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 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 PETITION FOR PERMISSION TO APPEAL AND FOR STAY PURSUANT TO FRCP 23(f) AND FRAP 5

SCOTT L. NELSON
BRIAN WOLFMAN
ALLISON M. ZIEVE
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

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MEMORANDUM OF AMICUS CURIAE PUBLIC CITIZEN, INC.

INTEREST OF AMICUS

Amicus 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 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. *See, e.g.*, *In re Diet Drugs Prods. Liab. Litig.*, 1999 U.S. Dist. Lexis 14881 (E.D. Pa. Sept. 27, 1999); *Clement v. American Honda Finance Corp.*, 176 F.R.D. 15 (D. Conn. 1998); *In re Ford Motor Bronco II Prods. Liab. Litig.*, 1995 U.S. Dist. Lexis 3507 (E.D. La. Mar. 20, 1995); *see generally* Henry J. Reske, "Two Wins for Class Action Objectors," 82 A.B.A. Journal 36, 37 (June 1996) (highlighting Public Citizen's work representing absent class members). Public Citizen's attorneys argued on behalf of lead objectors in two landmark cases from the Third Circuit involving nationwide class settlements that presented fundamental intra-class conflicts, *see Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom. Amchem Prods, Inc. v. Windsor*, 521 U.S. 591 (1997); *In re General Motors Corp. Pick-up Truck Fuel Tank Litig.*, 55 F.3d 768 (3d Cir. 1995). Perhaps most significantly for purposes of this case, Public Citizen's attorneys presented argument on behalf of objecting class members in this Court in *In re Telectronics Pacing Systems, Inc.*, 221 F.3d 870 (6th Cir. 2000), a decision that is closely related to the issues presented in this case.

Public Citizen is filing this brief because the class certification order at issue in this case threatens to undermine the protections Public

Citizen has fought for on behalf of class members who object to and wish to opt out of settlements negotiated by putative class representatives and their attorneys in derogation of the rights and interests of absent class members. If the use of the settlement class in this case is allowed to stand, it is likely to become a model for similar settlements in other matters, further undermining the rights of objecting class members nationwide.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents novel and important legal issues concerning the use of settlement class actions, issues whose immediate appellate resolution will significantly advance the development of the law of class actions. The case involves the latest attempt to evade the protections afforded class members by the Supreme Court's decisions in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and by this Court's ruling in *In re Telectronics Pacing Systems, Inc.*, 221 F.3d 870 (6th Cir. 2000). The district court's order conditionally certifying the class and preliminarily approving the settlement agreement in this case invokes Rule 23(b)(3)'s authority for the certification of an opt-out class, but in fact creates the functional equivalent of a non-opt-out, "limited fund" class under Rule 23(b)(1)(B) by denying plaintiffs who opt out any access to the funds of the principal defendants. And the order does so without any showing that the prerequisites for certification of a "limited fund" class are present. This fundamental defect in the district court's certification order, together with a number of other significant legal issues presented by the order, merit review by this Court under Rule 23(f).

ARGUMENT

A. Rule 23(f) Permits Appeals of Certification Orders Posing Issues Whose Resolution Would Advance the Development of the Law of Class Actions.

Federal Rule of Civil Procedure 23(f) permits interlocutory appeal, by permission of the Court of Appeals, from district court orders granting or denying class certification. The Rule specifies no criteria for the exercise of the appellate court's discretion with respect to whether to entertain such an appeal. The Advisory Committee note states that "[p]ermission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive," but that "[p]ermission is most likely to be granted when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation."

Although appeals from Rule 23(c) certification orders should be sparingly granted, appellate decisions construing Rule 23(f) have taken up the Advisory Committee's suggestion that permission to appeal is appropriate when a certification order presents an important legal issue that requires immediate appellate resolution. The defining quality of such an issue for purposes of the Rule is that it is a question whose early resolution "would advance the development of the law governing class actions." *Richardson Elec., Ltd. v. Panache Broadcasting of Pa., Inc.*, 202 F.3d 957, 958 (7th Cir. 2000); *accord Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 835 (7th Cir. 2000); *Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000).

Here, the district court's certification order presents novel and unsettled issues whose appellate resolution will unquestionably "advance the development of the law governing class actions." Moreover, because of the immediate impact that the district court's order has on the rights of class members, and because of the likelihood that the use of Rule 23(b)(3) in this case will serve as a model for other settlements designed to evade the strictures of *Amchem*, *Ortiz* and *Telectronics*, immediate resolution of the issues presented is clearly warranted.

B. This Case Presents the Important Question Whether the Holdings of *Ortiz* and *Telectronics* May Be Evaded Through the Use of Devices that Impair the Effectiveness of a Class Member's Right to Opt Out.

The essential features of the settlement class in this case can be briefly summarized as follows. The class consists of: (i) a relatively small number of plaintiffs (approximately 2,600) who have been severely injured by the defendants' apparently defective hip implants and have had to undergo surgery to replace the implants; and (ii) a much larger number of plaintiffs (approximately 20,000) who have received the implants but have not yet suffered injury and are apparently unlikely to suffer injury in the future. As to the first group of class members, the proposed settlement offers medical expense reimbursement and damages payments that are a fraction of what a jury would likely award for their injuries. As to the second group of class members, the settlement offers medical monitoring benefits and damages payments that, while modest, could well exceed any remedies that would be available under relevant state laws to persons not yet actually injured. The settlement provides that the defendants shall make payments from their assets, up to stated limits, into various trust funds to provide for the payments to the class. It goes on, however, to provide that *all* of the defendants' assets shall be encumbered by liens in favor of the class members – liens that, the settlement agreement provides, shall be operative *only* as against claims by plaintiffs who opt out of the class.

The settlement agreement specifically requires that the trustee for the class release the liens on any assets the defendants wish to use for any business purpose *except for* payment to a plaintiff who has opted out of the class. The agreement further grants releases to various persons and entities who are contributing nothing to the settlement.

The effect of the settlement agreement – and in particular of the liens it imposes on the defendants' assets – is to render ineffective the right of a class member to opt out and pursue remedies otherwise available to her. Although the district court maintained that opting out remains a viable option, the reality is different for a plaintiff facing the prospect that the principal defendants' assets will be totally unavailable to satisfy a damages claim for an indefinite period of time. As one of the defendants' counsel stated after the district court entered its order, "It's malpractice if a lawyer gets his client out of the class. . . . Their clients could very well get nothing." Moreover, contrary to the district court's suggestion, the disincentive to opting out is not based on the *benefits* offered by the settlement, as Rule 23 presumably envisions, but rather from the *penalty* it imposes on those who opt out.

Certification of a settlement class under these circumstances marks a radical departure from the principles established by recent case law in both the Supreme Court and this Circuit. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the Supreme Court announced the principle that due process requires that class members be afforded the opportunity to opt out of an action for damages in most circumstances. Rule 23 incorporates this due process principle by limiting the use of non-opt-out classes to those situations where a single adjudication of the rights of the class vis-à-vis the defendant is genuinely necessary. In *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), the Supreme Court gave teeth to Rule 23's limits by holding that a non-opt-out class may not be maintained on a "limited fund" rationale where the limits on the fund are not preexisting but are the product of the class action settlement itself. *Id.* at 848-50. This Court followed suit in *In re Telectronics Pacing Systems, Inc.*, 221 F.3d 870 (6th Cir. 2000), rejecting the use of a settlement class where the lawyers for the parties had artificially "created" a "limited fund." *Id.* at 880.

Here, the certification of the settlement class represents an attempt to accomplish precisely what the Supreme Court and this Court condemned in *Fibreboard* and *Telectronics*. The settlement agreement in this case creates an artificially limited fund by setting aside some – but not all – of the defendants' assets to satisfy class claims and placing all other assets off limits through the lien device. Plainly, such a agreement could not be used as the predicate for a Rule 23(b)(1)(B) class under *Ortiz* and *Telectronics*. Of course, to avoid the effect of those precedents, the class has nominally been structured as a Rule 23(b)(3) opt-out class, but the opt-out right has been effectively negated through the use of the liens. Thus, just like the class members in *Ortiz* and *Telectronics*, class members here have been relegated to the artificially limited fund or nothing.

Moreover, just as in *Telectronics*, the settlement class here is being used as a device to achieve the same ends as a discharge in bankruptcy while avoiding the procedural and substantive protections for creditors that bankruptcy offers. But as *Telectronics* held, the mere threat that a company's liabilities may ultimately exceed its assets does not justify the preemptive use of a settlement class to impose limits on the recovery of one group of claimants: "The district court cannot discharge the debt in advance of the occurrence [of insolvency], thereby usurping the bankruptcy scheme through settlement, even [if] it believes such an avenue to be in the best interests of most of the plaintiffs." 221 F.3d at 880. Yet that is exactly what the district court has done in this case.

C. The District Court's Certification Order Also Poses Other Important Legal Questions.

The certification order in this case presents a number of other important issues, which the district court's order does not adequately address. They include:

1. <u>Whether Subject-Matter Jurisdiction Exists</u>. The great majority of the class members in this case are persons (and their spouses) who have received hip implants, but have not yet suffered, and are unlikely to suffer, actual injury resulting from implant failure. These class members receive benefits under the settlement amounting to less than $10,000. It appears certain that most of these as-yet uninjured class members, if they have claims at all under relevant principles of state law, have claims that could not possibly lead to a recovery in excess of $75,000, the amount in controversy requirement under 28 U.S.C. § 1332. The exercise of diversity jurisdiction over this class action thus runs afoul of the holding of *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), that in a class action brought under § 1332, each class member's individual claim must satisfy the jurisdictional amount. Despite this obvious jurisdictional issue, the district court entered its certification and preliminary approval order without addressing whether it actually had subject matter jurisdiction over the case.

2. <u>Whether the Subclasses Truly Received Independent Representation in Settlement Negotiations</u>. This case presents an inherent conflict between the interests of the two subclasses – those who have already suffered serious injury and have well-grounded claims for substantial recovery from the defendants, and those who have not yet suffered injury and whose claims are far less substantial, both legal

and monetarily. The Supreme Court's decisions in *Amchem* and *Ortiz* require that such a class, if certifiable at all, be "divi[ded] into homogeneous subclasses under Rule 23(c)(4)(B), *with separate representation to eliminate conflicting interests of counsel*." *Ortiz*, 527 U.S at 856 (emphasis added) (citing *Amchem*, 521 U.S. at 627). Here, although the district court's order designates an attorney to serve as counsel for each of the two subclasses, the majority of the class attorneys represent the entire class without differentiation – thus failing to "eliminate conflicting interests of counsel." Even more importantly, the Court's certification opinion fails to address whether the two subclasses in fact received genuinely separate representation when it really mattered – in the actual negotiation of the settlement agreement. Separate representation once the terms of the deal have already been established is the judicial equivalent of closing the barn door after the horses are gone.

3. Whether There is a Genuine Predominance of Common Questions. Rule 23(b)(3) permits certification of a class only when "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Here, where one segment of the class consists of persons actually injured while the other segment comprises those whose injuries are at this point only potential, any finding that common questions "predominate" is highly suspect. The claims of the as-yet uninjured class members raise a variety of difficult issues that would likely turn on differences in state laws about the claims and remedies available to such persons as well as the individual circumstances of the potentially injured class members. *See Amchem*, 521 U.S. at 623-25. *Amchem* teaches that the certification of such a class under Rule 23(b)(3) is "ordinarily not appropriate," and the district court's certification order here fails to reflect the "caution" counseled by the Supreme Court in such circumstances. 521 U.S. at 625.

4. Whether the Court's Rule 23(b)(2) Certification Was Erroneous. Curiously, the district court certified the class in this case both as a 23(b)(3) opt-out class *and* as a 23(b)(2) non-opt-out class, apparently because the settlement agreement provides for medical monitoring, which the district court considered a form of injunctive relief. Leaving aside the contradiction in certifying the class as both an opt-out and non-opt-out class, certification under Rule 23(b)(2) is inappropriate in an action in which the primary relief sought is damages. *See Jefferson v. Ingersoll International, Inc.*, 195 F.3d 894, 898 (7th Cir. 1999); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 410-11 (5th Cir. 1998).

A. The Issues Presented Warrant Immediate Review.

Immediate appellate resolution of the important issues presented by the district court's certification order is appropriate for two principal reasons. First, although the order certifies the class "conditionally" and approves the settlement "preliminarily," it has immediate practical consequences. Counsel for the class and for the defendants have taken the position that the liens on the companies' assets have already gone into effect. Moreover, the settlement agreement provides that, within seven days of preliminary approval, all of the available liability insurance proceeds of the defendant companies will be placed in trust for the class, subject to liens placing these funds beyond the reach of members who opt out.

Thus, although it is unclear how, legally, a settlement agreement with a class can become effective when it has only been preliminarily approved, the district court's order has an immediate coercive effect on class members who might otherwise wish to opt out of the class. The agreement purports to place assets beyond the reach of class members now, presenting a significant impediment to their ability to enforce their legal rights. The order's immediate impact on class members militates against delay in appellate resolution of its validity.

Second, the clever agreement devised in this case, employing purported "liens" to create the functional equivalent of a non-opt-out class, is likely to be swiftly emulated by other mass tort defendants and putative class counsel seeking to avoid the strictures of *Ortiz* and *Telectronics*. Early appellate resolution of the legitimacy of the device employed here will significantly advance the development of class action law and influence the resolution of many cases to come.

CONCLUSION

For the foregoing reasons, the Petition for Permission to Appeal and for Stay should be granted.

Respectfully submitted,

Scott L. Nelson
Brian Wolfman
Allison M. Zieve
PUBLIC CITIZEN LITIGATION GROUP

1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Attorneys for Amicus Curiae

Public Citizen