IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 15-2206, 15-2217, 15-2230, 15-2234, 15-2272, 15-2273, 15-2290, 15-2291, 15-2292, 15-2294, 15-2304 & 15-2305

In Re: NFL Players Concussion Injury Litigation

Appeal from the United States District Court
For the District of Pennsylvania
E.D. Pa. No. 2-12-md-02323
(The Honorable Anita Brody)

BRIEF OF AMICUS CURIAE OF PUBLIC CITIZEN, INC. IN SUPPORT OF APPELLANTS SEEKING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 & 29(c)(1), amicus curiae Public Citizen, Inc. states that it has no parent corporation and that there is no publicly held corporation that owns 10% or more of Public Citizen, Inc.

/s/ Alan B. Morrison
Alan B. Morrison

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INTEREST OF AMICUS CURIAE

Public Citizen, Inc. is a non-profit consumer advocacy organization with more than 300,000 members and supporters nationwide. As stated more fully in the July 14, 2015 motion for leave to file this brief, granted on July 17, 2015, Public Citizen has longstanding interests in the proper application of Rule 23 and due process principles in class-action settlements. Because Public Citizen is not a member of the settlement class in this action, and because neither Public Citizen nor any of its attorneys represents any class member, it is able to make arguments in support of objections that are applicable to the settlement class as a whole, unlike lawyers who represent class members whose clients are adversely affected by specific provisions in the settlement and whose briefs will focus on the deficiencies applicable to their clients.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal is from an order certifying a class action under Federal Rule of Civil Procedure 23(b)(3) and simultaneously approving the settlement of the action under Rule 23(e). The opinion in support of the order resolved two basic issues: first, whether the class could properly be certified to implement the proposed settlement,

[1] No party's counsel authored this brief, in whole or in part, and no party, nor any person other than amicus, its members or its counsel, contributed money that was intended to fund preparing or submitting this brief.

and second, whether the settlement is fair, reasonable, and adequate. This brief addresses the first issue.

Because these lawsuits faced formidable problems that might extinguish the claims of all class members entirely, a settlement that did not fully compensate all class members might still be fair, if the class were adequately represented. In this case, for the class to be certifiable, the manner in which class counsel determined how the money that the NFL agreed to pay would be allocated among class members had to satisfy the adequacy of representation requirement of Rule 23(a)(4). The settlement class failed to satisfy that requirement.

The flaw in the class certification can be stated succinctly: A small group of attorneys, eventually designated as representing two named class representatives, devised a benefits plan and a grid for determining settlement benefits that (1) includes only five disease categories (plus death with CTE prior to settlement approval), (2) contains significant offsets to settlement benefits based on age at time of diagnosis and eligible years played in the NFL, and (3) excludes from payment a large percentage of the class who have concussion-related conditions that are alleged in the class complaint. The attorneys for the class did not, and could not, properly represent the wide range of circumstances of the class as a whole in this settlement.

A different settlement, arrived at by counsel who adequately represented the full range of interests within the class, and providing appropriate benefits for the

injured class, might allow certification of a class of retired players, consistent with Rule 23(a)(4) and due process. Such a settlement might be based on a grid and might even provide that not all players who suffered concussions would receive a monetary benefit. The problem with this settlement, and with the class certified solely for purposes of this settlement, is that it was constructed without the involvement of counsel representing significant segments of the class who are adversely affected by its offsets and exclusions.

STATEMENT OF THE CASE

A. The Settlement Agreement

This class action is an outgrowth of an MDL consolidation of over 300 cases brought on behalf of approximately 5,000 individuals who played in the NFL and who suffered one or more concussions resulting in damage to their brains and concomitant symptoms and diseases or the risk of developing them. After the MDL was established, the district court designated Christopher Seeger and Sol Weiss as co-lead counsel and created an executive committee and a steering committee of attorneys. JA 689. Counsel filed a master administrative long-form complaint on June 7, 2012, which was amended on July 17, 2012. JA 863. Neither complaint designated named plaintiffs, nor included class or subclass allegations. Looking to

that complaint and the stated intention of the NFL to move to dismiss on preemption grounds, the court ordered briefing and heard argument on the preemption issue.[2]

On July 8, 2013, the district court held a conference call with lead counsel in anticipation of a ruling on the preemption issue. Afterwards, the court ordered the parties to commence mediation to determine whether a consensual resolution of the case was possible under the supervision of retired United States District Judge Layn Phillips, who was directed to report back by September 3, 2013. The order did not designate class representatives nor suggest the creation of classes or subclasses. JA 954. Instead, as Diane Nast, counsel for the eventual subclass 2, explained, lead counsel and "the other members of the Plaintiffs' negotiating team" decided on their own to create two sub-classes, with one covering those who already had a "qualifying" injury, and the other including those who did not. JA 3918-19, ¶¶11-12. On August 29th, the parties advised the court that they had an agreed-upon term sheet, setting the amounts that the NFL would pay and under what conditions, and that a detailed settlement would follow. The terms were promptly made public, but the settlement agreement was not completed and filed until January 6, 2014. On that date, class counsel filed their first class action complaint seeking damages and

[2] Lead counsel also filed a complaint for medical monitoring on June 7, 2012, which included named plaintiffs and sought class certification and injunctive relief only under Rule 23(b)(2) for those retired players who had not filed a personal injury action for latent brain injury. JA 782, 788 ¶16.

certification under Rule 23(b)(3), naming Kevin Turner and Shawn Wooden as class representatives.

The declarations of participating counsel and mediator Phillips state that lead counsel determined that subclasses were needed. Judge Phillips described the two sub-classes and the rationale for creating them as follows (JA 3806, ¶7):

> In order to ensure the adequate and unconflicted representation of all of the proposed Class Members, Plaintiffs agreed to create two proposed separate subclasses, each represented by separate subclass counsel—(1) to include those Class Members who were not diagnosed with a qualifying injury; and (2) to encompass Class Members diagnosed with a qualifying injury. Plaintiffs believed—and I agreed—that having these two separate subclasses would ensure that any final resolution did not favor retired players who are currently suffering from compensable injuries from those who have not been diagnosed and who may not develop compensable injuries for years to come, if ever.

Class counsel Seeger put it this way at the settlement hearing (JA 5360-61):

> The motivation of Subclass I was to insure that without—that players without a qualifying injury today would have the money later to compensate injuries that would come down the road in the future. Subclass II was motivated to bargain for the best deal that they could presently get, and because the monetary award fund is … inflation adjusted and uncapped any possibility of a conflict between those two classes is eliminated.

Arnold Levin, counsel for subclass I (the futures), made his goal as sub-class counsel clear in paragraph 26 of his declaration in the district court (JA 3908): "I insisted on, and received, inflation-adjusted Monetary Awards to protect claimants over the 65 year term of the Settlement." Additional protections for future injuries were also provided by allowing class members who had received benefits, but whose

conditions worsened, to receive the greater benefits associated with the more aggravated condition. And as Levin noted (JA 3910, ¶31), he "paid particular close attention to the structure of the BAP to make sure it was sufficiently funded for a period of ten (10) years to provide a baseline" examination and "supplemental medical treatment and pharmaceuticals, as needed."

If the claims of appellants here were that class counsel did not adequately represent the interests of future claimants who would be diagnosed with conditions compensable under the agreement, that broad claim would fail. The problem with the class certification, however, is that the settling parties failed to recognize the need for separate representation of any other subclass. The settlement covers multiple other conflicting interests for which there were no separate subclasses and for whom there was no one at the bargaining table.

Most significantly, as the declarations themselves reveal, the basic decision that some conditions would qualify for compensation under the settlement and others would not was antecedent to the creation of the subclasses; indeed, the subclasses are *defined* with reference to the existence, or not, of a qualifying condition. But the fundamental decision as to which conditions are and are not compensable was made by class counsel without any separate representation of class members with the conditions that would not qualify for compensation.

The settlement agreement created a grid with payment schedules for five specific diseases: ALS, Alzheimer's, Parkinson's, and either moderate or severe dementia.[3] Accordingly to the estimate prepared by class counsel's expert, only about 3,600 out of 21,000 class members (17%) will receive any monetary award under the grid. JA 1568. Most class members will receive only an immediate medical examination to determine their baseline health condition and counseling and/or certain treatment if they are found to suffer from level 1 (moderate) neurocognitive impairment. If a class member eventually develops a diagnosed disease on the grid, he will then be entitled to monetary benefits. But if a class member does not develop any qualifying disease, he will receive no monetary benefits, regardless of how debilitating his symptoms and how much his life is disrupted because of his concussion-related symptoms. And, unless the class member opted out, his claims against the NFL are forever barred.

Class counsel were all aware of the excluded conditions, symptoms, and diseases alleged to be associated with concussions from playing football in the NFL because they signed the July 17, 2012, amended master complaint, which was the

[3] Benefits were also provided for a few class members who had died before July 7, 2014 with CTE, which was later extended to those who died before the court approved the settlement on April 22, 2015. For simplicity and because the existence of such claimants does not alter the analysis, this brief will not focus on benefits for those who may die with CTE in the future in assessing adequacy of representation under Rule 23(a)(4).

operative document when the negotiations took place. They specifically alleged in paragraph 74 that studies and tests have established that football players who sustained repetitive head impacts have suffered brain injuries that result in one or more of the following conditions:

> early-onset of Alzheimer's Disease, dementia, depression, deficits in cognitive functioning, reduced processing speed, attention and reasoning, loss of memory, sleeplessness, mood swings, personality changes, and the debilitating and latent disease known as Chronic Traumatic Encephalopathy ("CTE"). The latter condition involves the slow build-up of the Tau protein within the brain tissue that causes diminished brain function, progressive cognitive decline, and many of the symptoms listed above. CTE is also is associated with an increased risk of suicide. JA 882.

In addition, the complaint specifically alleged that brain damage can result in injuries "which develop over time and manifest later in life [and] include but are not limited to varying forms of neuro-cognitive disability, decline, personality change, mood swings, rage, and, sometimes, fully developed encephalopathy." JA 917, ¶255. See also JA 1139, ¶61; JA 1177, ¶257 (allegations concerning same conditions in the *Turner* class complaint). Despite class counsel's allegations that these conditions are concussion-related, most class members suffering them will receive no monetary benefits because they will not develop a disease on the grid.

With respect to those who have or may develop one of the five diseases, two features of the grid further underscore the potential conflicts among even those class members who are eligible for monetary benefits. First, the highest payment, for ALS, is $5 million, with the maximum payments for other diseases declining from $3.5

million (Alzheimer's & Parkinson's) to $3 million (Level 2 Neurocognitive Impairment) and $1.5 million (Level 1.5 Neurocognitive Impairment). Those numbers may or may not be appropriate, but they are not based on objective criteria (unlike losses in securities cases, for example), nor does anyone claim that (unlike in asbestos cases, for example), historic data on what claims for concussions involving these diseases have received in litigation or settlement is available to use as a benchmark for assessing their value. Moreover, there is no claim that these numbers can be derived from estimated costs of treatment, either in actual dollars or relative costs among the diseases.

It appears that class counsel—with no separate representation of the competing interests involved as between the diseases on the grid—based these amounts on their own subjective judgments, and the NFL agreed because the overall expenditures that it expected the grid to produce were consistent with its assessment of how much it was willing to pay to settle the case and for which diseases. JA 3575, ¶22; JA 3581, ¶35. Amicus expresses no view on whether, considered only as a matter of fairness among these five diseases, the numbers on the grid are appropriate because that question has no right or wrong answer. Indeed, the very subjective nature of these assessments underscores the need for separate lawyers to adequately represent the diverse interests of class members in making them.

Class counsel also created two major offsets that will significantly reduce the payments to class members who are on the grid: (1) reductions for players with fewer than five years of eligible play in the NFL and (2) decreases of 20 percent per five years beyond the age of 45 when a compensable disease is diagnosed. The impact of the eligible years' requirement, and in particular the failure to recognize that pre-season games and training camp are particularly likely sources of concussions, is vividly demonstrated in the brief on behalf of objector Andrew Stewart. He is likely to receive credit for only 1-2 years under the settlement, even though he has four years of credited service under the NFL's own retirement plan. As the expert report prepared for class counsel makes clear, more than 60% of the class have fewer than five years of credited service. JA 1572. That same report also estimates that the age of diagnosis offset would reduce the payments by 90% to Alzheimer's victims alone, with ALS class members suffering an estimated 40% reduction. JA 1573. No one at the bargaining table separately represented class members who are certain to be subject to either category of offsets. [4]

[4] Subclass 2 representative Turner has ALS, the disease with the highest payment on the grid. Because he played more than five years in the NFL and was diagnosed in 2010 before age 45, he is not subject to any offsets. JA 3816-17. Subclass 1 representative Wooden, who also played more than five seasons, was substituted for the original proposed representative in September 2013, after the term sheet was publicly announced. JA 3822-24. He was 41 when the settlement was filed, and at that time had no diagnosed qualifying disease. Thus, as with conditions not covered on the grid, there was no lawyer at the bargaining table who "advanced

In addition, although the amended master administrative complaint and the *Turner* class action complaint both included claims on behalf of the spouses of class members, JA 935 (Count XI) & JA 1196 (Count X), no one separately represented them in the negotiations. Rather than providing a separate benefit fund to offset their lost earnings and the disruption of the marital relationship, the settlement deducts 1% percent from a married player's award and redistributes it to his spouse. JA 5631, § 7.3. And if the player is not on the grid, the spouse receives nothing, regardless of the extent to which she has suffered a compensable injury.

Finally, the settlement agreement provides that class counsel will seek $112.5 million in attorneys' fees from the NFL, which the NFL has agreed not to contest, and that counsel may also move the Court for an additional 5 percent of the amount paid from each class member's benefits. JA 5670, §21.1. The settlement agreement *also* allows any of the attorneys being paid as class counsel to enforce any contingency fee contracts they have with class members who are able to recover on the grid. JA 1553, Q 16 (referring to offset for retainer agreements).

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the strongest arguments in favor of" recovery for class members who were not subject to these offsets. *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 253 (2d Cir. 2011).

B. Settlement Approval Proceedings Below

In deciding whether the class met Rule 23(a)(4)'s requirement of adequate representation, the district court began by noting the importance of counsel's experience, vigorous prosecution of the case, and arm's-length negotiation with the NFL—none of which amicus contests. JA 86-90. It followed with a discussion of the adequacy of the named parties (JA 90-91), and finally turned (JA 91-99) to "Absence of Conflicts of Interests." The court recognized the "differing levels of compensation" and the absence of compensation for many class members, but found that acceptable because those allocations decisions "reflect the underlying strength of Class Members' claims." JA 96. The court then upheld the asserted factual bases for these distinctions, even though the facts were never the subject of discovery or trial. The court did not explain how, consistent with Rule 23(a)(4), it was permissible for one set of class counsel to represent each of the disparate categories of injured class members adequately and without conflict.

ARGUMENT

THE DISTRICT COURT ERRED IN CONCLUDING THAT THE SETTLEMENT CLASS IN THIS CASE MET THE REQUIREMENTS OF RULE 23(a)(4).

The fundamental flaw in the settlement class approved by the district court is that class counsel negotiated and agreed to a settlement under which some class members will receive significant benefits, others will receive reduced benefits, and

many will receive no monetary benefits at all, without adequate representation of the conflicting interests of class members who stand to win and lose. Amicus does not suggest that class counsel acted in bad faith or deliberately set out to favor some class members at the expense of others. Rather, we assume the opposite. Nonetheless, Rule 23(a)(4) does not allow a single set of class counsel to represent a class with such differing interests and to negotiate a settlement that favors some members of the class at the expense of others.

A. *Amchem* Requires Reversal of the Class Certification Here.

Class counsel recognized that they had a potential problem under *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), where a single set of class counsel had attempted to represent both asbestos claimants who were currently injured and those who might develop asbestos-related illnesses in the future. As explained above, to deal with the present-versus-futures problem, class counsel here created two sub-classes, one for those who had current compensable diseases and one for those who did not. To protect the futures, they included provisions providing that payments to class members with current compensable injuries would not come at the expense of those who developed those specific injuries in the future. As a result, according to Mr. Seeger, "There are no A[m]chem issues as has been asserted [by the objectors]. There are no futures issue[s]. The entire class played in the NFL is discernible and was exposed to head impacts. The monetary award fund is uncapped.

Awards are inflation adjusted and there's no cash flow maximum." JA 5363. Amicus agrees that this settlement does not generally run afoul of the futures aspect of *Amchem*, but the case stands for much more than that.[5]

Amchem's rationale demonstrates why the class was improperly certified here. As the Supreme Court emphasized, the protections in Rule 23 are "designed to protect absentees by blocking unwarranted or overbroad class definitions [and] demand undiluted, even heightened, attention in the settlement context." 521 U.S. at 620. Class counsel in *Amchem* reached an agreement with defendants on behalf of a class of all persons injured by asbestos. Some of them had sustained or would sustain serious impairments, while others would sustain lesser harms and others no harm at all. Counsel agreed on a set of payments, like the grid here, applicable to all class members. Although the Court identified several concerns with the settlement and related class certification, the overarching problem was that one set of lawyers were attempting to represent class members in a settlement where class members had very different injuries and, in many respects, conflicting interests.

[5] However, as demonstrated in the briefs of several appellants, those who died with CTE prior to April 22, 2015 (current claimants) will receive monetary benefits, while those who die with CTE after that date (future claimants) will not—unless they have another disease compensable on the grid. That is precisely the kind of current vs. futures issue that class counsel sought to avoid. But even if that inequality were corrected, it would still leave uncompensated those class members who live with CTE-related conditions, at least until their death, as well as thousands of others whose conditions are not compensable.

The *Amchem* settlement covered individuals who had no current asbestos-related symptoms and may not have even known that they had been exposed to asbestos. Class counsel here avoided that aspect of *Amchem* because each class member knows whether he played in the NFL and whether he suffered blows to the head. In addition, the settlement assures that class members who manifest a disease on the grid in the future will receive the same inflation adjusted amounts as those who have such a disease now. However, the futures problem was only one reason why the Court rejected class certification in *Amchem*. Most importantly, "[a]s the Third Circuit pointed out, named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned." 521 U.S. at 626.

Specifically, some class members in *Amchem* would develop the deadly disease mesothelioma and others would develop asbestosis (some quite serious cases and others less so). *Id.* at 603. Many class members would have no physical impairment of their health, but would have lesions on their lungs that were detectable on x-rays and for which courts had been upholding jury verdicts, the so-called "pleurals." Under that settlement, the pleurals would receive no compensation "even if otherwise applicable state law recognizes such claims." *Id.* at 604. As in this case, class counsel in *Amchem* had decided how much each category of injury would

receive, and they allotted nothing for the pleurals or for the consortium claims for spouses. The Court in *Amchem* quoted with approval this Court's analysis of the problem: "'But the settlement does more than simply provide a general recovery fund,' the Court of Appeals immediately added, '[r]ather, it makes important judgments on how recovery is to be *allocated* among different kinds of plaintiffs, decisions that necessarily favor some claimants over others." *Id.* at 610 (emphasis by this Court).

Likewise here, class counsel decided which diseases would be on the grid, how much each such disease would be paid, and what offsets would be made. And, just as class counsel in *Amchem* decided that pleurals would receive no compensation, counsel here decided that thousands of class members (and spouses) whose claims and conditions are included in the class complaint would get nothing. As *Amchem* holds, Rule 23(a)(4) does not allow class counsel to make those choices, no matter how reasonable they may seem. As for the notion that class representatives can provide the adequate representation when class counsel do not, this Court has long since rejected that approach: "Experience teaches that it is counsel for the class representative and not the named parties, who direct and manage these actions. Every experienced federal judge knows that any statements to the contrary is sheer sophistry." *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 832 n.9 (3d Cir. 1973).

In one sense, the grid here is more unjustified than the allocation formula in *Amchem*. *Amchem* was an effort to deal with a situation in which asbestos cases had been litigated for years, with multiple jury verdicts and settlements and a range of recoveries well established for the various conditions resulting from asbestos exposure. By contrast, there are *no* litigated or settled cases against the NFL arising from football-related concussions, rendering both the numbers on the grid and the offsets wholly a creation of class counsel and the NFL. The declaration of Diane Nast, counsel for the "already diagnosed" subclass, illustrates the problem. She notes that the class representative for that subclass will receive "a larger award" than others, because "[o]bjectively …. ALS is a rapidly progressive neurological disease that invariably leads to death, usually within three (3) to five (5) years after the onset of symptoms." JA 3925, ¶ 30; *see also* Seeger Declaration, JA 3588, n.11 (same reasons for larger award for ALS). But the "objective" fact that ALS usually causes death within five years does not "objectively" require the conclusion that a former player who lives for 20 years with Level 2 dementia is entitled to at most 60% of that sum because there are no "objective" criteria on which such line-drawing can be based. Even if a class member with ALS were entitled to "a larger amount" than other class members, that point would not "objectively" answer the question of how much larger, or why the amounts on the top row of the grid are the correct ones. In

a case of this nature, with a varied group of class members, decisions of this kind cannot be made by lawyers who are attempting to represent the entire class.

Class counsel defended the settlement below on the ground that, because the NFL was unwilling to pay all class members for every disease alleged in the complaint, choices had to be made. That explanation underscores the problem. As Judge Phillips described the negotiations (JA 3807, ¶8), class counsel, applying their own notions of "fairness," decided which categories of class members would get how much and on what basis:

> Plaintiffs' [*i.e.*, class counsel's] actions throughout the negotiations reflected a sound appreciation of the scientific issues associated with their claims. They were aware of mainstream medical literature linking traumatic brain injury to an increase in the likelihood for developing early-onset dementia, Alzheimer's Disease, Parkinson's Disease, and ALS. Informed by their experts and based on their investigation, the Plaintiffs concluded that it was fair to compensate retired players for those diagnoses as part of the Settlement.

The Judge made similar observations (JA 3808, ¶13) about the offsets (only two of which are discussed in this brief):

> Appropriately, the parties, in consultation with their medical and actuarial experts, negotiated and agreed to four limited categories of downward adjustments, or offsets, that may be applied to all monetary awards. These offsets include: the player's age, if 45 or older, at the time of diagnosis of a qualifying injury; the incidence of a stroke or traumatic brain injury unrelated to football (e.g., a severe car accident); failure to participate in the BAP, which is designed to provide early detection of a qualifying injury; and the number of seasons of active participation in NFL football play (which the parties considered an objective substitute for exposure to injury).

At no time have class counsel ever retracted from the assertion that it was they who made the final calls on which diseases would be on the grid, how much each would be paid, what offsets would be imposed and in what amounts, and which conditions alleged in the complaint (including loss of consortium) would receive nothing. Indeed, the record is uncontradicted that lead counsel and sub-class counsel operated as a team and made the allocation and all other decisions on that basis.[6]

The adequacy of representation problem is that every class member is competing against every other class member for benefits in a situation in which the defendant is not willing to pay everyone in the class for all of their concussion-related conditions. Under those circumstances, class counsel cannot adequately represent all of the class members with their diverse interests when counsel decide who are the winners and losers under the settlement. Contrary to what Mr. Seeger said at the settlement hearing (JA 5374), the issue is not whether, in engaging in

[6] For example, all papers in the district court and this Court were signed jointly by all class counsel; lead counsel Seeger, who was the only lawyer for the class to speak at the fairness hearing, identified for the judge the "members of the negotiating team." JA 5340. Seeger described himself as "the principal negotiator and chief architect" of the settlement (JA 3563), and made it clear in numerous portions of his declaration supporting the settlement that his team made what they considered the necessary tradeoffs to bring the deal together. JA 3580, ¶32. And, in those exceptional cases where a particular part of his team made arguments for some portions of the class, Seeger identified them in his declaration. JA 3585, ¶44. *See also* Seeger Declaration JA 3573-75, ¶¶18-20; JA 3580 ¶32; JA 3582, ¶36: JA 3584, ¶42. Levin Declaration, JA 3904-11, ¶¶15, 19, 26, 32. Nast Declaration, JA 3919-23, ¶¶ 13, 14, 18, 24.

"line drawing," class counsel "could have done it better or should have gotten more, should have tweaked this that way." Rather, it is whether counsel had the right to draw those lines at all, with no one representing those with different constituencies and different ideas of what is "fair" and "appropriate." In such circumstances, "[o]nly the creation of subclasses, and the advocacy of an attorney representing each subclass, can ensure that the interests of that particular subgroup are in fact adequately represented." *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 252 (2d Cir. 2011).

The district court reviewed the numbers on the grid, the offsets, and the exclusions and, without the benefit of an evidentiary hearing, found them to "reflect the underlying strength of the Class Members' claims." JA 96. That conclusion does not address the Rule 23(a)(4) issue because it focuses on the wrong problem. The difficulty here is not that it would be impossible to justify an outcome similar to this settlement based on the strength of the different claims. But there are any number of different ways of dividing amounts among the class that could similarly be said to reflect, broadly speaking, the differences in underlying strength of the claims. Because those differences do not dictate any particular settlement, a broad range of compromises among the varied interests of the class members could conceivably meet Rule 23(e)'s settlement criterion of fairness and adequacy. The problem is that, under Rule 23(a)(4), the process by which those trade-offs are made is acceptable

only if distinct groups of class members have adequate representation, which is a structural pre-condition for class certification. Absent adequate representation, a class certification cannot meet the requirements of Rule 23(a) as articulated in *Amchem*, and hence evaluating the reasonableness of the grid and other settlement terms under Rule 23(e) is irrelevant.

B. Other Authority From this Circuit Compels Reversal.

Other authority from this Court also compels reversal. The most recent case resembling this one is *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170 (3d Cir. 2012), in which the class claims were based on a variety of economic losses from defects in the sunroofs of automobiles owned by the class. The district court had certified a single class that was divided into two groups, with one—the "reimbursement group"—receiving preference in payment from the settlement fund. The settlement presented two problems similar to those in this case: "All of the representative plaintiffs in the case are members of the reimbursement group," *id*. at 175, and the decisions as to who would be included and excluded were made by class counsel. *Id*. at 177. This Court reversed approval of the class certification based on inadequate representation under Rule 23(a)(4): "Put simply, representative plaintiffs had an interest in excluding other plaintiffs from the reimbursement group, while plaintiffs in the residual group had an interest in being included in the reimbursement group. This is precisely the type of allocative conflict of interest that

exacerbated the misalignment of interests in *Amchem*, 521 U.S. at 626–27." 681 F.3d at 188.

Under *Dewey*, "[t]o properly analyze the intra-class conflict alleged here, we must look to the class as certified as well as to the terms of the settlement agreement. [*Amchem*] at 627." *Id.* at 185. Explaining the Rule 23(a)(4) flaw, *Dewey* could have been addressing this case: "The problem with dividing the class without having any representation from one of the groups becomes clearly untenable in this case because of who drew the line. … [T]he line 'was decided by the lawyers.'" *Id.* at 188-89.

Another case addressing Rule 23(a)(4), *Sullivan v. DB Investments, Inc.*, 667 F.3d 273 (3d Cir. 2011) (en banc), offers a marked contrast with this case. *Sullivan* involved the settlement of antitrust claims involving price fixing in the sale of diamonds to two separately represented classes: "the direct purchasers were to receive $22.5 million of the fund, while the indirect purchasers would receive $272.5 million." *Id.* at 285. This Court accepted the findings of the district court because "there were no intra-class conflicts since all putative members experienced injury caused by De Beers, all sought recovery for overpayment caused by allegedly anticompetitive behavior, and all shared common interests in establishing damages and injunctive relief." *Id.* at 327.

Most significant in contrast to this case was the method by which the allocation of the settlement fund was made between two sub-classes of indirect

purchasers. The overall amounts to be paid by the defendants were set, and the allocation between direct and indirect purchasers was agreed upon. There followed two years of proceedings involving representatives of both sub-classes, several lengthy reports by the special master, and competing econometric reports by several experts. At that point, "the Special Master recommended that, apart from the $22.5 million allocated to the Direct Purchaser Class, the Indirect Purchaser Settlement Fund of $272.5 million should be allocated 50.3%, approximately $137.1 million, to the Resellers Subclass, and 49.7%, approximately $135.4 million, to the Consumers Subclass." *Id.* at 289-90 (footnotes omitted). By contrast to *Sullivan*, where the final allocation decision was made by the district court, the final allocation here was made by class counsel.

Two other cases from this Court illustrate that the class here should not have been certified. In *Warfarin Sodium Antitrust Litig*, 391 F.3d 516, 525 (3d Cir. 2004), adequacy of representation was assured because "[a]ny settlement discussions had to be attended by at least one of the co-chairs, one consumer representative, and one TPP [third party payer] representative, and no settlement offer could be made or accepted without the prior consent of all consumer and TPP representatives on the committee." Furthermore, "the named parties, who included consumers and TPPs, as well as consumers from the indirect purchaser states, all shared the same goal of establishing the liability of DuPont, suffered the same [economic] injury resulting

from the overpayment for warfarin sodium, and sought essentially the same damages by way of compensation for overpayment." *Id.* at 532. *See also id.* at 533 (citing "existence of separate counsel as well as the operation of the Executive Committee" as assurances of structural protections). By contrast, the pre-*Amchem* case, *In re General Motors Corp. Pick–Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3d Cir. 1995), involved a class with representational issues closely resembling the adequacy of representation problems in this case. There was a settlement fund from which different groups within the class were fighting for their shares, just as there is here. Because one set of counsel there made all the allocation decisions despite "conspicuous evidence of such an intra-class conflict in the very terms of the settlement" (*id.* at 801*)*, this Court overturned class certification on adequacy of representation (and other) grounds, as it has consistently done in cases with intra-class conflicts of the kind at issue here.[7]

[7] The district court cited four other cases from this Circuit to support the finding of adequacy of representation, none of which had a single set of class counsel who established a complex and exclusive payment grid: *In re Pet Food Products Liability Litigation*, 629 F.3d 333 (3d Cir. 2010); *In re Insurance Brokerage Antitrust Litigation*, 579 F.3d 241(3d Cir. 2009); *New Directions Treatment Services v. City of Reading*, 490 F.3d 293 (3d Cir. 2007); and *In re: Prudential Insurance Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283 (3d Cir. 1998). Moreover, none involved claims for personal injuries, where the likelihood of significant variations among class members and lack of objective criteria for determining the extent of a class member's loss make adequacy of representation (and hence class certification) much more problematic than in economic injury cases where each class member's damages can be readily determined and compared to those of others in the class.

C. Providing Adequate Representation Would Not Preclude Settlement.

In response to the argument that Rule 23 (a)(4) required that others have a seat at the bargaining table, the district court speculated that "negotiations would have ground to a halt," JA 99, making a class settlement in this case impossible. But Rule 23 does not guarantee a right to a class settlement no matter what the facts or law may be. Instead, as the cases cited above establish, Rule 23(a)(4) and due process require that all members of the class be adequately represented. *Hansberry v. Lee*, 311 U.S. 32, 44-45 (1940).

In any event, separate counsel for significant subclasses could have been included in the settlement negotiations, so that their different (and potentially conflicting) interests were represented. The district court's objection—that such a process would be so unwieldy as to preclude the possibility of reaching agreement—vastly overstates the number of necessary subclasses. First, subclasses for each of the five diseases on the grid were needed so that each could argue for an appropriate payment compared to the others, as well as a subclass for members with CTE who are alive and a subclass for members with CTE who died. In light of the proposals to reduce benefits for those who played fewer than five years or who were diagnosed with compensable diseases after age 45, counsel should have been present to represent older class members and class members with shorter NFL careers. In addition, advocates for benefits for the major conditions alleged in the complaint,

such as depression, inability to focus, and suicide (actual or considered), should have been represented. Finally, because a separate cause of action for the loss of consortium claim of a spouse has long been recognized in the United States, Restatement 2d of Torts, § 693; *Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498, 239 N.E.2d 897 (1968), spouses are also entitled to a seat at the table if the settlement is to resolve their claims, instead of being left with a tiny share of their husbands' recovery, as the settlement provided.

Once all interests were assembled, they could bargain to reach a settlement fair to everyone. This is in essence what happens in major reorganization cases under the Bankruptcy Code, where no fixed amount is available for creditors, who must compete among themselves and with shareholders. *See*, *e.g.*, *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2006) (final approval of reorganization with multiple tort claimants and other creditors). While the process would not be easy, the difficulties in both having the case proceed as a litigation class, or in having 20,000 individual cases go to trial, would create strong incentives to reach agreement. In this case, the incentives for the various groups of claimants to reach consensus would be aided by the fact that the NFL has already shown willingness to pay benefits expected to total $765 million. And as Judge Phillips observed (JA 3812, ¶24):

> If the NFL Parties did not succeed on dismissing all of these cases as a matter of law, they faced years of very expensive discovery and potentially hundreds or thousands of trials in state and federal courts around the country. Among Plaintiffs' many claims and allegations, the NFL Parties faced the risks of

> litigating issues relating to helmet safety standards and rules of football play. Each potential lawsuit carried with it the risk of a significant damage verdict and a negative precedent that could affect all cases that followed.

Moreover, as NFL counsel Brad Karp said at the settlement hearing (JA 5389), "What has been lost in the fog of the objections is that the league chose to do the right thing here" by agreeing to a substantial monetary settlement. In sum, if the City of Detroit can reach a consensual settlement with its creditors, (*see* http://www.nytimes.com/2014/12/11/us/detroit-bankruptcy-ending.html?_r=0), the NFL and the class should surely be able to do so.

CONCLUSION

For the foregoing reasons, the order of the district court certifying the settlement class should be reversed, and the case remanded for further proceedings.

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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7), I, Alan B. Morrison, counsel for the amicus curiae Public Citizen Inc., hereby certify that this brief was produced in proportionally spaced typeface Times New Roman 14-point type, using Microsoft Word, and contains no more than 6898 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii).

/s/ Alan B. Morrison
Alan B. Morrison

CERTIFICATE OF SERVICE

I certify that, on August 26, 2015, a true and correct copy of the foregoing brief was served on all parties to this appeal, via CM/ECF, pursuant to Third Circuit Rule 25.1(b), because counsel for all parties are Filing Users who will be served electronically by the Notice of Docket Activity.

/s/Alan B. Morrison
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CERTIFICATE OF BAR MEMBERSHIP

I certify that Alan B. Morrison and Scott L. Nelson, counsel for amicus curiae, are members of the Bar of this Court.

/s/Alan B. Morrison
Alan B. Morrison

LOCAL RULE 31.1(C) CERTIFICATIONS

I certify that the text of the electronic brief is identical to the text of the paper copies to be mailed to the Court pursuant to Local Rule 31.1(b) (3). I further certify that the electronic file of this brief was scanned with VIPRE anti-virus software and that no virus was detected.

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