The Quality of Legal Representation in U.S. Class Actions: The Problem of Conflicts

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As an exception to the general rule against nonparty preclusion, class actions depend for legitimacy on adequate representation of the class members. In a pair of decisions in the late 1990s - *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp*., 527 U.S. 815 (1999) - the United States Supreme Court articulated what seemed to observers at the time to be a newly-muscular approach to assuring adequacy by addressing intra-class conflicts through subclassing with separate counsel.

Amchem and *Ortiz* involved mass torts, which present special challenges because of the variety of divisions among class members they entail along a range of dimensions, including exposure, injury, and applicable law. These differences can lead to conflicts among class members regarding the level of case investment in particular claims or issues, participation in settlement class(es), and allocation of settlement proceeds.

Applied to such conflicts, *Amchem* and *Ortiz* have proved over time to be susceptible of relatively strong and weak reads. The strong read sees subclassing with separate counsel as the preferred structural solution to a relatively broad range of class conflicts. *See, e.g*., *" Literary Works in Elec. Databases Copyright Litig. v. Thomson Corp*., 654 F.3d 242, 253 (2nd Cir. 2011). The weak read confines *Amchem* and *Ortiz* to a narrow characterization of their facts (e.g., allocation conflicts between presently-injured and exposure-only plaintiffs). The weak read emphasizes that subclassing is only one of several options for assuring structural fairness; and it sees such structural assurances as necessary only when conflicts are sufficiently "fundamental," e.g., where class members' interests are directly adverse. *See, e.g*., *In re Pet Food Prods. Liab. Litig*., 629 F.3d 333, 346-48 (3rd Cir. 2010).

The Circuit Court split over how to read *Amchem* and *Ortiz* mirrors a split among commentators. Favoring a relatively stronger read are those commentators who focus on the interests of class members, e.g., by applying agency cost theory (e.g., Erichson (2014); Coffee (1986)) or Rawlsian individual rights theory (e.g., Tidmarsh (2014)). Favoring a significantly weaker read are those scholars who more pragmatically see conflicts as an inevitable, routine, and thus acceptable part of group litigation (Silver & Baker (1998)), or who focus on the needs of the system (e.g., Gilles & Friedman (2006)).

The weak read has proved to be far more popular among the lower federal courts. *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, in the United States District Court for the Eastern District of Louisiana, MDL No. 2179, is a case in point. On April 20, 2010, a blowout, explosion and fire aboard the Deepwater Horizon, a semi-submersible offshore drilling rig, led to deaths, other personal injuries, and an unprecedented discharge of oil into the Gulf of Mexico that continued for nearly three months. On August 10, 2010, the Judicial Panel on Multidistrict Litigation transferred all cases in the federal system arising out of this event, involving economic loss, property damage, and personal injury claims, to a single trial court judge, Judge Carl J. Barbier. Judge Barbier appointed 19 attorneys at the front end of the litigation to serve as members of the Plaintiffs' Steering Committee, tasked with managing pretrial activity in the matter. By March 2, 2012, the parties had reached an agreement-in-principle to resolve the proceedings on a class basis, and by May 2, 2012, the Court granted joint motions for preliminary approval of two settlement agreements involving two distinct settlement classes, one for economic loss and property damage claims, and the other for medical injuries. Those settlements were ultimately granted final approval and are being implemented.

Despite the sprawling array of claims and interests covered by these settlements, the same undifferentiated group of 19 lawyers appointed at the outset to serve in the MDL leadership was appointed to serve at the back end as settlement class counsel in both the economic loss and property damage and the medical class action settlements. This was so despite tensions among the class members across and within those classes. By way of example, the economic loss and property damage settlement makes distinctions among class members based on a range of factors, including geographic location and type of work or property; those distinctions reflect allocation tradeoffs class counsel arguably made among class members. Similarly, the medical benefits settlement class certified in the BP oil spill litigation in 2012 includes both

presently injured and exposure-only claimants, something even the narrowest readings of *Amchem* and *Ortiz* appear to prohibit.

How did we get from *Amchem* to the BP settlement? One answer, posited by Professor Jack Coffee in an affidavit supporting final approval of the BP class settlements, is that BP is *sui generis*, or at least is sufficiently distinct from *Amchem* and *Ortiz* to justify avoiding subclassing. Another possibility is that BP is the result of a confluence of doctrinal, structural and systemic factors. The trail from *Amchem* to BP results in part from the fact that *Amchem* continued a tradition of grounding the Rule 23 adequacy inquiry in the Due Process Clause, which does surprisingly little work in the U.S. federal system of procedure. Moreover, since *Amchem* and *Ortiz* were decided, mass tort litigation in the United States has largely been federalized via the Class Action Fairness Act of 2005, and centralized in 28 U.S.C. §1407 multidistrict litigation proceedings where leadership teams are appointed at the front end pursuant to standards that are far less rigorous than even a weak read of *Amchem* would suggest; by the time of any class settlement at the back end of such administratively aggregated proceedings, lead counsel have already resolved the matter, making it inconvenient to rigorously evaluate conflicts and the need for subclassing. That structural pressure favoring a particularly weak read of *Amchem* aligns with a systemic bias in favor of settlement. Not surprisingly, given the foregoing, the strong read has few champions, especially in the mass tort setting.

Proponents of a more aggressive stance toward managing conflicts have strategies they can pursue. Conflicts need not be evaluated only through a Due Process lens. For example, the adequacy requirements of Rule 23(a)(4) and the criteria for appointment of class counsel in 23(g) can be read as requiring or at least permitting an inquiry into the optimal level of competition among counsel, rather than merely an inquiry into whether conflicts rise to the level of a Constitutional violation. Similarly, ethics doctrine, long underutilized in class practice, can be brought to bear by expanding upon the balancing test announced in a line of intermediate appellate court cases that includes *Lazy Oil Co. v. Witco Corp*., 166 F.3d 581 (3rd Cir. 1999); conflicts among counsel under that approach should be addressed by subclassing whenever doing so would, on balance, benefit class members. Regardless of the doctrinal lens used to evaluate conflicts, the appointment of interim class counsel at the front end of litigation, at the time MDL leadership counsel are appointed, can address the structural problem created by the current mass tort litigation timeline, by better aligning the criteria for appointing counsel under the MDL statute and the class action rule.