The Lessons of Amchem for Class Action Practice

Beth Klein

Some thought that Amchem would be the death knell of class actions, and others thought that it would be a model for the resolution of all mass tort cases. The reality fell somewhere in between, and provided some pointers on the issues of commonality and adequacy of representation.

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A CLASS ACTION is a representative action in which one or more persons named as plaintiffs in the case pursue on behalf of themselves and the defined class, claims that arise from facts or law common to all of the class members. Because the action is representative in nature, Fed. R. Civ. P. 23 (Rule 23) and case law have established constitutional and procedural guidelines to protect the interests of absent class members—those who are not named or who have not intervened. If the constitutional and procedural protections are satisfied in the action, absent members are bound by the judgment or settlement of the case.

Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997), also known as “Georgine,” was a highly anticipated decision that caused tremendous speculation about the future of mass tort litigation and class actions in the United States. Some camps hoped that this decision would lead to a

Beth Klein is Special Counsel to the Denver office of Purvis, Gray & Gordon, LLP.
solution for the massive backlog of all asbestos personal injury cases and a template for resolution of mass torts. On the other side of the spectrum, many wished that *Amchem* would signal the death of class actions and Rule 23. Both camps anticipated a ruling that would change the face of litigation in the United States. Nothing of the sort materialized. Rather, the Court issued an opinion that is probably limited to its extraordinary facts. The Court reaffirmed that class actions are an important part of our judicial system and a mechanism for leveling the playing field between individuals with small claims and well-heeled wrongdoers. Yet, the Court re-emphasized that the class action is not a cure for all problems and that a class cannot be overly defined or under-represented at the expense of the individual class members’ rights. Additionally, the decision has provided some important lessons for class action attorneys on the issue of commonality and adequacy of representation.

**BACKGROUND OF AMCHEM**

The *Amchem* decision must be viewed in light of the history of asbestos litigation and the complexity of proving an individual asbestos case. This demonstrates the social and judicial problem that the parties to *Amchem* were attempting to address and why the proposed solution was unacceptable.

**The First Plaintiff**

*Amchem’s* roots can be traced to a little town in Texas in 1962 and a case filed by Mr. Claude J. Tomplait requesting damages for asbestosis and silicosis. Mr. Tomplait was a member of Local 112 of the International Association of Heat & Frost Insulators and Asbestos Workers in Lake Charles, Louisiana. During his career as an insulator, Mr. Tomplait had been employed by dozens of insulation contractors on hundreds of jobs in more than 15 states. He had spent his working life insulating steam pipes, boilers and high-temperature systems. He worked in shipyards, power plants, oil refineries and chemical plants. He used hundreds of products that contained asbestos manufactured and distributed by many different companies. He was eventually diagnosed with asbestosis.

**The “Typical” Case: Variation Is the Rule**

To prove an asbestos-related personal injury case, the plaintiff must show that:

- He was exposed to products that were manufactured by a defendant;
- Liability; and
- An asbestos-related disease or death.

The individual case on the average takes about two weeks to try on all issues, and the burdens of proof and specific theories and damage issues under state tort law vary greatly. There are other asbestos-related diseases and conditions besides asbestosis, and the diagnosis, prognosis, and treatment all vary; and causation can vary with the individual.

**The Floodgates Open**

Subsequent to the Tomplait case, an avalanche of asbestos disease litigation was filed, and the problem of allocating the limited resources of the defendants and the resources of the judicial system manifested itself. By the time *Amchem* was being negotiated, there were hundreds of thousands of asbestos-related lawsuits pending, each with an individual story like that of Mr. Tomplait. Numerous manufacturers had filed bankruptcy, and the pool of recoverable assets was shrinking.

**The Attempt To Rationalize the Litigation**

The parties in *Amchem* attempted to resolve the asbestos litigation against 20 solvent and former manufacturers of asbestos-containing products known as the “CCR” through a Rule 23(b)(3) class action. The parties were unsuccessful in their efforts, primarily because the
class was too large and each individual class member’s claims and concerns proved to be too distinct. Yet, the class was proposed as a solution to the undisputed realities that the number of potential asbestos claimants is staggering, and the available assets were (and are) dwindling. The class proposal was intriguing as it might have brought some sanity to the allocation of limited resources to plaintiffs no matter when they became sick and no matter where they live.

The Putative Class

The Amchem putative class potentially encompassed hundreds of thousands—possibly millions—of individuals who had been or will be someday in the future adversely affected by exposure to asbestos-containing products manufactured by the CCR members. These products varied widely and had been used extensively in construction and manufacturing before 1970. Given the CCR’s interests in creating a global resolution for its asbestos-related litigation, the definition of the class was broadly drafted to encompass as many potential claims as possible.

The Settlement Agreement

The settlement agreement itself exceeded 100 pages and included a schedule of payments to compensate class members who met defined asbestos-exposure and medical requirements. Class members were to receive no compensation for certain kinds of claims, even if the claims were recognized under state law. No compensation was offered for loss of consortium, increased risk of cancer, fear of future asbestos-related injury, and medical monitoring. The class members, generally, were bound by the settlement, while the CCR drafted opt out provisions allowing it to withdraw from the settlement after ten years. Persons who opted out of the class would waive a punitive damage claim or a claim for increased risk of cancer. Medical causation criteria was frozen to 1993 science and advances in diagnostic procedures and treatments were disregarded. A number of asbestos victims groups, numerous asbestos plaintiffs’ attorneys, and Public Citizen attacked the settlement. The Unions were divided, with the AFL-CIO backing the project. All objections were rejected, and the district court certified the class.

The Third Circuit’s Rejection of the Class

The argument for commonality and typicality at the trial level included the theory that the class was united by a common experience of exposure to asbestos and was united in seeking the maximum possible recovery for their asbestos-related claims while avoiding litigation. The argument did not center on the common issues of fact and law present in the vastly differing individual cases. The Third Circuit reversed the trial court and held that common questions did not predominate, emphasizing that the inquiry for commonality centers upon the very same issues that were avoided by the Amchem parties.

The Third Circuit also addressed the “serious intra-class conflicts” precluding the class from meeting the adequacy of representation requirement. The class members had distinctly different interests in the way the money in the general recovery fund would be allocated. For example, the plaintiffs who did not have a diagnosed asbestos-related disease would want protection against inflation for future recoveries and medical causation provisions that would keep pace with changing science and medicine. On the other hand, plaintiffs that had been diagnosed depending upon the severity of the disease would want higher current payouts. Since the class had been structured without regard to these divergent interests, there was no adequate representation for the interests of the two groups—those members with injury and those without. Additionally, the definition of the class went too far. The Third Circuit noted that un-