
POLYBUTYLENE PLUMBING PIPES LITIGATION:¹
***COX v. SHELL OIL*²**

PROLOGUE

Beginning in the late 1970s, polybutylene plastic plumbing systems—touted as being cheaper and more durable than copper pipe systems—were installed in new homes nationwide, particularly in the sunbelt states, which were experiencing a housing boom. Over the years, several million homes, many of them mobile homes, were built with polybutylene plumbing systems.³ Before long, the plumbing systems began to experience failures of the fittings and of the pipe itself. Consumers nationwide attributed the failures to various causes, including inadequate design, defective manufacturing, improper installation, and degradation of the materials from chemicals in the drinking water.⁴ More than ten years of litigation, and bankruptcy for one company, would follow, and hundreds of millions of dollars would be spent before reaching a final class action resolution.

In 1977, Shell Oil Company began manufacturing polybutylene resin—the raw material for the pipes. Until it withdrew the product from the U.S. market in 1996, Shell was the sole manufacturer of polybutylene resin. Shell has continued to manufacture the resin, which has undergone modifications over the years, for overseas sales. Hoechst Celanese Corporation manufactures an acetal compound under the brand name Celcon that, until 1990, was used to manufacture fittings for the plastic plumbing systems.⁵ DuPont manufactures a competing acetal product called Delrin that, from 1983 through 1988, was also used for manufacturing fittings. Both Celcon and Delrin were and continue to be used in a wide range of consumer products such as automotive components. United States Brass Corporation bought polybutylene resin from Shell and Celcon from Hoechst Celanese; it then designed and manufactured plumbing systems using the material, which it sold under the Qest brand name. Together, Shell and U.S. Brass conducted an advertising and sales campaign that established the market for the plastic plumbing systems. Vanguard Plastics, a com-

petitor of U.S. Brass, also designed and manufactured plumbing systems using both Celcon and Delrin for its fittings.

Litigation over leaking plumbing systems began in the early 1980s in California and Texas, but it was sparse and typically involved homebuilders or municipalities.⁶ No significant homeowner litigation occurred until mid-1987, when James Moriarty, of Houston's Moriarty & Associates, filed a lawsuit in Houston against General Homes Corporation (a developer and homebuilder), U.S. Brass, Shell, and Hoechst Celanese. Moriarty, who had previously brought suit against General Homes for other reasons, was approached by one of the homeowners in a subdivision in La Porte—a small, predominantly middle-class city east of Houston—about the leaking pipes. At that time, Moriarty had a small plaintiff consumer litigation practice, but he also had small-scale mass tort experience. Moriarty filed suit on behalf of about 100 homeowners in the development, alleging that their plumbing systems' failure caused property damage and mental anguish, seeking damages based on negligence, fraud, and violations of the Texas Deceptive Trade Practices Act (DTPA).⁷ Moriarty represented these plaintiffs individually, and he filed cases only on their behalf, not as a class action. He succeeded in getting an early trial date for the summer of 1988, and won a \$3.4 million verdict.⁸

Moriarty's research into the La Porte case quickly led him to believe that there was a vast potential market for polybutylene plumbing litigation. To pursue the litigation, he formed a partnership with George Fleming, an expert in aviation accident law whose Houston-based firm, Fleming, Hovenkamp & Grayson, handled personal injury mass tort litigation. Moriarty and Fleming met at a social function and realized that they shared a common interest in complex litigation as well as in the use of technology to gain an edge against opponents. They joined forces during the La Porte case and—until a reportedly bitter split in 1992—the partnership actively recruited and represented thousands of clients with polybutylene plumbing complaints, consolidating many individual claims for each trial. Moriarty said he had two goals in this litigation: Every one of his clients would get a premium over and above resolution of their plumbing problems, and the defendants would “replumb America.” Despite these far-reaching goals, neither Moriarty nor Fleming initiated class actions in the early years of litigation.⁹

Because the DTPA allowed for treble damages, and because Texas had liberal rules allowing out-of-staters to bring cases in Texas state courts, the trial environment there in the late 1980s and early 1990s was very favorable for consumer litigation. The early pipes cases were brought as consumer fraud cases with allegations typically including some combination of negligence, fraud, strict liability, and violations of the DTPA. Plaintiffs almost always won the cases that went to trial and, with the DTPA claim, judgments for the homeown-

ers were often in the range of \$25,000–\$50,000 each (out of which were paid attorney fees and expenses). However, the claims often encountered trouble on appeal, and many of the plaintiffs settled with the defendants during the appeals process for less than the original judgment but significantly more than they might have retained after appeal.

One of the defense counsel we interviewed said that he employed a tripartite strategy during this period. He first challenged the DTPA claims. He also tried to limit—on the grounds of due process—the number of cases that were tried at one time. Finally, he argued that people were not legally entitled to a full re-plumb, even if they were entitled to have their leaks fixed. The cost of fixing leaks was, of course, much less than a replumb. For example, in our interview, Moriarty noted that many people sustained only about \$250 in losses—less than he sought in litigation. Another feature of this early litigation was the substantial amount of finger-pointing among the named defendants as they attempted to demonstrate that their product or role in the process was not responsible for the failures that consumers were experiencing.

During this period Moriarty employed two settlement schemes. Early on he used a one-size-fits-all approach where each plaintiff got the same amount, which meant that his initial negotiating position was set by the value of larger claims. But over time (as both he and the defendants acquired more experience in this litigation), Moriarty realized that an individualized approach to calculating damages benefited both sides; it was less expensive for the defendants—thus making it easier to reach a settlement—and it resulted in at least as much client satisfaction as the one-size-fits-all approach because it appealed to most clients' sense of fairness and desire to be treated as individuals. Moriarty developed an algorithm that distinguished the value of his clients' claims according to whether a home was mobile or site-built; expensive or average, if it was site-built; contained a full polybutylene pipe system or just polybutylene yard line; and was located in Texas or not. Texas claims had greater value because the state's favorable consumer laws increased the likelihood of larger judgments at trial. In contrast, many Florida claims would have been worth nothing if litigated individually because Florida had a two-year statute of limitations, meaning that the defendants would have won at trial by claiming that the homeowner had waited too long to bring his claim. The only reason for defendants to settle the latter claims would be to save legal expenses; by bundling them together with claims that would prevail at trial, Moriarty was able to leverage their value.¹⁰

In 1988, U.S. Brass (with assistance from Shell and Hoechst Celanese) established an 800 number to respond to consumer complaints about leaky plumbing. Known as the Qest repair line, the toll-free number represented the first effort by the defendants to craft an industry response to the polybutylene pipes

problem. The program subcontracted with local plumbers and builders to repair or replace leaky plumbing systems. Reportedly, early in the program the company had difficulty developing a base of reliable contractors, leading to customer satisfaction problems. In 1991, with U.S. Brass facing financial trouble as a result of the mounting polybutylene litigation, Shell, Hoechst Celanese, and DuPont took over and, according to reports, significantly improved the consumer complaint operation, which they renamed the Plumbing Claims Group (PCG). According to a July 1993 news article, the PCG would pay for reasonable documented repairs and evaluate whether to take further action, which could include the replacement of the entire system. About 12,000 homeowners reportedly called the toll-free number between 1991 and 1993.¹¹ According to a March 1993 segment on the news program *Good Morning America*, the PCG received approximately 500 calls a month, a number consistent with the overall reported figure of 12,000.¹² Although the existence of the PCG was well known within the plumbing and building communities, the defendants did not actively promote it to the general public. One defendant told us this was for fear of “opening the floodgates”; another said that it was more cost-effective to reach people who had polybutylene plumbing problems through service providers.¹³ Press reports indicate that consumer complaints and this early litigation may have also triggered a probe by the Federal Trade Commission, but we found no indication of any outcome either in the press or from the parties we interviewed.¹⁴

As the litigation evolved, the DTPA claims continued to encounter trouble on appeal, and Texas trial courts began to limit the number of cases that could be tried at one time. The decreased probability of a verdict for the plaintiff and increased costs to try cases reduced the value of the later plaintiffs’ cases; often they settled for a replumb plus some modest financial premium. Against this backdrop, Moriarty believed he detected a softening in the stance of Shell (which had offered the staunchest defense) and, in early 1993, decided to try to settle his remaining claims. As a long-time student of mass torts, he knew that Kenneth Feinberg of Washington, D.C.’s Feinberg and Associates had mediated numerous major mass tort cases including the Agent Orange litigation, a case considered by many to be a watershed event in mass tort class actions. Moriarty persuaded defense counsel for Shell and Hoechst Celanese to hire Feinberg to facilitate settlement of his cases.

Altogether, Moriarty told us, he litigated about 15,000 cases for a total value of about \$160 million. Therefore, on average, his clients grossed about \$11,000 apiece.¹⁵ Of that, they would pay 40 percent in fees and another 1–1.5 percent in expenses, which would leave them with about \$6500. To put that figure in context, Shell indicated in a court document that “the average cost to replumb varies from something like \$800 for a single wide mobile homes [sic], to approximately \$4,000 for the average single family dwelling.”¹⁶

On May 24, 1994, U.S. Brass filed for bankruptcy protection. The 1994 Securities and Exchange Commission Form 10-K Annual Report for its parent, Eljer Industries, states that U.S. Brass and its insurance companies had paid out \$61 million in settlements of 202 suits and 11,000 nonlitigated homeowner claims by the end of 1993.

CLASS ACTION LITIGATION BEGINS

The first nationwide polybutylene plumbing class action, *Robert Beeman, et al. v. Shell Oil Company, et al.*, was filed in September 1993 in state court in Houston.¹⁷ A staff lawyer with Trial Lawyers for Public Justice (TLPJ)—a public interest group funded by plaintiffs' lawyers—had experienced a leak in her condominium and was referred to Marc D. Murr, a Houston solo practitioner who was handling some individual polybutylene cases. As a result, TLPJ lawyers soon learned of the extent of the polybutylene plumbing problem and began to think that the best way to obtain prompt relief for all individuals with leaky pipes would be to bring a class action.¹⁸ As is TLPJ's usual practice, it put together a team of lawyers with the necessary expertise; in this instance, it brought in Philadelphia class action specialist David H. Weinstein of Weinstein, Kitchenoff, Scarlato & Goldman to complement Murr's polybutylene expertise. Then Murr asked an old friend, Michael Caddell of Houston's Caddell & Chapman—a small firm that specializes in complex litigation—to join the team.¹⁹ None of these lawyers had the benefit of the by-now extensive discovery and substantive knowledge possessed by Moriarty and Fleming. Not long after filing, *Beeman* counsel invited both Moriarty and Fleming to join them, but only on the condition that they first settle their individual cases to avoid any potential conflict of interest in representing both individuals and the class. Moriarty agreed and proceeded to settle his cases; Fleming declined.²⁰

Meanwhile Feinberg, mediating the Moriarty cases, saw three related but distinct ongoing groups of litigants: Moriarty's clients, Fleming's clients (now distinct from Moriarty's), and the *Beeman* class members. Drawing on his extensive mass tort experience, Feinberg outlined a three-pronged approach to settlement—a replumb, payment for damages, and prompt relief—and suggested that the parties meet to see if they could negotiate a nationwide settlement and reduce some of the transaction costs of the litigation.²¹ At their first meeting, Arthur Bryant, executive director of TLPJ, put forward a negotiating position that arguably represented a departure from the strategy used to settle many previous mass torts. Bryant said that the only settlement that would be acceptable to *Beeman* class counsel would be one in which all eligible class members received full relief, no matter how much money that required.²² In other words, in the face of uncertainty about the amount of damages, the plaintiffs would not agree to a lump-sum settlement that effectively capped the defendants'

liability to the class. TLPJ felt that such an approach would be the only way to effect a polybutylene settlement that would serve the public interest. Bryant also stated that class counsel would not be willing to discuss fees until after both sides had reached a settlement that an independent committee of TLPJ foundation board members had reviewed and agreed would be in the public interest.²³

The defendants knew that their companies' boards would never approve a completely open-ended settlement, so the parties eventually agreed on the novel concept of a "soft cap" for the settlement fund as a way to satisfy concerns on both sides.²⁴ Eligible claimants would receive full relief but the parties would agree on the initial size of the fund as a condition of the settlement. Then, if the fund were exhausted before all the claimants received the relief to which they were entitled, the defendants could choose under the settlement either to provide additional funding or walk away. In return, the class members who had not yet received full relief would have their rights preserved (including extensions of any statutes of limitations) to pursue any legal and equitable claims against the defendants either individually or as a class. So, essentially, any uncompensated class members would lose time but nothing else.²⁵ In negotiating the amount of the soft cap, plaintiffs' attorneys say that they were looking for a sufficient funding commitment from the defendants to make it difficult for them to walk away if the funds were exhausted (rather than to provide the necessary additional funds). The defendants, in turn, wanted a safety valve that would allow them *to* walk away—even though they would face additional litigation—if the number and value of claims proved overwhelming.

To provide some perspective on the parties' negotiating positions, the worst-case estimate of the class size was that six million units had polybutylene plumbing systems, so the defendants were potentially looking at a multibillion-dollar problem. But no one knew exactly how many units had such plumbing, or how many were actually experiencing problems. The raw material for the pipe had undergone modification over the years, as had the procedures for installation, and the type and amount of chemicals in the water varied from location to location. Also, a significant number of the systems had metal fittings, thus avoiding one potential source of leaks.

The parties spent almost a year hammering out what became the *Beeman* settlement. Reportedly, one of the most difficult issues that emerged during the course of the mediation involved the defendants, who needed to work out an agreement among themselves over their respective shares for funding the settlement. They ultimately agreed to submit this issue to binding arbitration.²⁶ The proposed settlement was previewed to Public Citizen, a consumer advocacy group, to identify any features it might consider objectionable. A motion to approve the settlement preliminarily was presented to Harris County District

Court Judge Mary Katherine “Katie” Kennedy on October 24, 1994. When the settlement was presented to the court, a previously filed motion for class certification under Rule 42 of the Texas Rules of Civil Procedure was still pending.

The *Beeman* settlement contained most of the major features (summarized in Table 14.1) of what would later become the final class resolution of the polybutylene litigation. The soft-cap amount of the total fund was set at \$750 million. For leaks and property damage that occurred after the settlement’s initial notice date, eligible claimants would be entitled to recover the full amount of unreimbursed repair and property damage costs. Claimants would be eligible for relief if a qualifying leak occurred within one year after the initial notice date (no matter how old the plumbing system), or if a leak occurred within 10, 13, or 16 years after the date of installation of the plumbing system (depending on the type of system).²⁷ Furthermore, any eligible claimant who experienced one leak after the initial notice date, or two leaks before the initial notice date, would be entitled to an automatic replumb. The settlement also allowed for ad-

Table 14.1
Major Features of *Beeman* Settlement

Category	Provisions
Total fund (soft cap)	\$750M
Past expenses (soft cap)	\$50M (subset of total fund)
Eligibility for repair and full reimbursement of unreimbursed costs of repair and property damage	<ul style="list-style-type: none"> • If leak occurs within 1 year after initial notice date regardless of plumbing system’s age <i>or</i> • If leak occurs within 10, 13, or 16 years after date of installation (depending on type of system) • Provisions for additional or accelerated relief in special circumstances
Eligibility for replumb	Automatic replumb if one leak occurred after initial notice date or two leaks occurred before initial notice date (if claimants meet other eligibility criteria)
Mechanism	<ul style="list-style-type: none"> • Establishment of a Consumer Plumbing Recovery Center with operational responsibility shared by plaintiff and defendant representatives • Program continues about 13 years through September 10, 2007 • Four subsequent notice and opt-out periods at three-year intervals
Payments to representative plaintiffs	\$3000 to each single representative plaintiff or each representative plaintiff married couple; to be paid in addition to settlement fund
Fees to class counsel (application never formally presented to the court)	About \$24 million with no additional claims for expenses (not including interest and potential expenses for additional legal work); to be paid in addition to settlement fund

ditional or accelerated relief in special cases. Eligible claimants were allowed one year from the initial notice date to claim unreimbursed past expenses that had been incurred before that date. If past expense claims exceeded the allocated funding of \$50 million, then—as with the overall fund—the defendants could either add funding or the claimants would have their rights preserved to pursue those particular claims outside of the *Beeman* class.

Another innovative feature of the settlement provided for recurring notice to the class—every three years for the first 13 years of the program.²⁸ Anybody acquiring a unit with a polybutylene plumbing system after the initial notice date would be given an opportunity to opt out of the settlement class during the subsequent notice period. The program would be administered through the establishment of a Consumer Plumbing Recovery Center (CPRC), a nonprofit, tax-exempt corporation with both defendants and plaintiffs' class counsel having equal representation on the board of directors. The proposed CPRC organization included an ombudsman to facilitate the process of appeal and authorize additional or accelerated relief in special circumstances.

Defendants were to pay \$3000 to each representative plaintiff or representative plaintiff married couple in addition to the settlement fund. Fees to class counsel of about \$24 million (not including potential interest payments) were reportedly negotiated between the parties after the settlement and were to be paid by the defendants in addition to the settlement fund. There was to be no additional application by class counsel for expenses other than potential exceptions for additional legal work.²⁹

In February 1995, four months after the settlement was presented, Judge Kennedy denied the motion for its preliminary approval. Judge Kennedy's order listed, but—as is common in Texas state court practice—did not comment on, the factors she had considered in her ruling, including whether her court was an appropriate jurisdiction for a national class action. The ruling puzzled and dismayed counsel for both sides.³⁰ Published reports, court documents, and our interviews indicate that a group of lawyers led by Fleming vigorously opposed *Beeman*; other lawyers and academics questioned whether a Texas state court could properly exercise jurisdiction over a national class. Judge Kennedy was elected to the bench in 1992 and had little, if any, prior class action experience. Some sources speculated that she may have wished to avoid what had become highly charged litigation.

THE CLASS ACTION FLOODGATES OPEN

After Judge Kennedy's decision, statewide class actions were filed in rapid order around the country.³¹ Key participants told us that most of the state class actions were filed by two competing groups of lawyers (neither from *Beeman*),

and were filed in most of the 50 states. Defense counsel told us that they were served in 20–30 class actions, with two often competing in a single state. They noted that their transaction costs significantly increased during this period; one corporate counsel told us that his company had to retain about a dozen additional law firms to deal with the spurt of litigation.

Beeman counsel refiled in federal district court in Galveston (adding warranty charges under the Magnuson-Moss Warranty Act for federal jurisdiction) because U.S. District Judge Samuel Kent had a reputation for moving his docket quickly.³² Judge Kent, however, transferred the case to the backlogged federal court in Houston (where the state case had been litigated); once there, it languished until it was overtaken by the final class settlement.

TWO COMPETING NATIONWIDE CLASS ACTIONS

Two nationwide class actions emerged on the post-*Beeman* landscape. In November 1994, before the *Beeman* decision, a group of plaintiffs' lawyers led by solo practitioner J. L. Chestnut, Jr., of Selma, Alabama; T. Roe Frazer II of Jackson, Mississippi's Langston Frazer Sweet & Freese; and Joe R. Whatley, Jr., of Birmingham's Cooper, Mitch, Crawford, Kuykendall & Whatley, had filed a nationwide class action, *Spencer, et al. v. Shell Oil Company, et al.*, in the Circuit Court of Greene County, Alabama.³³ Our sources claimed this group obtained a copy of the *Beeman* petition (which was publicly available), changed the names and a couple of other minor details, and filed a class action in order to have an edge on any competition in the event that the *Beeman* deal did not go through. After the collapse of *Beeman*, *Spencer* counsel served the defendants and then contacted them, offering essentially the same deal that was worked out in *Beeman*. A hearing on class certification of *Spencer* was scheduled for June 1995.

Meanwhile, the informal but hard-won agreement by the defendants to seek a joint resolution of the litigation seemed to be falling apart: DuPont, which found being sued in Alabama a particularly risky prospect, decided to go its own way and agreed in mid-May to settle with the *Spencer* counsel. In the settlement, DuPont agreed to reimburse homeowners 8 percent (derived from its estimated share of the market) of the cost of any replumb up to a total fund of \$120 million. It also agreed to pay \$8.4 million in attorney fees. On May 19, the *Spencer* court certified a class action for settlement purposes only and as to DuPont only, and granted preliminary approval of the DuPont settlement. DuPont reportedly spent about \$7 million on a notice campaign. The opt-out deadline was October 27, 1995.

On June 13, 1995, with *Spencer* still awaiting certification rulings as to Shell and Hoechst Celanese, another group of plaintiffs' lawyers including John "Don"

Barrett of Barrett Law Offices in Lexington, Mississippi; solo practitioner Gordon Ball of Knoxville, Tennessee; Michael Hausfeld of Washington D.C.'s Cohen, Millstein, Hausfeld & Toll; Robert Lieff of San Francisco's Lieff, Cabraser, Heimann & Bernstein; and Bruce Conley of Union City, Tennessee's Conley, Campbell, Moss and Smith filed a nationwide class action, *Cox, et al. v. Shell Oil, et al.*, in the Chancery Court of Obion County, Tennessee.³⁴ To sidestep the DuPont settlement, the complaint named only Shell and Hoechst Celanese as defendants. Lest there be any question about how the cases were originating at this point, the complaint—after describing the plaintiff, Tina Cox, as owning a mobile home located in Obion County, Tennessee, having a defective plastic water delivery system—states that the plaintiff was “unaware of the misrepresentation of the defendants until June 1995, when contacted by her attorney.”³⁵ Unlike *Spencer*, *Cox* did not seek punitive damages.

The presiding judge, Chancellor Michael Maloan, granted immediate (*ex parte*) preliminary certification of the class on the day that *Cox* was filed.³⁶ At this point, *Cox* was the only certified nationwide class action that named more than one of the major defendants in the polybutylene litigation. However, Judge Hardaway in Alabama certified the *Spencer* class with Shell and Hoechst Celanese as defendants later that month, on June 30, and scheduled a trial date for November 27. Because Hardaway did not cede priority to *Cox*, the two actions proceeded in competition with each other; in fact, *Spencer* counsel sought to intervene in *Cox* and asserted that *Spencer* had priority because it had been filed first.

Cox class counsel, with defendants acting as matchmaker, invited the *Beeman* class counsel to join them in the hopes of securing a settlement that would not unravel under challenges from competing plaintiffs' attorneys. On July 31, 1995, Shell, Hoechst Celanese and *Cox* class counsel presented a preliminary settlement to Judge Maloan to which he granted preliminary approval. The settlement fund, still with a soft cap, had been increased by \$100 million to a total of \$850 million to try to head off opposition from potential objectors and intervenors as had earlier greeted the *Beeman* settlement; the amount for past damages was increased to \$75 million from \$50 million but was changed to a hard cap.³⁷ Otherwise, with the notable absence of DuPont, the fundamentals of the agreement were essentially that of *Beeman*. However, whereas nine lawyers or law firms appeared on behalf of the *Beeman* plaintiffs, 23 came forward on behalf of *Cox* plaintiffs—the nine from *Beeman* plus 14 more. With so many more lawyers involved, the fee application for class counsel was now \$45 million, up from the reported \$24 million in *Beeman*, even though the settlement was presented barely a month after the case was initially filed.³⁸ Table 14.2 lists class counsel for *Beeman* and *Cox*.

Table 14.2
Plaintiffs' Class Counsel for *Beeman* and *Cox*

<i>Beeman</i> Settlement	<i>Cox</i> Settlement
Michael A. Caddell, Esq., Caddell & Conwell, P.C., Houston, TX	Michael A. Caddell, Esq., Caddell & Conwell, P.C., Houston, TX
David H. Weinstein, Esq., Weinstein Kitchenoff Scarlato & Goldman Ltd., Philadelphia, PA	David H. Weinstein, Esq., Weinstein Kitchenoff Scarlato & Goldman Ltd., Philadelphia, PA
Trial Lawyers for Public Justice, P.C., Washington, D.C.	Trial Lawyers for Public Justice, P.C., Washington, DC
Moriarty & Associates., P.C., Houston, TX	Moriarty & Associates, P.C., Houston, TX
Kohn, Nast & Graf, P.C., Philadelphia, PA	Kohn, Swift & Graf, P.C., Philadelphia, PA
Law Offices of Marc D. Murr, P.C., Houston, TX	Law Offices of Marc D. Murr, P.C., Houston, TX
Bristow, Hackerman, Wilson & Peterson, P.C., Houston, TX	Bristow, Hackerman, Wilson & Peterson, P.C., Houston, TX
Law Offices of Dennis C. Burns, Dallas, TX	Law Offices of Dennis C. Burns, Dallas, TX
Law Offices of Charles E. Dorr, P.C., Duluth, GA	Law Offices of Charles E. Dorr, P.C., Duluth, GA
	Don Barrett, Esq., Barrett Law Offices, Lexington, MS
	Gordon Ball, Esq., Knoxville, TN
	Michael D. Hausfeld, Esq., Gary E. Mason, Esq., Cohen, Milstein, Hausfeld & Toll, Washington, DC
	Bruce Conley, Esq., Damon Campbell, Esq., Conley, Campbell, Moss & Smith, Union City, TN
	Lieff, Cabraser, Heimann & Bernstein, San Francisco, CA
	Hagens & Berman, Seattle, WA
	Heins Mills & Olson, P.L.C., Minneapolis, MN
	Jackson, Taylor & Martino, Mobile, AL
	Patrick Pendley, Esq., Plaquemine, LA
	Phillip Feliciano, Esq., Kensington, MD
	Moore & Brown, Washington, DC
	Thomas Jessee, Esq., Johnson City, TN
	Carey & Danif, L.L.C., St. Louis, MO
	Levin, Fishbein, Sedran & Berman, Philadelphia, PA

The settlement provided for an extensive notice program from August through October. Characterized by Judge Maloan as one of the most comprehensive class notice campaigns ever undertaken, notice was designed and administered as a joint venture of Rust Consulting and Kinsella Communications.³⁹ Printed notice included advertisements in consumer publications such as *TV Guide* and *People* magazine; in newspapers and newspaper magazines such as *Parade* and

USA Weekend; in newspapers targeted geographically and ethnically; and in trade and professional magazines. Other forms of notice included television advertisements on national networks and cable television targeted to ethnic audiences. A home page was set up on the internet and public service announcements were posted on appropriate bulletin boards of America Online, CompuServe, and Prodigy. All forms of notice advertised a toll-free 800 telephone number (staffed by both English and Spanish speakers because of the high concentration of potential class members in the Southwest). People who called this number could receive additional information and a complete notice package. Finally, direct notice was mailed to all potential class members presently identified or identifiable, such as mobile homeowners, who are required to register their homes as vehicles.⁴⁰ The complete notice package described the terms of the settlement in detail as well as the amount of the application for attorney fees.⁴¹ The notice program cost \$12 million (including the 800 line).⁴² The opt-out and objection deadline for *Cox* was October 20, 1995, extended from September 13. The fairness hearing was scheduled to begin on November 8, 1995.

Fleming, who had joined with *Spencer* counsel after the settlement with DuPont, fought *Cox* every step of the way.⁴³ He filed a number of statewide class actions with the intention of opting those entire classes out of the *Cox* settlement. He also had individual clients with over 100,000 claims whom he opted out of the *Cox* settlement. His action led to legal wrangling about whether his opt-outs were legitimate or whether he had misrepresented the deal to some clients and not had recent contact with many others; apparently, Fleming's clients did not personally sign exclusion requests as required by the court. He also sent letters to millions of mobile homeowners whom he did not represent, urging them to opt out and be a part of the *Spencer* class action. Press reports refer to consumers' confusion trying to sort out the barrage of information related to the competing actions and settlements.⁴⁴ For example, Florida homeowner Herbert Conner was quoted as saying, "I guess both sides want to sponsor me. . . I don't know what to do," when he received claiming information from both *Cox* and *Spencer* attorneys.⁴⁵

THE FINAL CHAPTER

In October, amid the competition and resulting confusion generated by the *Cox* and *Spencer* actions, Judge Richard Silver, who was presiding over an uncertified case for a putative statewide mobile homeowner class in the Superior Court of Monterey County, California, offered to broker a global settlement.⁴⁶ Judges Maloan (of the *Cox* court) and Hardaway (of the *Spencer* court) concurred that this move would further the cause of final resolution of polybutylene litigation and agreed to issue a joint order for a mandatory settlement

conference to take place on the beautiful Monterey peninsula with Judge Silver presiding. On October 10, Judge Silver conducted a “telephone conference call with all concerned attorneys and orally advised them of this joint order.”⁴⁷ He then issued an October 12, 1995 Order Setting Settlement Conference to convene the coordinated settlement process (that order was also issued as a joint order by the *Cox* and *Spencer* courts).⁴⁸ From October 23 through November 7, one day before the fairness hearing had been scheduled in Tennessee, negotiations were conducted and settlement finally reached among *Cox* class counsel, *Spencer* counsel, and defendants’ counsel and representatives.

By agreement of the parties, the global settlement was presented to the *Cox* court in Tennessee for approval. The final order approving the class settlement was dated November 17, 1995, after the fairness hearing on November 8–9, with the court retaining continuing jurisdiction throughout the administration of the settlement. The class was defined as:

All persons and entities that (1) own real property or structures in the United States in which there was installed between January 1, 1978 and July 31, 1995, polybutylene plumbing with acetal insert or metal insert fittings or a polybutylene yard service line; (2) own or previously owned such real property or structures and have already incurred any cost or expense, by reason of leakage from, or from failure, repair, or removal of, all or any portion of such polybutylene plumbing or yard service line which was installed between January 1, 1978 and July 31, 1995; or (3) will own such real property or structures during the term of entitlement to relief under the Settlement Agreement.

The main changes in the final *Cox* settlement, compared to the preliminary *Cox* settlement presented on July 31, 1995, were:

- The total fund, still a soft cap, was increased from \$850 million to \$950 million.
- Eligibility was extended to anyone who suffered a leak within a *two*-year period from date of notice, no matter how old the plumbing system (post-1978); otherwise the same 10-, 13- and 16-year limitations from date of installation held.
- The parties agreed that any funds received from U.S. Brass Corp. or Eljer (its parent company) after bankruptcy proceedings were concluded would be added to the \$950 million settlement fund.⁴⁹

The final order noted that Shell and Hoechst Celanese were assigned the right to pursue all claims against DuPont for its contested share of the responsibility to the class, but the order also stipulated that the defendants assumed full obligation for paying the \$950 million in the event that no funds were forthcoming from DuPont.⁵⁰

What was the price of these improvements to the final settlement? In addition to the \$45 million in fees paid to *Cox* counsel (which did not change), defendants paid \$30 million in fees to *Spencer* counsel on top of the \$8.4 million that DuPont had already paid them. None of the fees was to come out of the settlement fund; they required additional payments by the defendants. The original *Cox* settlement provided for the defendants to pay \$3000 to each of four representative plaintiffs. The final settlement provided for similar payments to the 12 representative plaintiffs in *Spencer*. Table 14.3 compares the major features of the *Beeman*, initial *Cox*, and final *Cox* settlements.

Unlike fees, costs of notice and administration were to come out of the settlement fund. Because the program extends over 14 years and includes recurring notice, these costs may be substantial. Total costs of notice are shown in CPRC financial documents as capped at \$28 million (not including \$2 million that the defendants spent on the toll-free telephone line during the first notice period). The CPRC has made no formal projection of administration costs, but our interviews suggest that an estimate of 10 percent of claims' costs, or about \$84 million, is not unreasonable.⁵¹ These calculations suggest that about \$838 million will be available for claims, not including any contributions forthcoming from U.S. Brass.

Table 14.3
Comparison of the *Beeman*, Initial *Cox*, and Final *Cox* Settlements

Category	<i>Beeman</i>	Initial <i>Cox</i>	Final <i>Cox</i>
Total fund (soft cap)	\$750M soft cap	\$850M soft cap (ambiguous as to how any proceeds from U.S. Brass/Eljer would be applied)	\$950M soft cap (with any proceeds from U.S. Brass/Eljer additive to fund)
Past expenses (subset of total fund)	\$50M soft cap	\$75M hard cap	\$75M hard cap
Eligibility for repair and full reimbursement of unreimbursed costs of repair and property damage	<ul style="list-style-type: none"> • If leak occurs within 1 year after initial notice date no matter how old the plumbing system <i>or</i> • If leak occurs within 10, 13, or 16 years after date of installation (depending on type of system) • Provisions for additional or accelerated relief in special cases 	Same	<ul style="list-style-type: none"> • If leak occurs within 2 years after initial notice date, regardless of plumbing system's age • Otherwise same

Table 14.3 (continued)

Category	<i>Beeman</i>	Initial <i>Cox</i>	Final <i>Cox</i>
Eligibility for replumb	<ul style="list-style-type: none"> Automatic replumb if one leak occurs after initial notice date or two leaks occurred before initial notice date (if other eligibility met) 	Same	Same
Mechanism	<ul style="list-style-type: none"> Establishment of a Consumer Plumbing Recovery Center with operational responsibility shared by plaintiff and defendant representatives Program continues about 13 years through September 10, 2007 Four subsequent notice and opt-out periods at three-year intervals 	Same	Same except program continues about 14 years through July 31, 2009
Payments to representative plaintiffs	\$3000 to each representative plaintiff to be paid in addition to settlement fund	Same	Same; includes representative plaintiffs for <i>Cox</i> and <i>Spencer</i>
Fees to class counsel	About \$24M with no additional claims for expenses (not including interest and potential expenses for additional legal work); to be paid in addition to settlement fund	\$45M with no additional claims for expenses (not including interest); to be paid in addition to settlement fund	\$45M to <i>Cox</i> counsel, \$30M to <i>Spencer</i> counsel; to be paid in addition to settlement fund (not including interest; not including DuPont's \$8.4M to <i>Spencer</i> counsel)

The *Cox* court decided that, because the terms of the settlement had improved in all respects for the class members, no additional notice was necessary for those who had not opted out. The court approved a supplemental notice program to those who had previously opted out in order to give them a chance to opt back in. Earlier court documents indicated that, as of September 29, only 1632 persons had submitted opt-out requests.⁵² We were told by the CPRC that the final number of opt-outs totaled 32,000 out of several million mailings.⁵³ Many of the opt-outs are reportedly commercial property owners whose claims for commercial damages, such as lost rent and work stoppages, may be better served by individual settlement. These individuals, as well as many of the other opt-outs, were typically represented by individual counsel. The court, in its final order approving the settlement, noted that it was “greatly comforted by the small number of individual opt outs.”

On November 17, 1995, the same day the Tennessee court gave final approval to the *Cox* settlement, the Alabama court gave final approval to a modified *Spencer* settlement in which DuPont increased its rate of reimbursement to 10 percent (up from 8 percent). DuPont then contractually agreed with Shell and Hoechst Celanese to pay 10 percent of the cost of replacing systems for the *Cox* class (with exceptions for yard lines and systems with metal fittings that had no connection with DuPont's product). DuPont's contribution would reduce the obligation of Shell and Hoechst Celanese.⁵⁴

In the three years since the settlement was approved, the CPRC has processed and replumbed more homes than in the entire previous ten years. Information regarding claims administration is available because the court-approved settlement agreement provides for periodic reporting of CPRC activities. As of June 1998, it has spent 59.7 percent of the fund for claims and performed over 220,000 replumbs.⁵⁵ The deadline for submitting claims for past expenses has passed, and about \$31 million in claims have been paid. (The remainder of the \$75 million set aside for past expenses became part of the total fund.) The CPRC also reports a high level of homeowner satisfaction—over 90 percent in 1997—from homeowner survey cards.⁵⁶ While the CPRC has not made any formal projections, general expectations are that the total funding will be sufficient to cover most, if not all, claims so that the defendants are likely to provide any modest additional funding that may be needed rather than face additional litigation.

On March 19, 1998, the U.S. Brass Corporation bankruptcy plan of reorganization became effective.⁵⁷ In late 1997, the U.S. Bankruptcy Court for the Eastern District of Texas approved the disclosure statement and the proposed plan of reorganization and set January 5, 1998 as the date by which creditors could vote for or object to the plan. *Cox* class members were also provided notice of the proposed plan of reorganization; those who wished to vote on the plan had to request a ballot. Under the terms of the reorganization, U.S. Brass and its parent companies will contribute about \$53.4 million in cash, any net funds recovered from their insurance carriers, and \$20 million in notes to fund polybutylene plumbing repairs and compensation. Eighty percent of these funds will go into the *Cox* settlement and 20 percent will stay in a separate trust fund set up to pay people with claims against U.S. Brass who are not members of the *Cox* class.⁵⁸

EPILOGUE

And what happened to Fleming and his clients? According to one defense attorney, Fleming's many motions and objections regarding jurisdiction, the ade-

quacy of the settlement, notice, and related issues actually ended up strengthening the legitimacy of the final settlement because the *Cox* court reexamined, in a public forum, each of the issues he raised. However, once the global settlement was approved, Fleming's negotiating position was seriously weakened—the defendants no longer faced the threat of open-ended litigation, the Texas courts were imposing more stringent limits on the number of cases that could be tried at one time, and it appeared that the Texas Supreme Court would not uphold the DTPA charges.

About a month after the global settlement was approved, Fleming reached his own settlement with Shell and Hoechst Celanese. About 50,000 of his clients—who were either no longer responding to his mailings or had not supplied sufficient information to substantiate their claims—would become part of the *Cox* settlement. More than 37,000 clients with close to 68,000 claims would be covered by Fleming's separate agreement.⁵⁹ Under its terms, Shell and Hoechst Celanese would provide up to 60,000 replumbs and put \$150 million into a settlement fund, out of which would come additional payments to Fleming's clients and his attorney fees. The defendants would also pay up to \$20 million of Fleming's expenses. As part of the settlement agreement, the defendants insisted that a court-appointed special master oversee the division of the settlement fund among Fleming's clients and between Fleming and his clients. The settlement agreement was presented to Judge Russell Lloyd, 334th District, Harris County, Texas, who was overseeing all of the polybutylene cases pending in Harris County.⁶⁰ Fleming submitted his proposed fee allocation to the special master appointed by Judge Lloyd. On the basis of his contingency-fee contracts with his individual clients, his proposed allocation called for \$88.8 million in fees for Fleming, other lead counsel, and his network of about 48 referring firms (i.e., 40 percent of the \$150 million settlement fund plus an estimated \$72 million in replumbing services).⁶¹ His clients would receive, on average, a replumb plus about \$1600 per client, or about \$900 per claim. In spite of the enormous attorney fees, those clients who had not incurred previous large out-of-pocket expenses would likely be better off under this agreement than under the *Cox* settlement, which provided repair and replumb costs only, with no additional premium. Nonetheless, at a March 26 hearing, Judge Lloyd said that he thought Fleming's 40 percent proposed fees were excessive for a settlement that was resolved on a mass (or wholesale) basis. He asserted the authority of the court to review the distribution of attorney fees and expenses in a mass tort settlement (even though it was not a class action), and set a hearing date for April 26 to consider Fleming's fee application.

In April, Public Citizen learned of the settlement and the questions raised by Judge Lloyd and filed an amicus brief supporting the court's jurisdiction in reviewing Fleming's fees. It also filed on behalf of one of Fleming's clients who,

after reviewing the court file, had asked Public Citizen to represent him in his objection to the fee request. Alan Morrison of Public Citizen said,

It is unlikely that the clients understood, or would have any reason even to suspect, that their cases would be resolved in a large class action, in which huge economies of scale would be enjoyed by all involved. But given these circumstances, it is wholly inappropriate to hold the clients to their contracts, which assumed a retail transaction, if those contracts in fact impose an unreasonable fee where the settlement is on a wholesale basis.⁶²

On November 18, 1996, about a month after a two-day hearing, Judge Lloyd awarded Fleming \$33.1 million in fees and \$10.4 million in expenses, and required him to pay for any replumbs that might be required over the 60,000 provided for in the settlement.⁶³ Fleming filed an appeal, and the district court allowed him to take the approved portion of the fee award and place the disputed portion in an interest-bearing escrow account. While the appeal was pending, Fleming sent his clients a settlement offer for the disputed portion of his fee award that essentially offered each client 15 cents on the dollar. Many of Fleming's clients accepted the offer and Fleming asked the appeals court to approve these settlements. Public Citizen filed a brief in opposition to Fleming's settlements, saying that the district court had jurisdiction over this question, that Fleming's offer was "barely above nuisance value," and that the settlement letter was misleading and essentially coercive.⁶⁴ The appeals court remanded the litigation back to Judge Lloyd in October 1997. In turn, Judge Lloyd appointed a special master to review the process Fleming's firm used to communicate the settlement offer, review the documents of plaintiffs accepting the settlement, and review the amounts requested to be released by Fleming. After a February 6 hearing to review the report of the special master, Judge Lloyd approved Fleming's settlements with his clients, which provided Fleming with roughly another \$25 million in fees. For those clients who did not accept Fleming's settlement, the fee dispute went back to the court of appeals.

And in yet another twist, in early February 1998, Houston legal malpractice specialist Larry Doherty reportedly filed a third-party action in *Adkins* on behalf of 21 of Fleming's clients, asserting negligence, gross negligence, breach of contract and fiduciary duty, fraud, deceit, misrepresentation and breach of state disciplinary rules. This suit asks for forfeiture of the escrowed funds and for punitive damages.⁶⁵

On January 27, 1998, according to press reports, the U.S. District Court in Camden, New Jersey, certified a class action on behalf of 38 insurance companies asserting subrogation claims against Shell, Hoechst Celanese, DuPont, and the Plumbing Claims Group.⁶⁶

Key Events	Date
<i>Beeman</i> filed in Harris County, Texas	September 1993
<i>Beeman</i> settlement presented	October 1994
<i>Spencer</i> filed in Greene County, Alabama	November 1994
Court denies <i>Beeman</i> settlement; 20 to 30 state class actions initiated	February 1995
Court grants preliminary approval to Dupont settlement in <i>Spencer</i>	May 19, 1995
<i>Cox</i> filed in Obion County, Tennessee, and preliminary certification granted	June 13, 1995
<i>Spencer</i> certified	June 30, 1995
Preliminary approval order of <i>Cox</i> settlement	July 31, 1995
<i>Cox</i> order approving forms of notice, scheduling fairness hearing, and setting opt-out and objection dates	August 24, 1995
<i>Cox</i> notice program	August–October 1995
Order setting settlement conference	October 12, 1995
<i>Cox</i> opt-out deadline	October 20, 1995
Global settlement conference	October 23– November 7, 1995
Opt-out deadline for <i>Spencer</i>	October 27, 1995
Fairness hearing on global settlement in <i>Cox</i> court	November 8–9, 1995
<i>Cox</i> final approval order to global settlement; <i>Spencer</i> final approval order of DuPont settlement	November 17, 1995
Agreement reached with Fleming	December 1995
Public Citizen objection to Fleming's fees	April 1996
Fleming's fees and expenses cut	November 18, 1996
Fleming's settlements approved	February 6, 1997
Third-party action filed on behalf of 21 of Fleming's clients asserting negligence, breach of contract, fraud and similar claims	February 1998

NOTES

¹As part of our research on this litigation, we conducted interviews with a number of the key plaintiff attorneys, and attorneys and corporate counsel for the defendants. We also interviewed representatives of public interest groups. Finally, we reviewed many of the pleadings and papers filed in the class actions cited here, as well as other documents including newspaper and magazine articles, newsletters, press releases, and internet web site postings.

²*Cox v. Shell Oil Co.*, No. 18,844 (Tenn. Ch. Ct. Obion County 1995) and related cases *Beeman v. Shell Oil Co.*, No. 93-047363 (Tex. Dist. Ct. Harris County filed Sept. 1993); *Spencer v. Shell Oil Co.*, No. CV-94-074 (Ala. Cir. Ct. Greene County filed Nov. 1994).

³Six million units is a commonly cited “worst-case” figure and comes from a U.S. Brass advertisement. In a response to an interrogatory, outside counsel for Shell Oil Company stated, “Based on limited information, using a variety of assumptions, it is our best estimate that approximately three million mobile homes, one million single family dwellings and 700,000 units in multiple unit structures were built from 1978 through 1993 containing polybutylene pipe and acetal insert fittings.” Answers and Objections of Shell Oil Company to Intervenor’s Second Set of Interrogatories, Exhibit A to Intervenor’s Memorandum Specifying the Incomplete Nature of the Settlement Agreement (Aug. 21, 1995) (hereinafter Intervenor’s Memorandum).

⁴See, for example, the Texas Supreme Court’s decision in *Amstadt v. U.S. Brass*, 919 S.W.2d 644, 647 (Tex. 1996) discussing failures of the fittings. The court notes, “Cracks developed in the Celcon fittings that eventually caused leaks. At trial, the parties vigorously disputed what caused the fittings to fail. Some of the experts testified that degradation of the Celcon from exposure to the households’ chlorinated water caused the cracks in the fittings. Others testified that inadequate design, defective manufacture, and improper installation, or a combination of these problems along with chemical degradation. . . caused the fittings to crack.”

⁵Hoechst Celanese stopped selling Celcon for use in plumbing systems in site-built homes in 1986.

⁶A number of these municipalities were experiencing quite extensive problems. For example, a *Chicago Tribune* article reported that San Antonio had installed about 60,000 plastic service pipes between 1966 and 1978 and was experiencing failures at the rate of 1500 a month. Casey Bukko, “Suit Adds Twist to Plastic-Pipe Issue: \$50 Million San Antonio Case May Give City Lawmakers Pause,” *Chicago Tribune*, Nov. 13, 1986, at 3.

⁷*Michael Diehl v. General Homes Corp.*, No. 87-21479 (Tex. Dist. Ct. Harris County 1988).

⁸The trial court ruled that the statute of limitations barred the negligence claim of many of the homeowners, but rendered judgment for most households under the Deceptive Trade Practices Act. Appeal of the DTPA claims in this and two other polybutylene actions went all the way to the Texas Supreme Court. It found, in 1996, for the defendants on the grounds that the DTPA was designed by the legislature to protect consumers from any deceptive trade practices made in connection with the purchase or lease of any goods or services, but was not intended to reach upstream manufacturers and suppliers when their misrepresentations are not communicated to the consumer. *Amstadt v. U.S. Brass*, 919 S.W.2d 644 (Tex. 1996). Many of the homeowners settled their claims with the defendants early in the appeals process.

⁹Both Moriarty and Fleming later participated in polybutylene class actions, and Fleming brought some statewide class actions.

¹⁰One of our interviewees noted that algorithms are often used in mass torts to help determine the aggregate settlement. But he also noted that if the underlying values of the individual claims are wrongly estimated because of missing or inaccurate information about those claims or about the population that would be covered by the settlement (such as in many class actions where the number of potential claimants is not known with any certainty), the aggregate settlement dollars may end up not being a good reflection of the true aggregate value of the injury.

¹¹Lorie Hearn, “Problem Pipes Trace Suspect Plastic Plumbing in Attic, Garage and Bath Walls,” *San Diego Union-Tribune*, July 11, 1993, at H-1.

¹²We requested, but did not receive, records of the activity of the PCG, such as how many claims were handled a month, how many leaking systems were repaired, and how many systems were actually replaced.

¹³The PCG still exists and responds to consumers with polybutylene plumbing problems who are not covered by the main class action settlement of the polybutylene litigation. It subcontracts

directly to the Consumer Plumbing Recovery Center, the repair and replumb operation established under the main class action settlement.

¹⁴See Karen Weintraub, “FTC Joins Inquiry into Pipe: Homeowners Blame Product for Damage,” *Houston Post*, Aug. 3, 1991, at A23; and Ruth Piller, “Federal Probe Focuses on Four Manufacturers: FTC Responds to Complaints of Faulty Plumbing Systems,” *Houston Chronicle*, Dec. 16, 1991, at 17.

¹⁵Of course, there was large variation around that average figure, depending on such factors as the clients’ actual damages and the time period when the case was tried or settled. According to Moriarty, every client did receive—at a minimum—a settlement sufficient to replace his or her plumbing system with the system (and plumber) of the client’s choice.

¹⁶Answers and Objections of Shell Oil Company to Intervenors’ Second Set of Interrogatories, Exhibit A in Intervenors’ Memorandum.

¹⁷*Beeman v. Shell Oil Co.*, No. 93-047363 (Tex. Dist. Ct. Harris County filed Sept. 1993). Shell Oil Company, Hoechst Celanese Corporation, and E.I. DuPont de Nemours & Company were named as defendants.

¹⁸TLPJ’s charter normally leads them to take on cases that are not currently being served by the private legal marketplace. This seemed like a natural case for them because private litigation had been serving only a subset of a potentially huge population. However, after assembling a group to undertake a class action, it became clear that TLPJ had served as a catalyst for the private market and that the lawyers involved would continue the class action with or without TLPJ’s involvement. This turn of events led to some soul-searching by TLPJ about whether to remain involved, but it concluded that, as a public interest organization, it could help set some precedents for how this type of mass-tort litigation should be approached.

¹⁹Murr did not know at the time that Michael Caddell also happened to be on the board of directors of TLPJ’s foundation, a nonprofit membership organization that helps fund TLPJ’s work. Caddell’s firm was then known as Caddell & Conwell.

²⁰The most widely cited and detailed press account of the polybutylene class action litigation (with a focus on George Fleming and his fees) was written by Alison Frankel. See Alison Frankel, “Greedy, Greedy, Greedy,” *American Lawyer*, Nov. 1996, at 70. Both Richard B. Schmitt of *The Wall Street Journal* and Brenda Sapino of *Texas Lawyer* provided extensive coverage over the course of the polybutylene litigation.

²¹Shell’s in-house counsel team included vice president and general counsel S. Allen Lackey, senior litigation counsel Hugh H. Saum III, and staff attorney Kathleen A. Phillips. Outside counsel for Shell was provided by the large, nationally prominent Houston firm of Vinson & Elkins, rated 20th on the *American Lawyer*’s 1996 list of the 100 highest-grossing law firms. “The AM Law 100,” Special Supplement, *American Lawyer*, July/Aug. 1997, at 39.

The Vinson & Elkins team representing Shell included partners Daniel A. Hyde, David T. Harvin, D. Ferguson McNiel III, and Mary Lou Strange. Hoechst Celanese’s in-house team comprised David A. Jenkins, vice president and general counsel, and Frank Israel, associate general counsel. Outside counsel for Hoechst Celanese was the New York firm, Kasowitz, Benson, Torres & Friedman, an 18-partner firm that has been engaged in high-profile mass and class actions (including representing the Liggett Group, Inc. in the tobacco litigation) since its inception in 1993. Hoechst Celanese was and is a long-time client of founding partner Marc Kasowitz. The team comprised Kasowitz and partners Dan Benson, Paul M. O’Connor, Michael Fay, and Jerry L. Mitchell, Jr. DuPont was assisted by the Richmond, Virginia office of McGuire, Woods, Battle & Boothe, rated 75th on the *American Lawyer*’s 1996 list of the 100 highest-grossing law firms. DuPont’s in-house counsel team was led by John F. Kane. *Id.* at 42.

The names of the defense lawyers involved in this litigation come from our interviews and an article by Brenda Sapino, “Big Deals; Big Suits,” *Texas Lawyer*, Nov. 27, 1995, at 11.

²²This position, as well as a “no coupon” position, had been previously communicated to Feinberg by *Beeman* counsel Michael Caddell.

²³TLPJ obtains such reviews from a “Case Evaluation Committee,” a standing committee of independent volunteer lawyers who sit on the board of directors of TLPJ’s foundation and who have no personal involvement in the case under consideration or its outcome.

²⁴The mediator Kenneth Feinberg developed the concept; class counsel Michael Caddell and Shell counsel Daniel Hyde convinced their initially skeptical constituencies to adopt the approach.

²⁵The structure of this settlement was similar to that later negotiated in the oriented strand siding (Louisiana-Pacific) case (see Chapter Thirteen).

²⁶The defendants' respective shares of the settlement fund remained an unresolved issue in what was to become the ultimate class resolution of the polybutylene litigation. Shell and Hoechst Celanese agreed to binding arbitration to determine their respective shares.

²⁷Shell did not start manufacturing the polybutylene resin until late 1977, so the earliest installation date applicable to any class action settlement described in this case study is January 1, 1978.

²⁸The concept of recurring notice was developed by mediator Kenneth Feinberg as a mechanism for resolving future claims. It was subsequently used in at least one other class action when the firm of Kasowitz, Benson, Torres & Friedman (outside counsel for Hoechst Celanese in the pipes litigation) incorporated recurring notice into a tobacco settlement class on behalf of its client Liggett Group.

²⁹A formal fee application was never presented to the court because the process never got that far. The *Beeman* fee agreement was reported to us by both plaintiff and defense counsel whom we interviewed. A more specific figure of \$24.25 million was included in the Agreement Concerning Plaintiffs' Attorney's Fees (Dec. 1994), Exhibit B to Intervenors' Memorandum.

³⁰Brenda Sapino, "Polybutylene Pipe Settlement Rejection Puzzles Both Sides," *Texas Lawyer*, Feb. 27, 1995, at 1.

³¹Some suits were also filed in *anticipation* of a possible adverse ruling.

³²Brenda Sapino, "Pipe Plaintiffs Refile in Galveston," *Texas Lawyer*, Apr. 24, 1995, at 2.

³³*Spencer v. Shell Oil Co.*, No. CV-94-074 (Ala. Cir. Ct. Greene County filed Nov. 1994). Shell Oil Company, Hoechst Celanese Corporation, and E.I. DuPont de Nemours and Company were named as defendants. The legal allegations were common law fraud, misrepresentation and omission, negligence and gross negligence, unfair trade practices, civil conspiracy to commit fraud, the Uniform Commercial Code's protection against breach of implied warranties, and common law strict liability.

Langston, Frazier, Sweet & Freese is a four-member, plaintiff's personal injury firm, with a practice including product defect and environmental liability and other high-stakes complex cases including class actions; Cooper, Mitch, Crawford, Kuykendall & Whatley is a seven-member firm established in 1950 that has been principally engaged in labor and employment law, but that has more recently diversified into other areas including personal injury and product liability as well as class actions.

³⁴*Cox v. Shell Oil Co.*, No. 18,844 (Tenn. Ch. Ct. Obion County 1995), Shell Oil Company, doing business as Shell Chemical Company, and Hoechst Celanese Corporation, defendants. The legal allegations were breach of the duty of good faith and fair dealing, breach of implied warranties, breach of express warranties, violations of the Tennessee Consumer Protection Act, misrepresentation, negligence, strict liability, and civil conspiracy. Unlike *Spencer*, which additionally sought punitive damages, *Cox* plaintiffs sought only compensatory and statutory damages.

Cohen, Millstein, Hausfeld & Toll, and Lieff, Cabraser, Heimann & Bernstein are both nationally prominent class action firms. Barrett Law Offices is a small firm with a general regional practice including personal injury, product liability, environmental torts, and class actions. Conley, Campbell, Moss and Smith is one of the largest plaintiff firms in this rural county; they specialize in personal injury cases but had no class action experience prior to the pipes litigation.

³⁵The term "misrepresentation" refers to the defendants' representing the plastic plumbing system as being suitable, reliable, and long-lasting plumbing material for use in domestic potable water systems.

³⁶Tennessee reportedly has no state rules or local rules for Obion County governing ex parte certification; it is left to the discretion of the judge.

³⁷Under the hard cap, if \$75 million were not sufficient to cover all past damage claims, then claimants had the option of either accepting a known, prorated share of the \$75 million, or opting out of the class with respect to their past damage claims. When he approved the settlement, Chancellor Maloan expressed some concern about whether the \$75 million would be sufficient.

³⁸Class counsel did not apply for a separate award for expenses. However, the application for attorney fees submitted by class counsel in *Cox* notes that class counsel collectively spent more than 20,000 hours of the professional time of lawyers and legal assistants; incurred more than \$594,000 in expenses; and expected to expend at least 2500 additional hours in connection with

settlement administration. Application of Class Counsel for Award of Attorneys' Fees and Expenses, and Awards to the Representative Plaintiffs (Oct. 1995) at 24, 31.

³⁹Kinsella Communications, Ltd., Washington, D.C., is one of the leading companies specializing in mass tort and class action notice programs. Rust Consulting, Inc., Minneapolis, MN, specializes in class action claims administration services.

⁴⁰The final order approving the *Cox* settlement noted that the national media campaign alone was estimated to have reached 92 percent of adults in the U.S. aged 35 years and over with an average exposure of four times apiece. See Final Order Approving the Class Action Settlement, Attorneys' Fees and Expenses, and Awards to Representative Plaintiffs (Nov. 17, 1995) at 13 (hereinafter Final Order).

⁴¹See <http://www.kinsella.com/polybutylene/propset.htm> for a copy of the Notice of Class Action and Proposed Settlement (Aug. 24, 1995).

⁴²For costs of notice not including the toll-free line, see Consumer Plumbing Recovery Center, Financial Statements and Management Reports (July 31, 1997). Plaintiff counsel told us that the phone line cost an additional \$2 million.

As with *Beeman*, the *Cox* settlement provided for four subsequent notice and opt-out periods. The cost cap for the four additional periods is \$18 million.

⁴³Fleming had settled about 50,000 individual cases with DuPont in 1994 for \$20 million, out of which he received 40 percent in fees plus \$2.7 million in expenses. See Brief of Appellees-Intervenors James and Rosalie Park and Dannell Miller and Public Citizen as Amici Curiae, *Adkins v. Hoechst Celanese Corp.*, No. 01-96-01528-CV (Tex. Ct. App. filed May 16, 1997) (hereinafter Public Citizen Amicus Brief).

⁴⁴See, e.g., Judith Evans, "Plastic Pipes Push Owners to Breaking Point; Corrosion-Prone Plumbing Prompts Worries Over High Repair Costs," *Washington Post*, Oct. 28, 1995, at E01; and Erik Milstone, "Lawsuit Pipeline: Dueling Polybutylene Class Actions Make Choices Plumb Difficult for Homeowners," *American Bar Association Journal*, Dec. 1995, at 20.

⁴⁵Milstone, *supra* note 44.

⁴⁶*Meers v. Shell Oil Co.*, No. M 30590 (Cal. Super. Ct. Monterey County 1995).

⁴⁷Minute Order Setting Settlement Conference (Oct. 12, 1995), *Meers v. Shell Oil Co.*

⁴⁸The order refers to similar or related actions pending in approximately 21 other states, many of which had either been stayed or whose presiding judges were considering motions to stay proceedings pending the resolution of the *Cox* and *Spencer* cases. Judge Silver or the parties contacted those courts to apprise them of the settlement conference and ask them informally to stay any planned proceedings for the duration of that effort.

⁴⁹Final Order at 15. We were not able to locate such a statement in Shell and Hoechst Celanese's Principles of Agreement (Nov. 7, 1995), to which Chancellor Maloan refers in his final order, but we have been assured by representatives of both sides that the agreement of the parties is that the funds are additive to the \$950 million soft cap. Financial statements from the CPRC show that the cap has already been raised by funds that have been forthcoming to date from U.S. Brass/Eljer. As the U.S. Brass/Eljer funds come in, they are being expended before additional sums from the CPRC are added to the fund, so if total claims are less than \$950 million plus the U.S. Brass/Eljer contribution, the defendants may end up paying less than \$950 million. But if total claims are greater, the defendants are obligated to pay the entire \$950 million, after which they may choose to add additional monies to the fund or face litigation from those class members who have not received full relief.

⁵⁰Final Order at 16.

⁵¹Administration costs early in the program have averaged about 7 percent of claims costs, but our interviews indicate that the fixed component of administrative costs will increase, as a percent of claims, as the number of claims decreases over time.

⁵²Memorandum of Points and Authorities in Support of Motion for Final Approval of Settlement (Oct. 5, 1995).

⁵³The CPRC is required to maintain a current list of opt-outs.

⁵⁴DuPont's obligation is to Shell and Hoechst Celanese, not to the *Cox* class.

⁵⁵The June 30, 1998 Financial Statements and Management Reports of the CPRC show cumulative expenditures of \$567.5 million for claims, \$34.9 million for administration, and \$10.9 million for notice (not including the toll-free telephone line). About 396,000 claims have been processed since the program began. Based on actual CPRC experiences in 1997, the average costs of a replumb for a site-built home was about \$3700; the cost of replumbing a mobile home was about \$1200.

⁵⁶Consumer Plumbing Recovery Center, Financial Statements and Management Reports (Feb. 28, 1998).

⁵⁷Dates from "Zurn Announces Consummation of US Brass Plan of Reorganization," *PR Newswire* (Mar. 23, 1998), and voice message at the toll-free number established for the Brass Trust.

⁵⁸*Id.*

⁵⁹See Appellants' Brief, *Adkins v. Hoechst Celanese Corp.*, No. 01-96-01528 (Tex. Ct. App. filed Sept. 18, 1997) (available at <http://www.fhg-law.com/briefs.html>). The settlement covered claimants and claims in 18 cases in Harris County courts and 13 cases in ten other counties and in one court of appeals.

⁶⁰*Adkins v. Hoechst Celanese Corp.*, No. 92-024674 (Tex. Dist. Ct. Harris County filed Nov. 18, 1996). All of the Harris County polybutylene cases were consolidated with *Adkins*. See Appellants' Brief, *Adkins v. Hoechst Celanese Corp.*

⁶¹The settlement had specified that the maximum value Fleming could assign to the replumbs for the purpose of estimating his fees was \$1200 per unit up to a maximum of 60,000 units. See Public Citizen Amicus Brief at 6.

⁶²Quoted in "Greedy, Greedy, Greedy," *supra* note 20, at 16.

⁶³Judge Lloyd allowed 40 percent fees on several hundred claims whose cases were either tried or arbitrated, and 20 percent fees on all other claims. He also disallowed about \$9.5 million in expenses (that amount would go back into the general settlement fund from which Fleming would get his 20 percent fee). See Public Citizen Amicus Brief at 11-12.

⁶⁴Opposition of James and Rosalie Park, Dannel Miller and Public Citizen to Motion of Appellants to Effect Partial Settlement (Sept. 18, 1997); *Adkins v. Hoescht Celanese Corp.*, *supra* note 59.

⁶⁵Brenda Sapino Jeffreys, "Plastic Pipe Case Erupts; Malpractice Suit Targets Plaintiffs' Counsel Over Fees," *Texas Lawyer*, Feb. 2, 1998, at 1.

⁶⁶"Insurers Win Class-Action Status in Plumbing Case," *BestWire*, Feb. 4, 1998.