PROLOGUE

In the early 1980s, at the advent of the AIDS epidemic, the supply of plasma used to manufacture factor concentrate, a blood product used by hemophiliacs to facilitate clotting, became infected with human immunodeficiency virus (HIV). Eventually, factor concentrate transmitted the virus to more than half of the 16,000 persons with hemophilia in the United States. Soon after, lawsuits against the manufacturers of factor concentrate arose across the country in state and federal courts, as both individual cases and class actions. The case presented here was intended to resolve all of the nationwide litigation in a single class action, and it has followed a particularly complicated course. After the initial complaint was filed, this lawsuit was certified as a class action, decertified by the Seventh Circuit Court of Appeals, and once again certified as a class action for purposes of settlement.

A Medical Breakthrough

Hemophilia, a disease afflicting males that is inherited from their mothers, is marked by spontaneous, uncontrollable internal and external bleeding that is caused by a lack of the proteins necessary for blood clotting. Internal bleeding into joints or organs may result in death or disability. External bleeding can also be fatal if the sufferer loses an excessive amount of blood.

In 1964, a process was developed to extract clotting agents from healthy human blood. The resulting extract, known as cryoprecipitate, is administered by transfusion to facilitate the clotting necessary to prevent excessive blood loss and permanent damage to the nerves, muscles, and organs. The development of cryoprecipitate was a step forward in the treatment of hemophilia, but there were drawbacks to its use. To prevent excessive blood loss, the patient needed to receive an injection of cryoprecipitate at the first sign of a bleeding spell; however, patients could not self-administer the treatment. If a bleeding spell
occurred, the patient would have to head immediately to a hospital for an injection.

Four years later a new clotting product, antihemophilic factor concentrate, was developed by researchers at the American Red Cross and Hyland Laboratories, a division of Baxter Healthcare Corporation. Commonly called factor concentrate, the product revolutionized the treatment of hemophilia because it is as effective as cryoprecipitate and also convenient; patients can self-administer it. The introduction of factor concentrate dramatically raised the life expectancy of persons with hemophilia from 39 to 60.

The manufacturing process for factor concentrate requires the plasma of up to 20,000 donors. In a process known as fractionating, plasma donations are pooled in large vats before Factors VIII and IX, two blood proteins that facilitate clotting, are separated from the body of the plasma. The factors are then stabilized, freeze-dried, and bottled. Because the plasma of so many donors is intermingled, a virus present in the blood of any one donor potentially infects the entire vat.

By the early 1980s, factor concentrate was used by the majority of hemophiliacs in this country. Virtually all of those who were seriously afflicted with hemophilia—as well as many with only mild or moderate hemophilia—infused the product. Doctors prescribed factor concentrate liberally, encouraging patients to infuse a dose at the earliest sign of a bleeding spell as a preventive measure.

Because the use of factor concentrate was so widespread, the pharmaceutical companies could not rely on voluntary donations of plasma to meet the demand for their product. The companies set up clinics where donors were paid $10 to $20 per visit. Some clinics were located in inner cities, within federal prisons, along the Mexican border, and in Central and South America, including Haiti. Although it was not known at the time, these clinics collected plasma from many persons who would later be classified as at high risk for carrying the AIDS virus.

Symptoms of the disease we now know as AIDS were first identified in homosexual men in June 1981, and were assumed to be passed through sexual contact. Not until January 1983 did the Centers for Disease Control conclude that the disease was also blood-borne. It has been alleged (but not proven) that at the worst of the crisis, HIV was present in every vial of factor concentrate offered for sale. By 1989, the life expectancy for a person with hemophilia had fallen to 40 years.

The four major pharmaceutical companies that manufactured factor concentrate—Alpha Therapeutic Corporation (Alpha); Armour Pharmaceutical Com-
pany, Inc. (Armour); Bayer Corporation (Bayer); and Baxter Healthcare Corporation (Baxter)—were the defendants in this case. 11

EARLY FACTOR CONCENTRATE LITIGATION

Lawsuits began to appear in 1985. Hemophiliacs brought the first cases in California state courts only to see them dismissed before they could reach a jury. 12 The first class action was brought that year in a federal court in Palo Alto, California. It also failed to reach trial. 13 In large part, the plaintiffs' difficulty in these cases can be attributed to the blood shield laws in effect in California.

The Application of Blood Shield Laws

Blood shield laws were adopted in most jurisdictions in the 1950s and 1960s, and remain on the books today in every jurisdiction but New Jersey, Vermont, and the District of Columbia. The statutes prohibit the treatment of blood and blood derivatives as "products" for the purposes of strict liability and implied warranty claims. 14 They are based on the premise that the transfusion of blood from one person to another is an inherently risky yet necessary practice. If blood banks, hospitals, and the Red Cross faced strict liability for injuries caused by a defective blood product, there would be a disincentive to provide the service. Thus, the blood shield laws were enacted to prevent a shortage in the blood supply by protecting the suppliers. 15

In factor concentrate litigation, the blood shield laws bar a claim for damages based on the allegation that the product was defective. 16 Rather, plaintiffs are required to prove that the defendants were actually negligent in the manufacture or distribution of the product—a much more difficult burden to meet. To establish negligence, plaintiffs must show that the defendants either knew or should have known of the risk of transmitting a deadly virus through the sale of factor concentrate. AIDS was a new disease in the early 1980s, and its sources and etiology were the subject of debate in the medical community. Therefore, it is difficult to prove what the defendants knew, or even what they should have known, about the transmission of HIV. 17 One of the early lawsuits was brought by Ryan White, then 13. 18 In November 1985, a federal judge in Indianapolis ruled that White's strict liability claims were barred by the Indiana blood shield law.

Class Litigation Begins

By the close of 1993, factor concentrate lawsuits were common—but often unsuccessful. Of 40 cases nationwide, approximately half had settled, 19 but
almost all of the others resulted in court action favorable to the defense. There had been 13 jury trials. The respective juries had found for the plaintiffs only twice, and one of those verdicts was set aside by the trial judge. The other, Christopher v. Cutter, was reversed on appeal, though the parties reached a settlement before it was retried by a jury. Despite this discouraging record, hemophiliacs who contracted HIV from factor concentrate were not deterred from filing lawsuits against the manufacturers. One newspaper estimated that approximately one hundred cases were pending in state and federal courts around the country at the end of 1993. Within one year that number had tripled.

Florida was a hotbed for factor concentrate litigation. That was the locale of the Christopher case in which a Tampa jury sitting in federal court initially awarded $2 million to the family of 11-year-old Jason Christopher of Clearwater. Florida was also the home state of Ricky Ray and his two brothers, all of whom had contracted HIV from factor concentrate. In 1987, someone set fire to the Ray home in Arcadia, an event that galvanized the previously silent hemophiliac community. Perhaps as a result of the subsequent publicity, the Florida plaintiffs’ bar was, and remains, particularly active in factor concentrate litigation. By 1993, the plaintiffs’ bar was considering options for class certification or other methods of aggregation.

At that time an individual factor concentrate case, Poole v. Alpha, was awaiting jury trial in a Chicago federal court. The plaintiffs were represented by Leonard Ring, a leading personal injury attorney. Ring conferred with David Shrager, another nationally known personal injury attorney, about the possibility of pursuing a class action against the defendant pharmaceutical companies. As chairman of the AIDS litigation committee of the Association of Trial Lawyers of America, Shrager was quite familiar with the factor concentrate cases. Shrager and Ring agreed that these cases should be aggregated, which would allow plaintiffs to pool resources and present a formidable case against the defendant pharmaceutical companies. The two attorneys assembled a team of plaintiffs’ attorneys to serve as class counsel, including Shrager and Dianne M. Nast, who served as co-lead class counsel, plus five attorneys from Florida.

The team of attorneys agreed to pursue certification of a national class action under Federal Rule of Civil Procedure 23, as well as multidistrict litigation (MDL) status for all federal factor concentrate cases under 28 U.S.C. §1407. The team also decided to request that the MDL be assigned to Judge John F. Grady, who presided over Poole, because they had been pleased with his handling of that case.
THE WADLEIGH CLASS ACTION

On September 30, 1993, the first day of the Poole trial, a complaint was filed in federal court for the Northern District of Illinois commencing the factor concentrate litigation known as the Wadleigh class action. From its inception Wadleigh was intended to serve as a nationwide class action, and a motion for certification was filed on October 20.

Legal Allegations and Defenses

The complaint alleged numerous claims based on negligence rather than strict liability, to avoid application of the blood shield laws. These claims relied primarily on three theories of liability—two of negligence and one of misrepresentation. First, the plaintiffs alleged that even before the emergence of AIDS, it was well known that other blood-borne viruses, including hepatitis B, were transmitted through factor concentrate. Therefore (they alleged), the defendant pharmaceutical companies were negligent when they failed to screen their donors or heat-treat their product. This negligence resulted not only in the spread of hepatitis B but also AIDS. HIV is deactivated by the same heat treatment as hepatitis, and high-risk donors for the two diseases share the same characteristics; thus, the plaintiffs argued, the transmission of HIV was a consequence of the defendants’ negligence in preventing the transmission of hepatitis.

Second, the complaint alleged that the defendants bypassed early opportunities to protect hemophiliacs from contracting AIDS. Specifically, the plaintiffs argued that the defendant pharmaceutical companies neglected to provide adequate warning to their consumers, screen their donors, or heat-treat the product even after the medical community became suspicious that AIDS was blood-borne. Instead, the defendant pharmaceutical companies continued to pool the plasma of thousands of donors, including those known to be at high risk of viral infection, even after the first cases of AIDS were reported in 1980.

Finally, the plaintiffs alleged that the four pharmaceutical companies gave false assurances that factor concentrate was safe and that the National Hemophilic Foundation (NHF), “influenced by the financial contributions it received from the defendant pharmaceutical companies, gave similar unfounded assurances of the safety of the defendant pharmaceutical companies’ products.”

The defendants countered these arguments in their answer to the complaint. Specifically, they asserted that there was a window of time when they were unaware of the risk of AIDS, that they could not have been expected to know of the risk during that time, that no available test could detect it, and that therefore they could not have prevented the risk of spreading HIV to the patients who re-
lied on factor concentrate to treat the symptoms of hemophilia. Furthermore, the defendants noted that they followed FDA regulations, including new standards for blood collection that were promulgated in March 1983, and that they utilized the first screening test as soon as it was available in 1985.35

Jonathan Wadleigh and the Committee of Ten Thousand

The choice of Jonathan Wadleigh as the named plaintiff for the class was not arbitrary. Wadleigh is a computer marketer who lives in Massachusetts. He was born with hemophilia and contracted HIV from factor concentrate in the early 1980s. He has been an active advocate for the hemophiliac community with HIV since 1985, when his brother, who also suffered from hemophilia, died of AIDS.

In 1988, Wadleigh met Thomas Fahey in a support group organized for men with hemophilia and HIV. Fahey, a mental health therapist, also lives in Massachusetts. Frustrated with the NHF, the two men organized the Committee of Ten Thousand (COTT) to provide a support system and to promptly distribute news and information to hemophiliacs with HIV.36 COTT then became involved with David Shrager and the team of plaintiffs’ attorneys who eventually filed the Wadleigh suit in Chicago. Throughout the litigation, COTT remained the outspoken voice of the hemophiliac community. In 1993, both Wadleigh and Fahey were honored by the AIDS Action Committee of Massachusetts for their efforts.37

Today, Wadleigh and COTT remain strong advocates for infected hemophiliacs; in particular, both support the Ricky Ray Relief Act, a federal bill proposed to establish a $900 million fund for hemophiliacs who contracted HIV from factor concentrate.38 If passed, the legislation will compensate each of these persons with $125,000 for the perceived failure of the Food and Drug Administration to protect the blood supply.

Multidistrict Litigation

In November 1993, class counsel filed a petition to unite the Wadleigh case with all other federal factor concentrate cases under the MDL statute.39 The purpose of MDL consolidation is to save courts and parties time and resources at the pretrial stage. However, MDL status may also provide plaintiffs added leverage in litigation against large corporations, such as the defendant pharmaceutical companies in this case. In traditional individual litigation, the plaintiff attorney has limited time and resources to invest in conducting discovery. Once a family of cases is classified as MDL, all of the plaintiff attorneys working on similar cases are able to pool their resources during the pretrial discovery period. As a
result, their discovery may be much more effective. Furthermore, an MDL may receive more press coverage than an individual case, which may also benefit the plaintiffs. Defendants who shy away from negative publicity may be more willing to settle when ordinary litigation is given MDL status.

A panel of seven federal trial and appellate judges (the Judicial Panel on Multidistrict Litigation, more commonly known as the “MDL panel”) makes the decision to transfer multidistrict cases to a single court. Because both MDL status and class certification require that the plaintiffs’ claims have common features, the arguments that defendants make against transferring cases under the MDL statute often resemble those made against class certification. But the standard for MDL is easier to meet than the standard for class certification.40

In this case, the defendants argued that collective discovery would be inefficient because of factual differences underlying the plaintiffs’ claims. For example, the question of liability rested in part on whether the defendants knew or should have known that there was a risk that their product carried a deadly virus. However, the extent of the defendants’ knowledge changed in the years between 1978 and 1985. AIDS was not identified until 1981. No one, including the defendants, knew or could have known of its existence before that year. From 1981 to 1983, medical authorities speculated about whether the disease was blood-borne. Whether the defendants knew or should have known that factor concentrate could transmit the virus is a factual question that—under law—is presented to a jury to decide. By the end of 1983, the Centers for Disease Control concluded that HIV is a blood-borne virus. From then on, the defendants arguably knew that the disease could be transmitted by blood and blood products. Thus, the defendants argued that uniting the factor litigation cases under the MDL statute was impractical because each case was determined in part by the date of infection.

The MDL panel, which included Judge Grady, did not accept the defendants’ arguments. On December 6, 1993, an order was issued to transfer every federal factor concentrate case to Judge Grady’s courtroom in Chicago where the Wadleigh class action was pending. At that time there were only 20 to 30 federal cases, and approximately 45 cases filed in state courts. Within three years 192 federal cases would be in the MDL, and 300 cases would be pending in state courts across the country.41

Discovery

The Wadleigh case was included in the MDL and all discovery was conducted through MDL procedures. Judge Grady set forth core subjects that were common to the consolidated cases and that were subject to discovery.42 The core subjects were “the use of, source and identification of blood and blood deriva-
tives; viral infectivity of blood and blood derivatives used by plaintiffs; laboratory tests and results regarding plaintiffs’ HIV infection; general nature and treatment of hemophilia; knowledge concerning the risk of viral infectivity and HIV; warnings and information regarding viral infectivity and HIV; plasma collection practices, including donor screening; and viral inactivation.”

Discovery was protracted, extensive, and contentious. After three years the majority of discovery was completed and the motion for class action status was still pending. At the end of this time, there were more than 1.5 million pages of documents and 850 deposition and trial transcripts filed in the plaintiffs’ document depository. Close to 100 discovery motions had been heard. The court’s docket (the listing of all papers and pleadings filed in the matter as well as notations of all matters heard before the court) exceeded 70 single-spaced pages.

Class Certification of Wadleigh

In the meantime, the participants in the Wadleigh case awaited Judge Grady’s decision on class certification. As the months passed, the parties—still not knowing what the judge’s decision would be—directed their efforts toward settlement negotiations. In August 1994, a tentative settlement was reached between class counsel and two of the defendants, Baxter and Armour. The agreement provided each class member an award of $30,000 in exchange for a release of claims against Baxter and Armour, who together constituted 40 percent of the factor concentrate market. Although class counsel were not enthusiastic about the offer, they tentatively accepted because the future of the class action was uncertain.

The parties presented the tentative settlement to Judge Grady for preliminary approval. At that time, the judge asked class counsel whether they would have accepted the settlement offer if the class were certified, implying that it was his intention to grant the certification. Class counsel acknowledged that they could not recommend the settlement to their clients if the class were certified because they believed the class’s claims were worth more than the two defendants had offered. When, later in the conversation, Judge Grady announced that he intended to certify the class, class counsel withdrew from the settlement.

Judge Grady certified the Wadleigh class on November 3, 1994, pursuant to subsection (c)(4)(A) of Rule 23. That subsection provides for class certification limited to the determination of particular issues. In this case the class was certified only for the purpose of resolving two questions: (1) whether the pharmaceutical companies were negligent in the collection of plasma and the manufacture and sale of factor concentrate; and (2) whether the NHF breached a fiduciary duty to the class in the promotion of factor concentrate. No other issues, including causation and damages, would be litigated in the class action.
At the end of a trial (if the case were not settled beforehand) the jury would issue a special verdict, and if the ruling were for the plaintiffs the class members would then litigate their claims individually in the appropriate courts across the country. These courts would determine causation and damages for each plaintiff, but could avoid rehearing the questions addressed in the class action trial under the doctrine of collateral estoppel, which provides that a factual issue that has been determined in a prior proceeding cannot be reopened between the same parties in a subsequent proceeding.

The Decertification of Wadleigh

Displeased with the prospect of a class trial, even on limited issues, the defendants turned to the appellate court to seek a review of the certification order. On March 16, 1995, the Seventh Circuit issued a writ ordering Judge Grady to rescind the certification order. In an opinion written by Chief Judge Posner, the court held that class certification would provide the plaintiffs undue leverage against the defendants and could potentially serve to bankrupt the entire industry. Noting the defendants’ winning record for defending individual factor concentrate suits, Judge Posner elaborated:

Consider the situation that would obtain if the class had not been certified. The defendants would be facing three hundred suits. More might be filed, but probably only a few more, because the statutes of limitation in the various states are rapidly expiring. . .

Three hundred is not a trivial number of lawsuits. The potential damages in each one are great. But the defendants have won twelve of the first thirteen, and, if this is a representative sample, they are likely to win most of the remaining ones as well. . .

[Compare] the situation that will face the defendants if the class certification stands. . .

And suppose the named plaintiffs in Wadleigh win the class portion of this case to the extent of establishing the defendants’ liability under either of the two negligence theories. It is true that this would only be prima facie liability, that the defendants would have various defenses. But they could not be confident that the defenses would prevail. They might, therefore, easily be facing $25 billion in potential liability (conceivably more), and with it bankruptcy. They may not be willing to roll these dice. That is putting it mildly. They will be under intense pressure to settle.

The opinion—from which one member of the three-judge panel dissented—was controversial. Posner placed emphasis on the potential to bankrupt the defendants and the “undue and unnecessary risk of a monumental industry-busting error in entrusting the determination of potential multi-billion dollar liabilities to a single jury.” Yet there was no evidence of the defendants’ financial
status or the potential compensation for each plaintiff in the record or in oral argument.

The opinion also questioned whether it is constitutional to subject the defendants to a lawsuit based on a composite of the laws of each jurisdiction, rather than that of any particular state. Although the plaintiffs had argued that the negligence standards of the different states “differ only in nuance,” Posner was not persuaded, particularly because the plaintiffs’ case rested on the determination of a novel question of law, informally known as the “serendipity theory.” Generally, the theory holds that if the defendants were negligent because they failed to take precautions to protect their consumers from Hepatitis B, and if such precautions would also protect against HIV, the defendants then should be held liable for all of the consequences of their negligence, even if the risk of HIV were unforeseeable. Posner held that it was impossible to set forth a single standard of liability that would accommodate the common law of all jurisdictions when none had had the opportunity to rule on the serendipity theory:

[The trial judge] proposes to have a jury determine the negligence of the defendants under a legal standard that does not actually exist anywhere in the world. . .

The assumption is that the common law of the fifty states and the District of Columbia, at least so far as bears on a claim of negligence against drug companies, is basically uniform and can be abstracted in a single instruction. . .

We doubt that it is true in general, and we greatly doubt that it is true in a case such as this in which one of the theories pressed by the plaintiffs, the “serendipity” theory, is novel. If one instruction on negligence will serve to instruct the jury on the legal standard of every state of the United States, . . . one wonders what the Supreme Court thought it was doing in the Erie case when it held that it was unconstitutional for federal courts in diversity cases to apply general common law rather than the common law of the state whose law would apply if the case were being tried in state rather than federal court. . .

Posner continued with a quote from Justice Holmes:

“The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified.” The voices of the quasi-sovereigns that are the states of the United States sing negligence with a different pitch.

The Aftermath of Decertification

Having lost the certification battle, plaintiff attorneys prepared to try the Wadleigh case as an individual lawsuit. Even though it would be legally binding on only a single case, the determination of negligence in Wadleigh would affect factor concentrate litigation nationwide. If the plaintiffs were successful in the
Wadleigh trial, the defendants would be more likely to settle future cases. On the other hand, if the Wadleigh plaintiffs lost the trial, other hemophiliacs would be discouraged from bringing suit.

The trial was scheduled to commence in October 1995. Lead counsel for the plaintiffs did not want to postpone the trial date even though they had not exhausted every option for review of Posner’s writ. A petition for rehearing already had been denied by the Seventh Circuit. It seemed unlikely that the Supreme Court would agree to review the writ, and asking it to do so would delay the trial for months. In this case, time was not expendable: Hemophiliacs were dying of AIDS at a fast rate. Lead counsel argued that they should proceed with trial immediately so that some of the plaintiffs would be compensated in their lifetimes.

COTT disagreed. Its leaders strongly objected to decertification and insisted that their counsel exhaust every option to achieve justice for the class as a whole. Accordingly, lead counsel filed a petition for writ of certiorari with the U.S. Supreme Court on July 25, 1995. The petition argued that Posner’s decision was inconsistent with the use of mandamus; that the decertification was based on the merits of the case, rather than the appropriate use of the class vehicle; and that there was no evidence in the record to support the contention that a class action could bankrupt the defendants. In January 1996, the Supreme Court denied the petition and the parties were back to square one—but with no trial date pending.

THE WALKER SETTLEMENT

Settlement negotiations resumed in March 1996. The defendants were not averse to a class settlement at this time even though they had objected strenuously to certification of the Wadleigh class. The likely reason for their change of mind was that a class settlement promised “universal peace” on the issues and limited the defendants’ exposure, whereas the prospect of litigating a class action that was bound for trial was much more unappealing. Now that the Seventh Circuit had effectively eliminated their exposure to an expensive, highly publicized class action trial, the defendants could choose to address the cases individually or settle with the plaintiffs en masse and conclude the factor concentrate litigation permanently. Remembering the Wadleigh case, David Shrager noted:

The manufacturers had all sorts of reasons at that time to claim that a class action was not appropriate. Now, almost two years later, the defendants have decided that they should attempt a class action settlement after all. What may have changed in the interim is their awareness that they now face legal exposure in hundreds of individual cases.
For a settlement to bind every potential plaintiff, Judge Grady would have to agree to certify a settlement class of the same group of plaintiffs that the Seventh Circuit had decertified as a trial class. Assuming this could be done, the parties continued to negotiate. On April 19, 1996, the defendants made an offer valued at $640 million, which would be open for acceptance until May 24. Forty million dollars of this fund would be set aside for legal fees and costs, and the remaining $600 million would constitute a fund to compensate the class. The latter fund would be capped at $600 million regardless of the size of the class. While the parties estimated the class size to be 6000, it was impossible to establish with certainty how many persons would be eligible to make a claim. It was also impossible to determine exactly how many of those persons would elect to join in the settlement rather than opt out. If 6000 were an accurate estimate, each member of the class would receive $100,000. If that number underestimated the size of the class, however, each participant would receive a smaller share. This possibility posed some concern for class counsel. Defendants, on the other hand, were concerned that too many plaintiffs would opt out, so their offer required that 95 percent of the potential class members take part in the settlement.

These provisions were not acceptable to class counsel or to COTT, who strongly opposed the amount of the settlement as too little and noted that persons with hemophilia in Japan had recently received a much better offer from the same defendants. Infected Japanese hemophiliacs had received $420,000 each for identical claims, 44 percent of which was paid by the Japanese government. The defendants had paid $235,200 per claimant in Japan—more than twice the amount offered to Americans.

Despite the passing of the May 24 deadline, the parties continued to negotiate. An agreement was reached in August 1996. The value of the new settlement was also estimated at $640 million, $40 million of which still was set aside for attorney fees and costs and other settlement-related expenses. The limitation on opt-outs was eliminated, however, and there was no cap on the total amount of compensation to the class. Each member would receive an award of $100,000 regardless of class size, meaning that the settlement could exceed $640 million if more claimants came forward. These concessions brought the parties to agreement.

To provide a vehicle for the settlement, counsel filed the Walker class action on August 14. The complaint, a motion for certification, and the proposed settlement were filed simultaneously. Judge Grady immediately granted preliminary approval of the settlement and certified the class for settlement.

The description of the Walker class members was exactly the same as for the prior Wadleigh class, and therefore the certification was dubitable. Although
Walker was certified for settlement purposes only, it was not clear whether the Seventh Circuit would approve certification of essentially the same class it had decertified previously in essentially the same litigation.

Details of the Agreement

The Walker settlement defined the class members as follows:

[P]ersons with hemophilia who used Factor Concentrates, processed or distributed by any of the Defendant pharmaceutical companies during the period from 1978 through 1985, and who are or were HIV infected.60

In addition, the class definition included the monogamous partners of persons with hemophilia who contracted the virus as a result of sexual relations as well as children who contracted the virus from a hemophiliac parent. Family members who were not infected with HIV but who have suffered the death or illness of a loved one (and might have had a viable legal claim for the loss) were also included in the class. If a class member were deceased, his estate could make a claim on his behalf.

The settlement provided $100,000 only for those class members who were infected with HIV. Family members who were not infected with HIV would be bound by the settlement but would not receive an award for their claims. The agreement allowed only a single $100,000 award for each class member who was actually infected, regardless of the number of people who had claims related to the death or illness of the infected class member.

The Release of Third-Party Claims

Because private and public health insurers paid for a large share of the medical bills incurred by hemophiliacs with HIV, these insurers would normally be entitled to recoup their expenditures from class members if the defendants compensated them for their injuries. The medical costs for HIV-infected hemophiliacs could easily exceed $100,000, leaving the class members with nothing. To prevent insurers from claiming class members’ awards, the settlement required the defendants to resolve insurers’ claims directly, so that the class members would receive their awards free and clear.

This independent resolution of insurers’ costs was an expensive condition for the defendants to meet. Nonetheless, they agreed to pay the federal government $12.8 million for the release of third-party claims against class members whose health-care costs were covered by Medicare, Medicaid, the Federal Employees Health Benefits Program and the Department of Veterans Affairs.61 A similar arrangement was made with most private insurers on an individual
basis. The defendants spent between $30 million and $40 million to compensate insurers in exchange for a release of third-party claims against the class.62

**Cost and Fee Fund**

The parties to the settlement addressed costs and fees in an unconventional manner. The agreement did not set forth specific amounts to compensate class counsel for their work and expenditures. Instead, it provided for a cost and fee fund of $40 million. Notice costs, the cost of administering the settlement (including the fee for a settlement administrator, the cost of processing the claims forms, and the costs associated with dispute resolution), reimbursement for litigation costs, as well as the fees for class counsel, members of the MDL steering committee, and any other attorneys purporting to represent members of the class were to be paid exclusively from this fund.63

Plaintiffs’ attorneys were barred from collecting fees directly from class members, including those with preexisting contingency-fee contracts.64 To collect from the fund, attorneys had to petition Judge Grady for their fees and costs. Every disbursement would be subject to his approval. This fee-award procedure is somewhat unusual; in a typical class action, plaintiffs’ attorneys decide among themselves how and among whom the fee fund is to be divided. As will be seen, this provision has been at the heart of the subsequent controversy surrounding the settlement.

**The Market Share Doctrine**

The defendants agreed to allocate financial responsibility for the settlement in the following manner: 15 percent would be borne by Alpha, 20 percent by Armour, 20 percent by Baxter, and 45 percent by Bayer.65 These proportions were determined according to the “market share doctrine,” which dictates that each defendant in a defective product lawsuit bears responsibility for a percentage of liability equal to its share of the market for that product.

The market share doctrine was first applied to apportion liability among the manufacturers of the drug diethylstilbestrol (DES). Throughout the 1950s and 1960s, DES was prescribed for pregnant women to prevent miscarriage.66 In 1971, the FDA determined that DES may cause vaginal and cervical cancer in the daughters of women who took the drug during pregnancy. In the litigation that ensued, it was impossible to determine which of 11 pharmaceutical companies manufactured the DES administered to a given woman; each company produced an identical version of the drug. Some courts apportioned liability among the defendants according to each company’s share of the market for DES.67
The market share doctrine has not been universally accepted, and has been rejected in an individual factor concentrate case brought in Florida state court. A hemophiliac who filed a complaint against the manufacturers of factor concentrate would face a formidable obstacle in a jurisdiction that rejects the market share doctrine because it is often impossible to determine which of the defendant pharmaceutical companies sold the vial that caused a particular person’s infection. Under the settlement, however, the defendants assumed a share of the liability equal to their market share, regardless of the variations of the law in the 51 jurisdictions.

Although the final numbers are not yet in, it is estimated that 6200 class members will receive $100,000 awards, for a total outlay of $620 million to the class. Thus, Alpha Therapeutics will contribute approximately $93 million, Armour and Baxter will each contribute approximately $124 million, and Bayer will contribute approximately $279 million. The market share theory was also applied to finance the cost and fee fund. Thus, Alpha Therapeutics was responsible for $6 million, Armour and Baxter were each responsible for $8 million, and Bayer was responsible for $18 million of the $40 million in the fund.

**Notice and Final Approval of the Settlement**

Judge Grady approved a plan to notify the class of the proposed settlement via announcements in *USA Today* (on August 20, September 3, and September 6, 1996), a press release to the electronic media, and direct mailing from lists provided by plaintiff and defense attorneys who were familiar with individual litigation across the country and the NHF. The plan also required posting the announcements on the appropriate internet bulletin boards. The announcements instructed potential class members to file a claim (i.e., opt in) or a request to opt out before October 15, 1996. Objections to the settlement were also due on that date.

The response deadline was set so that the defendants would have full information regarding class participation in the settlement before they made a final commitment. If a substantial number of potential class members filed a request to opt out, the defendants could have decided that the settlement was not worth pursuing. On the other hand, if the settlement would terminate the bulk of factor concentrate litigation, the defendants would choose to follow through on their offer.

The defendants have claimed that they received 7500 responses to notices. Of those, 600 were requests to opt out and 400 were claims from individuals deemed ineligible to take part in the settlement. The remaining 6500 responses appeared to be valid claims, 800 of which were submitted by plaintiffs already named in individual suits pending against the defendant pharmaceutical com-
panies. This number was satisfactory to the defendants and they chose to stand by the agreement.

Though the fairness hearing began on November 25, 1996, a ruling did not come immediately. Judge Grady gave his final approval to the settlement on May 8, 1997, more than eight months after it was initially presented. He rejected arguments set forth by attorneys Charles R. Kozak and Thomas W. Mull, members of the plaintiff attorneys’ steering committee who objected to the settlement on behalf of COTT. Kozak and Mull argued that class counsel failed to pursue every viable theory of liability against the defendant pharmaceutical companies, thereby decreasing the potential for settlement recovery.

The judge also rejected the objections of family members who argued that every class member with a viable claim for the loss or illness of a loved one should also be eligible for an award (recall that estates of decedents were already allowed to receive compensation).

In his order approving the agreement, the judge retained continuing jurisdiction over the implementation of the settlement provisions. Though the final order does not require regular reports of the distribution to the court, Judge Grady is continuing to personally supervise the disbursement of the fund.

IMPLEMENTING THE SETTLEMENT

Last-Hour Appeals

Two separate appeals were filed with the Seventh Circuit in the summer of 1997, temporarily delaying the administration of the settlement. The first was filed on June 6 by attorney Philip Fife on behalf of two Californians with hemophilia; the second was filed by Paul Hedlund on June 19 on behalf of 19 other class members. The two appeals presented the same request to the court: The appellants wanted to opt out of the agreement although they had planned to take part when the deadline arrived in October 1996. Fife and Hedlund argued that new information had emerged since October that strengthened the hemophiliacs’ case, and as a result the settlement offer was no longer satisfactory. Cutter Laboratories (a subsidiary of Bayer) issued a stipulation in January 1997—after the opt-out date but prior to final approval of the settlement—admitting that it "obtained plasma from some plasma collection centers that it knew were located in areas with populations whose plasma was at a higher risk for carrying the hepatitis virus." With access to this stipulation the appellants now wanted their day in court. They did not want Judge Grady to withdraw his approval of the settlement, however, or otherwise prevent other hemophiliacs from taking part. Both appeals were dismissed after an agreement was
reached with the defendants allowing the appellants to opt out of the settlement and pursue individual lawsuits.\textsuperscript{76}

**Pending Appeal of the Fee Order**

The future of the *Walker* settlement was further complicated by the long-awaited Supreme Court opinion in the case of *Amchem Products v. Windsor*, an asbestos class action. In that case, the Supreme Court held that a global settlement of asbestos-related claims could not be enforced because it failed to provide adequate representation of future claimants. Many practitioners believe the opinion also requires that settlement claims meet the more rigorous standards for certification of traditional trial classes.\textsuperscript{77}

In the factor concentrate litigation, some attorneys who represented class members but were not on the steering committee were unhappy with the settlement’s provision for attorney fees. Although they could not yet know if, or how much, Judge Grady would award them for their efforts, they suspected that their fee awards would be less than they would have received under their retainer agreements, which commonly provided for a contingency fee of one-third, and sometimes as much as 40 percent.\textsuperscript{78} Because the settlement provided that the $100,000 payments to class members would be net of any attorney fees, their fears were not groundless. Assuming all claimants had contracts with their attorneys for an average contingency fee of 33 percent, a net compensation fund of $620 million would mean that the gross fund would be one-third larger, or about $930 million. The attorney fee portion of the gross fund then would be about $310 million—a far cry from the $40 million set aside for all fees and costs. Four of these attorneys attempted to claim their standard fee against the cost and fee fund, and alternatively, against the defendants.\textsuperscript{79}

Judge Grady had enjoined lawyers from attempting to enforce their contingent-fee contracts (or liens based upon them) and declared that any such contracts would be void to the extent that they conflicted with the settlement provisions.\textsuperscript{80} To circumvent this obstacle, the four objectors to the fee limits argued that the class settlement did not pass muster under *Amchem*; therefore, it should be decertified and exist only as a mass settlement with many signatories. The attorneys would then have been able to collect contingency fees.

Judge Grady rejected these attorneys’ argument in an order dated February 18, 1998. The attorneys requested that the Seventh Circuit review his order—the same court that decertified the class for trial three years previously. Judge Posner, noting that the appellants were groundlessly accusing counsel for both the class and the defendants of “defamation, bait-and-switch tactics, hoodwinking, infamy, dishonesty, illegality, intimidation, extortion, hypocrisy, hysteria, and Marxism,” ruled that the objections to the attorney fee portion of the
settlement had not been made in a timely fashion.\textsuperscript{81} While Judge Posner labeled the settlement compensation scheme whereby all claimants received the same payment regardless of the strength of their individual cases or the amount of their individual damages as “downright weird” and noted that the “consent decree may well be questionable, both in its form (cf. \textit{Amchem Products, Inc. v. Windsor} . . .) and its terms,” he indicated that the district court was within its jurisdiction in entering the decree.\textsuperscript{82} Dismissing as “fantastic” allegations that one of the appellants was on the verge of negotiating a $1.8 billion settlement but for the fraudulent actions of class counsel, the Seventh Circuit ruled that a lawyer who failed to object to the settlement at the time of the fairness hearing, especially if he or she were in attendance, would be barred by the principals of waiver and equitable estoppel.\textsuperscript{83}

\textbf{EPILOGUE}

As of May 26, 1998, 4364 claimants had received compensation. Before a check was issued, every person falling within the class definition who might have had a claim related to an infected person (for example, noninfected family members) were required to sign a final release form. This requirement caused some delay in the administration of the settlement; however, the various appeals did not. The defendants and class counsel continue to process claims and issue checks to this day. Because the challenges pertained only to opt-out rights of some objectors and to limits on fee awards, the settlement appeared invulnerable for the large majority of plaintiff class members who had not opted out.

The final number of successful claimants will be less than the 6500 responses submitted prior to final approval. About 20 class members received special exemptions to pursue individual litigation even after the opt-out period had expired, and settlement administrators estimate that approximately 300 responses appear to be based on the HIV status of a family member or a loved one for whom a valid claim was already submitted; therefore these claims are duplicative. Thus it is estimated that $100,000 payments will eventually be made to about 6200 class members for a total of $620 million in compensation.

As of September 1998, an estimated $3 million to $4 million had been paid for the costs of administering the settlement from the $40 million set aside for expenses. Consequently, $36 million to $37 million remained available to be divided among the plaintiffs’ attorneys for their fees and expenses.
<table>
<thead>
<tr>
<th>Key Events</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>CDC concludes that AIDS is a blood-borne disease</td>
<td>June 1983</td>
</tr>
<tr>
<td>Screening test available for HIV-infected blood products</td>
<td>1985</td>
</tr>
<tr>
<td><em>Wadleigh</em> complaint filed in federal court in the Northern District of Illinois</td>
<td>September 30, 1993</td>
</tr>
<tr>
<td>All federal factor concentrate cases transferred to Judge Grady's courtroom in Chicago</td>
<td>December 6, 1993</td>
</tr>
<tr>
<td>Tentative settlement reached between <em>Wadleigh</em> class counsel and Baxter and Armour</td>
<td>August 1994</td>
</tr>
<tr>
<td>Judge Grady certifies <em>Wadleigh</em> class</td>
<td>November 3, 1994</td>
</tr>
<tr>
<td>Seventh Circuit orders Judge Grady to rescind certification</td>
<td>March 16, 1995</td>
</tr>
<tr>
<td><em>Wadleigh</em> trial scheduled to begin</td>
<td>October 1995</td>
</tr>
<tr>
<td>U.S. Supreme Court denies class counsel’s appeal</td>
<td>January 1996</td>
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<tr>
<td>Settlement negotiations between parties resume</td>
<td>March 1996</td>
</tr>
<tr>
<td>New <em>Walker</em> class action certified for settlement and preliminary settlement approval granted</td>
<td>August 14, 1996</td>
</tr>
<tr>
<td>Notice of settlement published</td>
<td>August and September 1996</td>
</tr>
<tr>
<td>Opt-out and objection deadline for class members</td>
<td>October 16, 1996</td>
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<tr>
<td>Initial fairness hearing</td>
<td>November 25, 1996</td>
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<tr>
<td>Settlement reached for third-party claims with the federal government and private insurers</td>
<td>April 30, 1997</td>
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<tr>
<td>Second fairness hearing</td>
<td>May 6, 1997</td>
</tr>
<tr>
<td>Final settlement approval granted</td>
<td>May 8, 1997</td>
</tr>
<tr>
<td>Two appeals filed; these claimants are released from class</td>
<td>June 1997</td>
</tr>
<tr>
<td>Judge Grady dismisses motion that would allow objecting plaintiffs’ attorneys to collect contingency fees</td>
<td>February 18, 1998</td>
</tr>
</tbody>
</table>
NOTES

1 As part of our research on this litigation, we interviewed the primary defense attorneys, lead counsel for the class, and the trial judge. We also reviewed the pleadings and papers filed in the case, law review articles, the legal press, the general press, internet web site postings, and Andrews, Mealey’s and Bureau of National Affairs (BNA) reporters.

2 This litigation was conducted in the U.S. District Court for the Northern District of Illinois. It was known as Wadleigh v. Rhone-Poulenc Rorer Inc., No. 93 C 5969 (N.D. Ill. filed Sept. 30, 1993), until January 1996, when the U.S. Supreme Court declined to review a Seventh Circuit writ to decertify the class. In the Matter of Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995), cert. denied, Grady v. Rhone-Poulenc Rorer Inc., 516 U.S. 867 (1995). The litigation continued as part of a larger multidistrict litigation known as In re Factor VIII or IX Concentrate Blood Products Litigation, MDL-986, No. 93 C 7452, until August 1996. At that time, a tentative class settlement was reached, known as In re Factor VIII or IX Concentrate Blood Products Litigation, No. 96 C 5024 (the Walker Settlement).

3 This fact is not at issue in the litigation, as the defendants have conceded that their products were capable of transmitting HIV. John Bacich, president of Baxter’s Hyland Division, has stated, “We deeply regret that early versions of the therapies that were designed to save lives unknowingly carried the AIDS virus. The virus had entered the blood supply before it was identified and this tragedy could not have been predicted or prevented.” “Pharmaceutical Firms Offer $640 Million to Settle Hemophilia HIV Lawsuits,” Andrews AIDS Litigation Reporter, Apr. 26, 1996, at 15408.

4 Cryoprecipitate was developed by Dr. Judith Poole at Stanford University.


7 Institute of Medicine, supra note 5, at 2.

8 Michael McLeod, “Bad Blood: Every Day, A Hemophiliac Dies of AIDS. It Didn’t Have to Happen,” Orlando Sentinel, Dec. 19, 1993, at 10. According to a defense attorney we interviewed, fewer than 10 percent of the clinics were located in these areas.

9 Id.; Institute of Medicine, supra note 5, at 3.


11 The National Hemophiliac Foundation (NHF) was also named as a fifth defendant.

Alpha is in the business of developing and producing plasma-based pharmaceutical products, and was responsible for the manufacture and sale of 15 percent of the blood factor concentrate market from 1978 through 1985. Alpha is a California corporation based in Los Angeles and a subsidiary of the Green Cross Corporation (Green Cross), a Japanese entity doing business in the United States as a Delaware corporation also based in Los Angeles. Green Cross was not named in the original complaint but is a party to the settlement.

Armour is a Delaware corporation based in Pennsylvania that manufactured and sold 20 percent of the blood factor concentrate marketed in the relevant time period. Armour is a subsidiary of Rhone-Poulenc Rorer, Inc. (Rhone-Poulenc), a pharmaceutical company based and incorporated in Pennsylvania. Rhone-Poulenc was named as a defendant in the original complaint and is a party to the settlement. Aside from factor concentrate, Rhone-Poulenc and its subsidiaries manufacture a large variety of pharmaceutical products, including respiratory and allergy medications, thrombosis and cardiology medicines, hormone replacement and cancer therapies, and over-the-counter preparations such as Maalox.

Miles is an Indiana corporation based in Pennsylvania. Through a division known as Cutter Laboratories, Miles manufactured and sold 45 percent of the factor concentrate marketed in the relevant time period. In 1984, Miles merged with Bayer A.G. (Bayer), a German multinational pharmaceutical company doing business in the United States as an Indiana corporation based in Pennsylvania. Bayer was not named in the original complaint but is a party to the settlement. Aside from factor concentrate and the well-known Bayer aspirin, Bayer and its subsidiaries produce a variety of chemical and medical products, including polyurethane, crop protection products, animal health products, and coating materials.
Baxter is a Delaware corporation based in Illinois that is responsible for manufacture and sale of 20 percent of the blood factor concentrate marketed in the relevant time period. Aside from factor concentrate, Baxter produces a variety of products primarily related to the blood and circulatory system such as intravenous delivery systems, blood collection and separation products, and products and services for the treatment of late-stage heart and renal disease. Baxter’s Hyland Therapeutics division is largely responsible for the research and development of factor concentrate.

12See, i.e., *Hyland Therapeutics v. Superior Court*, 175 Cal. App. 3d 509 (1985), issuing a peremptory writ of mandate to the trial court in *Gallagher v. Cutter Laboratories*, No. 548947 (Cal. Super. Ct. Santa Clara County 1985). The California Court of Appeal held in the *Hyland* case that the blood shield law in California prevented the plaintiffs from pursuing claims based on strict liability. Despite this adverse ruling, the *Gallagher* case continued and was settled on the third day of trial. Blood shield laws are explained in the subsequent section.

13*Gannon v. Cutter Laboratories*, No. C-8520078 (N.D. Cal. 1985). The attorney who represented this class is W. Robert Morgan, of San Jose’s Morgan, Morgan, Towery, Morgan & Spector. Morgan also represented the plaintiffs in the Gallagher case; in both cases he argued that an exception to blood shield laws should arise when blood products are made commercially available, rather than provided as a nonprofit service. Mary G. Galante, “Blood Liability Theory Rejected,” *National Law Journal*, Apr. 8, 1985, at 3.

Another class complaint was filed on July 30, 1986, in a state court in Seattle, Washington. The complaint, which was filed on behalf of an anonymous plaintiff, was never certified. “AIDS Fear Could Taint Blood Industry,” *United Press International*, Nov. 24, 1986, AM cycle.

For example, the Hawaii blood shield statute reads as follows:

“No physician, surgeon, hospital, blood bank, tissue bank, or other person or entity who donates, obtains, prepares, transplants, injects, transfuses, or otherwise transfers, or who assists or participates in obtaining, preparing, transplanting, injecting, transfusing, or otherwise transferring any tissue, organ, blood or component thereof, from one or more persons, living or dead, to another person, shall be liable as a result of any such activity, save and except that each such person or entity shall remain liable for the person’s or its own negligence or willful misconduct.” *Haw. Rev. Stat.* § 327–51.

15In at least two cases, individual plaintiffs have successfully presented negligence claims against defendant pharmaceutical companies. See *Christopher v. Cutter Laboratories*, 53 F.3d 1184 (11th Cir. 1995) (reversing jury verdict in favor of plaintiffs), and *JKB v. Armour Pharmaceutical Co.*, No. 49A02-9506-CV-341 (Ind. Sup. Ct. July 19, 1996). See also *Rogers v. Miles Laboratories, Inc.*, 116 Wash. 2d 195 (1991). In the last case, the court held that the Washington state blood shield law applies only to nonprofit blood donations. Thus, it did not bar a lawsuit against the defendant pharmaceutical companies because they purchased plasma from “donors” to produce factor concentrate. The plaintiffs were still required to prove actual negligence, however, because the court also found that blood is an inherently unsafe product; therefore the defendant pharmaceutical companies could not be held to a strict liability standard.

18Ryan White is famous for his lawsuit against an Indiana public school district that had banned him from campus due to his disease.

19According to the parties we interviewed, these early individual cases settled generally in the range of $10,000 to $50,000, a small amount of money considering the losses claimed.


21The Eleventh Circuit held that the trial judge did not properly instruct the jury about the role of the private physician as a “learned intermediary” between the patient and the pharmaceutical companies. The parties settled the case before it was retried. *Christopher v. Cutter Laboratories*, 53 F.3d at 1194–95.

22McLeod, supra note 8, at 10.

23*Wadleigh v. Rhone-Poulenc Rorer, Inc.*, 157 F.R.D. 410, 415 (N.D. Ill. 1994) (noting in decision to certify class action that 300 cases were pending nationwide).
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24 Attorney William L. Earl and his firm, Earl Blank Kavanaugh & Stotts, had handled more than thirty individual suits in Florida state court by the end of 1996. Robert Parks, of Haggard Parks and Stone, was also very active in factor concentrate cases. Five Florida attorneys, including Earl and Parks, are on the 15-lawyer steering committee for the Walker class. They handled more than one-fourth of the 800 cases pending nationwide in 1996. Altogether, approximately 500 Floridians were eligible for the eventual settlement of the class action.


26 David S. Shrager is a founding partner of Shrager, McDaid, Loftus, Flum and Spivey, a plaintiffs’ firm based in Philadelphia.

27 Leonard Ring died before any action was taken to aggregate the factor concentrate cases.

28 Shrager had represented a group of persons with hemophilia who were infected in the late 1980s (years after the plaintiffs in this case were infected) by factor concentrate that had been inadequately heat-treated.

29 Dianne M. Nast is a name partner at Roda & Nast in Lancaster, Pennsylvania, and a leading class action practitioner.


31 These allegations are supported by the Institute of Medicine, which states in its final report: “Shortly after the development of the technology to manufacture AHF concentrate it was recognized that these products carried a substantial risk of transmitting hepatitis B. Although some blood derivative products had been treated with heat to destroy live viruses since the late 1940’s, Factor VIII and IX concentrates in the United States were not subject to viral inactivation procedures until 1983 and 1984. If this technology had been developed and introduced before 1980 . . . fewer individuals with hemophilia might have been infected with HIV.” Institute of Medicine, supra note 5, at 5.


33 Id.

34 Id. These allegations are supported by the Institute of Medicine report, which states that “the plasma fractionation industry, and the FDA, accepted with little question estimates that the risk of AIDS was low . . . and they accepted advice that control strategies (such as automatic withdrawal of AHF concentrate lots containing blood from donors suspected of having AIDS, or a switch from AHF concentrate to cryoprecipitate in mild or moderate hemophiliacs) would be ineffective, too costly, or too risky. During this period, there were missed opportunities. . .” Institute of Medicine, supra note 5, at 4.

35 The Food and Drug Administration has regulatory authority over the supply and use of blood and blood products. Standards for the collection and use of plasma have been in effect since 1973, and there is a licensing system for those who meet the standard.

36 Sege, supra note 6.


39 28 U.S.C. § 1407 states: “When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.”

40 For example, the defendants argued that factor concentrate may not necessarily be the cause of infection for each plaintiff. This would be a strong argument against class certification because it implies that the causation issues are not common across the class. It was not enough to prevent MDL status, however, because causation could be argued for each plaintiff individually at trial, after the force of the MDL has ended. (In practice, however, most MDL cases settle without trial.)
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41 In re Factor Concentrate VIII or IX Concentrate Blood Products Litigation, 169 F.R.D. 632, 634 (N.D. Ill. 1996).

42 See Case Management Order (May 5, 1994), In re Factor VIII or IX Concentrate Blood Products Litigation, MDL-986, No. 93 C 7452.


44 Pharmaceutical Firms Offer $640 Million to Settle Hemophilia HIV Lawsuits, supra note 3.

45 Parties on both sides agree that the question Judge Grady posed to class counsel dramatically altered the dynamics of the negotiations, and eventually caused the collapse of the tentative settlement.

46 That subsection states: “When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.” Fed. R. Civ. P. 23(c)(4)(A).

47 Class certifications are not final orders; thus, at the time of this litigation they were not subject to appeal absent certification by the trial judge. The defendants filed a petition for a writ of mandamus, which is appropriate only in extraordinary circumstances. Two conditions must be met before a writ of mandamus will be issued. First, the petitioner must establish that only immediate review will prevent irreparable harm. Second, the writ of mandamus must be directed at an order issued by the trial judge that is, at the very least, patently erroneous. Kerr v. United States, 426 U.S. 394, 403 (1976); Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988), both cited in In the Matter of Rhone-Poulenc Rorer, Inc., 51 F.3d at 1295. Subsequently, Rule 23 was amended to permit interim appeals under some conditions.

48 Posner’s published opinion is located at In the Matter of Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995).

49 Id. at 1298.


51 In the Matter of Rhone-Poulenc Rorer, Inc., 51 F.3d at 1300, citing Erie R.R. v. Tompkins, 304 U.S. 64, 78–80 (1938) (holding that federal courts must apply substantive law in diversity cases).

52 51 F.3d at 1301, quoting the dissent written by Justice Holmes for Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917) (footnote omitted).


55 Pharmaceutical Firms Offer $640 Million to Settle Hemophilia HIV Lawsuits, supra note 3.

56 Id.


59 Susan Walker is a fictitious name for the actual class representative, who was the widow of a person with hemophilia who contracted HIV from factor concentrate. A fictitious name was used to protect her privacy.


Each insurer individually agreed to release all claims against the class members for medical expenses in exchange for compensation from the defendants. For ease of administration, the amount of compensation each insurer received was calculated according to its number of insureds rather than the number of class members it had covered. Specifically, each insurer received a payment equal to ten cents for every person covered under its health plan.

Settlement Agreement at 37–39.

The parties shall request that the court enter an order providing that no attorneys’ fees shall be payable by any class member other than those fees approved by the court to be payable from the cost and fee fund. . . .” The settlement goes on to provide one exception. If a class member consults an outside attorney for advice on the decision to take part in the settlement, the class member is responsible for the fee. *Id.* at 38–39.

*Id.* at 7.


The court stated that “we hold it to be reasonable in the present context to measure the likelihood that any of the defendants supplied the product which allegedly injured plaintiff by the percentage of DES sold by each of them for the purpose of preventing miscarriage bears to the entire production of the drug sold by all for that purpose. . . . Under this approach, each manufacturer’s liability would approximate its responsibility for the injuries caused by its own products.” 26 Cal. 3d at 303–04.

In 1996, a Florida court of appeal affirmed the dismissal of a factor concentrate case, holding that the market share doctrine did not apply. Specifically, the court noted that “Factor VIII concentrate products do not share a uniform composition. Factor VIII is collected from various plasma donors at various sites across the nation. Thus, each plasma pool from which the concentrate is processed is different. Each manufacturer uses a different proprietary method to prepare its concentrate.” *King v. Cutter Laboratories*, 685 So. 2d 1358, 1360 (Fla. App. 1996). In 1998, the Florida Supreme Court held that the market share doctrine may still apply if the defendants’ products were equally infectious, and remanded *King v. Cutter Laboratories*, noting, “the trial court must determine if the scientific evidence establishes that the blood product produced by each of the named defendants were sufficiently uniformly infectious to justify the application of the market share alternate theory.” 714 So. 2d 351 (Fla. 1998), distinguishing *Celotex Corp. v. Copeland*, 471 So. 2d 533 (Fla. 1985).


These requests included 50 requests from individuals who did not appear to have valid claims.

Pharmaceutical Firms Net 7,500 Claims for $100,000 Settlement,” *Andrews AIDS Litigation Reporter*, Oct. 25, 1996, at 16,317. Of the 600 opt-outs, 550 would have been eligible to take part in the settlement, and 380 were already involved in pending litigation.

Judge Grady removed Kozak and Mull from the steering committee in an order dated May 13, 1997.


The appellants also argued that the settlement did not conform with the Seventh Circuit’s ruling to decertify the Wadleigh class, and questioned whether the settlement would pass muster under a new Supreme Court ruling in the case of *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) (holding that a settlement class is not necessarily appropriate for certification merely because the proposed settlement is fair).


In our interviews, many practitioners have suggested that the effect of *Amchem* “in the trenches” has been to eliminate settlement classes unless the same class could be certified for trial.
The attorneys who eventually appealed the fee provisions in the settlement appear to have laid claim to $15 million of the $40 million fund. See In re Factor VIII or IX Concentrate Blood Litigation, 159 F.3d 1016, 1020 (7th Cir. 1998), cert. denied, 119 S. Ct. 1488 (1999).

Order Concerning Certain Claims for Attorneys’ Fees (Feb. 18, 1998) at 10, citing Skelton v. General Motor Corporation, 860 F.2d 250, 259 (7th Cir. 1988).