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In The
Supreme Court of the United States

October Term, 1997

ESTEBAN ORTIZ, *et al.*

Petitioners

vs.

FIBREBOARD CORPORATION, *et al.*

Respondents

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

BRIEF OF AMICUS CURIAE NATIONAL
ASSOCIATION OF SECURITIES AND
COMMERCIAL LAW ATTORNEYS (NASCAT) IN
SUPPORT OF RESPONDENTS

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**BRIEF OF AMICUS CURIAE NATIONAL
ASSOCIATION OF SECURITIES AND
COMMERCIAL LAW ATTORNEYS (NASCAT)
IN SUPPORT OF RESPONDENTS
INTEREST OF AMICUS CURIAE¹**

The National Association of Commercial Law Attorneys (NASCAT) is an association of law firms and attorneys who litigate 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, defective products, and anti-competitive conduct. In civil actions challenging such wrongdoing, NASCAT's members not only seek compensation for victims, but also attempt to deter wrongdoers, modify corporate behavior, and improve victims' access to justice.

In literally thousands of cases filed over the past 30 years, NASCAT's members have represented plaintiffs in class actions brought under Federal Rule of Civil Procedure 23, or its state law equivalents, including innumerable cases settled or tried to verdict. In each of those cases, NASCAT's members and their clients (the proposed class representatives) have sought to satisfy the adequate representation requirement of Rule 23(a)(4). Several of those cases have involved classes certified

¹ Letters of consent to the filing of this *amicus* brief received from Petitioners' and Respondents' counsel have been filed with this Court. Pursuant to Supreme Court Rule 37.6, NASCAT certifies that no counsel for any party authored this brief in whole or in part and no person or entity other than *amicus curiae* made any monetary contribution to its preparation or submission.

under subdivision (b)(1)(B) of Rule 23, including *In re Drexel Burnham Lambert Group*, 960 F.2d 285 (2d Cir. 1992), in which the Second Circuit affirmed Judge Pollack's certification of claims brought by securities claimants against Drexel, a bankrupt securities brokerage firm, and affirmed the trial court's approval of a \$350 million settlement. *Drexel* and other decisions issued by the lower federal courts since Rule 23 was amended in 1966 demonstrate that subdivision (b)(1)(B) must be applied flexibly, not restrictively, in accordance with the particular facts and circumstances of each individual case and that, if the trial court properly considers the evidence proffered by the parties and makes requisite findings of fact and conclusions of law in certifying the class under this provision, its judgment should be affirmed on appeal.

As a result of its members' collective experience, NASCAT believes and advocates in this *amicus curiae* brief that the district court properly certified the class under Rule 23(a)(1)-(4) and (b)(1)(B) and properly approved the Global Settlement Agreement in this case.²

² The district court's Memorandum Opinion certifying the class and approving the settlement is reported as *Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505 (E.D. Tex. 1995), and is reproduced as Appendix E to the Petition for Writ of Certiorari (Volume I) (the "Petition"), CA 183a-242a. The district court's Findings of Fact are reported as *Ahearn v. Fibreboard Corp.*, Civil Action No. 6:93cv526, 1995 U.S. Dist. LEXIS 11532 (E.D. Tex. July 27, 1995), and are reproduced as Appendix F to the Petition (Volume II), CA 243a-468a. The district court's Conclusions of Law are reported as *Ahearn v. Fibreboard Corp.*, 1995 U.S. Dist. LEXIS 11523 (E.D. Tex. July 27, 1995), and are reproduced as Appendix G to the Petition (Volume III), CA 469a-511a. The district court's Supplemental Conclusions of Law are reported as *Ahearn v. Fibreboard Corp.*, 1995 U.S. Dist. LEXIS 11531 (E.D.

NASCAT also believes and advocates below that the Fifth Circuit properly affirmed the district court's entry of judgment. For the reasons that will be advanced, NASCAT files this *amicus curiae* brief in support of Respondents and respectfully submits that the decision of the court below should be affirmed.

INTRODUCTION AND SUMMARY OF ARGUMENT³

The district court and the Fifth Circuit correctly found that the proposed class representatives satisfied the prerequisites of Rule 23(a)(1)-(4), including the "adequacy of representation" requirement. The courts below correctly rejected arguments concerning purported "intraclass conflicts" posited by Petitioners and their *amici*, which amounted to potential, hypothetical, or theoretical conflicts that the federal courts have uniformly found not to defeat class certification.

The district court properly certified the class under Rule 23(b)(1)(B), finding that plaintiffs and class members shared a common "significant risk" of losing Fibreboard's insurance coverage if piecemeal litigation was allowed to proceed, and the Fifth Circuit properly affirmed that finding. As an *alternative* holding – one that this Court need

Tex. July 27, 1995), and are reproduced as Appendix H to the Petition (Volume III), CA 512a-518a.

³ Page references to the briefs filed by Petitioners and their *amici* are stated as "Pet. Brief. at ___" (Brief for Petitioners), "Law Professors Brief at ___" (Brief of Legal Ethics, Civil Procedure, and Constitutional Law Scholars as *Amici Curiae* in Support of Petitioners), and "Trial Lawyers Brief at ___" (Brief of *Amicus Curiae* Trial Lawyers For Public Justice, P.C., In Support Of Petitioners).

not reach – the district court properly certified the class under subdivision (b)(1)(B) by finding that a “limited fund” existed; the Fifth Circuit correctly affirmed that alternative holding.

◆

ARGUMENT

I. THE COURTS BELOW PROPERLY FOUND THAT THE PROPOSED CLASS MET THE PREREQUISITES OF RULE 23(a) AND THAT THE INTERESTS OF THE CLASS REPRESENTATIVES AND THE MEMBERS OF THE CLASS ARE NOT ANTAGONISTIC

A. The Rulings Of The Courts Below

A class may be certified if all four prerequisites of Rule 23(a) are met and one or more of the provisions of Rule 23(b) is satisfied. *See Amchem Products, Inc. v. Windsor*, ___ U.S. ___, 117 S. Ct. 2231, 2245 (1997); 5 James W. Moore, *Moore’s Federal Practice* ¶23.20, at 23-55 (2d ed. 1998) (“5 J. Moore”); 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 2d* § 1759, at 97 (1986) (“7A Wright, Miller & Kane”). In this case, the district court found that the four prerequisites of Rule 23(a) – numerosity, commonality, typicality, and adequacy of representation – were met. *See* CA 223a-230a (162 F.R.D. at 523-26); CA 478a-484a (Conclusions of Law, ¶¶12-24); CA 513a-514a (Supplemental Conclusions of Law, ¶¶2-5). In the original appeal, the intervenors did not dispute the district court’s finding of numerosity, but they argued that the class met none of the other Rule 23(a) prerequisites; the Fifth Circuit, however, rejected these contentions. CA 54a-72a (90 F.3d at 974-82); *see also* CA 2a-3a (134 F.3d at 670) (“We detailed

in our prior opinion our agreement with the thorough study and conclusions by the district court, satisfying the requirements of class certification under Rule 23(a).”).

Petitioners and their *amici* now focus their attack upon Rule 23(a)(4)’s “adequacy-of-representation” requirement, seeking to persuade this Court that even a potential, hypothetical, or theoretical “conflict” between class members *per se* renders the class representatives inadequate. *See* Pet. Brief at 18-22; Law Professors’ Brief at 9-12. Their arguments were raised in the courts below, were thoroughly analyzed by the district court and the Fifth Circuit, and were properly rejected.

B. Potential, Theoretical, Or Hypothetical Intra-class “Conflicts” Do Not Prevent Class Certification Under Rule 23(a)(4)

A class action may be certified by the district court only if “the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). This requirement ensures that the class be “adequately represented both by counsel and by the named representative plaintiffs.” *Linney v. Cellular Alaska Partnership*, No 97-16637, 1998 U.S. App. LEXIS 20484, at *7 (9th Cir. Aug. 21, 1998) (citations omitted). “Adequate representation” depends on the qualifications of counsel for the class representatives, “ ‘an absence of antagonism, a sharing of interests between representatives and absentees [class members], and the unlikelihood that the suit is collusive.’ ” *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 390 (9th Cir. 1992) (citation omitted); *see also General Tel. Co. v. Falcon*, 457 U.S. 147, 159-60 n.13 (1982) (“adequacy-of-representation” requirement focuses on “conflicts of interest”). *See generally* 7A Wright, Miller & Kane,

§ 1768, at 326-66 (elucidating what constitute “antagonistic” or “conflicting” interests between class representatives and class members); 5 J. Moore, ¶23.25[4][b][i], at 23-118 (same).

In this case, after conducting an eight-day evidentiary hearing and properly taking the proposed settlement into account, *see Amchem*, 117 S. Ct. at 2248-49, the district court found that “[t]he Class representatives have . . . adequately represented the Class,” CA 228a (162 F.R.D. at 525), rejecting the intervenors’ arguments that there was a “conflict” between them and class members because they were united by a common interest in resolving Fibreboard’s insurance coverage dispute:

The Court concludes that the Class representatives have a sufficient stake in the outcome and that the interests of the Class representatives and the members of the class are not antagonistic. The Class representatives span the range of the various medical categories under the Trust Distribution Process and include both already-impaired and not-yet-impaired claimants. The class representatives and the members of the class – all of whom are equally at risk in the coverage litigation – are united in seeking the maximum possible recovery for their asbestos-related claims.

The class representatives adequately represent those Class members whose injuries have not yet become manifest. The Complaint is expressly brought on behalf of unimpaired Class members; and unimpaired Class members have interests in the global settlement common with each of the Class representatives and are united with them in eliminating the risk of the coverage litigation by seeking the maximum possible settlement for the entire Class.

