that “the futures plaintiffs share too little in common to generate a typical representative” because each may eventually manifest a different disease similarly fails to take into account the common interest of the presently non-impaired plaintiffs in settlement. At this moment, as the district court found (at Pet. App. 231a), *all of the non-impaired plaintiffs share precisely the same interest: achieving adequate compensation for all plaintiffs who manifest any asbestos-related condition during the term of the settlement. That interest is unaffected by the differences in diseases the non-impaired plaintiffs might eventually manifest. Ibid.*²²

²¹ This Court has observed that “[t]he commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.” *Falcon*, 457 U.S. at 157-158 n.13. “Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest.” *Ibid.*

²² The court of appeals did not set aside *any* of the district court's factual findings as clearly erroneous (see Fed. R. Civ. P. 52(a)). Yet the court of appeals' opinion contains statements that appear contrary to those findings. “If [the court of appeals] was of the view that the findings of the District Court were ‘clearly erroneous’ within the meaning of Rule 52(a), it could have set them aside on that basis.

* * * But it should not simply have made factual findings on its own.” *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986).

3. Adequacy of Representation. When the settlement is taken into account, it also is clear that the district court correctly concluded that the representative plaintiffs “fairly and adequately protect[ed] the interests of the class.” Rule 23(a)(4).²³ The Third Circuit held that the named plaintiffs could not adequately represent the class because it believed there were “serious intra-class conflicts” between presently ill and non-impaired plaintiffs. Pet. App. 49a. It listed all the “*potential* conflicts” of interest (*id.* at 48a (emphasis added)) it thought *might* arise between the non-impaired and presently ill plaintiffs in negotiating a settlement, and concluded that “presently injured class representatives cannot adequately represent the futures plaintiffs’ interests and vice versa.” *Id.* at 50a-51a. Pursuant to its holding that each of the Rule 23 “requirements must be satisfied without taking into account the settlement” (*id.* at 39a), however, the court of appeals refused to determine whether any of these supposed hypothetical intra-class conflicts *actually* were reflected in the settlement agreement. *Id.* at 49a-51a. And it ignored the district court’s determination, based on detailed factual findings, that there were no actual conflicts. *Id.* at 49a-51a; see pages 11-12, *supra*.

²³ This inquiry contains two components: whether the interests of the named plaintiffs are sufficiently aligned with those of the class; and whether the class counsel are qualified and serve the interests of the entire class. See *Falcon*, 457 U.S. at 157-158 n.13. Respondents have never challenged the qualifications of class counsel and the court below noted that the objectors’ allegations of collusion were resolved “in favor of class counsel largely on the basis of fact findings that the objectors have not challenged.” Pet. App. 49a. It is therefore settled for present purposes that counsel adequately represented the class. Consequently, we address only the first component of the adequacy inquiry: whether the interests of the named plaintiffs are sufficiently aligned with those of the absentees.

These errors fatally tainted the Third Circuit's conclusion. In fact, this Court has noted the important role played by the Rule 23(e) fairness inquiry in ensuring that potential intra-class conflicts do not infect the settlement terms. See *Evans v. Jeff D.*, 475 U.S. 717, 738-739 (1986) (observing that Rule 23(e)'s requirement of “court approval of the terms of any settlement of a class action” is “wise[]” because it allows the court to determine whether “[t]he potential conflict among members of the class” has affected the terms of the settlement). Courts of appeals accordingly have long recognized that a court's determination that the terms of the settlement are fair presumptively establishes that the class received adequate representation. See page 29, *supra* (citing cases). Moreover, the fairness inquiry is in an important sense a better assurance of adequacy than is a determination made prior to litigation; the settlement terms offer *objective* evidence of the absence of intra-class conflicts of interest, while a before-the-fact determination necessarily is in large part speculative. See pages 28-29, *supra*.

Here, the hypothetical conflict of interest posited by the Third Circuit did not prevent the class representatives from achieving a settlement that is fair for every member of the class.²⁴ Viewing the case from the perspective of the presently impaired plaintiffs, the court of appeals was concerned that their interest in maximizing immediate payouts might be compromised by the non-impaired plaintiffs' interest in preserving funds for payment at a later date (Pet. App. 50a). The district court, however, found that *in fact* the payments to injured plaintiffs reflected “historical settlement averages from the tort system.” *Id.* at 139a. That sort of determination is easy

²⁴ In fact, as Professor Hazard testified and the district court specifically found, there was not even a hypothetical conflict between the presently impaired and non-impaired class members, given their common interest in securing a settlement that maximized recovery for each asbestos-related condition. Pet. App. 185a-186a, 230a-231a.

to make in cases involving “mature mass tort litigation” where “claim values can be established within a relatively narrow range of uncertainty.” Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 949, 950 (1995). And that consideration has obvious relevance here, for the “leading example of mature mass tort litigation involves asbestos.” *Id.* at 949.

On the other hand, the court of appeals worried that non-impaired plaintiffs might be disadvantaged unless the settlement reduced current payments to presently impaired plaintiffs so as to preserve potential future recoveries for non-impaired plaintiffs (Pet. App. 50a). The district court, however, found that there *in fact* were sufficient funds to compensate *all* claimants who eventually qualified for payment. *Id.* at 172a-173a. Moreover, the district court specifically concluded that the settlement gives non-impaired plaintiffs a package of benefits that have “significant value” and compares *favorably* to their current treatment in the tort system. See pages 5-6, *supra*; Pet. App. 174a. Accord *id.* at 173a-176a, 268a. Like an insurance policy, the settlement guarantees these class members adequate compensation in the event that they do manifest asbestos-related diseases. This “insurance” model is a particularly effective means of compensating persons whose injuries, such as exposure to a toxic substance, increase their risk of developing a disease in the future.

[T]he insurance model fully justifies class action settlements that trade fear of cancer and other risk-based mental distress claims for corresponding increases in scheduled payments to compensate for the accrued ultimate injury. Those who bear long-term risk but are fortunate enough never to suffer the ultimate injury benefit *more* from the trade because the insurance against such injury makes them better off than payments of damages for their mental distress.

D. Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases*, 71 N.Y.U.L. REV. 210, 245 (April-May 1996) (emphasis in original).

Finally, the Third Circuit's focus on hypothetical conflicts of interest obscured an overriding concern that all plaintiffs hold in common: achieving a *global* settlement. The Judicial Conference Ad Hoc Committee on Asbestos Litigation noted the “unconscionable burden” of crushing transaction costs and the extreme delay involved in trying cases in the tort system. The Committee accordingly found that “[c]lass action proceedings have the advantages of promoting efficiency and consistency and prevent whipsawing by defendants of plaintiffs' claims as well as scrambles for the assets of limited funds.” *Id.* at 21-22. A class action also prevents lottery-like verdicts in which some plaintiffs receive nothing at all. Without a global settlement, all claimants would be relegated to the uncertainties and inequities of the tort system. And if it were not global, the district court found, petitioners would not enter into *any* class settlement. Pet. App. 179a-183a, 186a, 253a-254a. In these circumstances, the district court was correct in concluding that “there is no antagonism of interest” between class members (*id.* at 230a) and that the settlement is fair to all members of the class (*id.* at 115a-176a, 234a-248a).

4. Superiority. The Third Circuit's decision that a series of individual or state-wide suits would be superior to this class action was based primarily on its concern that “[c]onsidered as a litigation class, * * * the difficulties likely to be encountered in the management of this [class] action are insurmountable.” Pet. App. 54a.²⁵ But because class certification will entail a settlement, rather

²⁵ The Third Circuit also based its decision that a class action was not a superior method of adjudicating these cases on its concern that notification of non-impaired plaintiffs might be inadequate. Pet. App. 56a-57a. It expressly declined to decide, however, “whether the Constitution or Rule 23 prohibits binding futures plaintiffs to a 23(b)(3) opt-out class action” (Pet. App. 56a), and, as noted above, the district court carefully considered the notice issue and, based on the facts

than unmanageable litigation of the many tens of thousands of claims that comprise this “humongous” case (Pet. App. 42a), it is patently clear — especially in light of the district court's thorough fairness analysis — that “a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” Fed. R. Civ. P. 23(b)(3). See Pet. App. 227a-228a; see also *id.* at 106a-109a, 268a-271a. Given the undeniable benefits of class settlement in cases like this one, and the findings of the Judicial Conference Ad Hoc Committee, there can be no doubt that this particular class action is “a significantly improved method for delivering compensation to future victims of asbestos exposure” and “secures important gains for both sides.” Edley & Weiler, *supra*, 30 HARV. J. LEGIS. at 405. It does so, moreover, in a setting where class members may opt out if they are dissatisfied. The superiority requirement therefore is amply satisfied.

CONCLUSION

The judgment of the court of appeals should be reversed.

before it, was “confident” (*id.* at 272a) that all class members received fair notice. Moreover, the court of appeals' suggestion ignores the fact that the efficiency and fairness advantages of this settlement class action far outweigh any advantages of individual litigation.

Respectfully submitted.

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ADDENDUM

Rule 1. Scope and Purpose of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Rule 23. Class Actions

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all 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.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) 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; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) 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 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 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.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be

members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.