PUBLICCITIZEN Protecting Health, Safety and Democracy CH

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-304

IN RE INTER-OP HIP PROSTHESIS PRODUCT LIABILITY LITIGATION

On Petition for Permission to Appeal and Appeal from the United
States District Court for the Northern District of Ohio,
No. 01-CV-9000, Hon. Kathleen M. O'Malley, U.S.D.J.

MEMORANDUM OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF PETITIONERS-APPELLANTS' REQUEST FOR EXPEDITED APPEAL AND/OR STAY OF INJUNCTION

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September 28, 2001

INTEREST OF AMICUS

Amicus curiae Public Citizen was founded in 1971 as a public advocacy, lobbying, and litigation organization. On behalf of its 150,000 members, Public Citizen works toward the enactment and effective enforcement of consumer protection laws. As part of this work, Public Citizen's attorneys regularly represent objectors to class action settlements in state and federal trial courts, courts of appeals, and the Supreme Court. In the last nine years alone, Public Citizen has represented objectors in more than two dozen nationwide class action settlements in which the named representatives and their attorneys were inattentive to the needs and divergent interests of the absent class members whom they were supposed to represent. Public Citizen's attorneys represented lead objectors in the landmark Supreme Court decision, *Amchem Prods, Inc. v. Windsor*, 521 U.S. 591 (1997), which, like this case, involved a nationwide class settlement that presented fundamental intra-class conflicts. Public Citizen's attorneys also argued on behalf of objecting class members in *In re Telectronics Pacing Systems, Inc.*, 221 F.3d 870 (6th Cir. 2000), which is perhaps this Court's most significant decision in this area and is closely related to the issues presented in this case.

Like the objecting class members in this case, Public Citizen's clients in other matters have found themselves subject to overly broad injunctions – injunctions issued in violation of basic limits on the subject-matter and personal jurisdiction of the courts. Public Citizen believes that such injunctions not only add to the coercive effect to class settlements that are not in the best interests of objecting class members, but also infringe individual liberty and damage the legitimacy of the judicial system.

Public Citizen is filing this memorandum because the injunction at issue in this case, in combination with features of the proposed settlement agreement that have been designed to penalize class members who choose to opt out of the class, nullifies critical procedural protections that are afforded to dissident class members by Federal Rule of Civil Procedure 23 and are compelled by constitutional due-process principles. Public Citizen supports the appropriate use of federal class actions. The certification of a settlement class in this case,

however, coupled with the novel provisions of the proposed settlement agreement and the sweeping injunction now entered by the district court, threatens to become a state-of-the-art model for how to squelch the rights of objecting class members.

INTRODUCTION AND STATEMENT OF FACTS

On August 29, 2001, the district court in this case conditionally certified a Rule 23(b)(3) settlement class consisting of all persons in the United States who had received apparently defective hip implants manufactured by the defendants, Sulzer Orthopedics, Inc., Sulzer Orthopedics, Ltd., and Sulzer Medica, Ltd. (collectively "Sulzer"). Simultaneously, the court preliminarily approved a settlement agreement that, among other things, imposes a "lien" on all of Sulzer's assets, in order to prevent any class members who opt out from collecting judgments they may independently obtain against Sulzer.

Little more than two weeks later, on September 17, 2001, Sulzer requested – and the district court issued on the very same day – an injunction forbidding "any and all persons" from prosecuting actions "related in any way" to Sulzer hip implants against virtually any defendant in any state or federal court. The injunction protects not only the Sulzer defendants, but also other persons and companies who are not defendants in the class action and will not contribute financially to the proposed settlement. Although the district court entered the injunction without prior notice to those it purports to restrain (let alone an opportunity for them to be heard), it is neither a temporary restraining order nor a preliminary injunction, but a permanent injunction of indefinite duration. It purports to bind the entire world (including class members who eventually opt out of the court's jurisdiction) until it is modified, vacated, or lifted by the court.

The same objecting class members who have petitioned this Court for a Rule 23(f) appeal from the class certification order have now also appealed the injunction (which is an appealable order under 28 U.S.C. 1292(a)(1)), and have requested a stay of the injunction and expedited consideration of their appeal.

SUMMARY OF ARGUMENT

The district court entered its injunction with complete disregard for fundamental limitations on its jurisdiction. *First*, the court ignored the obvious, substantial, and antecedent issue of its apparent lack of subject-matter jurisdiction. *Second*, the injunction purports to bind persons over whom the district court lacks personal jurisdiction – that is, the vast majority of absent class members who lack minimum contacts with the forum and have not yet been afforded an opportunity to opt out of the class. *Third*, the injunction contributes to the near-total vitiation of the opt-out rights of class members – rights that are essential not only to the legitimacy of the Rule 23(b)(3) class certification but also to the assertion of personal jurisdiction over the absent class members. *Cf. Becherer v. Merrill Lynch, Pierce, Fenner Smith, Inc.*, 193 F.3d 415 (6th Cir. 1999) (en banc).

A federal court can only operate within the bounds of the fundamental jurisdictional and constitutional limits on its power. On its face, the district court's injunction strays so far beyond those limits that immediate appellate correction is needed. The request of the petitioners-appellants for a stay of the injunction and/or expedited consideration of their appeal should be granted.

ARGUMENT

A. The District Court Entered the Injunction Without Considering Its Subject-Matter Jurisdiction.

A federal court has no power to enter a binding injunction – or any other valid judgment or order – if it lacks subject-matter jurisdiction. "'Without jurisdiction the court cannot proceed at all in any cause.'" *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 97 (1998) (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)). It follows that, before taking any action, a district court must first assure itself that th matter before it presents a case or controversy that is within the scope of some statutory grant of subject-matter jurisdiction. As this Court has explained, "[t]he primacy of jurisdiction is evident, for without it courts have no power." *Douglas v. E.G. Baldwin & Assocs.*, 150 F.3d 604, 606 (6th Cir. 1998). Thus, "federal courts have an independent obligation to investigate and police the boundaries of their own jurisdiction." *Id.*

In this case, the district court's jurisdiction over the putative class action is ostensibly based on diversity of citizenship. Whether a federal court may exercise jurisdiction over such an action depends on satisfaction of the $75,000 amount-in-controversy requirement of 28 U.S.C § 1332. Section 1332, the Supreme Court has held, requires that *each* class member's claim satisfy the amount-in-controversy requirement. *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). There is currently a split in the circuits over whether *Zahn*'s holding survived the enactment of the supplemental jurisdiction statute, 28 U.S.C. § 1367. Decisions of district courts in this Circuit have sided wit

the better-reasoned decisions, and with the express statements in the legislative history, in holding that § 1367 does not alter the *Zahn* rul *See*, *e.g.*, *Casteel v. Sara Lee Corp.*, 51 F. Supp. 2d 816 (E.D. Mich. 1999).

In this case, the putative class encompasses a subclass consisting of roughly 2,500 members who have already suffered severe injury: Their hip implants have failed, and they have had to undergo what is euphemistically referred to as "revision" surgery to remove and replace the failed implants. The class also includes a second subclass of another 23,500-some members (and their spouses) whose hip implants have *not* yet failed, and who have *not* had to undergo revision surgery. The uninjured class members are said to be unlikely *ever* to suffer these injuries, because fewer than 10% of those who have not yet had revision surgery are expected to suffer a failure of their implants.

There is little doubt that the claims (if any) of the vast majority of the class who have not yet suffered implant failure do not satisfy the jurisdictional amount. The settlement allocates only nominal amounts to these class members, and it is extremely doubtful that applicable state law would permit such implant recipients (let alone their *spouses*) recoveries anywhere near $75,000. Indeed, even leaving aside the issue of jurisdictional amount, many of these class members have not suffered *any injury at all* and thus cannot satisfy the threshold Articl III case-or-controversy requirement of "injury in fact." *See Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 635-38 (3d Cir. 1996) (Wellford, J., concurring), *aff'd on other grounds sub nom. Amchem Prods, Inc. v. Windsor*, 521 U.S. 591 (1997); *cf. In re Joint Eastern & Southern Dist. Asbestos Litigation*, 14 F.3d 726, 730-32 (2d Cir. 1993).

Despite the obvious jurisdictional issues presented by these facts, no order yet entered by the district court in this case shows any sign tha the district judge has even considered subject-matter jurisdiction. That omission is particularly glaring in this case, for the defendants, on whose motion the injunction was issued, have themselves raised the issue of jurisdiction in their answer, which *denies* the class action complaint's allegations that the plaintiffs satisfy the $75,000 amount-in-controversy requirement and that the district court has jurisdiction under § 1332. *Thus, the very parties who have invoked the authority of the court to issue the injunction have themselves denied that the court has the power to issue it*. Of course, a federal court is supposed to consider its own jurisdiction even where the parties have not raised the issue or have affirmatively agreed that jurisdiction is present. *See Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986); *accord*, *Douglas*, 150 F.3d at 607-08. To issue an injunction without addressing the question of jurisdiction in the face of the movin party's *denial* that there is jurisdiction is inexplicable.

In *Carlough v. Amchem Products, Inc.*, 10 F.3d 189 (3d Cir. 1993), the Third Circuit unambiguously condemned the practice of issuing anti suit injunctions in class actions before resolving the issue of subject-matter jurisdiction. There, in the face of pending and unresolved challenges to its jurisdiction, the district court had issued an anti-suit injunction, stating only that the injunction would be lifted "if it is finally determined that this Court lacks jurisdiction." *Id.* at 198. The Third Circuit, noting that authority to issue an injunction against state-court proceedings under the All Writs and Anti-Injunction Acts is "wholly derivative" of the district court's subject-matter jurisdiction over an actio held that "the application of the Anti-Injunction and All Writs Acts should have been *preceded* by the satisfaction of jurisdictional prerequisites." *Id.*

Here, unlike in *Carlough* (where the district court at least recognized that it would eventually have to address its subject-matter jurisdiction the district court did not even pay lip-service to this requirement. Nor has the district court sought to cure its omission by a post-hoc affirmation of its jurisdiction, as did the district court in *Carlough*. That is not surprising, for any serious consideration of the issue would likely reveal that subject-matter jurisdiction is lacking for the vast majority of the class. In the absence of a determination that the district court in fact possesses subject-matter jurisdiction, its injunction must be vacated.

B. The District Court Lacks Personal Jurisdiction over Absent Class Members Who Have Not Yet Been Afforded Opt-Out Rights.

The district court's issuance of an injunction purporting to bind "any and all persons" is a classic example of judicial overreaching. In *Chas National Bank v. Norwalk*, 291 U.S. 431, 436-37 (1934), the Supreme Court held that an injunction directed at "all persons" is "clearly erroneous" to the extent it applies to persons over whom the district court has not acquired personal jurisdiction. *Chase Bank* was an application of the familiar principle that no court can issue an in personam judgment that is binding on a person over whom it lacks jurisdiction. *See*, *e.g.*, *Richard v. Jefferson County, Alabama*, 517 U.S. 793, 798 (1996); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 39 U.S. 100, 110 (1969); *Hansberry v. Lee*, 311 U.S. 32, 40 (1940). As the Supreme Court has explained, "[p]ersonal jurisdiction, too, is 'an essential element of the jurisdiction of a district court,' without which the court is 'powerless to proceed to an adjudication.'" *Ruhrgas AG v. Marathon Oil Corp.*, 526 U.S. 583, 584 (1999) (quoting *Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374, 382 (1937)).

Thus, a court may not issue or enforce an injunction against a person "over whom it never acquired personal jurisdiction." *Hatahley v.*

United States, 351 U.S. 173, 182 (1956). A court's power to bind persons to its injunctions extends only to parties over whom it has properly acquired personal jurisdiction (as well as persons legally identified with or acting in concert with such parties):

> [N]o court can make a decree which will bind anyone but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is pro tanto brutum fulmen, and the persons enjoined are free to ignore it. It is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who therefore can have their day in court.

Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 832-33 (2d Cir. 1930) (Hand, J.); *accord*, *Swetland v. Curry*, 188 F.2d 841, 843 (6th Cir. 1951).

It has long been established that due process limits the extent to which courts may exercise personal jurisdiction. *Pennoyer v. Neff*, 95 U.S 714 (1878). With respect to defendants, the constitutional requisites of personal jurisdiction are presence in, or minimum contacts with, the forum and service of process – or, alternatively, consent. *See*, *e.g.*, *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Where the issue is personal jurisdiction over absent members of a plaintiff class, the requirements are somewhat less stringent, but only somewhat. I *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the Supreme Court held that before a court entertaining a damages class action ma exercise personal jurisdiction and issue a judgment binding upon an absent class member who lacks minimum contacts with the forum, it must provide the class member "notice plus an opportunity to be heard in the litigation," and, "at a minimum," "an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Id.* at 812. The premise of the Court's opinion in *Shutts* was that exercise of personal jurisdiction under such conditions was permissible because "[a]ny plaintiff may consent to jurisdiction," and the failure to exercise an opportunity to opt out after adequate notice was sufficient to demonstrate a class member's consent to the exercise of personal jurisdiction. *Id.* at 812.

In light of *Shutts*, a district court may not exercise personal jurisdiction over – and thus may not issue an injunction binding upon – absent class members who lack minimum contacts with the forum and have not been provided the opportunity to opt out of the class. As the Third Circuit held in *In re Real Estate Title & Settlement Services Antitrust Litigation*, 869 F.2d 760, 769 (3d Cir. 1989), "if the [absent class] member has not been given the opportunity to opt out in a class action involving both important injunctive relief and damages claims, the member must either have minimum contacts with the forum or consent to jurisdiction in order to be enjoined by the district court that entertained the class action."

In this case, of course, class members will ultimately be afforded an opt-out right (at least nominally). But the *eventual* offer of an opt-out right cannot support the here-and-now assertion of personal jurisdiction necessary to sustain the district court's injunction. Under *Shutts*, consent (in the form of failure to exercise the opt-out right) is the sole foundation of the court's personal jurisdiction over absent class members who lack minimum contacts. Thus, the court cannot exercise personal jurisdiction over class members who have not yet receive notice and an opportunity to opt out and who therefore cannot be deemed to have consented to the court's jurisdiction.

In *Carlough v. Amchem Products*, the Third Circuit addressed precisely this issue and held that a district court lacked personal jurisdiction to issue an anti-suit injunction directed at absent class members who had not yet been afforded the right to opt out. The court stated:

> [W]e find no precedent for assuming consent prior to notice and the commencement of the opt out period. Thus, with neither express or inferred consent, and prior to notice and the commencement of the opt out period, the district court did not have personal jurisdiction over the [absent class members] and did not have authority to bind their actions when it issued the injunction. …
>
> We do not believe that the mere promise, *even certain eventuality*, that the opportunity to opt out of the class will be offered to absen class members satisfies the requirements of due process as defined by *Shutts*. …
>
> Thus, prior to notice and the opt out period, and absent minimum contacts with the … forum or consent to its jurisdiction, a federal injunction enjoining state action would violate due process.

10 F.3d at 200-01 (emphasis added).

Here, as in *Carlough*, absent class members have "not yet been afforded the opportunity to opt out – an essential component of personal jurisdiction in lieu of the more traditional minimum contacts." *Id.* at 200. Moreover, as in *Carlough*, the lack of personal jurisdiction over absent class members "is further evidenced in the record by clear indications that [they] did not consent to the district court's jurisdiction," *id.* at 200, including objections to the court's jurisdiction and many requests to opt out of the class. The district court's response has only

made the problem of lack of jurisdiction worse: The court has entered an order refusing to accept any opt outs until after a "final class notice" is sent out sometime in January 2002. Thus, the district court has ensured that its injunction will run for at least four months before can possibly acquire personal jurisdiction over absent class members. During that entire period, the injunction will stand as a violation of the due process rights of any class member who lacks minimum contacts with Ohio and has not affirmatively consented to jurisdiction.

The flaws in the court's injunction do not end there. The injunction, on its face, purports to bind even persons who ultimately opt out of the class. It is not limited to "class members," but extends to "any and all persons," and there is no provision for automatic termination of the injunction for those who opt out of the class. However, the district court cannot possibly have jurisdiction to bind persons who opt out of the class. Under *Shutts*, the very point of "opting out" is that the class member who does so *does not consent* to the court's personal jurisdiction. Since consent is the sole basis for binding persons who otherwise lack minimum contacts with the forum, it follows that the court has no personal jurisdiction over, and no power to enter judgments or orders binding upon, absent class members who exercise their right to opt out. *See, e.g., Becherer v. Merrill Lynch*, 193 F.3d at 426. Class members who opt out, like strangers to a non-class action, "are not parties before us; they have not constructively or affirmatively consented to personal jurisdiction; and they do not … have minimum contacts with [the forum]. Therefore due process deprives us of personal jurisdiction and prevents us from issuing the injunction prayed for …." *In re General Motors Corp. Prods. Liab. Litig.*, 134 F.3d 133, 141 (3d Cir. 1998).

In sum, from the standpoint of personal jurisdiction, the injunction entered by the district court both starts too early (insofar as it purports to bind absent class members who have not yet been afforded the chance to opt out) and lasts too long (insofar as it claims to bind class members even after they exercise their opt-out right). In both respects, it exceeds the power of the court and violates the due process righ of absent class members.

C. The District Court's Injunction Negates the Opt-Out Right.

The settlement class conditionally certified by the district court was already severely flawed because of the inclusion in the settlement agreement of a lien provision that purports to place the defendants' assets beyond the reach of any class member who opts out, thereby severely burdening the opt-out right if not rendering it totally illusory. By forbidding class members – even those who ultimately choose to opt out – to litigate their own claims against the defendants, the injunction completes the job of negating the opt-out right that the lien provision began.

The point of the opt-out right is not simply to enable a class member to disclaim participation in the benefits of the class action (or the class settlement); it is to free him entirely from the effects of membership in the class and enable him to "litigate … on his own." *Shutts*, 472 U.S at 813. To tell a class member that he is free to opt out, but that if he does, he can neither pursue his own claims nor collect his own judgment against the defendants, is to tell him that he has no real opt-out right at all. As this Court has put it, "[i]t would defeat the clear purposes of Rule 23 to bar a group of plaintiffs, who were putative members of the class but either opted out or retained their right to opt out, from litigating separately." *Becherer*, 193 F.3d at 426. Yet that is what the district court has now done, in blatant disregard of this Court's en banc decision in *Becherer*. As a result, "contrary to the Rule's opt-out provision," absent class members in this case "would be held hostage to litigation that they could not control" if the district court's injunction were allowed to stand. *Id.* If a court may not only preven absent class members from collecting judgments against the defendants, but also prevent them even from litigating their own claims, "their due process-based right to timely opt out of the settlement under the rule and their timely reservation of that right would be meaningless." *Id.*

Here, the district court has compounded the problem by entering an injunction that not only bars litigation against the defendants, but also precludes suits against the defendants' so-called corporate grandparent as well as doctors, hospitals, and medical supply companies, non of which is a defendant in this case, and none of which is contributing a penny to the proposed settlement. The broad scope of the court's injunction is particularly ironic, because the court's order conditionally certifying the class and preliminarily approving the settlement rejected the argument that the lien provision in the settlement would burden the opt-out right largely because a class member who opted out would be free to sue the corporate grandparent and other third parties. Specifically, the court stated that the opt-out right remained a viable option because a claimant could rationally choose the strategy of opting out and "obtaining a judgment against certain 'Sulzer-related' defendants that may not have contributed settlement funds in an amount satisfactory to the claimant (e.g., Sulzer AG)" and "obtaining a judgment against certain other defendants that have not contributed to the settlement (e.g., the surgeon or medical supply company)." August 31 Mem. & Order, at 41. In our view, those possibilities were never sufficient to justify the burden placed on the opt-out right by the lien provisions of the settlement agreement. But for present purposes, the key point is that the district court has now turned its back on its own analysis by entering an order specifically forbidding lawsuits against the very parties it had said class members who chose to opt out would be free to sue.

The protection thus offered to non-parties who are not contributing to the settlement further calls into question the validity of the district court's certification of the class. In *Telectronics*, the release granted to parent companies who were not parties and did not contribute to the settlement was one of the principal factors this Court relied on in holding that the certification of the settlement class was improper. *See* 22 F.3d at 878-80. Although the class members here, unlike in *Telectronics*, have a theoretical right to opt out of the settlement that releases the non-contributing non-parties, the injunction moves this case closer to *Telectronics*, because class members who may opt out are now indefinitely barred from bringing suit against those non-parties.

CONCLUSION

In this case, the district court has allowed its apparent conviction that the proposed settlement agreement is in the best interests of the class and the defendants to override its fidelity to the principles that the federal courts are courts of limited jurisdiction and that, as this Court has emphasized, "the legitimacy of the judiciary … relies upon the ability of courts to resist the temptation of exerting their authority beyond their constitutionally defined role." *Douglas v. E.G. Baldwin & Assocs.*, 150 F.3d at 606. Perhaps partly because it was entered without the benefit of any genuine adversary procedures, the district court's injunction suffers from fundamental and obvious jurisdictional flaws. The injunction should be vacated forthwith, and, accordingly, the petitioner-appellants' requests for a stay and/or expedited consideration of their appeal should be granted.

Respectfully submitted,

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