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In The
Supreme Court of the United States

October Term, 1996

AMCHEM PRODUCTS, INC., et al.,
Petitioners,

vs.

GEORGE WINDSOR, et al.,
Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Third Circuit

**BRIEF OF AMICUS CURIAE NATIONAL
ASSOCIATION OF SECURITIES AND
COMMERCIAL LAWYERS (NASCAT)
IN SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

When the parties to a putative class action enter into a settlement, must the district court nevertheless pretend that every legal and factual issue will be contested, and ignore the existence of the settlement, in determining whether class certification is appropriate under Rule 23 of the Federal Rules of Civil Procedure.

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Comment, <i>Developments in the Law – Class Actions</i> , (1976) 89 Harv. L. Rev. 1318	9
Samuel Estreicher, <i>Foreword, Federal Class Actions After 30 Years</i> , (1996) 71 N.Y.U. L. Rev. 1	16
Marc S. Galanter, <i>The Federal Rules and the Quality of Settlements</i> , (1989) 137 U. Pa. L. Rev. 2231	20
Geoffrey C. Hazard, Jr., <i>The Settlement Black Box</i> , (1995) 75 B.U.L. Rev. 1257	20
Jonathan R. Macey & Geoffrey P. Miller, <i>The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform</i> , (1991) 58 U. Chi. L. Rev. 1	4

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William W. Schwarzer, <i>Symposium: Settlement of Mass Tort Class Actions: Order out of Chaos</i> , (1995) 80 Cornell L. Rev. 837	9, 16
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**BRIEF OF AMICUS CURIAE
NATIONAL ASSOCIATION OF SECURITIES
AND COMMERCIAL LAWYERS (NASCAT)
IN SUPPORT OF PETITIONERS**

The National Association of Securities and Commercial Law Attorneys (NASCAT), by its Counsel of Record and pursuant to Supreme Court Rule 37.3, hereby files its *amicus curiae* brief in support of Petitioners.¹ For the reasons stated herein, the decision of the court below should be reversed.²

I. INTEREST OF AMICUS CURIAE

NASCAT is an association of law firms and attorneys who litigate class action cases involving antitrust, commercial, consumer, employee (and retiree) benefit, environmental and securities fraud claims in federal and state courts. NASCAT's members frequently represent victims of corporate abuse, schemes to defraud and so-called "white collar" criminal activity. In class actions challenging such wrongdoing, NASCAT's members not only seek compensation for victims, but also attempt to deter wrongdoers, modify corporate behavior and improve the access of victims to justice. As part of these efforts, NASCAT advocates the enactment and enforcement of effective state and federal laws to prevent wrongful,

¹ Pursuant to Rule 37.3(a), NASCAT has lodged with this *amicus curiae* briefs consent letters signed by Counsel of Record for Petitioners and Respondents.

² The Third Circuit's decision is reported as *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir.), *cert. granted*, 117 S. Ct. 379 (1996).

fraudulent, deceptive and manipulative business practices. NASCAT and its members also support the practical and utilitarian construction and application of Rule 23 of the Federal Rules of Civil Procedure (and its state law equivalents) in class action litigation.³

Over the past thirty years, NASCAT's members have litigated and settled literally hundreds of class action lawsuits⁴ filed in federal and state courts under Rule 23 (or its

³ NASCAT has previously filed *amicus curiae* briefs in this Court in a variety of contexts. See, e.g., *Grimmett v. Brown*, No. 95-1722 (RICO); *Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996) (ERISA); *BMW of N. Am. v. Gore*, 116 S. Ct. 1589 (1996) (punitive damages); *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223 (1995) (ERISA); *Plaut v. Spendthrift Farm*, 115 S. Ct. 1447 (1994) (securities fraud); *Gustafson v. Alloyd Co.*, 115 S. Ct. 1061 (1995) (securities fraud); *Boca Grande Club v. Florida Power & Light*, 114 S. Ct. 2703 (1994) (settlement – contribution); *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994) (securities fraud); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Musick, Peeler & Garrett v. Employers Ins.*, 508 U.S. 286 (1993) (securities fraud); *Reves v. Ernst & Young*, 507 U.S. 170 (1993) (RICO); *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992) (RICO).

⁴ “The class action was an invention of equity . . . mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs.” *Montgomery Ward & Co. v. Langer*, 168 F.2d 182, 187 (8th Cir. 1948). Class actions long have been part of American jurisprudence and for more than a century this Court has held that they were authorized by the equity rules in suits involving members of a class so numerous that it was impracticable to join them all as parties. See, e.g., *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921). In *Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1854), this Court allowed a representative suit to be brought on

state court equivalents)⁵ in virtually every substantive area of the law. NASCAT's members frequently bring securities fraud class actions under the Securities Act of 1933 and/or the Securities Exchange Act of 1934 and our collective experience has demonstrated that the class action "is the primary vehicle through which shareholders seek to vindicate their rights against allegedly fraudulent corporate conduct."⁶ Courts and commentators have uniformly

behalf of all the preachers in the Methodist Episcopal Church South seeking a declaration of the respective rights of each sectional group of the Methodist Episcopal Church of the United States to funds originally belonging to the entire church. This Court found that both groups of litigants had a "common interest" or "common right" to the assets in question, and equated that common interest, and the adequacy of representation signified by it, with the binding effect of the decree. *Id.* at 303. Despite the lack of notice and opportunity to be heard for many class members, this Court found the basic procedural conditions to bringing a class action to have been satisfied, thereby placing its imprimatur on the binding class action. *Id.* at 302-03.

⁵ As originally adopted in 1938, Rule 23 represented "a bold and well-intentioned attempt to encourage more frequent use of class actions." 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 2d* § 1752, at 15 (1986). Its provisions were completely rewritten and augmented in 1966. *Id.*, § 1753 at 41.

⁶ Stephen E. Morrissey, Note, *State Settlement Class Actions That Release Exclusive Federal Claims: Developing a Framework for Multijurisdictional Management of Shareholder Litigation*, 95 Colum. L. Rev. 1765, 1765 (1995) ("Morrissey, *State Settlement Class Actions*"). In the securities fraud context, the class action mechanism is seen as particularly appropriate for two reasons: "first, the alleged misconduct on the part of the defendant company's officers and directors is often the same from the standpoint of each individual shareholder; second, with small

lauded the class action as an important and effective tool in enforcing the federal securities laws.⁷

In order to resolve complex securities fraud (and other types of) class actions involving multi-million dollar claims being litigated on behalf of thousands of geographically diverse class members, NASCAT's members have filed so-called "settlement class actions" (similar to the litigation and settlement at issue in this case) or, to effectuate a settlement agreement with defendants, have agreed to seek certification of a "settlement class."⁸ As a

losses spread among large numbers of shareholders, the class mechanism is perhaps the only means through which shareholder litigation is economically viable." *Id.* at 1765 n.1 (citing Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1 (1991)).

⁷ See, e.g., *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 764-68 (1975) (Blackmun, J., dissenting); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 678-83 (1986) (noting "obvious" advantages of the class action mechanism); 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 2d* § 1781, at 28 (1986) ("Because most securities cases involve hundreds or thousands of class members who typically possess only small individual claims, the class action provides a useful mechanism for enforcing the policies underlying the securities laws and should be liberally allowed.") (footnote omitted).

⁸ See, e.g., *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768 (3d Cir.) ("GM Trucks") (holding that settlement class actions are cognizable under Rule 23 but setting aside settlement in question due to the district court's failure to make requisite Rule 23 findings), *cert. denied*,

result of their collective experience, NASCAT's members believe that (1) settlement classes may be properly used to facilitate settlement of complex litigation; (2) Rule 23 permits settlement class actions to be brought by claimants and permits settlement classes to be certified by the district courts; (3) the district courts may properly use the fact of settlement to determine that the requirements of Rule 23 have been met in a particular case; and (4) settlement classes are properly used to resolve complex cases where they are subject to the district court's review of the fairness and adequacy of the settlement. *See* Part III.A-D, *infra*.

In this case, which involves the settlement of a nationwide class action encompassing hundreds of thousands of individual asbestos claims and settlement payments worth more than \$1 billion, the Third Circuit invalidated the settlement agreement, holding that where the parties to a putative class action enter into a settlement, the district court must act as if the settlement does not exist and apply Rule 23's class certification criteria

116 S. Ct. 88 (1995); *In re Drexel Burnham Lambert Group*, 960 F.2d 285 (2d Cir. 1992) (affirming district court's certification of settlement class and subclasses and approving settlement agreement), *cert. dismissed*, 506 U.S. 1088 (1993); *In re Prudential Sec., Inc. Ltd. Partnerships Litig.*, 163 F.R.D. 200 (S.D.N.Y. 1995) (certifying settlement class and approving settlement providing \$100 million recovery in RICO class action involving 700 limited partnerships and 100,000 investors); *Klein v. McDonnell Douglas Corp.*, Case No. 4:95-CV-02225 TCM (E.D. Mo. Feb. 9, 1996) (certifying settlement class and approving settlement providing lifetime supplemental pension benefits worth \$450+ million in ERISA health care benefits class action involving 24,000 retirees).

"as if the case were going to be litigated." *Georgine*, 83 F.3d at 624 (citing *GM Trucks*, 55 F.3d at 799-800).⁹ In its opinion, the court below acknowledged that "the better policy may be to alter the class certification inquiry to take settlement into account," but asserted that "the current Rule 23 does not permit such an exception." 83 F.3d at 618.¹⁰ In so holding, the court below refused to follow reported decisions from the Second, Fifth, Eighth, Ninth and Eleventh Circuits, all of which have relied on the fact of settlement in applying Rule 23's requirements and certifying settlement classes in numerous cases.

NASCAT and its members respectfully submit that the decision of the court below ignores the letter and well-recognized practical construction of Rule 23, the collective experience of the federal courts in reviewing proposed settlements under Rule 23(e), as well as the " 'strong judicial policy that favors settlements.' " *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995)

⁹ See also *Georgine*, 83 F.3d at 626 (holding that "the rule in this circuit is that settlement class certification is not permissible unless the case would have been 'triable in class form.'" and that "the Rule 23(a) requirements of commonality, typicality, and adequacy of representation, and the Rule 23(b)(3) requirements of predominance and superiority . . . must be satisfied *without taking into account the settlement, and as if the action were going to be litigated*" (emphasis added) (quoting and citing *GM Trucks*, 55 F.3d at 799).

¹⁰ In *GM Trucks*, 55 F.3d at 798, the Third Circuit acknowledged that other courts of appeals uniformly take the existence of settlement into account in finding that Rule 23's requirements had been satisfied and upholding class certification, but it stated that it "disagree[d] with this approach." *Id.* at 799. See also Part III.C, *infra*.

(citation omitted). As a practical matter, the Third Circuit's decision in this case means that complex class action cases arising in that circuit cannot be easily settled but, rather, must be litigated for years at a cost of millions of dollars, to the collective detriment of claimants, defendants and the courts.

Given the frequency of its use in a wide variety of class actions, this case presents an appropriate occasion for this Court to hold that "settlement classes" and "settlement class actions" are authorized by Rule 23. This Court should endorse the approach utilized by a majority of the courts of appeals (and the greater number of district courts) and hold that the fact of settlement should be taken into account by trial and appellate courts in applying Rule 23's requirements. Because the Third Circuit refused to do so in this case, NASCAT and its members agree with Petitioners that the decision of the court below should be reversed.

II. ARGUMENT

A. Settlement Class Actions And Settlement Classes Are Properly Used To Facilitate Settlement Of Complex Litigation

As this Court has recognized, settlement is the principal means of resolving civil litigation in the federal courts. See *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 114 S. Ct. 1461, 1469 n.22 (1994) (observing that "[l]ess than five percent of cases filed in federal court end in trial" and that "the bulk of nontrial terminations reflect settlements"). Given this reality, the federal courts have

adhered to "the strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir.), cert. denied, 506 U.S. 953 (1992).¹¹ In the words of the court below, a "settlement class" is a procedural device

whereby the court postpones formal class certification until the parties have successfully concluded a settlement. If settlement negotiations succeed, the court certifies the class for settlement purposes only and sends a combined notice of the commencement of the class action and the settlement to the class members. By

¹¹ *Accord GM Trucks*, 55 F.3d at 805 (noting "the growing frequency of the settlement of increasingly large claims through the class action device" and the fact that "[c]ourts undertaking the special role of supervising class action settlements are apparently heeding the public policy in favor of settlement, and acknowledging the urgency of this policy in complex actions that consume substantial judicial resources and present unusually large risks for the litigants"); *Pacific Enters.*, 47 F.3d at 378 ("When reviewing complex class action settlements, we have a 'strong judicial policy that favors settlements.'") (quoting *Class Plaintiffs*, 955 F.2d at 1276); *In re School Asbestos Litig.*, 921 F.2d 1330, 1333 (3d Cir. 1990) (referring to "our policy of encouraging settlement of complex litigation that otherwise could linger for years") (citations omitted); *Air Line Stewards & Stewardesses Ass'n v. Trans World Airlines*, 630 F.2d 1164, 1166-67 (7th Cir. 1980) ("Federal courts look with great favor upon voluntary resolution of litigation through settlement. . . . This rule has particular force regarding class action lawsuits."), *aff'd*, 455 U.S. 385 (1982); *Prudential*, 163 F.R.D. at 209 ("It is well established that there is an overriding public interest in settling and quieting litigation, and this is particularly true in class actions.") (citing, *inter alia*, *In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 46, 53 (S.D.N.Y. 1993)).

conditionally certifying the class for settlement purposes only, the court allows the defendant to challenge class certification in the event that the settlement falls apart.

Georgine, 83 F.3d at 625 n.9.¹² The "settlement class" (or "settlement class action"), which has been successfully employed by class action claimants and defendants for more than two decades,¹³ "now has become commonplace in the federal courts" as a means of resolving complex cases.¹⁴ As a result, the *Manual for Complex Litigation*

¹² See also *GM Trucks*, 55 F.3d at 786; *In re Del-Val Fin. Corp. Sec. Litig.*, 162 F.R.D. 271, 273 n.3 (S.D.N.Y. 1995); Roger C. Cramton, *Symposium: Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 *Cornell L. Rev.* 811, 823 (1995) ("settlement class action" refers to a class action "that is designed to be settled rather than litigated, with the defendant not objecting to certification of the class providing the settlement is approved"); Morrissey, *State Settlement Class Actions*, 95 *Colum. L. Rev.* at 1766 (in settlement class actions, "a class is certified 'for settlement purposes only' at the instance of the litigants' counsel, who often have prearranged the terms of settlement"); William W. Schwarzer, *Symposium: Settlement of Mass Tort Class Actions: Order out of Chaos*, 80 *Cornell L. Rev.* 837, 840-41 (1995) (same).

¹³ See Comment, *Developments in the Law - Class Actions*, 89 *Harv. L. Rev.* 1318, 1555 n.105 (1976) ("*Developments*") (listing settlement class cases from as early as 1971).

¹⁴ Note, *Back to the Drawing Board: The Settlement Class Action and the Limits of Rule 23*, 109 *Harv. L. Rev.* 828, 831 n.27 (1996) ("*Note, Back to the Drawing Board*") (citing John C. Coffee, Jr., *Class Action Wars: The Dilemma of the Mass Tort Class Action*, 95 *Colum. L. Rev.* 1343, 1378 n.123 (1995) ("Settlement class actions are not only common, but in some district courts appear to constitute the majority of certified class actions.")). For additional commentary on settlement class actions, see Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 *Nw. U. L.*

§ 30.45 (3d ed. 1995) ("MCL 3d") recognizes that "courts permit the use of settlement classes" involving the certification of the class "for settlement purposes only," and "permit defendants to settle while preserving the right to contest the propriety and scope of the class allegations if the settlement is not approved." *Id.* at 243. "The costs of litigating class certification are saved and litigation expense is generally reduced by an early settlement." *Id.*¹⁵

Rev. 469, 472 (1994), and Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941, 961-62 (1995).

¹⁵ There are numerous reported cases in which district courts have certified settlement classes in securities fraud class actions. *See, e.g., Harden v. Raffensperger, Hughes & Co.*, 933 F. Supp. 763, 768 (S.D. Ind. 1996) (approving settlement of securities fraud class action and certifying settlement class); *Del-Val*, 162 F.R.D. at 273 n.3 (numerous courts have used their discretion to issue orders conditionally certifying classes for purposes of facilitating settlements). *See also In re Kendall Square Research Corp. Sec. Litig.*, 869 F. Supp. 53, 54 (D. Mass. 1994); *Wells v. Dartmouth Bancorp, Inc.*, 813 F. Supp. 126, 130 (D.N.H. 1993); *Balsam v. Eastchester Fin. Corp.*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) 96,900 (E.D.N.Y. 1992); *In re Farmers Group Stock Options Litig.*, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) 96,522 (E.D. Pa. 1991); *In re Businessland Sec. Litig.*, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) 96,059 (N.D. Cal. 1991); *Cagan v. Anchor Sav. Bank FSB*, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) 95,324 (E.D.N.Y. 1990); *Sanders v. Robinson Humphrey/American Express, Inc.*, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) 95,315 (N.D. Ga. 1990); *Moorhead v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) 94,448 (D. Minn. 1989); *Alvarado Partners, L.P. v. Mehta*, 723 F. Supp. 540, 545-46 (D. Colo. 1989); *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 537 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990); *Mashburn v. National*

As the Third Circuit acknowledged in *GM Trucks*, 55 F.3d at 793, "resistance to more flexible applications of Rule 23 has diminished over time," *id.*, as the federal courts (and many commentators) have recognized the benefits of settlement classes and settlement class actions. As the court elaborated in that case:

The evolution of the reception accorded settlement classes has manifested itself in the successive versions of the Manual for Complex Litigation. The first edition of the Manual criticized the initiation of settlement negotiations before certification, and discouraged all such negotiations. See MCL 1st § 1.46. The second edition recognizes the potential benefits of settlement classes but still cautioned that "the court should be wary of presenting the settlement to the class." MCL 2d § 30.45 at 243. The (draft) third version acknowledges that "settlement classes offer a commonly used vehicle for the settlement of complex litigation" and aims only to supervise rather than discourage their use.

Id. at 793-94.

In complex cases – whether the action involves a mass tort or an alleged scheme to violate the federal securities laws – the settlement class action permits litigants to use the courts to overcome collective action

Healthcare, Inc., 684 F. Supp. 660, 665 & n.4, 675 (M.D. Ala. 1988); *In re Wicat Sec. Litig.*, 671 F. Supp. 726, 730 (D. Utah 1987); *In re First Commodity Corp. Customer Accounts Litig.*, 119 F.R.D. 301, 308 (D. Mass. 1987); *Bush v. Rewald*, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) 92,999 (D. Haw. 1986).

problems that often preclude settlement.¹⁶ In *GM Trucks*, the Third Circuit expressly recognized the utility of the settlement class action in complex cases:

The use of settlement classes can thus enable both parties to realize substantial savings in litigation expenses by compromising the action before formal certification. Through settlement class certification, courts have fostered settlement of some very large, complex cases that might otherwise never have yielded deserving plaintiffs any substantial remuneration.

55 F.3d at 790 (citing 2 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 11.09, at 11-13 (3d ed. 1992)). Thus, as the Third Circuit made clear in that opinion, the federal courts' recognition and utilization of settlement classes have dramatically increased the number of actions that are amenable to settlement by increasing the rewards of a negotiated settlement by (1) increasing a defendant's incentive to settle because the settlement would bind the members of the class and prevent further lawsuits against the defendant; (2) reducing litigation costs by permitting

¹⁶ See Roger H. Transgrud, *Joinder Alternatives in Mass Tort Litigation*, 70 Cornell L. Rev. 779, 835 (1985) ("Transgrud, *Joinder Alternatives*") (in complex cases, use of a settlement class can help overcome certain elements of these actions that otherwise can considerably complicate efforts to settle, including "the large number of individual plaintiffs and lawyers; . . . the existence of unfiled claims by putative plaintiffs; and . . . the inability of any single plaintiff to offer the settling defendant reliable indemnity protection"); Bruce H. Neilson, *Was the 1966 Advisory Committee Right?: Suggested Revisions of Rule 23 to Allow More Frequent Use of Class Actions in Mass Tort Litigation*, 25 Harv. J. Legis. 461, 480 (1988) (same).

