

WHEN THE STARS ALIGN: NARROWING THE SCOPE OF APPELLATE REVERSALS OF JUDICIALLY APPROVED CLASS ACTION SETTLEMENTS

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I. INTRODUCTION

Class actions, especially those filed in or removed to federal court, are ever more prominent in the landscape of modern American litigation.¹ Since Congress passed the Class Action Fairness Act of 2005 (CAFA), which vastly expanded diversity jurisdiction in the context of class actions,² district courts have seen a veritable explosion of class action diversity filings and removals.³ In the Third Circuit alone, district courts have experienced an almost *fourfold* increase in such actions in the wake of CAFA's passage.⁴

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¹ See, e.g., Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1723, 1754 (2008) (“[F]ederal courts have seen an increase in diversity removals and, especially, original proceedings in the post-CAFA period as a result of the expansion of the federal courts’ diversity of citizenship jurisdiction.”).

² Federal district courts now possess, *inter alia*, original jurisdiction over classes whose members number 100 or more and whose claims, in the aggregate, exceed \$5 million. 28 U.S.C. §§ 1332(d)(2), (d)(5)(B) (2006).

³ Overall, the average number of post-CAFA federal class actions filed and removed per month more than doubled. See Lee & Willging, *supra* note 1, at 1723; see also EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., PROGRESS REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES ON THE IMPACT OF CAFA ON THE FEDERAL COURTS 1 (2007), available at [http://www.fjc.gov/public/pdf.nsf/lookup/cafa1107.pdf/\\$file/cafa1107.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/cafa1107.pdf/$file/cafa1107.pdf). Additionally, according to the Federal Judicial Center, “reliable data on class action activity in most state court systems simply do not exist.” *Id.* at 4. Nevertheless, CAFA aside, there appears to be an upward trend in state class action filings as well. *Id.* at 4–5.

⁴ Lee & Willging, *supra* note 1, at 1760. This relatively large increase in the Third Circuit has generally been attributed to non-CAFA factors, such as a more plaintiff-friendly attitude toward class certification. *Id.* at 1761. See generally EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: FOURTH INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 22 (2008), available at <https://bulk.resource.org/courts.gov/fjc/cafa0408.pdf>. One recent study of

With the growing salience of class actions to the federal docket, the necessity of their efficient and timely adjudication cannot be overstated. The federal judiciary is notoriously overburdened,⁵ and any opportunity to alleviate that burden should be seized upon. Conversely, any attempt to needlessly exacerbate that burden should be avoided.

Notwithstanding dismissals and state court remands, federal diversity class actions are most commonly concluded through settlements.⁶ In fact, one recent quantitative study of over 250 class actions noted that in *every* case where a putative class was certified, a settlement was eventually negotiated and approved.⁷ Therefore, to

securities class actions emphasizes the point that, immediately post-CAFA, federal filings dramatically increased. Dr. Renzo Comolli & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2013 Full-Year in Review*, NERA ECONOMIC CONSULTING 2 (Jan. 21, 2014), available at http://www.nera.com/nera-files/PUB_2013_Year_End_Trends_1.2014.pdf. In 2006, the year immediately following CAFA's passage, there were 132 federal securities class actions filed. *Id.* By 2008, that number had swelled to 245. *Id.* In the years since, though, the post-CAFA boom appears to have leveled out; but case filings have remained above 200 every year since 2008. *Id.*

⁵ See Diarmuid F. O'Scannlain, *Striking a Devil's Bargain: The Federal Courts and Expanding Caseloads in the Twenty-First Century*, 13 LEWIS & CLARK L. REV. 473 (2009). According to Circuit Judge O'Scannlain, the caseload facing federal district judges is "crushing," and "the actual burden [on appellate courts] is even greater than the raw numbers suggest." *Id.* at 475; Gary Fields & John R. Emshwiller, *Criminal Case Glut Impedes Civil Suits*, WALL ST. J., Nov. 10, 2011, <http://online.wsj.com/article/SB10001424052970204505304577001771159867642.html> ("Civil litigation has ground to a halt," [District] Judge McCuskey said, adding that 'you've got a right to sue but you do not get a right to a speedy jury trial.'). Indeed, some congressional debate surrounding the passage of CAFA dealt with the practical effect it would have on the federal courts. Lee & Willging, *supra* note 1, at 1732–33. For a recent examination of the effect the federal budget sequester is having on the courts, see Dahlia Lithwick, *Even Before the Shutdown, Federal Courts Had Already Been Crippled By the Sequester*, SLATE (Oct. 14, 2013), available at http://www.slate.com/articles/news_and_politics/jurisprudence/2013/10/federal_courts_and_shutdown_the_sequester_had_already_crippled_american.html ("One of the great underreported outrages of the past year is the degree to which the judicial branch has been limping along on inadequate funds. Following sequestration last March, \$350 million was stripped from the courts' budget. The net result has been a disaster in the administration of justice in this country.").

⁶ EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., IMPACT OF THE CLASS ACTION FAIRNESS ACT ON THE FEDERAL COURTS: PRELIMINARY FINDINGS FROM PHASE TWO'S PRE-CAFA SAMPLE OF DIVERSITY CLASS ACTIONS 6 (2008) (sampling over 250 cases). Indeed, settlement is an overwhelmingly prevalent disposition in civil litigation in general. See, e.g., Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUDIES 111 (2009).

⁷ Lee & Willging, *supra* note 6, at 11. This was so regardless of whether certification came in conjunction with, or separately from, settlement approval. *Id.*

mitigate the growing pressure on the federal judiciary, courts should eschew the formation of unnecessary impediments to either the initial approval or the finalization of class action settlements.

This Comment, specifically, argues against one such impediment: the notion that structurally inadequate⁸ class action settlements must be reversed even where curing this inadequacy will not increase the settling class's ultimate financial recovery. The Comment focuses a series of cases (*Dewey I*, *Dewey II*, and *Dewey III*) in which the United States Court of Appeals for Third Circuit forced such a reversal, notwithstanding the fact that the reworked settlement provided no additional monetary advantage to any class members.

Part II of this Comment provides some preliminary factual background to these cases. Part III delineates some of the general requirements and procedures for—along with fundamental policies behind—settling class actions. Next, Part IV further explores the specific settlement at issue in the *Dewey* cases. And Part V explores the underlying source of the counterintuitive doctrine espoused by the Third Circuit in *Dewey II*, the Supreme Court's opinion in *Amchem Products, Inc. v. Windsor*.⁹

Finally, Part VI asserts that courts should *not* reverse class action settlements for mere structural inadequacy, especially of the kind as was at issue in the *Dewey* cases. Instead, when faced with such errors at the district court level, appellate courts should apply the harmless error doctrine. That is, if changing the language of the settlement to comply with the law will not alter the class members' financial recovery, then the courts of appeals should let the settlement stand.

II. BACKGROUND

In July of 2002, the sky unleashed a heavy rainstorm on John M. Dewey's new Volkswagen Passat.¹⁰ The sunroof of the car, which was supposed to drain water out of the vehicle, instead rerouted the

⁸ "Structurally inadequate" and "procedurally inadequate" are used in this Comment as interchangeable labels for settlements that, while in technical violation of the Federal Rules of Civil Procedure governing class actions, nevertheless monetarily protected the interests of all class members as if those Rules had been met. See *infra* Part III.

⁹ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

¹⁰ Class Action Complaint at ¶¶ 17–18, *Dewey v. Volkswagen of Am., Inc.*, 728 F. Supp. 2d 546 (D.N.J. 2010) *rev'd and remanded sub nom.* *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170 (3d Cir. 2012) (No. 07CV02249), 2007 WL 2260530 [hereinafter *First Complaint*].

downpour *into* the car, flooding the rear passenger-side floorboards.¹¹ From there, water leaked into parts of the automatic transmission and, in conjunction with other damage, caused the car to break down.¹²

In February of 2006, Francis Nowicki purchased a pre-owned 2002 Audi A6 Quattro.¹³ In March of 2008, Mr. Nowicki opened the door to his car and noticed that half a foot of water had frozen on the passenger-side floor.¹⁴ Mr. Nowicki removed as much of the ice and water as he could and began driving.¹⁵ But as he drove, the car started to shake violently.¹⁶ Pulling into a rest stop to address the issue, he eventually called a tow truck.¹⁷

The experiences of Messrs. Dewey and Nowicki were by no means unique. In response, they and a group of similarly aggrieved car owners filed a class action,¹⁸ alleging that certain Volkswagen and Audi¹⁹ models were defectively designed.²⁰ The parties engaged in years of extensive class-certification and merits discovery.²¹

¹¹ *Id.*

¹² *Id.* at ¶¶ 4, 17–18.

¹³ Fourth Amended Complaint and Jury Demand at ¶ 31, *Dewey v. Volkswagen of Am., Inc.*, 728 F. Supp. 2d 546 (D.N.J. 2010) *rev'd and remanded sub nom.* *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170 (3d Cir. 2012) (No. 07CV02249), 2008 WL 8039626 [hereinafter *Fourth Complaint*].

¹⁴ *Id.* at ¶ 33.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *First Complaint*.

¹⁹ The broader corporate entity that oversees both car brands is known as the Volkswagen Group (“Group”). The Group, as it calls itself, directly controls the manufacturing of the Volkswagen and Audi lines, as well as Bentley, Bugatti, and Lamborghini, among others. Volkswagen Aktiengesellschaft, *Facts and Figures Navigator 2012*, 2 (Dec. 31, 2012), http://www.volkswagenag.com/content/vwcorp/info_center/en/publications/2012/03/navigator-2012—facts-and-figures.bin.html/binarystorageitem/file/Navigator_21_09_2012_en_WEB.pdf.

²⁰ *First Complaint*, at ¶ 18.

²¹ *Dewey v. Volkswagen of Am., Inc.*, 728 F. Supp. 2d 546, 559 (D.N.J. 2010) (*Dewey I*) *rev'd and remanded sub nom.* *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170 (3d Cir. 2012) (*Dewey II*). By way of general introduction, the Federal Rules of Civil Procedure anticipate class certification—meaning, judicial approval of the very structure of the lawsuit as representative—as a step primary to conclusions on the merits (or by settlement). FED. R. CIV. P. 23(c)(1)(A). Thus, some courts go so far as to stay merits discovery until after class certification. 1 JOSEPH M. McLAUGHLIN, *McLAUGHLIN ON CLASS ACTIONS* § 3:10 (9th ed. 2012). Although this type of discovery bifurcation can help limit needless litigation in the event class certification is denied, many courts ignore this potential benefit because of the risk of needless

Eventually, in early 2010, the plaintiff class and the defendants moved jointly for preliminary approval of a settlement.²²

The parties sent notice of the impending settlement to over 5 million class members.²³ As a result, 203 class members filed objections to the settlement.²⁴ The district court exhaustively scrutinized every component of the settlement, and analyzed each objection.²⁵ Subsequently, on July 30, 2010, in *Dewey v. Volkswagen of America* (“*Dewey I*”), the court approved the settlement.²⁶

On May 31, 2012, in *Dewey v. Volkswagen Aktiengesellschaft* (“*Dewey II*”), the Court of Appeals for the Third Circuit reversed the district court’s approval of the settlement.²⁷ According to the Third Circuit, the structure of the settlement was such that the class representatives did not adequately represent the class as a whole.²⁸ The court therefore reversed the settlement approval and remanded to the district court to restructure the settlement so as to fairly account for

disputes over the precise line between facts related to merits and facts related to certification. *Id.* Here, discovery on both certification and merits proceeded until settlement negotiations began. *Dewey I*, 728 F. Supp. 2d at 559.

²² *Dewey I*, 728 F. Supp. 2d at 560. As will be discussed further, unlike traditional lawsuits—which may be settled without judicial sanction—parties to a class action may only settle with court approval. FED. R. CIV. P. 23(e). The specific nature of the settlement will be described *infra*, in Part IV. For now, this settlement provided a number of types of relief; but, most relevant for this Comment, was the creation of an \$8 million fund from which class members could seek compensation for damaged cars. *Dewey II*, 681 F.3d at 189.

²³ *Dewey I*, 728 F. Supp. 2d at 574.

²⁴ *Id.* The larger purposes behind class action settlement approvals, and the role of objectors in those approvals, will be examined in more detail below. Preliminarily, though, the Federal Rules of Civil Procedure permit any class member to object to proposed settlements. FED. R. CIV. P. 23(e)(5). The approving district court uses these objections to measure the fairness of the settlement. *See* 2 JOSEPH M. McLAUGHLIN, McLAUGHLIN ON CLASS ACTIONS § 6:10 (9th ed. 2012); *see also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 812 (3d Cir. 1995) (“In an effort to measure the class’s own reaction to the settlement’s terms directly, courts look to the number and vociferousness of the objectors.”).

²⁵ *Dewey I*, 728 F. Supp. 2d at 563–615.

²⁶ *Id.* at 616. *See* FED. R. CIV. P. 23(c)(1), *supra* note 21, as to the requirements of class certification being prerequisites to any conclusion to litigation, either by way of a judgment or settlement. Common practice, therefore, is for classes to be deemed preliminarily certified where settling defendants and plaintiffs support certification. *See generally* 2 JOSEPH M. McLAUGHLIN, McLAUGHLIN ON CLASS ACTIONS § 6:7 (9th ed. 2012). Then, when the final fairness hearing is held on the acceptability of the settlement—after notice of the settlement has been given to class members and objectors have had opportunity to file objections—a proper analysis of class certification is simultaneously undertaken. *Id.*

²⁷ *Dewey II*, 681 F.3d at 190.

²⁸ *Id.*

the interests of the entire class.²⁹

Finally, on December 14, 2012, in yet another case captioned *Dewey v. Volkswagen of America* (“*Dewey III*”), the district court approved a new settlement agreement, restructured according to the guidelines set forth by the Third Circuit.³⁰

Though relatively rare, appellate reversals of class action settlement approvals do not themselves raise novel issues.³¹ Instead, what makes this series of cases unique is the fact that, though *structurally* inadequate, the original approved settlement would still have *functionally* awarded the non-representative class members the funds to which they were entitled.³²

Put a different way, the Third Circuit reversed because the original settlement did not incorporate certain requirements of the Federal Rules of Civil Procedure that safeguard the rights of the absent class members who do not directly participate in the negotiation of the settlement.³³ But even with this procedural inadequacy, the original settlement afforded the absent class members the same financial recovery they would have received—and, in fact, *did receive*—under the revised settlement.³⁴ Whether structurally appropriate or not, both the adequately *and* inadequately represented class members benefited under the original settlement—and benefited in such a way as to make their respective monetary recoveries equal in fact.³⁵

In a footnote, the Third Circuit acknowledged this curiosity and offhandedly dismissed it, instead suggesting that the ultimate lack of

²⁹ *Id.*

³⁰ *Dewey v. Volkswagen of Am. (Dewey III)*, 909 F. Supp. 2d 373, 374 (D.N.J. 2012).

³¹ For example, in *Reynolds v. Beneficial Nat. Bank*, 288 F.3d 277 (7th Cir. 2002), the Seventh Circuit concluded that the district judge abused his discretion in approving a settlement between consumers and a tax preparation company and a bank. There, the inadequacy involved the district judge’s insufficient scrutiny of the interactions between class representatives’ attorneys and the defendants, opening the door to the possibility of a collusive effect between these parties at the expense of the class as a whole. *Id.* at 282–83. Or, for another example, in *Staton v. Boeing Co.*, 327 F.3d 938, 940 (9th Cir. 2003), the Ninth Circuit reversed approval of a class action settlement based, first, on an incorrect methodology for calculating attorneys’ fees, and, second, on a wildly disparate—and unjustified—differential between monetary recovery for named class members and unnamed class members.

³² *Dewey II*, 681 F.3d at 189 n.19.

³³ *Id.* at 189.

³⁴ *Id.* See also *Dewey v. Volkswagen of Am. (Dewey III)*, 909 F. Supp. 2d 373, 385 (D.N.J. 2012); *infra* note 139.

³⁵ *Dewey II*, 681 F.3d at 189.

a monetary disparity between the old and new settlements was essentially irrelevant.³⁶ The structural inadequacy was sufficient to warrant reversal.³⁷

The notion that class action settlements with only *structural* inadequacies should be reversed, however, risks imposing unnecessary litigation costs, especially in the context of massive class action lawsuits. The gargantuan effort required by parties to obtain settlements in these cases should not be so easily undermined.³⁸ Certainly, district court decisions must be reviewable; occasionally, they warrant reversal.³⁹ Indeed, the Federal Rules' structural requirements protect all class members and should not be ignored in the first instance. But courts of appeals must also engage in cautious analysis before reversing a sensitively negotiated and judicially sanctioned settlement.⁴⁰

III. CLASS ACTION SETTLEMENTS AND THE ADEQUACY REQUIREMENT

As a framework for complex litigation, the class action has been described as “probably the most powerful joinder device in the United States.”⁴¹ Because of this power—rooted in the unique phenomenon of being able to bind “absent class members”—the modern Federal Rules of Civil Procedure built various procedural protections into the class action.⁴²

³⁶ *Id.* at 189 n.19.

³⁷ *Id.*

³⁸ *See infra* text accompanying notes 97–100.

³⁹ *See supra* note 31.

⁴⁰ Indeed, some courts of appeals delineate a standard of review for class action settlements that appears to go beyond standard abuse of discretion analysis. *See, e.g.,* Staton v. Boeing Co., 327 F.3d 938, 960 (9th Cir. 2003) (“[T]he district court’s final determination to approve the settlement should be reversed only upon a *strong* showing that the district court’s decision was a *clear* abuse of discretion.”) (emphasis added) (internal quotation marks omitted); Flinn v. FMC Corp., 528 F.2d 1169, 1173 (4th Cir. 1975) (“So long as the record before [the trial court] is adequate to reach an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated and form an educated estimate of the complexity, expense and likely duration of such litigation, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise, [the settlement should not be overturned].”) (internal quotation marks omitted). Admittedly, the Third Circuit does not appear to adopt this framework. *See, e.g., Dewey II*, 681 F.3d at 182; *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 812 (3d Cir. 1995).

⁴¹ STEPHEN N. SUBRIN & MARGARET Y. K. WOO, LITIGATING IN AMERICA: CIVIL PROCEDURE IN CONTEXT 193 (2006).

⁴² These protections are found throughout Rule 23, the rule governing class actions. *See, e.g.,* FED. R. CIV. P. 23(e)(5).

At the heart of the class action is Federal Rule of Civil Procedure 23(a),⁴³ which delineates the four basic requirements of this type of group litigation.⁴⁴ Each of these is fundamental, but Rule 23(a)(4), “[t]he adequacy of the class’s representation[,] is the *sine qua non* of modern class-action practice.”⁴⁵ Stated differently:

The class action is an awkward device, requiring careful judicial supervision, because the fate of the class members is to a considerable extent in the hands of a single plaintiff (or handful of plaintiffs, when . . . there is more than one class representative) whom the other members of the class may not know and who may not be able or willing to be an adequate fiduciary of their interests.⁴⁶

By definition, a class action precludes all plaintiffs from being active litigants and advocates for their interests. Absent class members must rely on the class representatives—those members of the class that *are* active participants in the suit—to protect their interests as well. By way of illustration, one fear regarding the adequacy of representation concerns so called “red-carpeting.”⁴⁷ Judges carefully scrutinize fee

⁴³ As a historical note, it is worth stating here that the modern class action has its roots in certain equitable principles born of English common law. And the notion that in some limited circumstances, parties to a case could bind other parties found expression in American law as well, with early landmark cases such as *Smith v. Swormstedt*, 57 U.S. 288, 303 (1853), and *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 367 (1921). These, in turn, gave way to a more sophisticated formulation for class actions in the 1938 Federal Rules and, subsequently, a revision in 1966 that brought Rule 23 into existence. See SUBRIN & WOO, *supra* note 41, at 194–95.

⁴⁴ FED. R. CIV. P. 23(a). (“One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable [“numerosity”]; (2) there are questions of law or fact common to the class [“commonality”]; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class [“typicality”]; and (4) the representative parties will fairly and adequately protect the interests of the class [“adequacy”].”).

⁴⁵ THOMAS D. ROWE, JR., SUZANNA SHERRY & JAY TIDMARSH, *CIVIL PROCEDURE* 646 (2d ed. 2008).

⁴⁶ *Culver v. City of Milwaukee*, 277 F.3d 908, 910 (7th Cir. 2002).

⁴⁷ 32B AM. JUR. 2D *Federal Courts* § 1947 (2013) (citing *Sutter v. Horizon Blue Cross Blue Shield of N.J.*, 966 A.2d 508 (N.J. Super. Ct. App. Div. 2009)). See, e.g., *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991) (“[T]here is also a conflict inherent in cases like this one, where fees are paid by a quondam adversary from its own funds—the danger being that the lawyers might urge a class settlement at a low figure or on less-than-optimal basis in exchange for red-carpet treatment on fees.”); *Piambino v. Bailey*, 757 F.2d 1112, 1139 (11th Cir. 1985) (“Because of the potential for a collusive settlement, a sellout of a highly meritorious claim, or a settlement that ignores the interests of minority class members, the district judge has a heavy duty to ensure that any settlement is ‘fair, reasonable, and adequate’ and that the fee awarded plaintiffs’ counsel is entirely appropriate.”).

awards for counsel of the class representatives.⁴⁸ Courts worry about these attorneys under-advocating for the class when negotiating with defendants' counsel, securing a higher fee award in exchange for lower class compensation.⁴⁹ Thus, it is essential that class counsel—as well as class representatives—be able to adequately represent the class as a whole. Considering the potential risks to absent class members, it is no wonder that “[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court’s approval.”⁵⁰

IV. *DEWEY V. VOLKSWAGEN*: THE SAGA OF A CLASS ACTION SETTLEMENT

As mentioned in Part II, plaintiffs filed a class action against Volkswagen for alleged water-related defects in certain Volkswagen and Audi models. Like so many others,⁵¹ this suit never went to trial. Instead, in early 2010, the parties petitioned the court for approval of a settlement agreement.

A. *Dewey I: Approval of the First Settlement Agreement*

On July 30, 2010, the district court approved the terms of the aforementioned settlement.⁵² Essentially, the settlement provided the plaintiff class members with three types of relief.⁵³ First, there was an educational component;⁵⁴ all class members were to be sent preventative maintenance information on how to properly inspect and clean the defective sunroofs.⁵⁵ Second, the settlement designated certain car models for free servicing from any authorized Volkswagen dealer.⁵⁶ And third, an \$8 million fund was created to reimburse class members for certain repairs.⁵⁷

⁴⁸ See 32B AM. JUR. 2D *Federal Courts* § 1947.

⁴⁹ *Id.* (citing *Sutter*, 966 A.2d at 508). A similar fear exists concerning underhanded agreements between class counsel and class *representatives*, whereby the attorneys and the class representatives secure substantial payouts for themselves, sidelining absent class members. See *id.*

⁵⁰ FED. R. CIV. P. 23(e). Note also that such approval is only permitted “after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.” FED. R. CIV. P. 23(e)(2). This is generally referred to as the “final fairness hearing.”

⁵¹ See *supra* text accompanying notes 6–7.

⁵² *Dewey I*, 728 F. Supp. 2d at 546.

⁵³ *Dewey II*, 681 F.3d at 175–176.

⁵⁴ *Id.* at 175.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

This \$8 million fund was the subject of the successful objection and the Third Circuit's reversal.⁵⁸ All told, there were approximately five million class members, collective owners of over three million cars.⁵⁹ Though all class members were seeking rectification for appreciably similar defects, these three million cars consisted of a number of vehicle models and years.⁶⁰ Depending on the vehicle owned, the settlement divided the class members into two groups: the "reimbursement group," and the "residual group."⁶¹ The reimbursement group was afforded the ability to presently receive reimbursement from the \$8 million fund for certain damages.⁶² Any money remaining in the fund after class members in the reimbursement group made their claims would be made available to those in the residual group.⁶³

According to the district court, this division was "based on objective criteria, namely the past frequency of failure and the design of the vehicles."⁶⁴ In other words, cars in the reimbursement group more frequently experienced problems than those in the residual group.⁶⁵

⁵⁸ *Id.* at 189.

⁵⁹ *Dewey I*, 728 F. Supp. 2d at 565.

⁶⁰ *Dewey II*, 681 F.3d at 174.

⁶¹ *Id.* at 174–175.

⁶² *Id.* at 173.

⁶³ *Id.* Administratively, the fund was capped at \$8 million. *Id.* The settlement provided that if this were insufficient to satisfy claims in the reimbursement group, the class members in that group would only receive *pro rata* recovery, theoretically leaving class members in the residual group with nothing. *Id.* at 176. Similarly, if the \$8 million were to be sufficient to satisfy *all* claims in the reimbursement group, but not all claims in the residual group, reimbursement group class members would receive full recovery and residual group class members would then receive *pro rata* recovery. *Id.* And, as will be noted below, if the \$8 million fund were to be sufficient to cover *all* claims by all class members, leaving some unclaimed amount, the settlement also provided for the "donation of all unclaimed reimbursement funds to an educational, charitable, or research facility after five years." *Dewey I*, 728 F. Supp. 2d at 561.

⁶⁴ *Dewey I*, 728 F. Supp. 2d at 579.

⁶⁵ *Dewey II*, 681 F.3d at 187. It is worth noting that the objectors, *inter alia*, also objected to the factual contention that cars in the residual group necessarily saw reduced claims:

There appears to be some dispute over whether or not the assignment of individual plaintiffs was actually based, as representative plaintiffs allege, on the relevant claims rates. The . . . Objectors note several outlier car models in the residual group with higher claims rates than certain models in the reimbursement group. We need not address this issue because we conclude that even if representative plaintiffs did assign cars into the various groups based on claims rates, they still

B. Dewey II: Reversal of the Settlement Approval

On May 31, 2012, the Third Circuit reversed the District Court's approval of the settlement.⁶⁶ The circuit found that dividing class members into reimbursement and residual groups was a generally acceptable framework for the administration of the settlement funds.⁶⁷ Nevertheless, in this case, the appellate court concluded that the division demonstrated a fatal flaw in the adequacy of the class's representation.⁶⁸

The difference between potential claims rates for owners of cars in the reimbursement group and those in the residual group was not as clear-cut as the lower court opinion suggested.⁶⁹ The sorting of car models into one group or another was, to borrow the Third Circuit's phrasing, a "line-drawing exercise."⁷⁰ The difference in claims rates was not an either/or proposition; rather, the different cars rested along a spectrum.⁷¹ But—because whichever class members wound up in the reimbursement group would be more advantageously poised to recover from the fund—"[e]very plaintiff in the class had an incentive to maximize the number of plaintiffs in the residual group, while ensuring that they themselves were in the reimbursement group."⁷² Thus, class representatives had an incentive to draw the line just below whichever car models they happened to own, thereby sidelining absent class members and arbitrarily relegating them to the residual group.⁷³

Again, the problem was not *that* there was a line to draw. Instead, the settlement presented deficiencies in representation

could not adequately represent the class.

Id. at 187 n.17. Both the Third Circuit's sidelining of the issue, and this insistence that even proper divisions would not have sufficed, further compound the primacy of structure over substance in the Third Circuit's analysis.

⁶⁶ *Id.* at 170.

⁶⁷ *Id.* at 188. Indeed, the Third Circuit notes Volkswagen's reliance on *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241 (3d Cir. 2009). There, the general acceptability of such recovery schemes was explicitly sanctioned: "This is simply a reflection of the extent of the injury that certain class members incurred and does not clearly suggest that the class members had antagonistic interests. . . . [It] merely created a structure for ensuring that reimbursement is tied to the extent of damages." *In re Insurance Brokerage Antitrust Litig.*, 579 F.3d at 272.

⁶⁸ *Dewey II*, 681 F.3d at 188.

⁶⁹ *Id.* at 187; *see also supra* note 65.

⁷⁰ *Dewey II*, 681 F.3d at 187.

⁷¹ *Id.*

⁷² *Id.* at 187–88.

⁷³ *Id.* at 188.

because of “who drew the line.”⁷⁴ As it happened, there was not a single class representative in the residual group.⁷⁵ A number of class members from the residual group then objected and the district court did, in fact, briefly address the objectors’ contentions:

[T]he division of class members into subclasses receiving different benefits based upon the type of vehicle they own does not necessarily render the settlement unfair or unreasonable, nor does it show a conflict of interest that renders the class representatives unable to adequately represent the class.⁷⁶

Notwithstanding this and the other many objections, the court approved the settlement.⁷⁷

The Third Circuit, however, pointed out that “the interests of the representative plaintiffs and the interests of the residual group aligned in opposing directions.”⁷⁸ According to the circuit, this violated the Rule 23(a)(4) adequacy requirement.⁷⁹ Therefore, the Third Circuit reversed the district court’s approval of the settlement.⁸⁰ The appellate court remanded the case to the district court, recommending that the revised settlement eliminate the reimbursement and residual groups entirely.⁸¹ Thus, all plaintiffs could then seek recovery from the \$8 million fund without some class

⁷⁴ *Id.* at 188–89.

⁷⁵ *Id.* at 187.

⁷⁶ *Dewey v. Volkswagen of Am.*, 728 F. Supp. 2d 546, 579–80 (D.N.J. 2010).

⁷⁷ *Id.* at 616.

⁷⁸ *Dewey II*, 681 F.3d at 188.

⁷⁹ *Id.* at 190.

⁸⁰ *Id.* Procedurally, it was not the approval of the settlement that was reversed. *See id.* at 189. The district court had followed common practice, simultaneously certifying the class and approving the settlement. *See supra* note 26. The Third Circuit technically reversed for a violation of Rule 23(a) (the portion of the rule that goes to class certification) and not Rule 23(e) (the portion of the rule that directly deals with settlement certification); and the reversal was thus on the holding of *Dewey I* that specifically dealt with class certification. *Dewey II*, 681 F.3d at 189 (“We will reverse the District Court’s order certifying the class because the representative plaintiffs fail to satisfy the adequacy requirement in Rule 23(a)(4).”). Still, in this case, as in others similar in nature, class certification and settlement approval are inexorably linked and, indeed, often conflated in both the district court and circuit court opinions. Therefore, for clarity’s sake, the Comment will refer to the reversal of the settlement approval, and not of class certification. Finally, it is also worth noting that adequacy is found directly within Rule 23(e), though, as is common, the Third Circuit emphasizes the reversal as going to Rule 23(a). *See* FED. R. CIV. P. 23(e)(2).

⁸¹ *Dewey II*, 681 F.3d at 189–90.

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members having priority over others.⁸²

C. Footnote 19: The Troubling Doctrinal Proposition Underlying Dewey II

As straightforward as this reversal may appear on its face, the analysis went beyond a simple application of Rule 23(a)(4). Under the terms of the original settlement, the three million cars were not evenly divided into the reimbursement and residual groups.⁸³ Instead, the reimbursement group was approximately *double* that of the residual group.⁸⁴ Assuming a 100% claims rate, the reimbursement group of approximately two million cars would seek \$16 million from the fund.⁸⁵ Clearly, this would exhaust an insufficient \$8 million fund, leaving nothing for the residual claimants and even limiting recovery for those in the reimbursement group.⁸⁶ At first blush, this report underscores the inherent unfairness of the settlement and the inadequacy of representation for the absent class members belonging to the residual.

As early as in *Dewey I*, however, the district court recognized that it was an “unfounded assumption that 100% of the class would seek out the benefits.”⁸⁷ Indeed, though class members were notified of the settlement while the appeal was pending, by the time the Third Circuit promulgated its opinion in *Dewey II*, claims rates were so low that “[r]epresentative plaintiffs project[ed] that the \$8 million reimbursement fund will be sufficient to satisfy the *claims of those in the reimbursement group and the residual group*, if projected claim rates hold true.”⁸⁸

⁸² *Id.* Technically, the Third Circuit made two different recommendations to the district court for it to consider on remand. *Id.* First, as already noted, the parties could eliminate the reimbursement and residual groups. *Id.* As will be made clear, the restructured settlement approved by the district court in *Dewey v. Volkswagen of Am.*, 909 F. Supp. 2d 373, 376–377 (D.N.J. 2012) essentially used this formulation. The Third Circuit did, however, offer an alternative arrangement where, instead of certifying one class with two subgroups, the district court could create two subclasses with two sets of representative plaintiffs. *Dewey II*, 681 F.3d at 189–90.

⁸³ Report of Dr. George C. Eads, Senior Consultant, CRA Charles River Associates, Inc. at 4, *Dewey v. Volkswagen of Am.*, 728 F. Supp. 2d 546 (D.N.J. 2010) (No. 07-cv-2249), 2010 WL 3289031. Dr. Eads explained that, of the total number of approximately three million cars, 1,084,838 were in the residual group. *Id.* at ¶ III.a.

⁸⁴ *Id.* at ¶ III.a.

⁸⁵ *Id.*

⁸⁶ *Id.* The reimbursement group would be forced to accept only *pro rata* recovery, as mentioned *supra* note 63.

⁸⁷ *Dewey I*, 728 F. Supp. 2d 546, 615 (D.N.J. 2010).

⁸⁸ *Dewey II*, 681 F.3d at 189 (emphasis added).

The Third Circuit accepted this valuation; in recommending to the district court that the new settlement simply eliminate the group distinctions,⁸⁹ the circuit noted, “there appears to be no need to create the residual group.”⁹⁰ On this point, the circuit added a footnote [“Footnote 19”], around which this Comment is ultimately constructed:

Volkswagen appears to suggest that the fact that the residual is likely sufficient to satisfy the claims arising out of the residual group implies that the representative plaintiffs adequately represented the class. Such an argument was made in *Amchem*, and was explicitly rejected by the Supreme Court.⁹¹ The adequacy requirement provides *structural* protections during the process of bargaining for settlement. The fact that the stars aligned and the class members’ interests were not actually damaged does not permit representative plaintiffs to bypass structural requirements.⁹²

D. Dewey III: *The Restructured Settlement*

On December 14, 2012, the district court approved the restructured settlement.⁹³ This modified agreement followed the recommendations of the Third Circuit, doing away with the reimbursement/residual distinction.⁹⁴ Echoing the implications of Footnote 19 in *Dewey II*, the district court in *Dewey III* noted that, of the \$8 million in the fund, only \$5 million was actually claimed by class members in the former reimbursement group.⁹⁵ Moreover, the value of claims from the former residual group was projected to be only “between \$466,048.80 and \$782,296.20.”⁹⁶ Said differently, the stars aligned. The residual class members were not actually harmed in the first settlement agreement.

Furthermore, in addition to not offering class members increased recovery, the process of restricting the settlement imposed significant costs on both the parties and the court. Months were

⁸⁹ See *supra* note 83.

⁹⁰ *Dewey II*, 681 F.3d at 189.

⁹¹ A direct quote from *Amchem*, omitted here for lack of context but crucial to the analysis below, can be found *infra* text accompanying note 125.

⁹² *Dewey II*, 681 F.3d at 189 n.19.

⁹³ *Dewey v. Volkswagen of Am.*, 909 F. Supp. 2d 373 (D.N.J. 2012).

⁹⁴ *Id.*

⁹⁵ *Id.* at 393 n.21.

⁹⁶ *Id.*

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spent reworking the terms of the settlement.⁹⁷ The district court returned to motion practice on this case, and held several lengthy hearings, both in-person and over the phone.⁹⁸ Similar to the months of litigation before *Dewey I*, the court opened up the redrafted settlement to a whole new round of objections, several which had to be addressed at length in *Dewey III*.⁹⁹ Attorneys' fee awards increased by over \$100,000.¹⁰⁰

Clearly, the costs of reversal were significant. To no one's surprise (including the Third Circuit), the revised settlement resulted in the same recovery for the former residual class members. Regardless, however, the Third Circuit saw it necessary to reverse.

The glaring question, then, is *why*?

V. *AMCHEM PRODUCTS, INC. v. WINDSOR*: PRELUDE TO *DEWEY II*

A. *Explaining Amchem*

"No settlement class called to our attention is as sprawling as this one," wrote the Supreme Court in *Amchem Products, Inc. v. Windsor*.¹⁰¹

Before the Court in *Amchem* was a massive settlement between plaintiffs and a consortium of twenty asbestos products manufacturers.¹⁰² Asbestos has a long and complicated relationship

⁹⁷ More significant, perhaps, than the months between *Dewey II* and *Dewey III* are the years between *Dewey I* and *Dewey III*. This protracted appeals process is certainly palatable where the outcome is tangibly beneficial. But in the context of the outcome of *Dewey III*, the cost is simply too high.

⁹⁸ See, e.g., *id.* at 377, 378 n.5, 379 n.9, 380.

⁹⁹ *Dewey v. Volkswagen of Am. (Dewey III)*, 909 F. Supp. 2d 373, 388 (D.N.J. 2012).

¹⁰⁰ *Id.* at 390. Furthermore, considering traditional methodologies for the calculations of such awards, this increase was modest. *Id.* at 390–95. Here, possibly due to this case's already protracted nature, the inarguably successful objectors' attorneys sought fractions of the fees (and expenses) they claimed to have incurred. *Id.*

¹⁰¹ 521 U.S. 591, 624 (1997). It is worth noting that *Amchem*, in general, was a landmark case for class action settlement certification. See, e.g., SUBRIN & WOO, *supra* note 41, at 207. Prior to the Court's decision in *Amchem*, various lower courts had relaxed the requirements of Rule 23(a) in the context of certification for the purposes of settlement. See, e.g., *In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996); *White v. Nat'l Football League*, 41 F.3d 402 (8th Cir. 1994); *Malchman v. Davis*, 761 F.2d 893 (2d Cir. 1985). The promulgation of *Amchem*, however, renewed the strength of Rule 23(a) in the context of Rule 23(e) settlement approvals. *Amchem*, 521 U.S. at 621 ("[I]f a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23(a) and (b), and permitting class designation despite the impossibility of litigation, both class counsel and court would be disarmed.").

¹⁰² *Amchem*, 521 U.S. at 599–600.

to Western society's advancement.¹⁰³ The severity of the dark aftermath of global exposure to asbestos was perhaps matched only by the glowing reputation it boasted before being sullied: "Seemingly blessed with useful attributes, such as softness, flexibility and resistance to fire, asbestos was once seen as the silk of a magical mineral world."¹⁰⁴ The use of asbestos,¹⁰⁵ consisting of a number of minerals used for hundreds of years in manufacturing and construction, skyrocketed toward the end of the nineteenth and beginning of the twentieth centuries.¹⁰⁶ The scientific community began publicizing the potential health hazards associated with asbestos as early as the 1930s.¹⁰⁷ But cancer and other asbestos-related diseases only manifest in earnest after decades of exposure.¹⁰⁸ Thus, the then-ubiquitous material's effects resulted in a flood of lawsuits by the 1970s.¹⁰⁹

In 1990, a report issued by the United States Judicial Conference Ad Hoc Committee on Asbestos Litigation determined that this flood of cases could only efficiently be managed through legislative reform at the federal level.¹¹⁰ While Congress did not undertake any such action, the federal judiciary, acting through the Judicial Panel on Multidistrict Litigation, transferred all filed asbestos cases not yet on trial to one district.¹¹¹ Subsequent to this transfer and consolidation, the parties managed to enter into settlement negotiations.¹¹²

The *Amchem* settlement covered two broad types of asbestos plaintiffs: those seeking redress of current injury or disease and

¹⁰³ James E. Alleman & Brooke T. Mossman, *Asbestos Revisited*, SCI. AM., July 1997, at 70.

¹⁰⁴ *Id.* at 70.

¹⁰⁵ Uses included being woven by the Ancient Greeks into handkerchiefs and being placed in schools, office buildings, and ships in the industrial era to guard against fires. *Id.* A popular French legend tells of Emperor Charlemagne lighting an asbestos tablecloth on fire to intimidate dinner guests. *Id.* at 71. And during World War II, the Central Intelligence Agency investigated rumors that the Germans were thwarting a global asbestos shortage through their development of a chemical substitute. *Id.* at 72.

¹⁰⁶ *Id.* at 72-73.

¹⁰⁷ BARRY I. CASTLEMAN, *ASBESTOS: MEDICAL AND LEGAL ASPECTS* 41 (5th ed. 2005).

¹⁰⁸ *Id.* at 102. *See also id.* at 97 (noting that "the average time from onset of exposure to development of cancer was 25 years for lung cancer with asbestosis, and 30 years for peritoneal cancer").

¹⁰⁹ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598 (1997).

¹¹⁰ *Id.* (quoting REPORT OF THE JUDICIAL CONFERENCE AD HOC COMM. ON ASBESTOS LITIG. 2-3 (1991)).

¹¹¹ *Amchem*, 521 U.S. at 599.

¹¹² *Id.*

those—so-called “exposure-only” plaintiffs—seeking the equivalent of insurance against possible future harm.¹¹³ The settlement provided, *inter alia*, for varying payouts for currently injured class members, and guaranteed recovery for exposure-only plaintiffs if and when they developed symptoms of an asbestos-related disease.¹¹⁴ Eventually, the district court approved both class certification and the settlement.¹¹⁵ The Third Circuit, however, in the consolidated case of *Georgine v. Amchem Products, Inc.*, reversed on a number of grounds, including lack of adequate class representation.¹¹⁶

In the *Amchem* cases, the named class representatives included both currently injured class members *and* exposure-only class members.¹¹⁷ No separately represented subclasses were created.¹¹⁸ This engendered a situation where currently injured class representatives were acting on behalf of absent, exposure-only class members and exposure-only class representatives were acting on behalf of absent, currently injured class members.¹¹⁹

The Court held these two groups to be in inherent conflict, neither of which could adequately represent the other.¹²⁰ Those class members seeking redress of current injuries or disease would chase the highest possible current payouts.¹²¹ In contrast, exposure-only plaintiffs—having not yet suffered cognizable injury—would seek minimal immediate recovery for the class.¹²² This group would lobby for inflation protection and provisions that account for the possibility that future and more sensitive medical testing could reveal as-yet undiscovered harmful effects of asbestos exposure.¹²³ As a result of these powerful conflicts of interest, the Third Circuit reversed the approval of the settlement, and the Supreme Court affirmed.¹²⁴

In *Dewey II*, the Third Circuit returned to *Amchem*, grounding Footnote 19’s proposition in a quote from the Supreme Court: “The

¹¹³ *Id.* at 602–04.

¹¹⁴ *Id.*

¹¹⁵ *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994), *vacated*, 83 F.3d 610 (3d Cir. 1996).

¹¹⁶ 83 F.3d 610 (3d Cir. 1996), *aff’d*, 521 U.S. 591 (1997).

¹¹⁷ *Amchem*, 521 U.S. at 626.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 625–26.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Amchem*, 521 U.S. at 625–26.

¹²⁴ *Id.* at 629.

disparity between the currently injured and exposure-only categories of plaintiffs, and the diversity within each category are not made insignificant by the District Court's finding that petitioners' assets suffice to pay claims under the settlement."¹²⁵ In other words, the structural adequacy (the combination of currently injured and exposure-only plaintiffs into one class) did not, ostensibly, result in financial prejudice (as the defendant parties would always be able to afford payments to all harmed class members). Reversal was nevertheless required.¹²⁶ Indeed, in Footnote 19, the Third Circuit used this exact sentence to assert that "[t]he fact that the stars aligned and the class members' interests were not actually damaged does not permit representative plaintiffs to bypass structural requirements."¹²⁷ It is with that proposition that this Comment takes issue.

B. Escaping Amchem

Reversing approval of class action settlements for representative inadequacy that did not cause harm wastes both judicial and party resources. As mentioned in the Introduction, federal dockets are already strained, especially in light of ever-increasing diversity class action litigation.¹²⁸

Where the ordinarily invaluable structural requirements of Rule 23(a) are not met, but the "stars align" and class members are not monetarily prejudiced as a result,¹²⁹ appellate courts should let these

¹²⁵ *Id.* at 626, quoted in *Dewey II*, 681 F.3d at 189 n.19. The assessment that the asbestos defendants would be able to meet any obligations was based on reports submitted to the district court by financial experts. *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 291 (E.D. Pa. 1994), *vacated*, 83 F.3d 610 (3d Cir. 1996). The reports examined the financial viability of the various defendant entities, using an initial ten-year period as a benchmark. *Id.* The reports asserted that, for eleven of the defendants, there was only a 2% chance of default under the weight of all claims. *Id.* For another eleven defendants, the chance of default was 5%. *Id.* And, finally, for the remaining two defendants, the chance of default was 25%. *Id.*

¹²⁶ *Dewey II*, 681 F.3d at 190.

¹²⁷ *Id.* at 189 n.19.

¹²⁸ See *supra* text accompanying notes 1–7.

¹²⁹ In the context of civil litigation, the general result of prejudice against a party is monetary loss. Nonetheless, certainly, in the event a structurally inadequate class action settlement unfairly prejudices a party in some non-monetary, but *tangible*, way, the same analysis should apply and the settlement should still be overturned. Similarly, while the focus of this Comment is the so-called "adequacy requirement," the broader argument—that harmless procedural failings should not automatically require appellate reversal of a class action settlement—could also be applied to other Rule 23 requirements, however unlikely they are to be the subject of such a reversal.

settlements stand, rather than upset the finality of carefully considered and judicially approved agreements. Below, Part VI of this Comment suggests the evidentiary “harmless error doctrine” as a potential legal framework for class action settlement appellate review.

Still, even assuming acceptance of this framework, it is necessary for courts to sidestep the proposition espoused in Footnote 19 of *Dewey II*. As such, this Comment argues that the Third Circuit misinterpreted the Supreme Court’s opinion in *Amchem*. Moving beyond the solitary passage quoted in Footnote 19, a broader examination of the holding in *Amchem* reveals a more complicated picture of the settlement at issue there—a picture that exposes fundamental differences between it and the settlement in *Dewey II*. This being the case, other appellate courts should decline to follow the approach of the Third Circuit. And the Third Circuit itself—perhaps even the Supreme Court—should step in to reverse course of this precedent.

Part V(B)(i) examines the Third Circuit’s misinterpretation, Part V(B)(ii) uses another section of *Dewey II* to further undermine Footnote 19, and Part V(B)(iii) adds an additional policy argument to the reasons why the footnote’s rule should be abandoned.

1. *Dewey II* Incorrectly Interpreted *Amchem*

Again, recall that the Third Circuit cited to the following statement in *Amchem* to undergird its own holding: “The disparity between the currently injured and exposure-only categories of plaintiffs, and the diversity within each category, are not made insignificant by the District Court’s finding that petitioners’ assets suffice to pay claims under the settlement.”¹³⁰ Unlike in Footnote 19, however, the Supreme Court continued:

The terms of the settlement reflect essential allocation decisions designed to confine compensation and to limit defendants’ liability. For example, as earlier described, the settlement includes no adjustment for inflation; only a few claimants per year can opt out at the back end; and loss-of-consortium claims are extinguished with no

¹³⁰ *Amchem*, 521 U.S. at 626, *quoted in Dewey II*, 681 F.3d at 189 n.19. The presence of two potentially misaligned groups of class members in both cases certainly makes comparisons between the two tempting, if not inevitable. See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994), *vacated*, 83 F.3d 610, 630 (3d Cir. 1996) (“[T]he settlement does more than simply provide a general recovery fund. Rather, it makes important judgments on how recovery is to be *allocated* among different kinds of plaintiffs, decisions that necessarily favor some claimants over others.”).

compensation.¹³¹

Thus, unlike what can be gleaned from Footnote 19, the Supreme Court did not rest its decision only on the grounds of some theoretical structural deficiency. Present in that settlement agreement was a structural deficiency that *manifested* in financial harm to one group over another.

By way of example, “the [*Amchem*] settlement includes no adjustment for inflation.”¹³² Any future injuries that exposure-only class members claimed would not be upwardly adjusted for the always-decreasing value of money.¹³³ This is a very tangible disadvantage. According to the Bureau of Labor Statistics, since 1997—the year *Amchem* was decided—the value of \$1.00 has inflated by as much as 44%.¹³⁴ For plaintiffs needing treatment for cancer or other diseases, this is quite a significant jump.¹³⁵ And added to the other shortcomings mentioned by the Court, this settlement plainly and financially favored the then injured plaintiffs at the expense of the exposure-only group.¹³⁶ Indeed, the “undivided set of representatives could not adequately protect the discrete interests of both currently afflicted and exposure-only claimants.”¹³⁷

Contrast this with the statement made in *Dewey II*: “The fact that the stars aligned and the class members’ interests were not actually damaged does not permit representatives to bypass structural requirements.”¹³⁸ This assertion is unqualified and, given the more

¹³¹ *Id.* at 626–27.

¹³² *Id.* at 627.

¹³³ *Id.*

¹³⁴ CPI INFLATION CALCULATOR, http://www.bls.gov/data/inflation_calculator.htm (last visited Feb. 11, 2013) (illustrating the purchasing power of \$1.00 in 2012).

¹³⁵ *But see Amchem*, 521 U.S. at 638 (Breyer, J., dissenting) (“An inflation adjustment might not be as valuable as the majority assumes if most plaintiffs are old and not worried about receiving compensation decades from now. There are, of course, strong arguments as to its value. But that disagreement is one that this Court is poorly situated to resolve.”).

¹³⁶ *Id.* at 611.

¹³⁷ *Id.* To a degree, even the Third Circuit acknowledges some of the inherent differences between the settlement in *Amchem* and that in *Dewey II*. See *Dewey v. Volkswagen Aktiengesellschaft (Dewey II)*, 681 F.3d 170, 185 (3d. Cir. 2012) (“This case bears some resemblance to *Amchem* and raises some of the same concerns. . . . This resulted in a misalignment of interests—certain members of the class had an incentive to pursue protections for future claims, while the representative plaintiffs lacked any such incentive. Here, on the other hand, the alignment of interests is not so starkly problematic.”).

¹³⁸ *Dewey II*, 681 F.3d at 189 n.19.

complex picture in *Amchem*, not a natural interpretation of the Supreme Court's holding.¹³⁹

Yes, in *Amchem*—like in *Dewey*—there was a structural representative adequacy problem with the division of the class.¹⁴⁰ And yes, in *Amchem*—like in *Dewey*—this structural representative adequacy problem did not seem to bear practically on the size of the settlement negotiated; there was enough money to go around.¹⁴¹ But in *Amchem*—unlike in *Dewey*—the problem *did* produce a tangible detriment to the inadequately represented faction.¹⁴² “[T]he settlement unfairly disadvantaged those without currently compensable conditions in that it failed to adjust for inflation or to account for changes, over time, in medical understanding.”¹⁴³

¹³⁹ On this point, by way of devil's advocacy, it is necessary to posit that a similar substantive qualification could theoretically be asserted about the settlement at issue in *Dewey II* as well. It is certainly possible that the Rule 23(a)(4) deficiency did indeed cause the residual group tangible, financial harm. There was obviously a conceptual scenario in which the \$8 million fund was completely or partially exhausted by the reimbursement group, leaving either nothing or reduced *pro rata* recoveries for the residual group. See, e.g., *supra* note 63. Though high recovery rates are not common, were not expected here, and *indeed did not manifest*, an argument could be made that the terms of the settlement were facially unfair. The Third Circuit raises this possibility in another footnote: “there remained a chance, however remote, that the fund would not be sufficiently large.” *Dewey II*, 681 F.3d at 187 n.15. Indeed, the actual terms of the restructured settlement considered this possibility and made some adjustments to the contours of the \$8 million fund. *Dewey v. Volkswagen of Am. (Dewey III)*, 909 F. Supp. 2d 373, 385 (2012). The fund remained capped at \$8 million only to the degree that, were this amount not to be exhausted by the end of the claims period, any differential would go to charity, as was provided for in the original agreement. *Id.* See also *supra* note 63. What changed from the first settlement to the new settlement, however, was that if this \$8 million fund *was* exhausted, Volkswagen would fully pay *any* timely claims in excess of the \$8 million. *Dewey III*, 909 F. Supp. 2d 373, 385 (2012). Practically, the \$8 million was always expected to suffice, and appeared to be more than enough to pay all claims even by the promulgation of *Dewey III*. See *supra* text accompanying notes 95–96. Still, this modification technically created an *unlimited* claims fund. On its face, this argument then makes the above assertion—that there is analytical space between *Amchem* and *Dewey II*—a theoretical straw man. The text of Footnote 19, however, renders this hypothetical irrelevant. The Third Circuit was unabashed in its proposition that “the stars aligned and the class members’ interests were not actually damaged.” *Dewey II*, 681 F.3d at 189, n.19. The thrust of this Comment can therefore easily rest solely on that language, notwithstanding any real or imagined factual assertions to the contrary.

¹⁴⁰ *Amchem*, 521 U.S. at 626, *quoted in Dewey II*, 681 F.3d at 189 n.19.

¹⁴¹ *Amchem*, 521 U.S. at 627.

¹⁴² *Id.*

¹⁴³ *Id.* at 606. Additionally, the *Amchem* settlement's other limitations on recovery, see *supra* text accompanying note 131, such as the extinguishment of loss-of-consortium claims can also be conceptualized as financial symptoms of inadequate class representation. Individuals with unique interests are best cared for by unique

In *Amchem*, the Rule 23(a)(4) deficiency was not merely structural; it was actual. Therefore, Footnote 19's use of *Amchem* to undergird its automatic-reversal-for-structure proposition was misplaced. This doctrine should therefore be ignored or overturned.

2. The Language of *Dewey II* is Inherently Contradictory

Certainly, "the doctrine of *stare decisis* is of fundamental importance to the rule of law."¹⁴⁴ For the sake of a predictable legal system, courts must follow precedent.¹⁴⁵ Yet, although "[t]he obligation to follow precedent begins with necessity . . . a contrary necessity marks its outer limit."¹⁴⁶ The Supreme Court has not been shy about the malleability of precedent:

Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed.¹⁴⁷

It is to the "other extreme" that this Comment appeals.

Adding to the case for the rejection of Footnote 19, the Third Circuit itself—in *Dewey II*—wavered from its stance. "Obviously," the Third Circuit qualified, "not all intra-class conflicts will defeat the adequacy requirement."¹⁴⁸ And, when discussing the general law of Rule 23(a)(4), the Third Circuit emphasized that only "fundamental" representative inadequacies will defeat the class.¹⁴⁹ The court directly cited the Eleventh Circuit in *Valley Drug v. Geneva Pharmaceuticals* to help define this term: "A fundamental conflict exists where some [class] members claim to have been *harmed* by the same conduct that benefited other members of the class."¹⁵⁰ In fact, this type of

representatives.

¹⁴⁴ *Welch v. Tex. Dep't. of Highways and Pub. Transp.*, 483 U.S. 468, 494 (1987).

¹⁴⁵ *See, e.g.*, Karl N. Llewellyn, Paul Gewitz & Michael Ansaldi, *The Case Law System in America*, 88 COLUM. L. REV. 989, 991 (1988).

¹⁴⁶ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992).

¹⁴⁷ *Id.* at 854.

¹⁴⁸ *Dewey II*, 681 F.3d 170, 184 (3d. Cir. 2012).

¹⁴⁹ *Id.* (quoting *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003) ("Significantly, the existence of minor conflicts alone will not defeat a party's claim to class certification: the conflict must be a 'fundamental' one going to the specific issues in controversy.")).

¹⁵⁰ 350 F.3d at 1189, *cited in Dewey II*, 681 F.3d at 184 (emphasis added).

qualification is not uncommon in the relevant case law.¹⁵¹

Footnote 19 lost sight of this clear tempering of the adequacy requirement, tempering that the Third Circuit itself embraced. At best, this undermines Footnote 19. At worst, it renders the judgment in *Dewey II* inherently paradoxical. Either way, it further justifies jettisoning Footnote 19 and the proposition for which it stands.¹⁵²

3. Professional Class Action Settlement Objectors

In addition to the general policy of not unnecessarily overburdening federal courts, one specific, recent trend in class action litigation begs for fewer—not more—procedural hurdles to the finalization of class action settlements. Though reversals of class action settlements may still be relatively rare,¹⁵³ the role of objectors in settlement proceedings is increasingly significant and

¹⁵¹ See, e.g., *Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 180 (4th Cir. 2010) (“For a conflict of interest to defeat the adequacy requirement, that conflict must be *fundamental*.”) (emphasis added); *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 959 (9th Cir. 2009) (“An absence of *material* conflicts of interest between the named plaintiffs and their counsel with other class members is central to adequacy and, in turn, to due process for absent members of the class.”) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998) (emphasis added)). Due process concerns, as noted in *Rodriguez* and *Hanlon* are certainly well taken. The heart of Rule 23 is protection of absent class members’ interests. See *supra* Part III. Yet, such protection is not the *only* policy at issue in the class action settlement approval process. Justice delayed, as the maxim goes, is justice denied. And vague notions of due process should not require unnecessary delay for non-existent financial gain.

¹⁵² As an aside, an argument—though admittedly a weak one—could be made for Footnote 19 being relegated to dicta. The fact that this assertion is housed in a footnote, however, is not necessarily an indication of the dividing line between precedent and non-binding dicta. Even if Footnote 19 was the only source in *Dewey II* for the current issue, for even the first-year law student, Footnote 4 of *United States v. Carolene Products Co.* serves as a lasting monument to the potential centrality of footnotes in legal analysis. 304 U.S. 144, 153 (1938). See also Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 92 COLUM. L. REV. 1093 (1982). And—far from the ultimate result in *Dewey II* not being dependent on the subject of Footnote 19—a judgment demanding reversal of this settlement, even where no additional monetary relief would be afforded, was central to *Dewey II*. 681 F.3d at 189 n.19. It may be somewhat easier to assign the relevant statements in *Amchem* to dicta, as that reversal turned on a number of issues. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997) (“[W]e have concluded that the class in this case cannot satisfy the requirements of common issue predominance *and* adequacy of representation.”) (emphasis added). Still, a case turning on multiple dispositive issues also does not render each tangential to the judgment. And, clearly, adequacy of representation was fundamental to the reversal in *Amchem*. Either way, the gravamen of *Dewey II* is likely too intertwined with Footnote 19 for it to be considered dicta.

¹⁵³ See generally THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 80–86 (1996).

controversial.¹⁵⁴ Rule 23(e)(5) permits “[a]ny class member [to] object to the [settlement] if it requires court approval.”¹⁵⁵

Certainly, objectors serve an important conceptual purpose in making the class representatives accountable to the class as a whole.¹⁵⁶ But objectors are also infamously unpopular participants in the settlement process.¹⁵⁷ They can cause delay for the sake of delay, essentially extorting class representatives and their counsel into receiving payoffs to avoid further disruption of the process.¹⁵⁸ So-called “professional objectors” have been labeled “the least popular litigation participants in the history of civil procedure.”¹⁵⁹ In fact, one commentator noted, “objectors are as welcome in the courtroom as is the guest at a wedding ceremony who responds affirmatively to the minister’s question, ‘Is there anyone here who opposes this marriage?’”¹⁶⁰

Considering the existence and growing proliferation of professional objectors, courts should be especially wary of placing any more procedural impediments in the path of class action settlements. Footnote 19 is one such impediment. Its effect is to render viable objections that put money in the pockets of objectors’ attorneys alone. Giving objectors the power and encouragement to object when they are the only parties who will benefit financially, only fuels the cottage industry of objecting for its own sake.¹⁶¹

¹⁵⁴ See, e.g., John E. Lopatka & D. Brooks Smith, *Class Action Professional Objectors: What to Do About Them?*, 39 FLA. ST. U. L. REV. 865 (2012); Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403 (2003).

¹⁵⁵ FED. R. CIV. P. 23(e)(5).

¹⁵⁶ Brunet, *supra* note 154, at 408–09 (“Informational input from objectors regarding a proposed settlement could, in theory, improve the monitoring problem. By definition, the objector is a monitor, who is evaluating a proposed settlement and then investing resources to either improve the settlement or reject the settlement.”). See also *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 273 F. Supp. 2d 563 (D.N.J. 2003) (objectors contributed to an increase of approximately \$56 million in recovery for class members).

¹⁵⁷ Lopatka & Smith, *supra* note 154, at 867.

¹⁵⁸ *Id.*

¹⁵⁹ Brunet, *supra* note 154, at 411.

¹⁶⁰ Lawrence W. Schonbrun, *The Class Action Con Game*, 20 REG. 4 (1997).

¹⁶¹ It is worth mentioning that Ted Frank, founder and president of the Center for Class Action Fairness, was the lead attorney behind the objection at issue in *Dewey II*. See, e.g., Brief for Appellees/Cross-Appellants Volkswagen Group of Am, Inc. (*Dewey II*), 681 F.3d 170 (3d Cir. 2012) (Nos. 10-3618(L), 10-3651(XAP), 10-3652(XAP), 10-3798), 2011 WL 4975416 (“Mr. Frank [is] the appointed champion of the West objectors.”). The Center for Class Action Fairness has, in the past, been negatively labeled a professional objector, though Mr. Frank disputes the label. See,

VI. HARMLESS ERROR DOCTRINE

As already noted, in place of Footnote 19's reversal-for-structural-deficiency rule, courts should instead apply an already ubiquitous framework for appellate review: the harmless error doctrine. Though this principle largely governs evidentiary, trial, and criminal law, it can easily be applied to the current context.

In the Federal Rules of Evidence, for example, "[a] party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party."¹⁶² In the Federal Rules of Criminal Procedure, harmless error is defined as "[a]ny error, defect, irregularity, or variance that does not affect substantial rights."¹⁶³ All fifty states have similar provisions, which are generally interpreted to mean that reversals for evidentiary error are only appropriate if the error can be shown to have harmed the appealing party.¹⁶⁴ And the Uniform Probate Code is pushing for this doctrine to be applied to improperly executed wills as well.¹⁶⁵

Furthermore, the harmless error doctrine is so ingrained in American jurisprudence that even constitutional trial errors need not automatically result in appellate reversal.¹⁶⁶ True, "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."¹⁶⁷ And those errors that demand automatic, unqualified, reversal include a denial of a criminal defendant's right to counsel,¹⁶⁸ exclusion of members of a defendant's race from grand jury proceedings,¹⁶⁹ and a right to public trial.¹⁷⁰ But aside from these exceptions, and a small number of

e.g., Daniel Fisher, *A Lawyer Who Tries to Block Settlements*, FORBES (Sept. 21, 2009, 6:00 PM), <http://www.forbes.com/forbes/2009/0921/outfront-tort-consumers-lawyer-tries-to-block-settlements.html> ("Frank is 'a professional objector,' fumes Stephen Garcia, lead attorney on a suit against Motorola . . . [But w]hen pushed, Garcia can't name a case where Frank earned a fee; Frank says all of his objections so far have cost him money."). Instead, Frank styles himself, and his organization, as a bulwark against class action settlements that unfairly benefit attorneys at the expense of class members. *See, e.g.*, Rachel M. Zahorsky, *Unsettling Advocate*, 96 A.B.A. J. 30. *See also* CENTER FOR CLASS ACTION FAIRNESS, <http://centerforclassactionfairness.blogspot.com/> (last visited Jan. 10, 2013).

¹⁶² FED. R. EVID. 103(a).

¹⁶³ FED. R. CRIM. P. 52(a).

¹⁶⁴ *See, e.g.*, Chapman v. California, 386 U.S. 18, 22 (1967).

¹⁶⁵ UNIF. PROBATE CODE §2-503 (amended 2010).

¹⁶⁶ *Id.* at 22–23.

¹⁶⁷ *Id.* at 23.

¹⁶⁸ *See generally* Gideon v. Wainwright, 372 U.S. 335 (1963).

¹⁶⁹ *See generally* Vasquez v. Hillery, 474 U.S. 254 (1986).

¹⁷⁰ *See generally* Waller v. Georgia, 467 U.S. 39 (1984).

others,¹⁷¹ “most constitutional errors can be harmless.”¹⁷²

This dividing line—between errors that can be overlooked as harmless and those so fundamental that they require automatic reversal—was succinctly described by Professor Charles Ogletree, Jr., in his article *Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*.¹⁷³ “To the *Fulminante* majority,” wrote Ogletree, referencing a landmark Supreme Court case for harmless error analysis,

a trial error seems to be one for which we can sometimes know for sure whether it has caused inaccuracy in a trial outcome, and a structural error seems to be one for which we can never know with any certainty. This artificial distinction, however, is really one of degree, not of kind.¹⁷⁴

Said differently, an error only requires automatic reversal if the appellate court cannot at all discern if the outcome of the underlying trial would have been different but for the error.

Thus, Footnote 19 begs the following question: did the error (the division of the class members into the two groups) actually affect the outcome (the ultimate financial recovery)?

This Comment has already demonstrated that the answer is no. Nothing substantial would have changed had the error not occurred. Nothing substantial *did* change. The settlement in *Dewey I* should not have been disturbed. And subsequent judicially approved settlements in analogous circumstances should not be disturbed either.

VII. CONCLUSION

The Third Circuit spoke of line drawing.¹⁷⁵ It chastised the district court for certifying a class and approving a settlement that violated Rule 23(a)(4)’s requirement of adequate representation.¹⁷⁶ It claimed that those drawing the line were not poised to do so with the interests of the whole class in mind.¹⁷⁷ But if the Third Circuit’s

¹⁷¹ See generally Harry T. Edwards, *To Err is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1177 n.36 (1995).

¹⁷² *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991).

¹⁷³ 105 HARV. L. REV. 152 (1991).

¹⁷⁴ *Id.* at 162.

¹⁷⁵ *Dewey v. Volkswagen Aktiengesellschaft (Dewey II)*, 681 F.3d 170, 177–78 (3d Cir. 2012) (“It was this line-drawing exercise that exacerbated the adequacy problem here . . . That is, every plaintiff had an incentive to draw the dividing line just beneath their model run, placing as many cars as possible into the residual group.”).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

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own words are to be believed, this was truly a line drawn in the sand. No class members were likely to be prejudiced by the settlement as was written, and none were.¹⁷⁸

In *Amchem*, the Court correctly upheld the rejection of the settlement agreement at issue because it treated one class of plaintiffs unfairly.¹⁷⁹ Because of the inadequate representation of counsel, the group of victims with exposure-only claims was set to receive a lesser award.¹⁸⁰ The fact that the defendants possessed enough money to pay both classes of plaintiff was inapposite.¹⁸¹

In *Dewey II*, the Third Circuit took an offhand remark in the *Amchem* decision out of context. In failing to recognize that *Dewey* was distinguishable, the Third Circuit misread the Court and incorrectly expanded the scope of *Amchem*. And the resulting doctrine, expressed in Footnote 19, adds pressure to overtaxed federal courts and emboldens professional objectors. *Dewey II*'s automatic-reversal-for-structural-problem rule is incorrect, bad policy, and should be overruled.

The stars aligned. Isn't that enough?

¹⁷⁸ One final anticipated counterargument, similar in nature to what is discussed *supra*, in note 139, is that the original settlement did not sufficiently notify the residual claimants of their rights. That is, the original notice to class members described the differences between the reimbursement and residual groups, and the updated settlement required notifying the former-residual claimants that they could now seek recovery from the \$8 million fund in the first instance. *Dewey v. Volkswagen of Am.*, 909 F. Supp. 2d 373, 379 (2012). This is an advantage, however, that relates to time and nature of recovery, not monetary size of recovery. And even were this benefit quantifiable—which, itself, requires some logical leaps—Footnote 19 does away with any damaging effect such benefits might have on the thrust of this Comment. As far as the Third Circuit was concerned, “class members’ interests were not actually damaged.” *Dewey II*, 681 F.3d at 189 n.19. It was on this assumption that the reversal rested.

¹⁷⁹ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625–27 (1997).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*