08-2784; 08-2785; 08-2789; 08-2799;
08-2817; 08-2818; 08-2819; 08-2831; 08-2881

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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

Plaintiffs-Appellees

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.,

Defendants-Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF OF THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE, IN SUPPORT OF PLAINTIFFS-APPELLEES

Eric L. Cramer Andrew C. Curley Berger & Montague P.C. 1622 Locust Street Philadelphia, PA 19103 (215) 875-3000	Daniel E. Gustafson Gustafson Gluek PLLC 650 Northstar East 608 Second Avenue South Minneapolis, MN 55402 (612) 333-8844	Prof. Joshua P. Davis University of San Francisco School of Law 2130 Fulton Street San Francisco, CA 94117 (415) 422-6223

Attorneys for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. App. R. 26.1 and Local Rule 26.1.1, Amicus Curiae American Antitrust Institute hereby certifies that it has no parent corporation and has not issued any shares of stock to any publically traded company.

/s/ Eric L. Cramer
Eric L. Cramer
Andrew C. Curley
BERGER & MONTAGUE, P.C.
1622 Locust St.
Philadelphia, PA 19103
Tel: (215) 875-3000

Daniel E. Gustafson
Gustafson Gluek PLLC
650 Northstar East
608 Second Avenue South
Minneapolis, MN 55402
(612) 333-8844

Prof. Joshua P. Davis
University of San Francisco School of Law
2130 Fulton Street
San Francisco, CA 94117
(415) 422-6223

Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Other Authorities

INTEREST OF AMICUS CURIAE

The American Antitrust Institute ("AAI") is an independent and nonprofit education, research, and advocacy organization whose mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. AAI is managed by its Board of Directors with the guidance of an Advisory Board consisting of over 100 prominent antitrust lawyers, law professors, economists and business leaders.[1] AAI frequently appears as *amicus curiae* in cases raising important competition issues. *See* antitrustinstitute.org for a complete description of AAI's activities.

The Supreme Court has long recognized the important role private litigation plays in the enforcement of the federal antitrust laws. *See, e.g.*, *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990) (describing private enforcement as "an integral part of the congressional plan for protecting competition"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) ("Without doubt, the private cause of action plays a central role in enforcing this regime."); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745 (1977) (recognizing "the

---

[1] AAI's Board of Directors alone has approved this filing for AAI. The individual views of members of the Advisory Board may differ from AAI's positions. Certain members of the Advisory Board serve as counsel for plaintiffs in this matter. However, no counsel for a party has authored this brief in whole or in part, and no such counsel or party has made a monetary contribution intended to fund the preparation or submission of this brief.

longstanding policy of encouraging vigorous private enforcement of the antitrust laws"). The federal government cannot be expected to prosecute all violations of federal antitrust laws. Nor has the federal government traditionally seen its role as compensating the victims of antitrust violations. The private mechanism was designed to fill these significant gaps.[2] The same points apply to claims arising under state antitrust and other laws. Private enforcement plays a crucial role in deterring violations of the law and compensating victims, a role that government enforcement by itself cannot fulfill.

Further, given the economic disparities between typical class action defendants and their victims, the often diffuse nature of the harms, and the costs involved in complex litigation, the class mechanism is integral to private enforcement of antitrust and other consumer protection laws. *See, e.g., Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972) ("Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private

---

[2] *See* Robert H. Lande & Joshua P. Davis, *Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F.L. Rev. 879, 897, 906 (2008), *available at* http://ssrn.com/abstract=1090661 (reviewing forty recent successful private antitrust cases and finding that of the $18-19.6 billion recovered for victims in those cases, almost half of the total recovery came from fifteen cases that did not follow government actions); Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 B.Y.U. L. Rev. __ (forthcoming 2011), *available at* http://ssrn.com/abstract=1565693 (showing important deterrent effect of private enforcement of antitrust laws).

[antitrust] actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture."); *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 21 (D.D.C. 2001) ("[L]ong ago the Supreme Court recognized the importance that class actions play in the private enforcement of antitrust actions . . . . Accordingly, courts have repeatedly found antitrust claims to be particularly well suited for class actions[.]").

As detailed below, resolution of the class settlement and class certification issues in this matter will affect not only the members of the proposed class in this case, but also consumers and victims of anticompetitive violations generally, and therefore could have the potential for far-reaching harmful effects on consumers and competition throughout the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

Without an effective, fair, and efficient means for settling class actions brought pursuant to Rule 23 of the Federal Rules of Civil Produce, the Rule will cease to serve the purpose of providing redress to victims without the economic ability or incentive to pursue individual claims. This is particularly true in the antitrust context where the erection of additional hurdles to class certification and resolution of meritorious antitrust cases will surely create disincentives for capable counsel to make the investments and take the risks necessary to support vigorous private antitrust enforcement. Given the federal government's inability to

prosecute all antitrust violations—or to seek redress for victims even in cases in which the government does get involved—weakening of private enforcement could result in less deterrence of anticompetitive conduct, increased harm to consumers, and diminished economic competitiveness. These points also apply to state government enforcement of state antitrust, consumer protection, and unjust enrichment claims. Where government enforcement is possible at all, it cannot adequately deter legal violations or compensate victims.

To ensure that Rule 23 continues to provide an effective mechanism for enforcing the antitrust and other laws and fostering competition in the United States, AAI believes various points are essential in setting an appropriate standard for evaluating the settlement of antitrust class actions such as this one. First, the role of the trial court judge in approving a class action settlement should be to protect absent class members, not defendants. The only reason class actions depart from the general rule that private parties may settle litigation on any terms they choose is fear that the interests of absent class members may suffer—in short, that absent class members may recover *too little* or be treated less well in an aggregate settlement. The structure of a class action, however, does not warrant a court second-guessing a class settlement—as the panel appears to have done here—out of a concern that the defendant had agreed to pay *too much*. That form of paternalism conflicts with our adversarial system of litigation. Nor need this Court

worry that the settlement might create the appearance of new substantive rights for it is the private contract of settlement, not the Federal Rules, that entitles absent class members to recover from the defendants.

The second point is that concern for absent class members should shape not only the judicial assessment of the adequacy of a class action settlement, but also the decision whether to certify a class in light of a settlement. That is a crucial lesson from *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591 (1997), *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516 (3d Cir. 2004) ("*Warfarin II")*, and *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions,* 148 F.3d 283 (3d Cir. 1998). In *Amchem*, the Supreme Court used the class certification analysis primarily as a means of ensuring procedural safeguards against collusion to the detriment of absent class members. *Amchem*, 521 U.S. 620-28. As the Supreme Court made clear, concern about the management of a trial that will never occur makes no sense. *Id.* at 620. What should matter is whether litigation is well-suited to judicial assessment and oversight of a class settlement, and in particular whether the litigation is amenable to judicial protection of the interests of absent class members. *Id.*

A third point is that the standards for approving class settlements and certifying classes in light of settlement should be framed with the potential for abuse in mind. Although some objectors to class action settlements seek to protect

absent class members, others all too frequently seek to benefit at absent class members' expense. A cottage industry has sprung up of so-called professional objectors who may raise issues and exercise procedural rights not out of a concern for absent class members, but as a means to impose costs and delay. Their goal may sometimes be to be paid by class counsel to go away, not to improve the quality or fairness of any settlement. To be sure, courts must carefully attend to the legitimate or even weak objections that well-meaning absent class members may raise. But the complaint that the class may have recovered *too much* is not one of those legitimate objections. More generally, a clear standard that allows for predictable results is crucial, lest professional objectors extort the class for funds and interpose unnecessary delays, harming the very absent class members whose rights the court is charged to protect.

A fourth point is that in deciding whether to approve a class action settlement and certify a class in light of settlement, the vacated panel decision conflicted with various Third Circuit precedents.

AAI is primarily concerned with general principles of class action doctrine, not with the result in any particular case. Nevertheless, applying these general principles to the settlement before this Court supports approval of the settlement and certification of the proposed class. It appears that the primary concern of the vacated panel decision was that the settlement provided *too much* compensation to

absent class members from some states, permitting a recovery to some absent class members whose claims, according to the panel opinion, were weak. Excessive compensation to the class should not provide a basis for rejecting a class action settlement or denying certification of a class in light of settlement. If a defendant is willing to pay a premium for a global settlement—if it is willing to provide greater compensation to the class due to the presence of some claimants with weak claims[3]—it should be free to do so. As long as all class members receive fair, reasonable, and adequate compensation in a settlement, any apparent excess in payments to some class members should not be a concern regarding settlement approval or class certification. A trial court can address that issue, if at all, in assessing the plan for distributing the settlement proceeds to the class members.

ARGUMENT

I. In Assessing Class Action Settlements, Courts Should Protect Absent Class Members, Not Defendants.

Although the vacated panel opinion addressed various complicated issues relevant to certification of a settlement class, the nub of its analysis can be distilled: the settlement includes excessive compensation because of the presence

[3] De Beers' willingness to pay for a release of what the vacated panel opinion suggested were weak claims and its interest in a global release confirm that all of the claims at issue have some potential for success. Otherwise, De Beers would not be willing to pay to get rid of their claims.

of some class members with weak claims. In particular, according to the panel, the claims of some class members were based on the laws of states that do not permit indirect purchasers to bring antitrust claims for damages, and these class members' other claims—*e.g.*, consumer protection statutes, unjust enrichment—may be quite weak.

For various reasons, the possibility that a sophisticated defendant has chosen to pay a premium for global resolution on a class basis—even providing what the court may surmise would ultimately be, depending upon the plan of allocation, excessive compensation to some class members—does not provide an appropriate basis for rejecting a class action settlement or denying certification of a class in light of settlement.

The general rule is that parties may settle litigation on any terms they choose. A small number of exceptions exist to this general rule. One of them is the class action settlement. The reason for the exception is crucial. Courts must approve class action settlements because there is a risk that the active participants in the litigation may reach a result that benefits them at the expense of the absent class members. Thus, the standard is whether the settlement is "fair, reasonable, and adequate." If the settlement is not insufficient—even if the court believes that it may be excessive—approval is appropriate. The court's sole role is to act as a

fiduciary for absent class members, not for defendants. *Ehrheart v. Verizon*, 609 F.3d 590, 593 (3d Cir. 2010).

The concern for absent class members does not provide a basis for rejecting a settlement that benefits them *too much*. A defendant in a class action is better situated than a court to assess the value of settling a case rather than trying it. Consider an analogous situation. In many jurisdictions, courts must approve settlements with minors. But their charge is to protect against inadequate compensation, not excessive compensation. They assume a paternalistic stance that is appropriate regarding children who appear as plaintiffs, but not the adults who are defendants. The same should be true for class actions.

This view is consistent with the Supreme Court's decision in *Amchem* and this Court's decisions in *Warfarin II* and *Prudential*. Those cases reflect the potential concern about absent class members receiving too little, not defendants paying too much.

A court therefore has no proper basis to second-guess the value to a defendant of a global settlement. A court may believe that a defendant should not be willing to pay much, if anything, to obtain a release from a group of potential plaintiffs with relatively weak claims. But that is for the defendant to decide. Whether to pay a premium for universal peace—and how much of a premium to

pay for that peace—are matters that should rest within a defendant's judgment.[4] So is the decision to stipulate to an injunction regulating the defendant's conduct.

The vacated panel opinion suggests two potential bases for a federal court to refuse to approve a settlement that may over-compensate weak claims. First, the panel cites to the concern about collusion discussed in *Amchem*. But the Court in *Amchem* worried only about collusion to the detriment of absent class members, not about a settlement that provided *excessive* compensation. *Amchem*, 521 U.S. at 620-28. A court's decision in effect to prevent a defendant from paying an amount that the court believes to be *excessive* would turn *Amchem* on its head. This is not to say that courts should disregard the potential for collusion between class counsel and defendants, whereby class counsel agree to include additional class members with weak claims at the possible expense of class members with stronger claims. But that more traditional concern, *i.e.* collusion at the expense of class members,

---

[4] True, courts have at times expressed concern that the threat of a class action can result in excessive compensation to class members. The theoretical and empirical basis for that concern is dubious. *See, e.g.*, Charles Silver, "*We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357 (2003) (demonstrating the weakness of the claim that class actions are a form of blackmail). In any event, that concern is best addressed—and has been addressed—through the rules for litigation, not settlement, such as in setting the pleading standard. *See, e.g., Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Moreover, even if protecting defendants were a legitimate concern in certifying settlement classes, preventing sophisticated defendants from paying too much in settlement limits their options, harming them, not helping them.

should be addressed in the normal course of determining whether (a) the process was accomplished at arm's-length, (b) the total settlement was fair, reasonable, and adequate, (c) there were or were not class conflicts under Fed. R. Civ. P. 23(a), and (d) the plan of allocation was fair and appropriate. Here, the vacated panel's decision turned on predominance under Fed. R. Civ. P. 23(b)(3), did not reach questions relating to the allocation plan, and appeared to suggest that the defendants paid too much, not too little.

The vacated panel opinion's second basis was that approval of payment for claims it believed were weak would somehow involve federal courts in modifying state substantive law. The vacated panel opinion suggested that such a ruling could violate the Rules Enabling Act and principles of federalism. *Sullivan v. DB Invs. Inc.*, 613 F.3d 134, 149 (3d Cir. 2010). In this regard, the vacated panel opinion's reasoning is also exactly backward. Merely deferring to a defendant's appraisal of the strength of a legal claim does not effect a change in substantive law. It is business as usual. Federal courts routinely allow the settlement of claims—including state law claims—without making any effort to assess whether the defendants have paid too much for potentially invalid claims. Approving a settlement merely recognizes the power of the parties over their own litigation; it does not affect the parties' substantive legal rights.

Indeed, the approach of the vacated panel opinion itself might violate the Rules Enabling Act and undermines principles of federalism. After all, the panel opinion did not cite to a single state that allows its courts to prevent defendants from making excessive payments in settlement. A federal court adopting that novel position might well be altering the substantive legal rights of the parties.

Fortunately, for present purposes there is no need to draw the elusive line between procedure and substance. What matters is that by allowing defendants to pay as much as they choose in settlement—just as state courts do—a federal court would be abiding by ordinary practice under state law, not modifying state substantive law in a way that could exceed the scope of the Rules Enabling Act or violate principles of federalism.

II. In Certifying a Settlement Class, Courts Should Ensure that Procedural Safeguards Protect Absent Class Members.

Application of Rule 23 serves fundamentally different purposes in the contexts of settlement and contested litigation. *Amchem*, *Warfarin II*, and *Prudential* make clear that the principal reason to apply the class certification requirements in the settlement context is to provide procedural safeguards to absent class members. *Amchem* specifically concluded that in certifying settlement classes, lower courts need not consider the manageability of trials that will never occur. *Amchem*, 521 U.S. at 620. And it used the class certification requirements

as a means to protect against the sacrifice of the interests of absent class members. *Id.*

Focusing the class certification analysis on protecting absent class members supports a less demanding—not a more demanding—standard for certification of settlement classes. Yet the vacated panel opinion applied a more stringent standard for certifying settlement classes than litigation classes.

Perhaps most striking in this regard is the panel's statement that mere variations in the extent of injury among class members might render class certification inappropriate. *Sullivan*, 613 F.3d at 153, n.17. This novel standard for class certification would impose a far greater burden on settlement classes than applies to litigation classes.

In regard to this point, the vacated panel opinion appears to address an element of an antitrust claim variously called "impact," "fact of damage," or "antitrust injury." *Sullivan*, 613 F.3d at 153, n.17. The panel opinion could potentially be read to imply that to prove the element of impact through class-wide evidence—often called "common impact"—plaintiffs would have to show uniform harm to each and every member of a class. That would be an extraordinary requirement, one that conflicts in several ways with doctrine that applies to litigation classes.

First, to establish the element of antitrust injury, any given plaintiff must establish only some harm, regardless of its extent. The amount of damages a class member suffered does not matter for liability, only in determining the amount of recovery. And courts have held in a litigation context that variations in the amount of damages among class members do not provide a basis for denying class certification. *See e.g., Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 456 (3d Cir. 1977) ("[I]t has been commonly recognized that the necessity for calculation of damages on an individual basis should not preclude class determination when the common issues which determine liability predominate"); *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975) ("The amount of damages is invariably an individual question and does not defeat class action treatment"). Such variations do not warrant denial of certification of a settlement class.[5]

Second, the question at class certification is whether common issues predominate in the case as a whole, not whether they predominate in regard to each and every element of litigation. *See* Fed. R. Civ. P. 23(b)(3) ("[a] class action may be maintained if Rule 23(a) is satisfied and if … the court finds that the questions of law or fact common to class members predominate over any questions affecting

[5] Indeed, courts routinely certify classes and approve settlements in which the members of the class will receive varying amounts of compensation. The claims administration process is able to contend with those variations.

only individual members"); *see also Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.,* 502 F.3d 91, 107-08 (2d Cir. 2007) (noting that even if individual issues predominate regarding proof of impact, that does not necessarily mean they will predominate as to the case as a whole at a class trial). This issue ordinarily would be addressed by considering the potential class action trial and determining whether it would focus on predominantly common issues. *In re Hydrogen Peroxide Antitrust Litig.,* 552 F.3d 305, 311 (3d Cir. 2008). For a litigation class, common issues may well predominate at trial even if one element of a claim—such as impact—might not involve purely class-wide proof. *Cordes,* 502 F.3d at 107-08. For a settlement class, surely the same is true. Given that trial manageability is not a concern in certifying a settlement class, *Amchem*, 521 U.S. at 620, variations in the extent of injury among class members should not prevent certification of a settlement class.

Third, various courts have recognized, even in regard to the element of fact of damage, plaintiffs need not provide class-wide evidence of harm to *all* class members. *See Bogosian*, 561 F.2d at 455 (vacating district court's denial of class certification even though class contained some unharmed members for whom "the free market price would be no lower than the conspiratorially affected price"); *see also In re Linerboard Antitrust Litig.,* 305 F.3d 145, 158 (3d Cir. 2002) (upholding class certification despite recognizing the existence of some unharmed "[class]

purchasers whose contracts were tied to a factor independent of the price of linerboard"). The *Hydrogen Peroxide* panel acknowledged it was not empowered to overrule prior precedent, 552 F.3d at 318 n.18, so the better interpretation of that opinion is that it requires proof of impact (not necessarily common proof) only regarding those class members who seek to recover.

The Seventh Circuit has given the most recent and most explicit attention to this issue, holding that for purposes of certifying a litigation class, what matters is that plaintiffs offer evidence showing harm that is *widespread* among class members, not harm to each and every class member. *Kohen v. Pacific Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009) (the "possibility or indeed inevitability" that a class will include uninjured parties "does not preclude class certification"); *see also Pella Corp. v. Saltzman*, 606 F.3d 391 (7th Cir. 2010) (same). The "widespread impact" standard has long been the general rule enforced by district courts. *See, e.g., In re Wellbutrin SR Direct Purchaser Antitrust Litig.,* No. 04-5525, 2008 U.S. Dist. LEXIS 36719, at *41–42 (E.D. Pa. May 2, 2008) ("Even if it could be shown that some individual class members were not injured, class certification, nevertheless, is appropriate where the antitrust violation has caused widespread injury to the class") (citation omitted); *In re Nifedipine Antitrust Litig.*, 246 F.R.D. 365, 369 (D.D.C. 2007) ("In order to demonstrate that common

evidence exists to prove class-wide impact or injury, plaintiffs do not need to prove that every class member was actually injured").[6]

In sum, the vacated panel opinion ignored several key doctrinal points that apply to certification of a litigation class: first, establishing fact of damage for class members on a class-wide basis requires evidence only that they suffered some harm, not that they suffered the same amount of harm; second, common issues may predominate in a case as a whole even if they do not predominate with regard to the element of fact of damage; and, third, to establish common impact does not require evidence of harm to all class members, but rather evidence of harm, in one formulation, that is "widespread" among class members.

No reason exists to apply a more exacting standard in certifying a settlement class than a litigation class. On the contrary, certification should be more forthcoming in a settlement context because a court need not worry about the manageability of trial. *Amchem*, 521 U.S. at 620. For example, it is sometimes noted that variation in state law claims could complicate the trial of a class action. Accordingly, in *Prudential*, this Court suggested grouping state laws by common elements to make the litigation class more manageable. *Prudential*, 148 F.3d at

---

[6] *See also* Joshua P. Davis & Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure*, 17 GEO. MASON L. REV. 969 (2010), available at http://ssrn.com/abstract=1578459 (discussing "common impact" requirement).

315. Here, as in *Warfarin II*, the complications are not present, and such grouping is not necessary, because the proposed class is for settlement purposes only. *See Warfarin II*, 391 F.3d at 529 ("[T]he same concerns with regards to case manageability that arise with litigation classes are not present with settlement classes, and thus those variations are irrelevant to certification of a settlement class.").

Indeed, the main concern of a court, as reflected in *Amchem*, should be that the structure of the settlement class will not harm absent class members. If, for example, the predominance requirement is not met in a way that suggests the interests of some class members might be sacrificed to benefit others, that provides a potential reason not to certify a settlement class. *See Amchem*, 521 at 622-25. However, the panel opinion's concern that the class may have recovered too much because some members of the class have very weak claims would not fall in this category.

In the context of this litigation, the predominance requirement appears not to provide a reason to refuse to certify a class for settlement purposes. The litigation involves overriding common issues regarding whether there was a conspiracy and whether it resulted in increased prices, issues relevant to all of the claims in this case. Any variations in state law claims would not seem to undermine predominance, but rather would speak to potential issues regarding manageability

of a trial. But, as noted above, trial will never occur if the settlement is approved and *Amchem* makes clear issues of trial manageability have no bearing on the propriety of certifying a class for settlement purposes. *Amchem*, 521 U.S. at 620.

III. In Formulating Standards for Class Action Settlements, Courts Should Recognize the Potential for Abuse by Professional Objectors.

Preserving the existing precedents in this Circuit regarding class action settlements—including *Warfarin II* and *Prudential*—serves an important purpose. Those decisions provide clarity and certainty, as does a commitment to *stare decisis* in general. Such clarity and certainty facilitates the settlement of class litigation, which in turn can benefit class members, defendants, and the courts. Of course, settlement offers advantages over litigation in general, including conserving resources and decreasing risk and uncertainty. But the need for clear and certain rules regarding permissible settlements in the class context is particularly acute.

The reality is that a cottage industry has developed of professional objectors, who may raise concerns about settlement classes not to protect absent class members, or even their own nominal clients in whose name the objections are made, but to become a sufficient nuisance that they will get paid to go away. *See, e.g.*, Barabara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* 31, Federal Judicial Center (2d ed. 2009); *In*

re Initial Pub. Offering Sec. Litig., 2010 WL 2505677 (S.D.N.Y. June 17, 2010); In re *Wal-Mart Wage & Hour Employment Practices Litig.,* MDL No. 1735, 2010 WL 786513 at *1 (D. Nev. March 8, 2010); *Barnes v. Fleet Boston Fin. Corp.,* 2006 U.S. Dist. LEXIS 71072, at *3-4 (D. Mass. Aug 22, 2006); *Varacallo v. Massachusetts Mut. Life Ins. Co.,* 226 F.R.D. 207, 240 (D.N.J. 2005); *In re Compact Disc Minimum Advertised Price Antitrust Litig.,* 216 F.R.D. 197, 218 n.52 (D. Me. 2003), *judgment entered,* 2003 WL 21685581 (D. Me. 2003); *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 975 (E.D. Tex. 2000).

By confirming the distinction between litigation and settlement classes and by focusing on the court's duty to protect absent class members in settlement, this Court has the opportunity to confirm and clarify the rules regarding what is and is not permissible in a class context. By abiding by those rules and judicial precedents, courts can facilitate settlement in complex litigation and decrease the risk of opportunistic objections.

CONCLUSION

The vacated panel opinion did not express concern that the settlement provided too little recovery to absent class members or that certification of a settlement class would place the interests of some absent class members at risk. Instead, the gravamen of its concern appears to have been that the class might recover too much and fare too well. If this result of De Beers' desire to obtain

global peace—and of its willingness to pay a premium to do so—is the only reason to question the settlement class, that does not provide a proper reason to reject the settlement or to deny class certification. If, on the other hand, this Court has some concern about compensation correlating to the strength of different class members' claims, that issue is best addressed not by disapproval of the settlement or denial of class certification, but by adopting an appropriate plan of allocation.

Dated: September 24, 2010

Respectfully submitted,

/s/ Eric L. Cramer
Eric L. Cramer
Andrew C. Curley
BERGER & MONTAGUE, P.C.
1622 Locust St.
Philadelphia, PA 19103
Tel: (215) 875-3000

Daniel E. Gustafson
Gustafson Gluek PLLC
650 Northstar East
608 Second Avenue South
Minneapolis, MN 55402
(612) 333-8844

Prof. Joshua P. Davis
University of San Francisco School of Law
2130 Fulton Street
San Francisco, CA 94117
(415) 422-6223

Attorneys for Amicus Curiae

CERTIFICATE OF BAR MEMBERSHIP

I, Eric L. Cramer, certify that I am a member of the bar of this Court.

Dated: September 24, 2010

Respectfully submitted,

/s/ Eric L. Cramer

Eric L. Cramer
BERGER & MONTAGUE, P.C.
1622 Locust St.
Philadelphia, PA 19103
Tel: (215) 875-3000

Attorney for Amicus Curiae

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because is contains 4,924 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportional spaced typeface using Microsoft Word 2007 in 14 font size and Times New Roman.

/s/ Eric L. Cramer
Eric L. Cramer
BERGER &
MONTAGUE, P.C.
1622 Locust St.
Philadelphia, PA 19103
Tel: (215) 875-3000

CERTIFICATIONS PURSUANT TO LOCAL APPELLATE RULE 31.1(C)

I certify that his brief complies with Local Appellate Rule 31.1(c) in that prior to it being filed by ECF was scanned using Symantec Endpoint Protection 3.0 and Kaspersky Antivirus 2010, and no virus was detected. I further certify that the paper copies of this brief and the text of the PDF version of this brief filed electronically with the Court today are identical, except insofar as the paper copies contain physical signature and the PDF version contains electronic signatures.

/s/ Eric L. Cramer
Eric L. Cramer
BERGER &
MONTAGUE, P.C.
1622 Locust St.
Philadelphia, PA 19103
Tel: (215) 875-3000

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2010, I caused a true and correct copy of the foregoing Motion of the American Antitrust Institute for Leave to File an Amicus Curiae Brief to be served on the following:

Counsel for Plaintiffs: Craig C. Corbitt Zelle, Hofmann, Voelbel & Mason 44 Montgomery Street Suite 3400 San Francisco, CA 94104 Susan G. Kupfer Glancy, Binkow & Goldberg One Embarcadero Center Suite 760 San Francisco, CA 94111 Josef D. Cooper Cooper & Kirkham 357 Tehama Street, Second Floor San Francisco, CA 94103	Steven A. Katz Korein Tillery 505 North 7th Street Suite 3600, United States Bank Plaza St. Louis, MO 63101 Joseph J. Tabacco, Jr. Berman, DeValerio, Pease, Tabacco Burt & Pucillo 425 California Street Suite 2100 San Francisco, CA 94104 John A. Maher 450 Springfield Avenue Summit, NJ 07901
Counsel for Defendants: Jessica Biggio Matthew P. Hendrickson Skadden, Arps, Slate, Meagher & Flom 4 Times Square New York, NY 10036	Francis Ciani-Dausch Tara S. Emory Mark J. Sagat Steven C. Sunshine Skadden, Arps, Slate, Meagher & Flom 1440 New York Avenue, N.W. Washington, D.C. 20005

Counsel for Non-Party Appellees: John J. Pentz, III Class Action Fairness Group 2 Clock Tower Place Suite 260G Maynard, MA 01754 Robert A. Skirnick Meredith, Cohen, Greenfogel & Skirnick One Liberty Plaza, 35th Floor New York, NY 10006	 Edward W. Harris, III Taft, Stettinius & Hollister One Indian Square Suite 3500 Indianapolis, IN 46204 Jared Stamell Stamell & Schager One Liberty Plaza, 35th Floor New York, NY 10006

/s/ Eric L. Cramer
Eric L. Cramer
BERGER &
MONTAGUE, P.C.
1622 Locust St.
Philadelphia, PA 19103
Tel: (215) 875-3000