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Heidi Lindsey, et al. v. Dow Corning Corp., et al.: The Exclusion of Claimants from Australian, Ontario and Quebec

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HEIDI LINDSEY, et al. V. DOW CORNING CORP., et al.: THE EXCLUSION OF CLAIMANTS FROM AUSTRALIA, ONTARIO AND QUEBEC

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Abstract: In September 1994, the United States District Court for the Northern District of Alabama approved a multi-billion dollar settlement in a global class action for breast implant recipients. The court concluded its opinion by excluding women from Australia, Ontario and Quebec from the settlement. After examining U.S. class action procedural requirements and analyzing the District Court's opinion, this Comment argues that the court improperly applied the procedural requirements for a class action to the detriment of the potentially injured women from Australia, Ontario and Quebec.

I. INTRODUCTION

On September 1, 1994, the United States District Court for the Northern District of Alabama approved a $4.25 billion global settlement agreement in a breast implant class action.[1] This settlement is the largest products liability class action in United States history.[2] It includes women from the United States, as well as claimants from sixty-five additional countries.[3]

Foreign women criticized the settlement agreement as inequitable to foreign claimants as compared with domestic claimants.[4] Only three percent of the settlement was allocated to foreign class members.[5] Class members from Australia and the Canadian provinces of Ontario and Quebec voiced the strongest opposition to the settlement agreement.[6] In response to

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1 *In re* Silicone Gel Breast Implant Products Liability Litigation (MDL 926), Heidi Lindsey, et al. v. Dow Corning Corp., et al., No. CV 94-P-11558-S, 1994 U.S. Dist. LEXIS 12521, at *3 (N.D. Ala. Sept. 1, 1994) [hereinafter *Lindsey Opinion*].

2 *Id.* at *3.

3 *Id.* at *6.

4 *Id.* at *6.

5 *Id.* at *11.

6 *Id.* at *6, *14. One theory about the lack of strong opposition from other foreign claimants may be that many of those countries were underrepresented in the settlement. Australia and Canada had aggressive attorneys for the breast implant litigation. However, developing countries are less apt to have effective advocates for their rights. Indication of the differing standards certain manufacturers apparently have applied when dealing with some of the developing countries can be gleaned from the alleged actions of certain silicone breast implant manufacturers prior to the present controversy. Documents obtained during discovery allegedly show that some of the breast implant manufacturers were sending defective or substandard products to some foreign countries. According to the Foreign Plaintiffs' Subcommittee, a

their opposition, the court, at the end of the settlement opinion, excluded women from Quebec, Ontario and Australia.[7] In order to understand the implications of this decision, it is important to understand the background of breast implants and the recent breast implant litigation.

Dow Corning Corporation introduced silicone gel-filled breast implants[8] into the market in the early 1960s.[9] Women immediately began utilizing the implants to correct congenital defects, remedy unsuccessful breast reduction surgery, and for reconstruction after surgery for breast cancer.[10] The implants were also used for cosmetic augmentation.[11] It is unclear exactly how many women have received the implants; estimates range from 1 million to as many as 2.2 million women.[12]

Beginning in the early 1990s, scientific testimony was presented at Congressional and Food and Drug Administration ("FDA") hearings, advising that "all breast implants slowly degrade during residence in the body and produce a risk of rupture that increases with time."[13] On January 6,

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1979 Bristol-Meyer memorandum indicated that the company had 140 gel-filled mammaries which had "incomplete adhesion of the gel to the shell." Memorandum of Law of Foreign Plaintiffs' Sub-Committee of Plaintiffs' Steering Committee in Opposition to Proposed Settlement, at 12 (on file with author); *Lindsey Opinion*, *supra* note 1. The memorandum allegedly included handwritten notes stating: "These units can be packaged for shipments to any country *other* than USA, Western Europe, Australia & New Zealand. They are excellent for So. Am., Near East, *Eastern* Europe, Africa, and the Far East." *Id.* (emphasis in original).

The Foreign Plaintiffs' Subcommittee also claimed that selling defective or inferior products was also considered by another manufacturer, McGhan. They alleged that a company document, dated October 22, 1977, stated: "[p]roduct deviates from specifications due to visible flaws. Request approval to release product for shipment to Mexico." *Id.* at 13 (quoting from Shainwald Affidavit, ¶ 16). This document was allegedly signed by the Quality Assurance Manager, Product Director and Production Manager at McGhan. *Id.*

7 *Lindsey Opinion*, *supra* note 1, at *14-15. The court did state that although claimants from those areas were excluded, if individual claimants wanted to affirmatively include themselves in the settlement, they could do so. However, to the extent that the court eliminated those claimants, the right of re-entry was conditioned by their agreement to *waive any objections* and to accept the general terms of the settlement. *Id.* at *21-22 (Final Order, 2(b)(2)(B)(i)) (emphasis added).

8 Silicone gel-filled breast implants are the most common type of implant. They consist of a smooth or textured silicone rubber envelope filled with silicone gel. Jorge Sánchez-Guerrero, et al., *Silicone Breast Implants and Rheumatic Disease, Clinical, Immunology, and Epidemiologic Studies*, 3 ARTHRITIS & RHEUMATISM 158, 159 n.2 (1994).

9 Roman M. Silberfeld, *Identifying the Proper Defendant in Implant Cases*, MED. LEGAL ASPECTS OF BREAST IMPLANTS, Oct. 1993, at S-1.

10 Sánchez-Guerrero, *supra* note 8, at 158-59.

11 *Id.* at 159.

12 *Id.* at 158; *see also* Response of Settlement Class Counsel to Comments and Objections To the Proposed Settlement, at 11 (on file with author) [hereinafter Class Counsel Response], *Lindsey Opinion*, *supra* note 1.

13 Dr. Norman D. Anderson & Wendie A. Berg, *Recent Advances for Detecting Failed Implants*, MED. LEGAL ASPECTS OF BREAST IMPLANTS, June 1993, at 4.

1992, the FDA requested a temporary ban on the use of silicone breast implants.[14] Included in the material which prompted the moratorium was an internal memorandum from Dow Corning staff indicating concern about breast implants.[15] Some of the concerns expressed in the memorandum included "inadequate quality control specifications; animal studies showing that silicone components evoked immune reactions in rats; data on "bleeding" of silicone through the intact elastomer; reports of implant rupture; and reports of systemic disease in implant recipients."[16]

While it is true that the history of breast implant litigation began more than fifteen years ago,[17] it was not until 1992 that the litigation facing manufacturers of silicone breast implants rapidly began to grow.[18] The increased scrutiny by the FDA, as well as several favorable plaintiff verdicts, contributed to the increase in litigation.[19] In September 1993, Dow Corning[20] responded by proposing a global settlement to resolve the controversy.[21] After a year of negotiations, the court approved the global settlement agreement.[22]

Although the *Lindsey Opinion* resulted in inequitable treatment of all foreign breast implant recipients, this Comment focuses primarily on the problems injured women from Australia, Ontario and Quebec suffered as a

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[14] *E.g.*, Bendall et al. v. McGhan Medical Corp. et al., 14 O.R.3d 734 (Can. 1993). On January 8, 1992, the Department of National Health and Welfare in Canada similarly declared a moratorium on the distribution of silicone gel-filled implants. *Id.* at 735.

[15] Bendall, 14 O.R.3d at 735.

[16] *Id.*

[17] *Lindsey Opinion*, *supra* note 1, at *3.

[18] Leslie J. Bryan, *How the PSC Came to Play Pivotal Role in Implant Cases*, MED. LEGAL ASPECTS OF BREAST IMPLANTS, Oct. 1993, at 4. Included in the various lawsuits filed in early 1992 was a class action, Dante v. Dow Corning Corp., Civil Action File No C-1-92-057 (S.D. Ohio 1992). A controversy surrounding *Dante* led to an order by a multidistrict panel of federal judges, directing consolidation of all federal breast implant cases before the U.S. District Judge Sam C. Pointer of the Northern District of Alabama. *In re* Silicone Gel Breast Implants Products Liability Litigation, 793 F. Supp. 1098 (Jud. Pan. Mult. Lit. 1992).

[19] Bryan, *supra* note 18, at 4.

[20] Dow Corning was one of the largest manufacturers of breast implants. *See generally Lindsey Opinion*, *supra* note 1, at *20, *21; *see also* Memorandum of Law of the Government of Canada as Amicus Curiae in Connection with the Proposed Settlement, at 9-10 n.5 (citing Dow Corning's Form 10K for the fiscal year ending December 31, 1988) (on file with author) [hereinafter Government of Canada], *Lindsey Opinion*, *supra* note 1.

[21] Bryan, *supra* note 18, at 4.

[22] *Lindsey Opinion*, *supra* note 1, at *3. Other settling defendants included: Baxter Healthcare Corp., Baxter International, Inc., Medical Engineering Corp. Bristol-Myers Squire Co., Minnesota Mining & Manufacturing Co., Applied Silicone Corp., Wilshire Technologies, Inc., Union Carbide Corp., and McGhan Medical Corp. *Id.* at *21.

result of the court's decision.[23] This focus is predominantly due to the availability of information about breast implant recipients from Australia, Ontario and Quebec.[24]

Part II of this Comment discusses the procedural background of the settlement agreement. Part III briefly outlines the purpose and need for class actions in an expanding products liability market. Part IV outlines the class action procedural requirements necessary for the discussion of this settlement. Part V discusses the procedural errors in the opinion and the resulting difficulties facing women in Australia, Ontario and Quebec. Finally, Part VI offers a brief solution the court could have adopted to resolve the problems for those women.

II. PROCEDURAL BACKGROUND OF THE SETTLEMENT OPINION

In April 1994, Judge Sam C. Pointer, Jr., of the United States District Court for the Northern District of Alabama provisionally certified *In Re: Silicone Gel Breast Implant Products Liability Litigation, Heidi Lindsey, et al., v. Dow Corning Corp., et al.*,[25] under Federal Civil Procedure Rule 23(b)(3), as a class action[26] for settlement purposes.[27] This certification included preliminary and conditional approval to a proposed $4,225,070,000 settlement amount.[28]

A. Procedural Requirements to Participate in the Settlement

The settlement agreement was intended to resolve the increasing controversy resulting from thousands of silicone breast implant lawsuits

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[23] Although this was purported to be a global class action breast implant settlement agreement, women from those areas were excluded from the settlement. *Id.* at *15.

[24] The availability of information about women from Australia, Ontario and Quebec likely resulted because of the aggressive legal representation those women received prior to the settlement approval, as well as the fact that large number of women from those areas were breast implant recipients.

[25] *Lindsey Opinion*, *supra* note 1, at *3.

[26] FED. R. CIV. P. 23(b)(3), one possible form for filing a class action lawsuit, requires that the court find that the questions of law or fact common to the class predominate over any questions affecting individual members, and further the court must determine that a class action suit is superior to other available methods for "fair and efficient adjudication of the controversy." *Id.*

[27] FED. R. CIV. P. 23(e) provides for the settlement of class actions, but only if the settlement agreement is approved by the court. *See* 7B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1797 n.4, (1986).

[28] *Lindsey Opinion*, *supra* note 1, at *3.

pending in the United States and abroad.[29] According to the *Lindsey Opinion*, detailed information concerning the settlement was sent by first-class mail to each person identified as a possible breast implant recipient, both foreign[30] and domestic.[31] This notice included all of the items required under Rule 23(c)(2),[32] as well as a form for requesting exclusion from the class.[33]

Recipients of the settlement notice packages had several options. First, to be guaranteed compensation, women needed to register in the class.[34] Initial registration in the class was intended to provide immediate benefits to claimants at the conclusion of settlement approval.[35] Foreign women were required to send the registration form by December 1, 1994, or they lost *all* benefits under the settlement.[36] In contrast, domestic class members who did not file at the specified time still retained the right to benefits, although the early registrants received first priority and consideration.[37] Second, class members had the choice to opt out of the class,[38] preserving their right to individually sue in a U.S. court.[39] Finally, domestic claimants could do nothing, thereby remaining in the settlement, regardless

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29 *Id.* at *3.

30 Under the terms of the Settlement Agreement, "Foreign Claimants" were identified as those class members who, as of April 1, 1994, were neither citizens nor permanent resident aliens of the United States and whose breast implants were done outside of the United States. *See* Breast Implant Litigation Settlement Agreement at 31 (on file with author) [hereinafter Settlement Agreement], *Lindsey Opinion, supra* note 1.

31 The Settlement Agreement used the term "domestic" claimants to refer to all class members not defined as "Foreign Claimants." *Lindsey Opinion, supra* note 1, at *3 n.1.

32 FED. R. CIV. P. 23(c)(2) states that 23(b)(3) class actions require the court to "direct the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." In addition, the notice must "advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel." *Id.*

33 *Lindsey Opinion, supra* note 1, at *3.

34 *Id.* at *6.

35 *Id.* at *5. However, no benefits can be distributed to class members until any appeals are resolved. Currently, there are numerous class members appealing the settlement, including women from both Australia and Canada. *In re Silicone Gel Breast Implant Products Liability Litigation*, ANDREWS BREAST IMPLANT LITIGATION REPORTER (Nat. Journal of Breast Implant Lit.), Oct. 28, 1994, at 4432.

36 *Lindsey Opinion, supra* note 1, at *10.

37 *Id.*

38 The right to "opt out" of a settlement class is designed to protect absent dissident class members by allowing them to exclude themselves from a settlement that the court may find is fair, adequate, and reasonable despite objections by those protesting the settlement. *See* 2 HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 11.28 (1992).

39 *See* FED. R. CIV. P. 23(c)(2)(A). Foreign claimants who chose to opt out preserved their right to sue in both U.S. courts or the courts of their country. *Lindsey Opinion, supra* note 1, at *13.

of the outcome.[40] This would possibly entitle them to compensation if they should later develop injuries or diseases, and the fund still had compensation available.[41] The court made note of the fact that foreign women retained the "right" to proceed in courts of their own country if they missed the deadline to register or to opt out.[42]

B. Foreign Women Were Treated Inequitably Under the Agreement

Although the settlement agreement has been controversial, the court stated that generally, domestic women favored the settlement.[43] However, the court acknowledged that virtually all foreign women who submitted comments to the court felt the settlement inequitably treated foreign claimants relative to domestic claimants.[44] Most foreign class members requested that the court use its powers to "reduce *perceived inequities* between foreign and domestic members."[45] The court contended that foreign class members were not requesting rejection of the entire settlement, but rather that the settlement amount be distributed equitably.[46]

Opposition to the settlement was most significant among putative class members from Australia and Canada.[47] Women from those countries submitted numerous letters and memoranda to the court criticizing the disparate allocation of the settlement fund.[48] In fact, at the time of the settlement opinion, almost eighty percent of foreign class members opting out of the settlement were from Australia, Quebec and Ontario.[49]

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40 *See* Settlement Agreement, *supra* note 30, at 12.

41 *See id.* at 21.

42 *Lindsey Opinion*, *supra* note 1, at *6. This was one of the solutions the court suggested for foreign women if they did not receive notice of the settlement. *Id.* at *6.

43 *Id.*

44 *Id.*

45 *Id.* (emphasis added).

46 *Id.*

47 *Id.*

48 *Id.* at *6, *11.

49 *Id.* at *14.

C. *The Objections Expressed by Foreign Class Members*

1. *The Notice to Foreign Women Was Inadequate.*

Foreign women objected to the settlement for several reasons. First, the notice given to foreign claimants was less than that given to domestic claimants.[50] Foreign claimants argued that it did not meet the requirements for notice under the Federal Rules of Civil Procedure.[51] The court stated that over 380,000 notice packages were mailed to potential claimants before September 1, the date the settlement was approved.[52] Many of those claimants were identified by what the court termed a "Claimant-Identification Program," which provided, in part, abbreviated information about the settlement.[53] This program, which was administrated at a cost of over $2 million, was used for advertising in the United States. The information appeared in newspapers, magazines and on television. The program further included distribution of audio tapes for radio transmission in the United States.[54] However, the program did not provide for similar advertisements outside the United States.[55]

Sources in Australia estimated that between 80,000 to 100,000 Australian women received breast implants.[56] Canada estimated between 80,000 to 120,000 women received the implants.[57] In addition, foreign

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[50] *Id.* at *5.

[51] *Id.* at *11. In addition to the minimal actual notice sent to non-U.S. claimants, notice outside the United States apparently consisted of press conferences and press releases, directed to world-wide media, as well as press kits sent to media in 24 foreign countries. The court noted that claimants from over 65 countries had participated or excluded themselves from the settlement. *Id.* at *5. It seems objectionable that press kits were only sent to media in 24 foreign countries if the court is aware of claimants in at least 65 countries.

[52] *Id.* at *4.

[53] *Id.* at *5.

[54] *Id.*

[55] *Id.* The court further stated that because foreign women would still have the right to sue in the courts of their own countries [a fundamental sovereign right that the United States has no control over], there is a strong argument that a "claimant-identification program" would not have been required outside the United States. *Id.* at *13. This seems extremely unjust given the fact that the plaintiffs' class purportedly *includes* foreign claimants.

[56] *See* Australian Objectors in Response to Plaintiffs' Opening Memorandum in Support of Approval of Class Settlement and Opening Memorandum for Certain Settlement Defendants in Support of Final Approval of Breast Implant Settlement Agreement at 156; (Open Letter from Breast Implant Resource Service (Australia) to The Honorable Sam C. Pointer, Jr. (June 2, 1994)) (on file with author) [hereinafter Australian Objectors], *Lindsey Opinion, supra* note 1.

[57] Government of Canada, *supra* note 20, at 6. The Canadian government stated that their estimate was based on information gathered by the Health Protection Branch of Health Canada from the breast implant industry and the Provinces of Health Department. *Id.* at 6.

class members claimed that Dow Corning acknowledged receiving $68 million from the overseas sales of at least 579,000 breast implants.[58] However, the Plaintiffs' Class Counsel conceded that only 5,894 of the notice packages were sent to non-U.S. residents.[59]

2. The Representation for Foreign Women was Inadequate.

In addition to inadequate notice, foreign claimants raised several important objections to the representation of foreign class members. First, although the pleadings named seven plaintiffs, none were foreign women.[60] Further, none of the attorneys on the Plaintiffs' Negotiating Committee represented foreign class members.[61] Many foreign class members argued that these two factors indicated they were not adequately represented in the settlement.[62] Finally, foreign claimants' participation in the proposed settlement was initiated by a defendant rather than the Plaintiffs' Negotiating Committee.[63] Many foreign women, particularly those from Australia and Canada, felt the Plaintiffs' Negotiating Counsel did not advocate their position.[64]

3. The Settlement Allocation Was Unfair to Foreign Class Members

Finally, the primary and fundamental objection by foreign class members related to the disparity in potential benefits afforded foreign claimants as opposed to domestic claimants.[65] This included a three percent

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58 Objections of Diane Matheson, Catherine McNeil and Barbara Living, On Their Own Behalf and On Behalf of the Putative Subclass of Foreign Claimants, to Provisional Class Certification and Final Settlement Approval, at 5 n.1 (on file with author), *Lindsey Opinion, supra* note 1.

59 *See* Class Counsel Response, *supra* note 12, at 35.

60 *Lindsey Opinion, supra* note 1, at *11.

61 The court determined that "the lack of foreign claimants from the list of named Plaintiffs or from those who were clients of counsel on the Plaintiffs' Negotiating Committee is not necessarily fatal to certification of the class and approval of the settlement, even in the face of differences in treatment under the settlement." *Id.* at *14.

62 Australian Objectors, *supra* note 56, at 11. Foreign claimants argued that the resulting disparity in the settlement amount between the domestic and foreign claimants was further reflected by the fact that there was an absence of direct participation in the negotiating process by representatives of foreign claimants. *See Lindsey Opinion, supra* note 1, at *11.

63 *Id.* at *11.

64 *See* Australian Objectors, *supra* note 56, at 11; *see also* Government of Canada, *supra* note 20, at 12.

65 *Lindsey Opinion, supra* note 1, at *11.

cap under the settlement Disease Compensation Program[66] for money to go to foreign claimants, while the remainder of the $4.2 billion settlement was designated for domestic claimants.[67] The negotiating parties acknowledged,[68] and the settlement opinion reflects, that the three percent cap was not based on empirical data, but instead on "pragmatic" considerations.[69] The court explained:

> [i]n short, recognizing that a total of [$2.7 billion] would be paid into the [Disease Compensation] Program, how much of this should be set aside for foreign claimants to enable offers of settlement that would be acceptable to many of them, *while not so depleting the funds available for domestic claimants as to make the settlement offer unacceptable to too many of them?* The 3% figure was ultimately viewed by the parties as not so large as to result in offers of settlement unacceptable to too many domestic claimants.[70]

D. *The Court's Justifications for Settlement Approval*

In the settlement opinion, the court's primary justifications for

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[66] The "Disease Compensation Program" is defined in the settlement agreement as the program under which claimants who satisfy the diagnostic criteria set forth in the Disease Definitions of the agreement are entitled to receive payment for those Diseases. Settlement Agreement, *supra* note 30, at 17. This program is the *primary* source of compensation for claimants, both foreign and domestic. *See id.*, Exhibit F.

[67] *Lindsey Opinion*, *supra* note 1, at *11.

[68] The Plaintiffs' Settlement Counsel, in their Class Counsel Response, stated:

> The *potentially* disparate treatment of domestic and foreign claimants is predicated upon sound practical and policy reasons. The Court approved Notice states: 'Claims in the United States Courts by [foreign Claimants] are subject to strong and unique procedural and substantive defenses. Many foreign Claimants have national health and medical care programs that pay costs or diagnoses and treatment and either do not have access to indigenous tort systems or are significantly limited, in comparison with United States Claimants, in the compensation they may recover.' This is, in part, the rationale behind the 3% cap . . . .

Class Counsel Response, *supra* note 12, at 34-35 (emphasis in original), *Lindsey Opinion*, *supra* note 1.

[69] *Lindsey Opinion*, *supra* note 1, at *13.

[70] *Id.* (emphasis added).

approving the disparities in the settlement included:

> (1) [P]rovisions were included in the settlement to afford all registering foreign class members a guaranteed second right to opt out after the amounts payable to foreign claimants under the Current Disease Compensation Program were determined... [which would assure foreign claimants] rights to pursue claims in their own country, but also whatever rights they might have—with benefit of a suspension of statutes of limitation—to pursue litigation in the United States . . . ;[71] and
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> (2) [t]he settlement value of tort claims that can be pursued in federal or state courts in the United States is generally greater than the settlement value of such claims if pursued in judicial and administrative tribunals *in at least most other countries* . . . .[72]

Despite the strong objections by Australian and Canadian women, as well as other foreign class members, on September 1, 1994, the settlement was approved.[73]

E. The Exclusion of Women from Australia, Quebec and Ontario

The court modified the *Lindsey* agreement before approving the settlement.[74] This included a redefinition of the class by excluding foreign claimants from Australia and the Canadian provinces of Ontario and Quebec.[75] The court noted that almost eighty percent of the foreign women opting out of the breast implant settlement were from Australia and the Canadian provinces of Ontario and Quebec.[76]

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[71] *Id.* at *12-13. The court added that in order for the foreign claimants to sue in U.S. courts, they would have to overcome defendants' arguments based on the doctrine of *forum non conveniens* as well as potential choice-of-law problems. *Id.* at *12.

[72] *Id.* at *12. According to the negotiating parties and the court, this included the differences in "standards and procedures for offering expert testimony, the actions and findings of governmental regulatory bodies with respect to breast implants, and the extent of governmentally supported healthcare systems." *Id.* at *12.

[73] *Id.* at *3.

[74] *Id.* at *14.

[75] *Id.*

[76] *Id.*

The court justified excluding claimants from Australia, Ontario and Quebec by applying the requirements of the Federal Rules of Civil Procedure.[77] Rule 23(b)(3),[78] states that maintenance of a class action under this rule is conditioned upon a determination that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[79] Factors pertinent to a finding of superiority include: "(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions," and "(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class."[80] The court maintained that these two criteria were not met with respect to potential class members from Australia, Quebec and Ontario and therefore warranted their exclusion.[81] In order to understand the injustice of excluding class members from Australia, Ontario and Quebec, it is necessary to discuss the function of a class action in a product liability context.

III. THE PURPOSE OF CLASS ACTIONS

"The class action was an invention of equity . . . mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs."[82] In 1938, with the adoption of the Federal Rules of Civil Procedure, class actions became available in actions for legal relief as well as actions historically equitable.[83]

The history of mass tort class actions has been greatly disputed, but the recent phenomenon of nationwide or worldwide products liability cases congesting the U.S. courts has created increased pressure upon both state and federal courts to utilize class actions.[84] Although management

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77 *Id.* at *15.

78 This class action was certified as a 23(b)(3) class action. *See Lindsey Opinion, supra* note 1, at *3.

79 FED. R. CIV. P. 23(b)(3).

80 *Id.*

81 *Lindsey Opinion, supra* note 1, at *15.

82 7A WRIGHT ET AL., *supra* note 27, § 1751 (quoting Montgomery Ward and Co. v. Langer, 168 F.2d 182, 187 (8th Cir. 1948)).

83 7A WRIGHT ET AL., *supra* note 27, § 1752.

84 7B WRIGHT ET AL., *supra* note 27, § 1805.

difficulties are often raised as a bar to class litigation,[85] when a potential class has thousands[86] or even millions[87] of claimants, courts need to utilize a class action to avoid unmanageable court congestion.[88] It is in these situations where the traditional alternatives, such as joinder, consolidation, and intervention are impracticable.[89]

Currently, class action lawsuits are used to relieve individuals from the burden and expense of separate legal actions when the underlying claim is shared by hundreds or thousands of other claimants.[90] Class action suits provide for expeditious handling of mass product liability disputes.[91] Consolidation of the claims give individuals with fewer resources who have been harmed or injured a feasible opportunity for redressing their injuries.[92]

Breast implant litigation has increased dramatically in the United States in the last two years.[93] Women throughout the world have been

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85 This defense is usually raised by the defendants as a bar to certification of a class action. 1 NEWBERG, *supra* note 38, § 4.33.

86 "Decisions upholding classes with several thousand members are common." *Id.* § 4.33 (citing Ouellette v. International Paper Co., 86 FRD 476 (D. Vt. 1980), where a class of 3,150 were certified under Rule 23(b)(3) in an environmental action).

87 1 NEWBERG *supra* note 38, § 4.33 (citing Appleton Elec. Co. v. Advance-United Expressways, 494 F.2d 126 (7th Cir. 1974), where a class of over 1 million members was allowed).

88 1 NEWBERG, *supra* note 38, § 4.33.

89 *Id.* Professor Newberg cites to *Illinois v. Harper & Row Publishers*, a case involving library book price fixing, where the District Court of Illinois discussed the resulting problems stemming from the initial class denial of a potentially large class:

> The extensive litigation already commenced illustrates the wide-spread, but diffuse nature of the injury inflicted upon the public libraries and schools. Recognizing the desirability of concentrating this interwoven, far-flung litigation in a single forum, the Judicial Panel transferred all cases to this Court for consolidated pretrial proceedings. Intensifying the concentration, class actions will promote desirable economies of time, effort and expense. For example, plaintiffs will no longer need to file new lawsuits, most of which would eventually be transferred here anyway. In response, defendants suggest that permissive intervention and joinder is preferable. The recent history of this litigation dramatically illustrates the impracticability of these alternatives. In 1966 there was a single suit purporting to be a class action. The entire litigation might have been concluded without further complexity. But defendants successfully opposed the class suit, with the result that lawsuits have blossomed throughout the country. Rather than the original handful of attorneys, lawyers are now so plentiful that the entire courtroom is filled at each pretrial conference. Section 1407 consolidation became mandatory. When returned for trial, the subsequently filed cases will consume substantial amounts of the transferor courts' time. The prospect of further intervention and joinder, combined with the inevitable proliferation of lawsuits, is inimical to economical adjudication.

1 NEWBERG, *supra* note 38, § 4.33 (quoting Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484, 489-90 (ND Ill. 1969)).

90 *See* 7B WRIGHT ET AL., *supra* note 27, § 1783.

91 7B WRIGHT ET AL., *supra* note 27, § 1805.

92 7A WRIGHT ET AL., *supra* note 27, § 1754.

93 *Lindsey Opinion*, *supra* note 1, at *3.

facing both physical and emotional injuries as a result of silicone implants.[94] Further, medical reports regarding the danger of silicone implants[95] have added to the dramatic increase of breast implant litigation.[96] The attempt to settle these claims resulted in the filing of *Lindsey* as a class for settlement purposes.[97] The court stated that when proposing a settlement in the face of the uncertainties of individual litigation, the parties recognized:

> (1) the defendants' resources are not unlimited, and would be reduced, to the potential detriment of claimants, by huge costs incurred in litigation over the coming years; (2) thousands of claimants cannot afford to wait their turn in the judicial queues; and (3) the federal and state court systems will not be able to resolve promptly all breast implant cases without a substantial reduction in the number of cases now pending or expected.[98]

The possibility of a successful breast implant class action would remedy these dangers. First, it would relieve both domestic and foreign claimants from the burden and expense of separate legal actions. It potentially provides for expeditious handling of breast implant disputes. Additionally, a class action for breast implant settlement gives claimants with fewer resources, but who have been injured by the implants, an opportunity to receive compensation for their injury. Finally, a successful breast implant class action would provide a "cap" on defendants' liability.

IV. THE REQUIREMENTS FOR CLASS ACTIONS IN THE UNITED STATES

A. Requirements Necessary to Certify a Class Action

Several requirements exist in order to certify a class action. First, although not specifically mentioned in the Federal Rules of Civil Procedure,

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94 *See, e.g.*, Bendall et al. v. McGhan Medical Corp. et al., 14 O.R.3d 734 (Can. 1993).
95 *Id.* at 736.
96 Bryan, *supra* note 18, at 4.
97 *See Lindsey Opinion*, *supra* note 1, at *3.
98 *Id.* at *4.

courts have determined there must be a "class."[99] In addition, the named representative parties must be members of the class they are representing.[100] These two requirements were not an issue in the *Lindsey Opinion.*

Rule 23(a) then expressly sets forth four factors that must exist before the class can be certified.[101] Rule 23(a) states:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.[102]

The first three requirements of this rule were not an issue in the *Lindsey Opinion.* However, the court erred when applying the fourth prerequisite for certification of this class action.[103]

B. The Role of the Court in Maintenance of a 23(b)(3) Class Action

The *Lindsey* breast implant class action was certified as a Rule 23(b)(3) action for settlement purposes.[104] According to the requirements of Rule 23(b)(3), the court must ensure the settlement is fair and adequate as a class, which will facilitate resolution of the class controversy.[105] The role the district courts play in determining whether a class action should be maintained and what the definition of the class will be requires a weighing of four factors listed in Federal Rule of Civil Procedure 23(b)(3).[106] The Rule states:

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99 7A WRIGHT ET AL., *supra* note 27, § 1760. Existence of a class is a question of fact determined by the circumstances of each case. However, every potential member of the class does not have to be ascertainable to certify the class. *Id.*

100 *See* Bailey v. Patterson, 369 U.S. 31, 32-33 (1962).

101 FED. R. CIV. P. 23(a).

102 *Id.*

103 *See* discussion *infra* at part V.

104 *Lindsey Opinion, supra* note 1, at *3.

105 2 NEWBERG, *supra* note 38, § 11.28.

106 7A WRIGHT ET AL., *supra* note 27, § 1780.

> An action may be maintained as a class action if the prerequisites of subdivision (a) [FRCP 23(a)] are satisfied, and in addition: . . . (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.[107]

While the last two factors were not at issue in the *Lindsey Opinion*, the court in *Lindsey* incorrectly determined that (A) and (B), were not met[108] and thereby justified exclusion of class members from Australia, Ontario, and Quebec on those grounds.[109]

V. THE COURT ERRED WHEN APPLYING CLASS ACTION REQUIREMENTS

Rule 23 should be liberally construed to achieve its objectives.[110] The court has the *continuing* duty to guarantee that a settlement agreement meets the requirements of the Rule, ensuring that the settlement is fair and adequate.[111] In *Lindsey*, the court did not ensure that foreign women were afforded adequate representation, which subsequently led to the disparate settlement allocation and the exclusion of claimants from Australia, Quebec and Ontario.

Although the *Lindsey* court did not explicitly state that due process requirements need not be met for foreign claimants, the court's justification

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107 FED. R. CIV. P. 23(b)(3).

108 *See* discussion *infra* at Part V.

109 *Lindsey Opinion*, *supra* note 1, at *15.

110 *See, e.g.*, Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 563. (2d Cir. 1968) (dismissing "a particular proceeding as not a proper class action is justified only by a clear showing to that effect and after a proper appraisal of all the factors enumerated on the face of the rule itself.").

111 3 NEWBERG, *supra* note 38, § 16.25 (emphasis added).

for the settlement disparity suggested that effect.[112] The class defendants expressly argued that foreign class members should not and are not entitled to due process rights.[113] However, by certifying a "global" class, the *Lindsey* court brought foreign women within the jurisdiction of the United States for purposes of the breast implant settlement. In *Lindsey*, the class was defined as:

> *All persons and entities wherever located*, who have or may in the future have any claim (whether filed or unfiled, existing or contingent, and specifically including claims for injuries or damages not yet known or manifest), including assigned claims in any state or federal courts of the United States or the courts of its territories or possessions, against any of the Defendants and/or Released Parties arising out of, based upon, related to or involving Breast Implants or Breast Implant Materials manufactured prior to June 1, 1993 . . . .[114]

In addition, in another global class action, *In Re Agent Orange Product Liability Litigation*,[115] that court afforded due process rights to Australian and New Zealand plaintiffs by ensuring that they received adequate representation and equal compensation.[116] The *Lindsey* court had the same responsibility to foreign women in this class action.

A. Foreign Class Members Did Not Have Adequate Representation

Rule 23(a)(4) requires that the representative parties will fairly and adequately protect the interests of the parties.[117] The courts have determined that adequate representation requires that the representative parties

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112 *See Lindsey Opinion, supra* note 1, at *12-13; *see also* Memorandum of Settling Defendants in Response to Certain Objections and in Further Support of Approval of Settlement, at 47 (on file with author), *Lindsey Opinion, supra* note 1.

113 Memorandum of Settling Defendants in Response to Certain Objections and in Further Support of Approval of Settlement, at 47 (on file with author), *Lindsey Opinion, supra* note 1.

114 Settlement Agreement, *supra* note 30, at 10 (emphasis added).

115 611 F. Supp. 1396 (E.D.N.Y. 1985), *aff'd in relevant part, reversed in part*, 818 F.2d 179 (2d Cir. 1987).

116 *Id.* at 1443-1445 (In a worldwide settlement of Agent Orange claims, Vietnam veterans from Australia and New Zealand were found to constitute up to 2% of the total population of Vietnam veterans. They were therefore allocated 2% of the settlement fund.). *Cf.* Vancouver Women's Health Collective Society v. A.H. Robins Co., 820 F.2d 1359, 1363 (4th Cir. 1987).

117 FED. R. CIV. P. 23(a)(4).

themselves must be adequate[118] and the attorneys representing the class must be adequate.[119] This prerequisite, essential to meet due process standards, must be satisfied at all stages of the process.[120] The court in *Lindsey* determined that although no attorneys on the Plaintiffs' Negotiating Committee represented foreign claimants, it was not "fatal to certification of the class and approval of the settlement, even in the face of differences in treatment under the settlement."[121] The court based this conclusion on the justifications that tort damage awards in most foreign countries are not equal to awards in the United States, and further that foreign claimants were afforded a second right to opt out, thereby allowing them to file suit in the United States or in their own country.[122]

For settlement purposes, the adequate representation requirement is satisfied when the court determines that "the settlement was negotiated at arm's length and was not collusive in favoring the class representative at the expense of the class."[123]

If the settlement process meets this criteria, courts presume that class interests have been adequately represented in the negotiation, and the settlement should be approved if the court determines the settlement is fair and adequate for resolution of the class controversy.[124] In the *Lindsey opinion*, although the court did not approve a settlement amount that favored the class representatives over all absentee members of the class, the court did approve a settlement amount that allocated only three percent of the $4.2 billion dollars to all foreign claimants, with the rest reserved for

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118 *See, e.g.*, Hansberry v. Lee, 311 U.S. 32, 42-43 (1940).

119 *See* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562-563 (2nd Cir. 1968) (requiring the class attorney to be "qualified, experienced and generally able to conduct the proposed litigation.").

120 *In re* General Motors Corp Engine Interchange Litigation, 594 F.2d 1106 (7th Cir. 1978), *cert. denied*, 444 U.S. 870 (1979) (holding that the trial court has a "continuing duty to undertake stringent examination of adequacy of representation by the named class representatives and their counsel at *all* stages of the litigation.") (emphasis added).

121 *See Lindsey Opinion, supra* note 1, at *11.

122 *Id.* at *13.

123 2 NEWBERG, *supra* note 38, § 11.28; *see also In re* A.H. Robins Co. (Breland v. Aetna Casualty & Surety Co.), 85 B.R. 373 (Bankr. E.D. Va. 1988) ("The primary issue which the Court must ultimately determine in a settlement context is whether the class's claims were fairly and vigorously advocated in non-collusive negotiations reaching a fair and reasonable settlement.").

124 2 NEWBERG, *supra* note 38, § 11.28; (citing Rogers v. Etowah County, 717 F. Supp. 778 (N.D. Ala. 1989), requiring the settlement proposal to be fair, adequate and reasonable and not the product of fraud and collusion between the parties prior to court approval).

domestic claimants.[125] This was based on what the judge admitted was an arbitrary determination.[126]

The court should use a strict standard when reviewing the allocation of disparate settlement funds between plaintiff classes.[127] To determine whether the court should approve a class action settlement, the court must recognize that different class members may have diverging interests, and should therefore examine whether some of those interests are unjustly compromised.[128] When a settlement expressly favors certain plaintiffs, "a substantial burden falls upon proponents of the settlement to demonstrate and document its fairness."[129]

In *Holmes v. Continental Can Co.*,[130] the Eleventh Circuit considered a class action settlement agreement in an employment discrimination controversy between the Continental Can Company and the Steel Workers of America. The method of distribution adopted by the class representatives allocated approximately one-half of the settlement funds to the eight named representative plaintiffs. The remainder of the fund was to be allocated to the remaining 118 members of the class.[131] When reviewing the fairness and adequacy of the settlement proposal, the court stated:

> The court should not allow a majority, no matter how large, to impose its decision on the minority. In such circumstances, objection by a few dissatisfied class members should trigger close judicial scrutiny to ensure that the burden of settlement is not shifted arbitrarily to a small group of class members. We agree that 'where representative plaintiffs obtain more for themselves by settlement than they do for the class for whom they are obligated to act as fiduciaries, serious questions are raised as to the fairness of the settlement to the class.'[132]

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125 *Lindsey Opinion, supra* note 1, at *13.

126 The Court acknowledged that the 3% cap placed on the amount of money to go to foreign claimants was an arbitrary number, finding no support from empirical data. *Id.*

127 *See generally In re* Chicken Antitrust Litigation American Poultry, 669 F.2d 228 (C.A. Ga. 1982).

128 Reynolds v. King, 790 F. Supp. 1101, 1105 (M.D. Ala. 1990).

129 Holmes v. Continental Can Co., 706 F.2d 1144, 1147 (11th Cir. 1983).

130 *Id.*

131 *Id.* at 1146.

132 *Id.* at 1148, *quoting* Plummer v. Chemical Bank, 91 F.R.D. 434, 441-42 (S.D.N.Y. 1981), *aff'd*, 668 F.2d 654 (2nd Cir. 1982).

In *Holmes*, the objecting class members argued that they received inadequate representation in the settlement and that the "inadequacy of representation [was] evidenced by the disparate distribution of the fund and by class representatives' failure to consider the merits of the objecting parties' individual claims."[133] The court subsequently concluded that the settlement proponents did not meet their burden of overcoming the facial unfairness of the allocation of the settlement fund.[134]

In *Reynolds v. King*,[135] a case involving a similar class settlement, an Alabama district court considered a class action settlement agreement challenging the Alabama Highway Department's alleged discrimination in the hiring and promotion of African Americans.[136] The proposed settlement was to give the six named representative plaintiffs substantial monetary benefits, but provided only nominal amounts to other class members.[137] The court applied the rationale of *Holmes*, holding that in determining whether to approve settlement in a class action, the "court must recognize that interests of different class members may diverge."[138] Accordingly, the court must be careful to scrutinize whether certain of those interests are "wrongfully compromised, betrayed or 'sold out'"[139] under the terms of the proposed settlement.[140] The court then determined that the settlement terms were inequitable and refused to approve the settlement.[141]

The *Lindsey* settlement is similar to the fact situations in both *Holmes* and *Reynolds*. Nevertheless, in *Lindsey* the court did not find that the rights of absent foreign class members had been wrongfully compromised. In *Lindsey*, although the agreement did not discriminate between the class representatives and the absentee members, it did discriminate between domestic claimants and foreign claimants by placing a three percent cap on damages allocated to foreign claimants. The disparity in settlement proceeds created an inherent conflict of interest between domestic claimants and foreign claimants, thereby making it unfeasible for Plaintiffs' Counsel to adequately represent foreign women.

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133 *Holmes*, 706 F.2d at 1148.
134 *Id.* at 1148.
135 Reynolds v. King, 790 F. Supp. 1101 (M.D. Ala. 1990).
136 *Id.* at 1102.
137 *Id.* at 1104.
138 *Id.* at 1108.
139 *Id.* at 1108, (quoting Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1169 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979)).
140 Reynolds, 790 F. Supp. at 1108.
141 *Id.* at 1114.

The Plaintiffs' Negotiating Counsel and the court justified these discrepancies based on claims that foreign claimants who opted out of the settlement still retained additional rights to sue in the United States as well as in their own countries, and finally because damage awards in *most* countries are less than damages awarded in the United States.[142] Foreign claimants, particularly claimants in Quebec, Ontario and Australia, expressed opposition to this rationale.[143]

B. Application of Rule 23(b)(3) Was Incorrect

In response to the intense opposition from Australian and Canadian claimants, the court made a few changes to the settlement agreement, and subsequently excluded claimants from Australia, Quebec and Ontario.[144] The court based the exclusion on its finding that Rule 23(b)(3) requirements were not met.[145]

First, the *Lindsey* court stated that women from Australia, Quebec and Ontario did not meet the requirements of Rule 23(b)(3)(A).[146] This rule provides that account must be taken of the interest individual members might have in controlling their rights in separate lawsuits.[147] Careful evaluation of the individual interests is important to ensure that injured parties have an opportunity to have their day in court or have their interests completely protected by the representative parties.[148] As one authority suggests, "a strong desire for individual control may often reflect dissatisfaction with the class representation, both of the counsel and the representative parties."[149] In *Lindsey*, claimants from both Australia and the two Canadian provinces, as well as attorneys representing the government

142 *See Lindsey Opinion, supra* note 1, at *12.

143 Claimants from both countries submitted memoranda arguing that the tort values in Australia and Canada are comparable to damage awards in the United States. *See* Australian Objectors, *supra* note 56, at 14; *see also* Government of Canada, *supra* note 20, at 10.

144 *Lindsey Opinion, supra* note 1, at *15.

145 *See Lindsey Opinion, supra* note 1, at *15.

146 *Id.* at *15.

147 FED. R. CIV. P. 23(b)(3)(A)

148 7A WRIGHT ET AL., *supra* note 38, § 1780.

149 *Id.*

of Canada, submitted briefs and letters to the court[150] declaring their dissatisfaction with the class representation for foreign class members.[151]

In addition, the court determined that Rule 23(b)(3)(B) further justified exclusion of women from Australia, Ontario and Quebec.[152] Rule 23(b)(3)(B) requires a determination of whether class actions are appropriate based on whether litigation already commenced by class members is excessive and related in nature to the current controversy.[153] The court found it significant that there were breast implant cases pending in courts in Australia and Canada.[154] Further, the court noted that both countries permit class actions comparable to Federal Rule 23, and that both countries were either contemplating class actions or had already filed such actions in their own countries.[155] This seems less significant given the fact that the court previously acknowledged that almost 10,000 breast implant cases were pending in federal courts in the United States, with almost as many in the state courts.[156] The court did not explain why the fact that breast implant cases are pending in Australia and the two Canadian provinces is a reason to exclude those claimants, since thousands of breast implant cases by domestic women were similarly pending in U.S. courts before the *Lindsey* settlement was certified.

Finally, Rule 23(b)(3)(B) is meant to ensure judicial efficiency and to reduce the likelihood of multiple claims.[157] Excluding claimants from Australia, Canada and Quebec, rather than guaranteeing their fair treatment, has done little to ensure judicial efficiency and reduce the possibility of multiple claims. Thousands of claimants from both countries have now filed individual lawsuits in the United States.[158]

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150 *See generally* Australian Objectors, *supra* note 56; *see also* Government of Canada, *supra* note 20, at 12.

151 Many of the objections regarding adequate representation of foreign claimants, particularly claimants in Australia, felt that the lack of representation for women was directly related to the fact that the total amount of compensation to go to all foreign claimants was only 3%. *See generally* Australian Objectors, *supra* note 56; *see also* Government of Canada, *supra* note 20.

152 *Lindsey Opinion*, *supra* note 1, at *15.

153 FED. R. CIV. P. 23(b)(3)(B).

154 *Lindsey Opinion*, *supra* note 1, at *15.

155 *Id.*

156 *Id.* at *4.

157 7A WRIGHT ET AL., *supra* note 27, § 1780.

158 *See Lindsey Opinion*, *supra* note 1, at *15.

VI. PROPOSED SOLUTION

If the court determines that the representation is not adequate, possible solutions include dismissing the action for noncompliance with Rule 23(a)(4),[159] allowing the proceeding to continue solely for the benefit of the named parties, or issuing an order establishing subclasses.[160] Rule 23(c)(4)(B) was designed to give courts maximum flexibility and it authorizes courts to divide the class into appropriate subclasses.[161] Courts have the ability to continuously evaluate and isolate any issues appropriate for separate representative treatment, and should scrutinize the agreement throughout the settlement process.[162]

The creation of subclasses is generally used in class actions where the interests of certain members of a class are divergent or antagonistic.[163] In *Lindsey*, the interests of class members from Australia, Canada and Quebec were so antagonistic from the interests of the rest of class members that almost eighty percent of the foreign claimants excluding themselves from the class were from those two countries.[164] They were strongly opposed to the disparate settlement allocation and to the lack of adequate representation.[165] However, creation of a subclass from Australia, Ontario and Quebec would have remedied many of the objections by those women. This would have allowed the counsel who were already advocating the position of those women to participate in the Plaintiffs' Negotiating Committee.[166]

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159 In cases when adequacy is raised at the outset of the action, the court need not dismiss the action on grounds of inadequate representation, but rather is authorized to remedy the problem, possibly by creating subclasses. See 7B WRIGHT ET AL., *supra* note 27, § 1790.

160 *See* Rental Car of New Hampshire, Inc. v. Westinghouse Elec. Corp., 496 F. Supp. 373 (D.C. Mass. 1980) (where the court held that a conflict of interest must jeopardize the interests of the class members to justify class denial, and that conflict should not preclude class certification when the interests of the absentees can be protected by the creation of subclasses . . .).

161 7B WRIGHT ET AL., *supra*, note 27, § 1790.

162 *Id.*

163 *Id*; *see also* Mendoza v. U.S., 623 F.2d 1338, (9th Cir, 1980), *cert. denied*, 101 S.Ct. 1351, 450 U.S. 912, 67 L.Ed.2d 336 (holding that it is appropriate to create subclasses when there are divergent views among class members, and that a subclass would materially improve representation of class considerations).

164 *Lindsey Opinion*, *supra* note 1, at *14.

165 *Id.*

166 *See* Australian Objectors, *supra* note 56, at 11.

VII. CONCLUSION

The *Lindsey* class action was intended as a global settlement for silicone breast implant recipients.[167] Instead, the settlement allocated disparate monetary compensation to foreign class members. The strong opposition by foreign claimants afforded foreign class members no further advantages, and further resulted in the exclusion of women from Australia, Ontario and Quebec.

By excluding claimants from Australia, Quebec and Ontario, those claimants, in order to receive compensation for their physical and emotional injuries, must now file separate claims. This means either filing suit in their own countries or in the United States, or initiating a similar class action in their own countries. The court, in *Lindsey*, acknowledged that filing individual lawsuits was risky given that the defendants' resources are not unlimited and would further be reduced by the tremendous costs of individual litigation.[168] Further, the court acknowledged that claimants, numbering in the thousands, cannot afford to wait until the judicial queues can process their individual claims.[169] These same problems seem to apply even if women from Australia or the two Canadian provinces choose to initiate class actions in their own countries. If the resources allocated to this settlement agreement are distributed to all other claimants in the *Lindsey* action, it will limit the available resources for either class actions in Canada and Australia, or individual lawsuits filed by claimants in those two countries. Therefore, rather than uphold the settlement with the disparities and exclude women from Australia, Ontario, and Quebec, the court should have created a subclass of women from Australia and the two Canadian provinces.

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167 *See Lindsey Opinion, supra* note 1, at *3.
168 *Id.* at *4.
169 *Id.*