PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

_____

Nos. 08-2784/2785/2798/2799/
2818/2819/2831/2881

_____

SHAWN SULLIVAN;
ARRIGOTTI FINE JEWELRY;
JAMES WALNUM, on behalf of themselves
and all others similarly situated,

v.

DB INVESTMENTS, INC; DE BEERS S.A.;
DE BEERS CONSOLIDATED MINES, LTD; DE BEERS
A.G.;
DIAMOND TRADING COMPANY; CSO VALUATIONS
A.G.;
CENTRAL SELLING ORGANIZATION; DE BEERS
CENTENARY A.G.

DAVID T. MURRAY, Appellant in 08-2784
(Pursuant to Fed. R. App. P. 12(a))

SUSAN M. QUINN, Appellant in 08-2785
(Pursuant to Fed. R. App. P. 12(a))

MARVIN L. UNION; TIM HENNING;
NEIL FREEDMAN; KYLIE LUKE; WILLIAM

BENJAMIN COFFEY, Jr., Appellants in 08-2798
(Pursuant to Fed. R. App. P. 12(a))

AARON PETRUS, Appellant in 08-2799
(Pursuant to Fed. R. App. P. 12(a))

JANET GIDDINGS, Appellant in 08-2818
(Pursuant to Fed.R.App.P. 12(a))

FRANK ASCIONE; ROSAURA BAGOLIE;
MATTHEW DELONG; SANDEEP GOPALAN;
MANOJ KOLEL-VEETIL; MATTHEW METZ;
ANITA PAL; DEB K PAL; JAY PAL;
PETER PERERA; RANGESH K. SHAH; ED
MCKENNA; THOMAS VAUGHAN,
Appellants in 08-2819
(Pursuant to Fed.R.App.P. 12(a))

KRISTEN DISHMAN; MARGARET MARASCO,
Appellants in 08-2831
(Pursuant to Fed.R.App.P. 12(a))

JAMES B. HICKS, Appellant in 08-2881
(Pursuant to Fed. R. App. P. 12(a))

Appeals from the United States District Court
for the District of New Jersey
(D.C. Civil No. 2-04-cv-02819)
District Judge: Honorable Stanley R. Chesler

No. 08-2785 Argued on January 28, 2010
Nos. 08-2784/2798/2799/2818/2819/2831/2881 Submitted
Under Third Circuit L.A.R. 34.1(a) on January 28, 2010

Before: RENDELL and JORDAN, Circuit Judges, and
AMBROSE*, District Judge.

Reargued En Banc
on February 23, 2011

Before: SCIRICA, RENDELL, AMBRO, FUENTES,
SMITH, FISHER, CHAGARES, JORDAN and VANASKIE,
Circuit Judges.

(Opinion Filed December 20, 2011)

---

*Honorable Donetta W. Ambrose, United States District Court Judge for the Western District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

RENDELL, *Circuit Judge*, with whom *Circuit Judges* SCIRICA, AMBRO, FUENTES, FISHER, CHAGARES and VANASKIE, join.

At issue on appeal in this class action litigation is the propriety of the District Court's certification of two nationwide settlement classes comprising purchasers of diamonds from De Beers S.A. and related entities ("De Beers").[1] The settlement provided for a fund of $295 million to be distributed to both the direct and indirect purchasers: the direct purchasers were to receive $22.5 million of the fund, while the indirect purchasers would receive $272.5

[1] The Settlement involved five individual class actions pending in federal court and two other class suits pending in state court. The individual federal suits presently before us are: *Sullivan v. DB Investments, Inc.*, Index No. 04-cv-02819 (D.N.J.); *Null v. DB Investments, Inc.*, Madison Co. No. 05-L-209 (Madison County, Ill. Cir. Ct., removed to S.D. Ill.); *Leider v. Ralfe*, No. 01-CV-3137 (S.D.N.Y.); *Anco Industrial Diamond Corp. v. DB Investments, Inc.*, No. 01-cv-04463 (D.N.J.); and *British Diamond Import Co. v. Central Holdings Ltd.*, No. 04-cv-04098 (D.N.J.). The two other class actions pending in state court pertinent to the Settlement and this set of appeals are: *Hopkins v. De Beers Centenary A.G.*, San Francisco County No. CGC-04-432954 (Cal. Super. Ct.), and *Cornwell v. DB Investments, Inc.*, Maricopa Co. No. CV2005-2968 (Ariz. Super. Ct.).

million. A panel of our Court held that the District Court's ruling was inconsistent with the predominance inquiry mandated by Federal Rule of Civil Procedure 23(b)(3), and remanded the matter for further proceedings. *See Sullivan v. DB Investments, Inc.*, 613 F.3d 134 (3d Cir. 2010), *reh'g en banc granted and vacated by Sullivan v. DB Investments, Inc.*, 619 F.3d 287 (3d Cir. 2010). We then granted the plaintiffs' petition for rehearing en banc and vacated the prior order. Accordingly, we address anew the propriety of the District Court's certification of the direct and indirect purchaser classes pursuant to Federal Rule of Civil Procedure 23(b)(2) and 23(b)(3), and also consider for the first time the objections raised to the fairness of the class settlement.[2]

We believe that the predominance inquiry should be easily resolved here based on De Beers's conduct and the injury it caused to each and every class member, and that the straightforward application of Rule 23 and our precedent should result in affirming the District Court's order certifying the class. But the objectors to the class certification and our dissenting colleagues insist that, when deciding whether to certify a class, a district court must ensure that each class member possesses a viable claim or "some colorable legal claim," (Dissenting Op. at 10). We disagree, and accordingly, we will reason through our analysis in a more

[2] Because the Panel found the certification of the class to be flawed, it did not reach the Rule 23 fairness objections to the settlement, distribution plan, and fee award, or the District Court's resolution of these objections. *See Sullivan*, 613 F.3d at 142 n.6. Because we now conclude that the District Court's certification of the proposed settlement was appropriate, we will also address these issues.

deliberate manner in order to explain why the addition of this new requirement into the Rule 23 certification process is unwarranted.

Sullivan v. DB Investments, et al.,
Nos. 08-2784/2785/2798/2799/2818/2819/2831/2881

SCIRICA, *Circuit Judge*, concurring.

I fully concur in the Court's opinion. I write separately to address this case in the wider context of the evolving law on settlement classes.

Ever since the Supreme Court's landmark decisions in *Amchem Products Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), one of the most vexing questions in modern class action practice has been the proper treatment of settlement classes, especially in cases national in scope that may also implicate state law. Grounded in equitable concepts of structural and procedural fairness for absent plaintiffs—competent and conflict-free representation, fair allocation of settlement, absence of collusion—*Amchem* and *Ortiz* set down important standards and guidelines for settlement classes.[1]

[1] The class action device has a venerable pedigree in equity practice. As early as the seventeenth century, English chancery courts employed bills of peace to facilitate representative suits analogous to "common question" suits under Rule 23(b)(3). Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. Pa. L. Rev. 1849, 1861-65 (1998). Inchoate class actions continued in the American legal system until codified under Rule 23 in Federal Rules of Civil Procedure in 1938. *Id*. at

Despite initial uncertainty the opinions might pose formidable obstacles for settling massive, complex cases, this has not, for the most part, proved to be the case. Nonetheless, class settlement in mass tort cases (especially personal injury claims) remains problematic, leading some practitioners to avoid the class action device—most prominently in the recent $4.85 billion mass settlement of 50,000 claims arising out of use of the drug Vioxx. In fact, some observers believe there has been a shift in mass personal injury claims to aggregate non-class settlements. "The *Zyprexa* and *Ephedra* settlements, as well as the more recent *Guidant* and *Vioxx* settlements, suggest that the MDL process has supplemented and perhaps displaced the class action device as a procedural mechanism for large settlements." Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation after* Ortiz, 58 U. Kan. L. Rev. 775, 801 (2010); *see also* Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 636 tbl. 12 (2006) (presenting evidence that, in sample, 41% of cases denied

---

1878-1942. The 1966 amendments to Rule 23 substantially modified earlier practice and ushered in a class action "revolution" by introducing most of the current aspects of class action litigation, particularly the broad provisions of 23(b)(3) and the concomitant procedural safeguards requiring predominance and notice. Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. Pa. L. Rev. 1439, 1484-89 (2008).

class certification ended in non-class settlement). This is significant, for outside the federal rules governing class actions,[2] there is no prescribed independent review of the structural and substantive fairness of a settlement including evaluation of attorneys' fees, potential conflicts of interest, and counsel's allocation of settlement funds among class members.[3]

Because of the pivotal role and ensuing consequences of the class certification decision, trial courts must conduct a "rigorous analysis" of Rule 23's prerequisites. *Wal-Mart Stores, Inc. v. Dukes*, --- U.S.---, 131 S. Ct. 2541, 2551-52 (2011); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 315-21 (3d Cir. 2008); *In re Initial Pub. Offerings Secs. Litig.*, 471 F.3d 24, 31-42 (2d Cir. 2006).[4] The same

---

[2] Bankruptcy may also provide a vehicle for some measure of compensation to mass claimants (creditors) and for resolution of liability.

[3] Nevertheless, some MDL transferee judges have treated the MDL proceedings as quasi class actions and restricted contingent fee agreements in non-class aggregate settlements under their equitable and supervisory powers. *See In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 558-62 (E.D. La. 2009); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708 (DWF/AJB), 2008 WL 682174 (D. Minn. Mar. 7, 2008); *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006).

[4] For a litigation class, the key decision is whether or not to certify the class. Once a class is certified, the dynamics of the case change dramatically. For many plaintiffs, denial of

analytical rigor is required for litigation and settlement certification, but some inquiries essential to litigation class certification are no longer problematic in the settlement context. A key question in a litigation class action is manageability—how the case will or can be tried, and whether there are questions of fact or law that are capable of common proof. But the settlement class presents no management problems because the case will not be tried. Conversely, other inquiries assume heightened importance and heightened scrutiny because of the danger of conflicts of interest, collusion, and unfair allocation. *See Amchem*, 521 U.S. at 620 ("[O]ther specifications of the Rule [23]—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context.").

In conducting a "rigorous analysis" under Rule 23, lower courts have applied the strictures laid down in *Amchem* and *Ortiz*, and added some of their own. So far, the developing jurisprudence appears to have justified the judgment of the Judicial Conference's Committee on Rules of Practice and Procedure and Advisory Committee on Civil

---

certification may sound the death knell of the action because the claims are too small to be prosecuted individually. For many defendants, class certification may create hydraulic pressure to settle, even for claims defendants deem non-meritorious. For these reasons, the Supreme Court adopted Federal Rule of Civil Procedure 23(f) to permit a discretionary interlocutory appeal from the grant or denial of class certification.

Rules to defer consideration of a variant rule for settlement class actions.

Rule 23(a) sensibly provides that every certified class must share common questions of law or fact. For (b)(3) classes, common questions must predominate over individual questions, claims must be typical, and the class action device must be superior to other available methods for fairly and efficiently adjudicating the controversy. Naturally, there is some overlap in the requirements for commonality, typicality, and predominance—all of which must be shown.

Commonality for a settlement class should be satisfied under the standard for supplemental jurisdiction first set forth in *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966), allowing joinder of claims deriving from a common nucleus of operative fact. *See also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, --- U.S. ---, 130 S. Ct. 1431, 1443 (2010) (Scalia, J., plurality opinion) ("A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits."). Variation in state law should not necessarily bar class certification. The focus in the settlement context should be on the conduct (or misconduct) of the defendant and the injury suffered as a consequence. The claim or claims must be related and cohesive and should all arise out of the same nucleus of operative fact. The "common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the

validity of each one of the claims in one stroke." *Dukes*, 131 S.Ct. at 2551. The interests of the class members should be aligned.

The nature of the predominance analysis reflects the purpose of the inquiry, which is to determine whether "a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem*, 521 U.S. at 615 (quoting Fed. R. Civ. P. 23 advisory committee note). This is important even though, in the settlement context, a court need not worry about the challenge of litigating the claims to a verdict in a single proceeding. If the class presented a grab-bag of unrelated claims, a trial court would be unable to ensure that absent class members' interests were protected. The question, then, is what kind of common issues a settlement class must share to satisfy commonality and predominance.

In certain areas, such as antitrust, common issues tend to predominate because a major focus is the allegedly anticompetitive conduct of the defendant and its downstream effects on plaintiffs. *See In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 268 (3d Cir. 2009). Commonality and predominance are usually met in the antitrust settlement context when all class members' claims present common issues including (1) whether the defendant's conduct was actionably anticompetitive under antitrust standards; and (2) whether that conduct produced anticompetitive effects within the relevant product and geographic markets. *See id.* at 267.

Even when a settlement class satisfies the predominance requirement, the inclusion of members who have a questionable chance of a favorable adjudication may present fairness concerns that demand the district court's attention. Trial courts must enforce the Rule 23(a) and (b) requirements in order to obtain a "structural assurance of fair and adequate representation for the diverse groups and individuals affected." *Amchem*, 521 U.S. at 627. In discharging this responsibility, district courts have a number of ways to address fairness concerns.[5] Due to the context-

[5] Trial courts can certify subclasses in situations where divergent interests implicate fair allocation—a situation not presented here, as all indirect class members have aligned interests. Certifying subclasses may be proper "[w]here a class is found to include subclasses divergent in interest." *In re Ins. Brokerage Antitrust Litig*, 579 F.3d at 271 (quoting Fed. R. Civ. P. 23(c) advisory committee note). Even the conflicts in *Amchem* were amenable to resolution through sub-classes. *See Ortiz*, 527 U.S. at 856 (explaining that *Amchem* requires "a class divided between holders of present and future claims" to be "divi[ded] into homogeneous subclasses . . . with separate representation to eliminate conflicting interests of counsel"). Objector Quinn, in her answer to the petition for rehearing, states that subclasses would adequately address the *Illinois Brick*-based disparities in this case; she does not argue that it would be categorically improper to afford class treatment to indirect purchasers governed by *Illinois Brick*. *See* Quinn Answer at 11. The District Court here examined whether indirect purchasers'

specific nature of these judgments, district courts should be afforded a broad ambit of discretion.

For viable settlement classes, *Amchem* and *Ortiz* made clear that expediency could not negate the requirements of Rule 23, which serve to protect absent class members. *See Amchem*, 521 U.S. at 621 ("Subdivisions (a) and (b) [of Rule 23] focus court attention on whether a proposed class has sufficient unity so that absent members can be fairly bound by decisions of class representatives. That dominant concern persists when settlement, rather than trial, is proposed."). The principal danger of collusion lies in the prospect that class counsel, induced by defendants' offer of attorneys' fees, will "trade away" the claims of some or all class members for inadequate compensation. There is also the possibility that a settlement will not serve the interests of all of the class members, which may be in tension. In *Amchem*, for instance, the Court concluded the settlement was not demonstrably fair—there was insufficient allocation to asbestos claimants who were seriously injured (e.g. mesothelioma) and insufficient protection of non-impaired plaintiffs. 521 U.S. at 625-28. The Court worried that the claims of the exposure-only class members were being released without adequate protection. *Id.*; *see also In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 148 F.3d 283, 315 (3d Cir. 1998) ("*Prudential*") (identifying and distinguishing *Amchem*'s

---

interests diverged depending on the law applied to their claims, and found such differences to be irrelevant in the context of this settlement. I find no abuse of discretion in such a conclusion.

concerns); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 784-86 (3d Cir. 1995) (providing summary of the debate regarding propriety of mass tort settlements prior to *Amchem*).

These observations elucidate the issues of predominance and fairness present in this case. Here, the objectors contend certain claims (claims under state-law following *Illinois Brick*) are not viable--that is, they fail to state a cause of action.[6] For this reason, objectors believe that defendants are barred from settling these claims in a settlement class action because of the predominance requirement. Under objectors' view of Rule 23, trial courts would be obligated at the settlement class certification stage to decide which state's law would govern for that particular plaintiff, and whether a plaintiff has stated a valid cause of action, even if no defendant has raised a Rule 12(b)(6) objection—the usual way to contest the validity of a claim. Objectors contend they seek to protect absent class members, but fail to explain how absent class members—all of whom claim injury—are harmed by the defendants' willingness to settle all potential claims.

This interpretation also presents significant administrative problems. Objectors view the indirect purchaser class as composed of members who either have valid claims under the laws of states with *Illinois Brick*

[6] Objectors also claim that variance on state claims (based on consumer protection and unjust enrichment laws) defeats predominance as well.

repealers or members who have invalid claims under the laws of non-repealer states. But a claim cannot be declared invalid without proper analysis, which would require a choice-of-law examination for each class member's claim. Such analyses may pose difficulties in cases where the residence of the class member is not the sole consideration; modern choice-of-law standards often consider an array of factors particular to individual plaintiffs. Consequently, individual 12(b)(6) inquiries for settlement class certification could present serious difficulties in administration and greatly increase costs and fees, and may deplete rather than increase the recovery of even successful plaintiffs.[7]

---

[7] The purported "overbreadth" of the putative class at issue here is qualitatively different from the Supreme Court's concerns in *Amchem*. Under *Amchem* the significance of variations in state laws is properly assessed in terms of the interests of absent class members. The proposed *Amchem* settlement, extinguishing claims for different injuries with different onsets incurred at different times due to conduct of different defendants, undercompensated exposure-only claims and those with mesothelioma. Here, objectors contend some class members do not have a valid cause of action, but these class members with non-repealer state law claims have lost nothing through inclusion in the class. Objectors speculate inclusion of non-repealer state law claims necessarily diminishes the settlement accrued to class members whom they contend have undisputedly valid claims. But they provided no support for their assertion. In *Amchem* the objectors provided evidence of intraclass conflicts detrimental

Issues of predominance and fairness do not undermine this settlement. All plaintiffs here claim injury that by reason of defendants' conduct—market manipulation and fraud—has caused a common and measurable form of economic damage. They seek redress under federal antitrust laws and state antitrust, consumer protection, and unjust enrichment laws. All claims arise out of the same course of defendants' conduct; all share a common nucleus of operative fact, supplying the necessary cohesion. Class members' interests

---

to class members. For example, 15% of the proposed *Amchem* settlement's mesothelioma claims arose in California, where the average recovery for a mesothelioma claim was more than double their maximum recovery in the settlement. *Amchem*, 521 U.S. at 610 n.14.

The objectors have not shown that plaintiffs suffering identical economic injuries due to a single course of conduct on the part of the defendant have conflicting interests solely because some class members may have stronger claims depending upon variation in state law. Objectors assume that the non-repealer state claims have zero settlement value and that defendants would contribute the same amount to the common settlement fund regardless of how many claims the settlement may extinguish. But the settlement of the considerable bulk of claims against the defendants for a prior course of conduct may be of substantially greater value to defendants than a settlement of only the strongest claims against them. And, unlike in *Amchem*, objectors have not shown the inclusion of more claims was achieved by grossly underpaying some class members.

are aligned. The entire DeBeers settlement class consists of members with some pleaded claim (but not necessarily the exact same one) arising out of the same course of allegedly wrongful conduct such that shared issues of fact or law outweigh issues not common to the class and individual issues do not predominate. As the class structure and settlement assure fairness to all class members, there appears to be nothing in Rule 23 that would prohibit certification and settlement approval.

Moreover, the focus on the alleged insufficiency of some members' claims is misplaced. Settlement of a class action is not an adjudication of the merits of the members' claims. It is a contract between the parties governed by the requirements of Rule 23(a), (b), and particularly (e),[8] and

[8] Rule 23(e) is especially relevant in this context because it governs the settlement, dismissal, or compromise of a class action. It requires court approval of any agreement, and establishes five procedural requirements that must be satisfied:

> (1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.
>
> (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
>
> (3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

establishes a contractual obligation as well as a contractual defense against future claims. Here, class members and DeBeers want to settle all state and federal claims arising out of defendant's alleged misconduct. *Amchem* recognized the legitimacy of such a settlement under Rule 23, setting forth applicable parameters. The court's responsibility is to supervise and assume control over a responsible and fair settlement. Those requirements have been met here.

A responsible and fair settlement serves the interests of both plaintiffs and defendants and furthers the aims of the class action device. Plaintiffs receive redress of their claimed injuries without the burden of litigating individually. Defendants receive finality. Having released their claims for consideration, class members are precluded from continuing to press their claims. Collateral attack of settlements and parallel proceedings in multiple fora are common realities in modern class actions—features that can imperil the feasibility of settlements if defendants lack an effective way to protect

---

> (4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.
>
> (5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

Fed. R. Civ. P. 23(e).

bargained-for rights. *See Prudential*, 314 F.3d at 104-05. If the indirect-purchaser claims at issue here were excluded, nothing would bar the plaintiffs from bringing them as separate class actions or as aggregate individual actions, leaving defendants "exposed to countless suits in state court" despite the settlement. *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 367 (3d Cir. 2001) ("*Prudential II*"). (Here, prior to removal and MDL consolidation, it appears an Illinois state court certified a nationwide litigation class asserting indirect-purchaser claims under the laws of all 50 states.) Perhaps a defendant will be willing and able to defend or settle all of these actions separately, or perhaps it won't. Either way, the costs (direct and indirect) and risks of continuing litigation will be greater. A defendant, therefore, may be motivated to pay class members a premium and achieve a global settlement in order to avoid additional lawsuits, even ones where it might be able to file a straightforward motion to dismiss for failure to state a claim.[9]

Finally, new limitations such as those proposed by objectors would, I believe, undercut the policy goals of the

[9] Facing liability for alleged misconduct, a defendant may desire global settlement for several possible reasons: (1) redressing plaintiffs' injuries; (2) the possibility of liability; (3) the direct costs of defending suits, often in multiple fora; (4) the risk of financially unmanageable jury verdicts which may threaten bankruptcy; (5) the effects of pending or impending mass litigation on its stock price or access to capital markets; (6) the stigma of brand-damaging litigation; and (7) maintaining financial stability.

Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4, and the Multidistrict Litigation Statute, 28 U.S.C. § 1407, both of which are designed to encourage the consolidation of mass claims national in scope—and in the case of CAFA, with particular reference to class actions based on state law claims. Of course, district courts must fully enforce the requirements of Rule 23. But the limitations objectors propose here "would seriously undermine the possibility for settling any large, multi district class action." *Prudential II*, 261 F.3d at 367.[10]

---

[10] In *Prudential II*, we affirmed the grant of an injunction enjoining a state-court action brought by policyholders who were members of the *Prudential* class to the extent the state-law claims were based on or related to claims released in the class action. We agreed with the district court that allowing the policyholders to prosecute their civil actions in state court "would allow an end run around the Class settlement by affording them (and other class members who might later attempt the same strategy) an opportunity for relitigation of the released claims." 261 F.3d at 367 (internal quotation marks omitted). We noted that the position urged by the policyholders "would seriously undermine the possibility for settling any large, multi district class action. Defendants in such suits would always be concerned that a settlement of the federal class action would leave them exposed to countless suits in state court despite settlement of the federal claims. . . . [S]uch state suits could number in the millions." *Id*. It is for this reason that releases of all claims—whether state or federal—have been held valid, "provided they are based on

The class action device and the concept of the private attorney general are powerful instruments of social and economic policy. Despite inherent tensions, they have proven efficacious in resolving mass claims when courts have insisted on structural, procedural, and substantive fairness. Among the goals are redress of injuries, procedural due process, efficiency, horizontal equity among injured claimants, and finality. Arguably a legal system that permits robust litigation of mass claims should also provide ways to fairly and effectively resolve those claims. Otherwise, mass claims will likely be resolved without independent review and court supervision.[11]

---

the same factual predicate." *Prudential*, 148 F.3d at 326 n.82. So long as a sufficient factual predicate exists, a release can even bar later claims which could not have been brought in the court rendering the settlement judgment. *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 377 (1996).

[11] The final draft of the American Law Institute's *Principles of the Law of Aggregate Litigation* points out the current lack of judicial oversight over non-class aggregate settlement. § 3.15 cmt. a (2010). It notes that, unlike class settlements, "[n]on-class aggregate settlements are governed primarily by ethical rules and are rarely subject to court review or approval for fairness" and so advocates "a fresh look . . . at how non-class aggregate settlements should be regulated." *Id.* In particular, it proposes a rule to provide each plaintiff a nonwaivable right to challenge in court a settlement that is allegedly "not procedurally and substantively fair and reasonable." § 3.18(a). The ALI *Principles* analogizes these

proposed requirements to those applied to class settlements. § 3.17 cmt. e.