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Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes

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+ Footnote by Senior Articles Editor of VANDERBILT LAW REVIEW: This essay was presented orally at a conference that the VANDERBILT LAW REVIEW agreed to publish. Many parts of this essay contain no citation to authority. The author was asked to provide citations and opted not to do so. Instead, the author requested that the essay be deemed an opinion piece. Therefore, the reader should understand that many parts of this essay represent the author's personal opinions and observations. These opinions work as assumptions that the author uses to reach her legal conclusions, which is common in many areas of scholarship. In other words, the author contends that if one assumes her opinions are correct, then her legal conclusions should properly follow. As stated, using assumptions of this sort to reach conclusions is common in scholarship generally and should not be considered as undermining the legal conclusions of this essay.

I. INTRODUCTION

In the past decade, the debate over settlement classes has moved considerably beyond the *"sturm und drang"* inspired by the epic settlement classes in *Amchem Products, Incorporated. v. Windsor*[1] and *Ortiz v. Fibreboard Corporation*.[2] Whereas *Amchem* asked whether and on what terms federal courts were authorized to approve settlement classes,[3] and *Ortiz* asked whether a mandatory, limited-fund global asbestos settlement was sustainable,[4] the settlement class issue *du jour* focuses on the ability of litigants to collaterally attack settlements in remote forums[5] and at remote times.[6]

Because the collateral attack problem is so vital to the sanctity of settlement classes, the locus of the debate over the future of settlement classes is centrally located in the issue of adequacy. Today, it seems beyond cavil that the federal class action rule authorizes settlement classes, even without a specific provision for settlement classes in Rule 23 of the Federal Rules of Civil Procedure. Indeed, the great rulemaking debate of the late 1990s over the possible amendment of Rule 23(b) to include a new subdivision that would

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1. 521 U.S. 591 (1997).

2. 527 U.S. 815 (1999).

3. *Amchem Prods.*, 521 U.S. at 612-13; *see also* Georgine v. Amchem Prods., Inc., 83 F.3d 610, 634-35 (3d Cir. 1996) (endorsing settlement class concept but finding dubious authority in Rule 23 of the Federal Rules of Civil Procedure for settlement classes); *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 786-804 (3d Cir. 1995) (upholding concept of settlement class but disapproving proposed settlement class on its merits); Georgine v. Amchem Prods.; Inc., 157 F.R.D. 246, 315 (E.D. Pa. 1994) (approving settlement class without discussion of concept of settlement class); *In re* A.H. Robins Co., 880 F.2d 709, 739-40 (4th Cir. 1989) (discussing and upholding concept of settlement classes).

4. *Ortiz*, 527 U.S. at 823-30; *see also* Flanagan v. Ahearn (*In re* Asbestos Litig.), 90 F.3d 963, 993 (5th Cir. 1996) (upholding certification of limited fund mandatory Rule 23(b)(1)(B) settlement class).

5. State v. Homeside Lending, Inc., 826 A.2d 997, 1016-17 (Vt. 2003).

6. Dow Chem. Co. v. Stephenson (*In re* Agent Orange Prods. Liab. Litig.), 539 U.S. 111, 112 (2003) (per curiam); *see also* Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of* Epstein v. MCA, Inc., 73 N.Y.U. L. REV. 765, 766 (1998) (arguing that "a substantially narrower opportunity for collateral challenge" should be adopted); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1149-1181 (1996) (examining the mechanics of collateral estoppel); David Lehn, Note, *Adjudicative Retroactivity as a Preclusion Problem:* Dow Chemical Co. v. Stephenson, 59 N.Y.U. ANN. SURV. AM. L. 563, 563-66 (2004) (exploring retroactive collateral attack); Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 366 (2003) (agreeing with the viewpoint of Kahan & Silberman, *supra*, that "problems of inadequacy in class representation [should be addressed] at their source: in the rigor brought to the generation of class judgments . . . rather than through the post hoc vehicle of collateral attacks."); Patrick Wooley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX. L. REV. 383, 389 (2000) (maintaining that "legislators and rulemakers should not modify current law permitting collateral attacks.").

have specifically authorized settlement classes now seems a quaint tempest in the class action teapot.[7]

During the past two decades, the courts, practicing attorneys, academic commentators, rulemaking committees, and interested spectators have come a long way in the class action wars.[8] In addition to providing a rule basis for interlocutory appeal of class certification orders in 1998,[9] the Advisory Committee on Civil Rules amended Rule 23 in 2003 to add new subsections dealing with appointment of class counsel and attorney fees.[10] In large measure, these new provisions are relatively unimaginative, noninnovative, and work to simply codify existing case law.[11] The Advisory Committee also tinkered around the edges of settlement classes,[12] though again doing so without fully engaging the most pressing issues relating to settlement classes.

The *Agent Orange* litigation, which came before the Supreme Court last Term,[13] coalesced many of the long-running debates and

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7. *See, e.g.*, Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 ARIZ. L. REV. 461, 462-63 (1997) (arguing in opposition to proposed promulgation of new Rule 23(b)(4) settlement class provision as violative of the Rules Enabling Act); Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 ARIZ. L. REV. 615, 622-39 (1997) (arguing in support of proposed new subdivision (b)(4) settlement class proposal).

8. The first intensive salvos in the class action wars during the past two decades were inspired by the infamous *Georgine* asbestos class action settlement. *Georgine* was the underlying settlement class that eventually resulted in the Supreme Court's *Amchem* decision. For the district court's approval of the *Georgine* settlement class, see *Georgine*, 157 F.R.D. at 337-38. For commentary inspired by the *Georgine* settlement, see John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995) [hereinafter Coffee, *Class Wars*]; Roger C. Cramton, *Individualized Justice, Mass Torts, and Settlement Class Actions: An Introduction*, 80 CORNELL L. REV. 811 (1995); Susan Koniak, *Feasting While the Widow Weeps;* Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045 (1995); Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159 (1995); Judith Resnik, *Aggregation, Settlement, and Dismay*, 80 CORNELL L. REV. 918 (1995); and Charles W. Wolfram, *Mass Torts – Messy Ethics*, 80 CORNELL L. REV. 1228 (1995).

9. FED. R. CIV. P. 23(f); *see also* Linda S. Mullenix, *Some Joy in Whoville: Rule 23(f), A Good Rulemaking*, 69 TENN. L. REV. 97, 102-03 (2001).

10. FED. R. CIV. P. 23(g), (h).

11. *See* Linda S. Mullenix, *No Exit: Mandatory Class Actions in the New Millennium and the Blurring of Categorical Imperatives*, 2003 U. CHI. LEGAL F. 177, 177-78 (2003) ("Although the rule amendments at first seem like a sweeping overhaul, in reality the revisions embody the codification of class action practice over the past thirty-six years.").

12. Fed. R. Civ. P. 23(e) (adding, among other things, a requirement that the court may approve settlements "only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate" and giving plaintiffs a second opportunity to opt-out of the class).

13. Dow Chem. Co v. Stephenson, 59. U.S. 111 (2003).

problems with settlement classes,[14] including problems relating to attorney and judicial conduct in negotiating and finalizing class action settlement,[15] adequacy of representation, and the possibility of collateral attack.[16] And, because the Supreme Court split over the issue and failed to ultimately address or decide the important settlement class issues in that appeal, the future of settlement classes remains substantially problematic, troubling, and uncertain.[17] The most important question that all actors in the system want answered is: will the settlement stand for all time? Unfortunately, the answer to this question has been left vague and doubtful by the Supreme Court's troubling deadlock.

Into this jurisprudential miasma, then, the possibility of subsequent collateral attack looms as the singlemost threatening challenge for the resolution of aggregate disputes through the class action mechanism. In this context, the core issue of adequacy has moved to center stage in the ongoing debate over class action jurisprudence.

This paper advances three very simple but important contentions. First, courts and litigants—meaning both plaintiff and defense counsel—do a very poor job of ensuring adequacy of representation at the front end of class action litigation. This is true both in situations where the parties are seeking certification of either a litigation class or a conditional class. Second, for a variety of reasons, courts do a fairly poor job of ensuring adequacy of

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14. To be sure, numerous other class action developments percolating in the federal appellate courts also embody cutting-edge issues in class action litigation, including, but not limited to, problems relating to certification of mandatory punitive damage classes under Rule 23(b)(1)(B). *E.g., In re* Simon II Litig., 211 F.R.D. 86 (E.D.N.Y. 2002).

15. For commentary flagging the problems inherent in class counsel's representation in class action litigation, see Coffee, *Class Wars*, *supra* note 8, *passim*; John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 *passim* (1987); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 *passim* (1986); and John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, LAW & CONTEMP. PROBS., Summer 1985, at 5, 17-18, 20-23. For critical commentary relating to the role of the judiciary in supervising class action settlements, see Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337 (1986) and Jack B. Weinstein, *A View From the Judiciary*, 13 CARDOZO L. REV. 1957 (1992).

16. Problems relating to intrasystem and intersystem collateral attack of settlement classes are not new on the class action landscape. *E.g.*, Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 377-85 (1996); Epstein v. MCA, Inc., 179 F.3d 641, 648-49 (9th Cir. 1999), *cert. denied*, 528 U.S. 1004 (1999); *see also* Kahan & Silberman, *supra* note 6, at 765; 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 130.07[3] (3d ed. 1997).

17. *See* Nagareda, *supra* note 6, at 316-33 (commenting on the Court's "missed opportunity" in the *Stephenson Agent Orange* appeal).

representation at the time of the approval of settlement-only classes under Rule 23(e) on the back end of class litigation. Third, these systemic failures are a grave mistake, because adequacy of representation is significant in class action litigation[18] in important ways that do not necessarily matter in ordinary litigation.

To put the case simply, courts pay lip service to the concept of adequate representation but fail to robustly engage in any meaningful inquiry to establish the existence of such adequate representation. For judges, the adequacy inquiry usually is the least-rigorously examined requirement for certification, either for litigation or for settlement classes. Instead, courts routinely wave their blessings over class counsel and proposed class representatives[19] and presumptively make findings of adequacy on nonexistent or scant factual showings.[20]

As a consequence of these dual failures, both at the front end and the back end of class action litigation, courts and the parties before them set the stage for subsequent collateral attack, which often occurs many years later. With the passage of time, courts in distant forums or after lengthy periods of time must re-examine questions relating to adequacy of representation and reconstruct such findings years after the initial inquiry, often utilizing an exceedingly poor factual record. As will be discussed below, the collateral attack against the *Agent Orange* settlement is the poster-child for this precise set of problems.

It would seem, then, that the future of settlement classes is imperiled to the extent that courts and litigants lack sufficient *gravitas* about the adequacy inquiry. Because I believe that the adequacy inquiry is so central to the durability of negotiated settlements, I argue for a more robust, meaningful set of standards to

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18. *See generally* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 373 (2000) (observing that the Court "may develop [the concept of 'adequacy of representation'] as a due process limitation upon the ability of class counsel to resolve the legal rights of absent or non-consenting class members"); Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571, 571 (1997) (noting that "courts and commentators have often assumed that adequate representation—rather than an individual opportunity to be heard—is the touchstone of due process.").

19. Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiff's Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations For Reform*, 58 U. CHI. L. REV. 1, 66 (1991) ("To be sure, courts already have power, in theory, to enforce the typicality and adequacy requirements. In practice, however, the courts tend to play a passive role, focusing on questions of typicality and adequacy only when they are specifically raised by defendants.").

20. *See, e.g.*, Berger v. Compaq Computer Corp., 257 F.3d 475, 481 (5th Cir. 2001) (finding that the district court erred in "adopting a presumption that the class representatives and their counsel are adequate in the absence of specific proof to the contrary" and thus "improperly shifted the burden of proof to the defendants . . . .").

govern courts in the adequacy determination. Furthermore, I also urge a more robust, vigorous judicial scrutiny of the adequacy requirement to ensure this requirement is actually, not presumptively, satisfied. In short, the best way to make settlement classes attack-proof is to ensure adequate representation at the outset of class litigation and meaningfully convince a judicial officer that interests of absent class members are actually protected from attorney self-dealing and other objectionable conduct.[21]

My argument for taking adequacy more seriously also is grounded in my belief that modern class action litigation, and particularly modern aggregative mass tort litigation, has come to resemble a private law dispute resolution paradigm that arrogates immense powers to both private parties and an array of judicial surrogates. As I have argued elsewhere, this private dispute resolution paradigm resembles nothing so much as private legislation with wide-reaching effects, carrying the imprimatur of judicial oversight and approval, but it is frequently accompanied by troubling questions about fairness, adequate representation, and the subtle merger of legislative, administrative, and judicial functions.[23]

As I remain unconvinced that this is a desirable trend, it seems to me that a more robust adequacy requirement has become increasingly imperative in order to temper, restrain, or check the possible excesses and abuses of an unlegislated private aggregative dispute resolution model.

In Part I of this piece, I survey the adequacy issues that arise in the context of litigation classes. This portion of the paper addresses the situation where a proposed class action is certified upfront, with an eye towards the actual trial of the case. In this context, I explain how and why litigants and judges do a fairly poor job of ascertaining the true adequacy of representation, with respect to both the class counsel and the proposed class representatives. As a consequence, I

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21. The Fifth Circuit, I believe, correctly identified and understood this set of principles in its *Compaq Computer* decision:

> In sum, the district court's "presumption" of adequate class representation "in the absence of any specific proof to the contrary" is reversible error on two grounds. First, it inverts the requirement that the party seeking certification bears the burden of proving all elements of rule 23(a). Second, it effectively abdicates—to a self-interested party—the court's duty to ensure that the due process rights of the absent class members are safeguarded.

Compaq Computer, 257 F.3d at 482.

23. Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413, 415 (1999).

argue that front end determinations of adequacy typically provide inadequate insulation from subsequent collateral attack.

In Part II, I survey the problems of the adequacy determination in the parallel universe of settlement classes. In this section, I provide a brief historical overview of the problems of settlement classes, with a focus on the development of the concept of the settlement class. In addition, I also address special adequacy issues that have arisen in the context of settlement classes.

The point of this discussion is to suggest that adequacy issues in the context of settlement classes arise too late in the development of litigation to address the core concerns of the adequacy requirement. I argue that back end determinations of adequacy in settlement classes typically are *pro forma*, cursory, and predetermined, and therefore they provide no meaningful content to the adequacy requirement. Similar to the problems relating to the adequacy determination for litigation classes, the adequacy determination in the context of settlement classes is problematic because these meaningless determinations of adequacy set the stage for subsequent collateral attack.

In Part III, I briefly discuss the *Agent Orange* settlement class and the resulting collateral attack, up through the Supreme Court appellate litigation. I contend that the *Agent Orange* fiasco embodies all the core problems relating to the adequacy inquiry, including both lame front end and back end adequacy determinations. In addition, the *Agent Orange* settlement class provides a precise illustration of the types of inadequate assessments of adequacy that occur during the course of class action litigation. In short, adequacy inquiries that occurred throughout the *Agent Orange* litigation are not only emblematic of what most courts do but also emblematic of what courts and litigants ought not to do.

Part IV of this paper is prescriptive. In this portion of the paper I make a number of suggestions for standards that would ensure actual adequacy in both litigation and settlement classes. I contend that establishing proper adequacy at the front end of class litigation—as opposed to courts utilizing solely back end determinations—is the most appropriate method for ensuring the fairness of a class action trial or settlement.

My conclusions regarding the importance of the adequacy inquiry stem from a collection of beliefs about the nature, purpose, and functions of class action litigation. The single most important feature of class action litigation is that it is *representational* litigation. This basic understanding distinguishes class litigation from ordinary

bipolar litigation or even simple aggregated litigation such as consolidated cases.[24]

The fact that class litigation is representational litigation compels the further conclusion that class litigation is undergirded by serious due process concerns.[25] These due process concerns are largely absent in bipolar litigation or consolidated cases, where individual litigants are consciously present to oversee the conduct of the litigation and the actions of their own attorneys. In contrast, the central due process concern that is manifest in class action litigation is the protection of the interests of absent class members, who are not actually present in the litigation to oversee the resolution of their own claims.[26] And, as academic commentators have consistently and urgently argued, absent class members need protection both from their own class counsel, who may be tempted to engage in self-dealing, as well as their own class representatives, who may not exercise sufficient independent control over the litigation to prevent breaches of duty to the class.

Federal Rule of Civil Procedure 23 itself embodies numerous due process protections in several provisions: (1) the early interposition of a judicial officer in the litigation, to ensure that due process protections are in place;[27] (2) the requirement for an early determination that the proposed action is suitable to be maintained as a class action;[28] (3) the requirement for a judicial finding of both adequacy of the class representatives as well as of the proposed class counsel;[29] (4) the requirement of notice to class members in the Rule 23(b) class categories;[30] (5) the opportunity for exclusion from the Rule 23(b)(3) class;[31] (6) the requirement for notice and a hearing in settlement classes, with an opportunity for a back end opt-out;[32] (7)

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24. *See* FED. R. CIV. P. 42 (providing the rule for consolidation of actions).

25. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 806-814 (1985); Diane W. Hutchinson, *Class Actions: Joinder or Representational Device?*, 1983 SUP. CT. REV. 459, 488-91 (1983); Deborah Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1192, 1198 (1982); *see also* Hansberry v. Lee, 311 U.S. 32, 37 (1940) (setting forth due process concerns in representational litigation, although not in the context of a Rule 23 class action).

26. *See* FED. R. CIV. P. 23(g) advisory committee's note ("[This sub-section] recognizes that the primary responsibility of class counsel, resulting from appointment as class counsel, is to represent the best interests of the class. The rule thus establishes the obligation of class counsel, an obligation that may be different from the customary obligation of counsel to individual clients."); *see also Compaq Computer*, 257 F.3d at 482.

27. FED. R. CIV. P. 23(c)(1)(A).

28. *Id.*

29. FED. R. CIV. P. 23(a)(4); *see also* FED. R. CIV. P. 23 (g)(1)(B).

30. FED. R. CIV. P. 23(c)(2)(A), (B).

31. FED. R. CIV. P. 23(c)(2)(B).

32. FED. R. CIV. P. 23(e)(1), (3).

the requirement of judicial approval before a class action may be dismissed, compromised, or otherwise settled;[33] (8) the requirement that settling parties report any side-deals made in connection with any settlement, compromise, or dismissal of a class action;[34] (9) the opportunity for objectors to present objections to proposed class action dismissals, compromises, or settlements;[35] and (10) the requirement of judicial scrutiny and approval of attorney fee awards.[36]

Due process issues are the single most important feature of class litigation, and adequacy of representation looms over the entire debate.[37] Without adequate representation—and without adequate representation from the onset of proposed class litigation—the other due process protections embedded in class litigation are unavailing.

II. ADEQUACY ISSUES IN LITIGATION CLASSES

Since the late 1980s, at least, federal courts began to distinguish the concepts of litigation classes from the concept of settlement classes.[38] The differences between so-called litigation classes and settlement classes primarily relate to the timing of the class certification determination, the intention behind the certification, and the standards for certification. As will be discussed below, the differences between litigation classes and settlement classes are pertinent to the adequacy determination and actually serve to exacerbate many problems relating to this determination.[40]

Generally speaking, a litigation class is a class that is certified upfront, or as soon as practicable after filing the case.[41] Litigation

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33. FED. R. CIV. P. 23(e)(1)(A).

34. FED. R. CIV. P. 23(e)(2).

35. FED. R. CIV. P. 23(e)(4)(A).

36. FED. R. CIV. P. 23(h).

37. *See, e.g.*, Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 316-17 (E.D. Pa. 1994); *see also* 1 HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 3:21, at 408 (4th ed. 2002) ("This [adequacy] prerequisite, essential to meet due process standards, must be satisfied at all stages of a class action, because the final judgment in a class action is binding on all those whom the court determines are members of the class.") (citations omitted).

38. *See, e.g.*, *In re* A.H. Robins Co., 880 F.2d 709, 739-40 (4th Cir. 1989) (discussing and approving concept of the settlement class); *see also In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir. 1995) (generally endorsing the concept of settlement classes but questioning the appropriate standards for their certification).

40. *See infra* Part III.

41. Until December 1, 2003, Federal Rule of Civil Procedure 23(c)(1)(A) provided that a proposed class action needed to be certified as such "as soon as practicable" after the filing of the lawsuit. FED. R. CIV. P. 23(c)(1)(A) (repealed 2003). After December 1, 2003, Rule 23(c)(1)(A) has been modified to specify that a class action should be certified "at an early practicable time." It

classes are certified with an eye towards actually trying the class, in contrast to settlement classes, which are certified for the sole purpose of providing a framework for counsel to move forward with settlement negotiations.[42]

A court may certify a settlement class at any time—after the attorneys file a proposed class action, during proceedings, or at the back end, after counsel have negotiated a settlement. Indeed, in the most extreme and controversial variation of the settlement class posture, counsel may simultaneously seek class certification of a settlement class concurrent with a motion for approval of a settlement under Federal Rule 23(e).[43] In this variation, the court previously even would not have reviewed or certified the proposed class.

The major jurisprudential debate during the mid-1990s concerned whether the standards for certification of settlement classes differed from those required for certification of litigation classes.[44] The Supreme Court settled this argument in its *Amchem* decision, indicating that except for the manageability requirement in Rule 23(b)(3) classes, settlement classes needed to satisfy the same certification requirements as litigation classes.[45] The significance of *Amchem,* then, for the purposes of this paper, is that both litigation classes and settlement classes must satisfy the same Rule 23(a) requirement for adequacy.

This section focuses on a discussion of how courts and litigants typically implement the adequacy requirement in situations where class counsel seeks certification of a litigation class. The purpose of this discussion is to illustrate that neither counsel nor the courts take the adequacy inquiry very seriously, and both typically fail to develop

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should be noted that the old version of the rule made no mention of class certification; the new version of the rule does so. *See* FED. R. CIV. P. 23(c)(1)(A) (as amended Dec. 1, 2003).

42. Further complicating this schema is the possibility that proposed classes may be conditionally or provisionally certified. FED. R. CIV. P. 23(c)(1)(C). If a court conditionally certifies a class, it must "finally" certify the class at some subsequent point in the litigation and prior to final judgment.

43. FED. R. CIV. P. 23(e). The objectors in the *Georgine* settlement class argued that this is the sequence of events that led to the *Georgine* settlement: that is, that the request for approval of the settlement class was simultaneously filed with the proponents' request that the court certify the class. The objectors further argued that this request for simultaneous certification and settlement approval was an illegitimate procedure. Notwithstanding the objector's version of events, the district court in Philadelphia previously had certified the *Georgine* class prior to the motion for approval of the settlement under Rule 23(e). Georgine v. Amchem Prods. Inc., 157 F.R.D. 246, 261 (E.D. Pa. 1994).

44. *See, e.g.*, Georgine v. Amchem Prods., Inc., 83 F.3d 610, 618, 634 (3d Cir. 1996) (suggesting the proposition that settlement classes had to satisfy the exact same standards for certification as litigation classes); *In re* Gen. Motors, 55 F.3d at 799 (same).

45. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997).

a sufficient record to support a finding of adequacy. This discussion sets up the following proposition, explored in the next section, that the problems of a weak adequacy determination for litigation classes are further exacerbated in the context of settlement classes.[46]

It is well-received hornbook law that a finding of adequacy is a threshold requirement for class certification under Rule 23(a)(4).[47] The adequacy requirement "embraces both the competence of the legal counsel of the representatives and the stature and interest of the named parties themselves."[48] Therefore, the proponents requesting class certification[49] carry the burden of demonstrating two separate propositions: the adequacy of class counsel and the independent adequacy of the proposed class representatives.[50]

A. Adequacy of Class Counsel

1. The Hornbook Version

Historically as well as currently, courts repeatedly have stated that the general standard for determining the adequacy of class counsel is that "counsel must be qualified, experienced, and generally able to conduct the litigation."[51] In fleshing out the parameters of

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46. *See infra* Part III.

47. FED. R. CIV. P. 23(a)(4). "One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . . (4) the representative parties will fairly and adequately protect the interests of the class." *Id*; *see* 7A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 1765-1770, at 262-405 (2d ed. 1986); 5 MOORE'S, *supra* note 16, ¶ 23.25; 1 NEWBERG ON CLASS ACTIONS, *supra* note 37, §§ 3:21-3:28, at 408-440.

48. 7A WRIGHT ET AL., *supra* note 47, § 1766, at 297-98 (citation omitted); *see also Amchem Prods.*, 521 U.S. at 626 n.20 ("The adequacy heading also factors in competency and conflicts of class counsel . . . .[W]e decline to address adequacy-of-counsel issues discretely in light of our conclusions that common questions of law or fact do not predominate and that the named plaintiffs cannot adequately represent the interests of this enormous class.").

49. There is some debate concerning which party carries the burden of demonstrating adequacy. The majority position reflects the proposition that the proponents seeking class certification carry the burden to demonstrate both types of adequacy. *See* Berger v. Compaq Computer Corp., 257 F.3d 475, 481 (5th Cir. 2001) ("The district court unquestionably adopted an incorrect legal standard by stating that '[t]he adequacy of the putative representatives and of plaintiffs' counsel is presumed in the absence of specific proof to the contrary.' This is error; the party seeking certification bears the burden of establishing that all requirements of rule 23(a) have been satisfied." (quoting Castano v. Am. Tobacco Co., 84 F.3d 734, 740 (5th Cir. 1996) and citing FaIcon v. Gen. Tel. Co., 626 F.2d 369 (5th Cir. 1980), *vacated on other grounds by* 450 U.S. 1036 (1981) as "not to the contrary")). A minority of courts have held that the party challenging class certification has the burden of proving the inadequacy of the named representatives. For a discussion of this debate, see 5 MOORE'S, *supra* note 16, ¶ 23.25[3][c].

50. 5 MOORE'S, *supra* note 16, ¶ 23.25[3][a].

51. 1 NEWBERG ON CLASS ACTIONS, *supra* note 37, § 3:21, at 408; *see also* 5 MOORE'S, *supra* note 16, ¶ 23.25[5][a](reciting exact same standard); 7A WRIGHT ET AL., *supra* note 47, § 1769.1,

these criteria, courts have considered class counsel's competence[52]—including counsel's record in current and other cases[53]—counsel's particular expertise,[54] and counsel's resources.[55] In addition to assessing counsel's competence, courts also will examine counsel's possible conflicts of interest with the class[56] and counsel's history of "ethical" conduct.[57] Finally, some courts apparently have tempered these requirements, holding that excessive litigiousness is not a factor that will render class counsel inadequate.[58]

2. Practical Reality

Notwithstanding the hornbook version of the standards for the adequacy of class counsel and the smattering of cases that have considered and applied these standards, the practical reality of the adequacy determination in most class certification settings is radically different. In reality, most courts routinely, reflexively, and presumptively certify proposed class counsel as adequate[59] without a sufficiently probing inquiry.[60] In the modern literature, one has to look long and hard to find cases in which class counsel have been deemed inadequate to represent the class.[61]

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at 375 (same). All three treatises collect numerous cases repetitively reciting this general standard.

52. 5 MOORE'S, *supra* note 16,¶ 23.25[5][b].

53. *Id.* ¶ 23.25[5][b][i].

54. *Id.* ¶ 23.25[5][b][ii].

55. *Id.* ¶ 23.25[5][b][iii]

56. *Id.* ¶ 23.25[5][e].

57. *Id.* ¶ 23.25[5][d].

58. *Id.* ¶ 23.25[5][c].

59. *See* 1 NEWBERG ON CLASS ACTIONS, *supra* note 37, § 3:24, at 417-18 ("In reaching a determination concerning vigorous prosecution of the action on behalf of the class, courts consider the competence and experience of class counsel, attributes which will most often be presumed in the absence of proof to the contrary."); *see also id.* § 3:42, at 530-31 ("Class counsel must, of course, be competent, but such competency is properly presumed at the outset of litigation, in the absence of specific proof to the contrary by the defendant.") (citation omitted).

60. See, for example, *In re* HealthSouth Corp. Sec. Litig., 213 F.R.D. 447, 461 n.12 (N.D. Ala. 2003) (citation omitted), where the district court made the following remarkable admission: "At the class certification hearing, the court announced that it had no questions about the adequacy of counsel. However, the court is somewhat concerned about counsel's refusal or neglect to address the court's stated concerns about intraclass conflicts and the suggestion that subclasses appeared necessary." Although the court held class counsel adequate, the court denied the motion for class certification because the proposed class presented "the occasional extreme case where a conflict of [interest among class members of] this type is too great and simply dominates the landscape too completely to ignore." *Id.* at 463. The court further concluded that "[it] could not rely on the plaintiffs' counsel to help manage the class and subclasses that would be created." *Id.* at 465 (citation omitted).

61. This phenomenon is even more pronounced in state class action litigation, where courts seem to pay even less attention to the adequacy requirement. I could find only one Texas class

Neither Rule 23 nor the cases relating to adequacy provide guidance for proving adequacy of class counsel. Consequently, attorneys have evolved various practices in attempting to satisfy this burden. At one end of the spectrum, some counsel make no proffer at all of their own adequacy, but they instead merely argue this point—in conclusory fashion—as part of the more general argument in support of class certification.[62] Other attorneys make at least some attempt at an evidentiary offer of proof of adequacy. This may come in the form of an affidavit from the proposed class counsel, or a photocopy of the class counsel's entry in *Martindale Hubbell* or some similar law firm publication, typically attached as an exhibit to the motion for class certification. In some rare instances where multiple attorneys are proposed as class counsel, the attorneys may call one another as witnesses to provide testimony in support of their own adequacy.

While such evidentiary offers of proof are commendable, the general problem is that these offers tend to be self-serving, incomplete, or insufficiently illuminating. For example, self-serving affidavits that list the class actions in which proposed class counsel has been "involved" virtually never indicate how counsel developed, litigated, or settled those actions, or provide the terms of such a settlement. Proffers of adequacy, regardless of their form, virtually never indicate whether proposed class counsel have sufficient resources, financial as well as logistical, to support full-scale complex litigation. Needless to say, class counsel never ruminate over their own actual or possible conflicts of interest with the class representatives, absent class members, or other class counsel. In a similar vein, proposed class counsel obviously have no incentive to disclose their personal involvement in any disqualifying ethical snafus during the course of their professional career.

Compounding these significant gaps in information, courts rarely probe beyond the written page or spoken testimony (if offered) of the attorneys, and they seem almost totally disinterested in making

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action decision holding class counsel inadequate. *See* Phillips Petroleum Co. v. Bowden, 108 S.W.3d 385, 399-400, 404 (Tex. App. 2003) (holding class counsel inadequate because counsel repleaded complaint to eliminate claims, causing prejudicial res judicata effect for class members). This dearth of cases relating to adequacy of class counsel is striking in a high-volume class action jurisdiction.

62. I have seen class counsel satisfy this burden at class certification hearings by simply stating to the court some variation of this theme: "And of course, class counsel are competent to represent the class." On this representation alone, any number of courts have granted their blessings to class counsel.

further inquiries of proposed class counsel.[63] Thus, because the judge virtually never examines proposed class counsel, the burden of probing adequacy issues shifts to the party opposing class certification, most typically defense counsel. Yet the class opponent faces considerable obstacles in making the case for *inadequacy*, not the least of which is the inability or disinclination to call proposed class counsel as a witness for examination on adequacy issues. And, if class counsel offers proof of adequacy by affidavit or a *Martindale Hubbell* entry, this leaves defense counsel with the problem of the inability to cross-examine a paper record.[64] Finally, it is well-nigh impossible for the party opposing the class to discover information concerning the class counsel's resources or refuting his or her ability to finance and logistically support a complex, sustained litigation.

3. Possible Explanations for the Inadequate Assessment of Class Counsel's Adequacy

My argument is based on the notion that in the real world of class certification proceedings, most courts do not take the adequacy inquiry very seriously and virtually always *presumptively* ratify whomever "steps up to the plate," no matter how inexperienced, ethically challenged, underfinanced, or ill-prepared. There may be several possible explanations for this phenomenon, some of which I explore below.

First, it may very well be that most attorneys who file and pursue class action litigation easily satisfy the stated standards for a finding of adequate class counsel. If this is indeed the case, it would explain the courts' literal and figurative inattention to this part of the class certification process. While I am willing to concede that this is generally true, my problem is with the universe of proposed class actions where it is not. In these cases, courts exhibit the same inattention and disinterest as in those cases involving qualified litigators, and they in essence give a free ride to proposed class counsel who should not be ratified to represent the class.

Second, the disinclination of courts to rigorously scrutinize proposed class counsel may be explained in large measure by an ingrained tradition of professional courtesy and civility. The prospect

63. Over a fifteen-year span, during the vast number of class certifications I have attended, I have never once witnessed a judge who asked class counsel any questions at all bearing on the issues relating to class counsel's adequacy. This includes class certification hearings where the adequacy of class counsel was in issue.

64. In addition, the party opposing class counsel faces significant obstacles in conducting precertification discovery concerning the adequacy of proposed class counsel.

of having to evaluate professional competence is painful; both judges and even opposing counsel are uncomfortable passing judgment on another attorney's career.[65] Indeed, in some class action proceedings, judges have found the prospect of a defense counsel examination of proposed class attorney so distasteful that the judges refuse to permit such an examination.

Third, the cursory, presumptive, rubber stamping of the adequacy of class counsel usually is the result of plaintiff-drafted class certification orders. Once a judge determines to certify a class, many state judges typically invite class counsel to draft the court's certification order. Not surprisingly, plaintiff-drafted certification orders recite, in rote conclusory fashion, that the court finds class counsel adequate to represent the class. This is typically set forth without any findings of fact. Although defense counsel may in these circumstances also submit a defense version of the certification order, by the time the court has informed the parties it intends to certify the class, the adequacy issue has been rendered virtually moot, and the defense is unlikely to counter with an order denying adequacy of class counsel even if defense counsel believes there are pertinent issues surrounding adequacy.

4. Consequences of the Class Counsel Adequacy Free Pass

As most courts engage in a virtual presumption of class counsel adequacy, the issue is rarely raised, examined, probed, or explored during the certification process. Consequently, because courts routinely rubber stamp approval of proposed class counsel, judges are inattentive to serious representation problems that may unfold during subsequent class proceedings. The most serious examples of these subsequent problems include lack of dilig+ence in prosecuting the action, ineffective assistance of counsel as a consequence of inexperience or underfinancing, abandonment of parties or claims, self-dealing, collusion or other ethical improprieties, and most importantly, the conduct and conclusion of settlement negotiations.

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65. *See, e.g., In re* HealthSouth Corp. Sec. Litig., 213 F.R.D. 447, 461 (N.D. Ala. 2003) ("The fact that defendants do not challenge the abilities of plaintiffs' counsel does not surprise the court."). There are limits to this professional courtesy, however, and if defense counsel have sufficient evidence of inadequacy of proposed class counsel, they will at least make an attempt to make the case if it requires examining proposed class action.

70. 1 NEWBERG ON CLASS ACTIONS, *supra* note 37, § 3:24, at 417.

B. Adequacy of the Class Representatives

Problems relating to the assessment of adequacy of class counsel are replicated in the twin requirement of a finding of adequacy of the class representative. While most courts pay at least ritual obeisance to the concept that a class must be represented by adequate counsel, however, many courts virtually ignore the class representative altogether. This phenomenon is striking.

1. The Hornbook Version

Not surprisingly, the leading academic treatises are somewhat in disagreement concerning the applicable standards for evaluating the adequacy of class representatives. Generally, *Newberg on Class Actions*—the leading plaintiff-oriented treatise—places an emphasis on the competency of class counsel.[70] In *Newberg's* class action universe, if the proposed class representative has no conflict of interest with absent class members (which *Newberg* suggests is the usual case), then the appropriate focus is on the adequacy of class counsel to the exclusion of any inquiry into the class representative.[71]

In essence, the *Newberg* approach distills the class representative adequacy inquiry to the simple question: "Does the class representative have a conflict of interest with the absent class members?" If the answer is "no," then *Newberg* remains untroubled by any other attributes of the proposed class representative.[72] The *Newberg* treatise suggests that class action jurisprudence does not require inquiry into any aspect of a proposed class representative's knowledge, character, circumstances, motives, abilities, or other characteristics.

Clearly, the effect of the *Newberg* approach is to severely truncate any inquiry into the quality and nature of the purported class representative. This method is a version of the potted-plant theory of the class representative; as long as the potted plant is conflict-free, its

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71. *Id.* ("[I]n . . . the usual case when the plaintiff has no conflict [of interest] with the class, courts focus primarily on class counsel, not on the plaintiff, to determine if there will be vigorous prosecution of the class action. Plaintiffs are generally laypeople and they are not expected to prosecute their own action or that of the class."); *see also* Comment, *The Class Representative: The Problem of the Absent Plaintiffs*, 68 NW. U. L. REV. 1133, 1136 (1974) ("[T]he single most important factor considered by the courts in determining the quality of the representatives' ability and willingness to advocate the cause of the class has been the caliber of the plaintiff's attorney.").

72. 1 NEWBERG ON CLASS ACTIONS, *supra* note 37, § 3:26, at 433-34. In somewhat garbled prose, the *Newberg* treatise seems to conclude that as long as class counsel are competent and the class representative is free from conflicts, then it is not necessary to probe into any "individual circumstances, attributes, or motives of the purported class representative." *Id.*

appropriate role is to remain mute, provide background foliage, and do nothing more. The *Newberg* approach has been endorsed by many courts that routinely recite that the competency of class counsel is the single most important factor in assessing adequacy. In the extreme version of this method, some have suggested that the caliber of class counsel is the *only* thing that matters; the adequacy of the class representative is of no consequence at all.[73]

In contrast to *Newberg*, the two other federal practice treatises —which are in agreement—set forth an entirely different concept regarding the adequacy of a class representative. The Wright and Miller treatise encapsulates this enhanced standard as follows: "[W]ith regard to the necessary qualities for the named representative parties, the general standard is that the representatives must be of such a character as to assure the vigorous prosecution or defense of the action so that the members' rights are certain to be protected."[74] In order to assess the adequacy of the named representatives, courts have looked to factors such as their honesty, conscientiousness, and other affirmative personal qualities. If the representative displays a lack of credibility regarding the allegations being made or a lack of knowledge or understanding concerning what the suit is about, then the court may conclude that Rule 23(a)(4) is not satisfied. This inquiry into the knowledge of the representative is to ensure that the party is not simply lending his name to a suit entirely controlled by the class attorney; the named party must be an adequate representative in addition to having adequate counsel.[75]

Moore's Federal Practice treatise is in substantial agreement with Wright and Miller, noting that "[t]he class representative acts as a fiduciary for the entire class," and as a fiduciary, "the class representative owes the putative class a duty of loyalty."[76]

In this enhanced view of the adequacy requirement for proposed class representatives, it is legitimate, if not necessary, to examine an entire array of attributes of the class representative. These include whether: (1) the proposed class representative has any

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73. Professor Issacharoff has endorsed this position. *See* Southwestern Bell Yellow Pages, Inc. v. Waterin Hole, Inc., No. 95- 03809, 1997 WL 124110, at *2, *4 (Tex. App. Mar. 20, 1997) (explaining Professor Issacharoff's position while reversing class certification and disagreeing with his position regarding standards for adequacy of class representatives); *see also* Macey & Miller, *supra* note 19, at 6 (arguing for the centrality of the class attorney's role and arguing that class representatives not be required at all: "We believe that the costs of requiring an actual named plaintiff greatly outweigh the benefits. Accordingly, we recommend that actual, identified named plaintiffs not be required in large-scale, small-claim litigation.").

74. 7A WRIGHT ET AL., *supra* note 47, § 1766, at 302-311.

75. *Id.*

76. 5 MOORE'S, *supra* note 16, ¶ 23.25[2][a].

interests that are in conflict with or antagonistic to other class members;[77] (2) the class representative is subject to a unique defense;[78] (3) the class representative is closely affiliated with class counsel;[79] (4) the class representative has claims against the defendant other than the class claims;[80] (5) the class representative is familiar with the action;[81] (6) the class representative has ceded control over the litigation to class counsel;[82] (7) the class representative is of advanced age, in ill health, or suffering from other disability;[83] (8) the class representative has a sufficient financial stake in the outcome of the litigation;[84] (9) the class representative has the ability to finance the litigation;[85] and (10) the class representative is of sufficient moral character to represent a class, including whether the representative displays traits of honesty, credibility, and purity of motive.[86]

Although these criteria have been developed through a series of judicial decisions, in the vast majority of reported class certification decisions most courts display scant acknowledgement of these requirements, focusing instead on the single inquiry of whether the class representative has any conflict of interest with class members. For our purposes, however, it is important to consider that an appreciation of the class representative as a fiduciary for the interests of the absent class members invites inquiry into all these categories of information.

2. Practical Reality

The practical reality of how the judicial system deals with the adequacy of class representatives is nicely encapsulated by a fine appreciation of the divergent views presented by *Newberg on Class*

77. *Id.* ¶ 23.25[2][b].
78. *Id.* ¶ 23.25[2][b][iv].
79. *Id.* ¶ 23.25[2][b][vi].
80. *Id.* ¶ 23.25[2][b][vii].
81. *Id.* ¶ 23.25[2][c][ii].
82. *Id.* ¶ 23.25[2][c][ii].
83. *Id.* ¶ 23.25[2][c][iii].
84. *Id.* ¶ 23.25[2][c][iv].
85. *Id.* ¶ 23.25[2][d].
86. *Id.* ¶ 23.25[2][e].

90. This is certainly the practice in Texas state courts, where at least one intermediate court of appeals reversed a class certification for lack of adequacy where the class representatives failed to appear at the class certification hearing. Southwestern Bell Yellow Pages, Inc. v. Waterin Hole, Inc., No. 95- 03809, 1997 WL 124110, at *3-*4 (Tex. App. Mar. 20, 1997). Such was the court's finding even though the class representatives had given prior deposition testimony. *Id.*

Actions, Wright's *Federal Practice and Procedure*, and *Moore's Federal Practice*. Simply put, plaintiffs' class counsel heartily endorse the *Newberg* view while defense counsel subscribe to the Wright and *Moore's Federal Practice* view. These divergent approaches have practical consequences as to how each side prepares for and presents supporting evidence during the class certification process.

a. Plaintiff's Approach to Proving Up Adequacy

Because many class counsel subscribe to the class-representative-as-potted-plant theory, some counsel believe it is unnecessary to make any evidentiary proffer of the adequacy of the class representatives beyond the conclusory assertion of the truth of the matter. In the olden days, because most courts routinely accepted such conclusory assertions, the actual production of the class representative was not considered necessary to a finding of adequacy. This was especially true in jurisdictions where class certification was decided on the pleadings and without an evidentiary hearing, and it remains true in those jurisdictions that do not conduct evidentiary class certification hearings.

As some federal and state courts have tightened class certification requirements and come to require evidentiary hearings in the last decade, class counsel have become conscious of the desirability —if not the necessity—of making the class representative testify at the class certification hearing.[90] It is now common for class representatives to be deposed prior to certification, and some sophisticated plaintiffs' law firms will also seek to ensure the adequacy of their class representatives by furnishing those representatives with a description of the nature of class actions and their fiduciary duties.[91]

The plaintiff's strategic approach to proving up the class representative's adequacy is simple: it proceeds along the lines of "the less said, the better."From this perspective, class counsel's goal is to get the class representative on and off the witness stand as quickly as possible. In addition, in situations where the class representative is actually adequacy-challenged, class counsel desires to avoid any probing inquiries into the class representative's knowledge, understanding, personal attributes, solicitation issues, or any other characteristics.

91. The San Francisco law firm Lief, Cabraser routinely engages in this laudable practice. The signed information sheets subsequently are offered as exhibits supporting the adequacy of the class representatives at the time of the motion for class certification.

The plaintiff's offer of proof of adequacy proceeds along predictable lines. Class representatives are usually examined about the representative's personal history, the extent and nature of their injuries, and any information supporting good character (whether or not relevant to the issue of serving as a class fiduciary) The class representative will then be asked whether he or she is willing to vigorously prosecute the lawsuit on behalf of the class (yes) and whether the class representative has any conflicts of interest (no). In giving testimony, class representatives frequently manifest every indicia of careful prehearing testimony preparation, including coaching. Class counsel typically employ leading questions to steer the witness through this direct examination and, more often than not, conclude the entire examination in less than five minutes.

b. Defense Approach to Challenging Adequacy

In contrast, defense counsel universally subscribe to the Wright's *Federal Practice and Procedure* and *Moore's Federal Practice* understanding of the adequacy inquiry. In this view, it is both necessary and legitimate for defense counsel and the court to extensively probe into the class representative's knowledge and understanding of the litigation, active participation in decisionmaking, ability and willingness to financially support the litigation, moral character to serve as a fiduciary, actions regarding solicitation to serve as the class representative, and numerous other issues that bear on the ultimate issue whether the class representative has ceded control of the litigation to the attorneys.[92]

To establish a record concerning the adequacy of the class representative, defense counsel routinely depose all class representatives prior to the motion for class certification.[93] Information elicited during this deposition may serve as the basis for challenging the class representative's adequacy in the defendant's brief in opposition to class certification. The class representative's

92. Although most defense attorneys will attempt to make a factual record bearing on the inadequacy of the proposed class representatives, Professors Macey and Miller have argued that defendant's conduct depends on how the defendant's interests are aligned, and that in some cases, the defendant may have little or no incentive to challenge the adequacy and typicality of the class representatives. Macey & Miller, *supra* note 19, at 63-66.

93. To the extent that plaintiff's counsel invoke attorney-client privilege (and instruct the class representative not to answer questions), taking the class representative's deposition frequently may prove to be a frustrating exercise for defense counsel. Such invocations of attorney-client privilege in this context are usually inappropriate and improper invocations of the privilege. Defense counsel have the right to make inquiries of the class representative that have bearing on the adequacy issue, and no privilege shields the class representative from answering these questions.

testimony also serves as a basis for impeachment if, during the course of live certification testimony, class counsel attempt to rehabilitate the class representative's prior deposition testimony.

Defense counsel have a second opportunity to explore adequacy issues during cross-examination at the certification hearing. Defense attorneys use this opportunity both to create a record of inadequacy based on the array of criteria that affect the adequacy determination, as well as to impeach the class representative who has changed prior adverse deposition testimony.

c. Judicial Approach to Assessing the Class Representative's Adequacy

Most courts seemingly subscribe to the *Newberg* potted-plant view of the class representative. As a consequence, this tends to induce judicial inattention, if not an outright disregard of the evidentiary presentation regarding the adequacy of the class representative. Quite similar to the judicial approach to assessing the adequacy of proposed class counsel, most judges presumptively give the proposed class representatives a free pass. There is virtually no effort to establish actual conformity to the array of possible concerns relating to the adequacy inquiry.

Although most judges will sit patiently through a lengthy cross-examination of a class representative, some do not.[94] Some judges may truncate cross-examination of the class representatives altogether. Furthermore, judges rarely ask any questions of the proposed class representatives on their own initiative. These problems, of course, are exacerbated in jurisdictions where class counsel attempt to prove adequacy of the proposed class representatives on a paper submission without a live evidentiary hearing. More often than not, such submissions consist of mere conclusory recitations and self-serving statements, often copied from the pleadings, that the class representatives are adequate, will vigorously represent the class because they have retained competent counsel, and are free of conflicts of interest.

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94. I have been present at more than one class certification hearing where the judge, impatient with defense cross-examination of the class representative, has ordered counsel to cease and desist from any further examination, explaining that nothing the witness could say would cause the court not to find to find the class representative adequate. In other instances judges have stated that such examination is pointless because the adequacy requirement for the class representative is so low. This abrupt termination of cross-examination of the class representative frustrates the ability of defense counsel to make its record concerning the adequacy of the class representative.

3. Possible Explanations for the Inadequate Assessment of the Adequacy of Class Representatives

In canvassing possible reasons for why courts do not take the adequacy of class representatives seriously, the following possible rationales closely parallel the universe of explanations regarding the inquiry surrounding the adequacy of class counsel.

First, whether courts are willing to engage in a probing inquiry of the adequacy of the class representative depends on what approach the court believes is appropriate. Because most courts historically and reflexively believe that the most important thing is the presence of competent counsel (the *Newberg* view), there is a general feeling of apathy toward class representative issues. In short, courts seem perfectly willing to ignore even the most clueless class representatives.

One must also consider the enduring legacy of Mrs. Surowitz. In *Surowitz v. Hilton Hotels Corporation*, the Supreme Court in 1966 famously held that an illiterate, elderly Polish immigrant who signed a verified class action complaint in a shareholder derivative lawsuit had not violated the verification requirement in Rule 23(b).[95] Faced with a colorful set of facts, the Supreme Court decided Mrs. Surowitz had not violated the verification requirement because she had been counseled and assisted by her aptly named son-in-law, Mr. Brilliant, who, according to the reported decision, "had graduated from Columbia University, possessed a master's degree in economics from Columbia University, was a professional investment advisor, and in addition to his degrees and his financial acumen, he wore a Phi Beta Kappa key."[96] The influence of the *Surowitz* decision on the Rule 23(a)(4) adequacy inquiry has been pervasive,[97] notwithstanding the

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95. 383 U.S. 363, 373-74 (1966).

96. *Id.* at 368, 371-72. Many courts that cite *Surowitz* for the proposition of a minimalist standard for adequacy for class representatives frequently recite the facts relating to Mrs. Surowitz's illiteracy, her lack of formal education, her son-in-law Mr. Brilliant, and his Phi Beta Kappa key. Some courts also point to Mrs. Surowitz's Polish ethnicity. *See* reported cases cited *infra* note 97.

97. *See, e.g.*, *In re* Turkcell Iletisim Hizmetier, A.S. Sec. Litig., 209 F.R.D. 353, 356-57 (S.D.N.Y. 2002) (citing *Surowitz* as support for using a low threshold for adequacy determinations); *In re* Ins. Mgmt. Solutions Group, Inc. Sec. Litig., 206 F.R.D. 514, 517 (M.D. Fla. 2002) (same); *In re* Theragenics Corp. Sec. Litig., 205 F.R.D. 687, 696-97 (N.D. Ga. 2002) (holding that Supreme Court's rationale in *Surowitz* "is clearly applicable to Rule 23(a)(4)."); Paper Sys. Inc. v. Mitsubishi Corp., 193 F.R.D. 601, 609 (E.D. Wis. 2000) (citing other cases to the same effect); McFarland v. Bass & Associates, P.C., No. 97 C 3944, 1998 WL 42286, at *5 (N.D. Ill. Jan. 30, 1998) (citing *Surowitz* as authority for the proposition that "[t]he knowledge requirement for the named representative is minimal."); Wells v. HBO & Co., Civ. A. No. 1:87CV657JTC, 1991 WL 131177, at *6 (N.D. Ga. Apr. 24, 1991) (same); Clark v. TAP Pharm. Prods., Inc., 798 N.E. 2d 123, 132 (Ill. App. Ct. 2003) (same); *In re* Fuqua Industries, Inc. Shareholder Litig., 752 A.2d 126, 131-133 (Del. Ch. 1999) (discussing *Surowitz*). Impressively,

fact that the Supreme Court decided the case in the context of a shareholder derivative lawsuit, under a pre-amended version of the modern class action rule, and based on a ground entirely apart from the Rule 23(a) adequacy issue.[98]

Nonetheless, the ghost of Mrs. Surowitz haunts the modern assessment of the class representative, perhaps because everyone, including judges, remembers learning about the colorful Mrs. Surowitz in law school. Mrs. Surowitz has become the rallying cry for the lowest possible denominator for assessing the adequacy of the class representative, an argument which runs something like: "If the Supreme Court held that an illiterate Polish immigrant with limited English vocabulary and practically no formal education is an adequate

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Mrs. Surowitz's impact has stretched even all the way to the Northern Mariana Islands. Does I v. Gap, Inc., No. CV-01-0031, 2002 WL 1000073, at * 4 (D. N. Mar. I. May 10, 2002).

98. *Surowitz*, 383 U.S. 363, 373 (holding that the court could not "construe Rule 23 or any other one of the Federal Rules as compelling courts to summarily dismiss, without any answer or argument at all, cases like this where grave charges of fraud are shown by the record to be based on reasonable beliefs growing out of careful investigation."). For a scathing critique of the almost universal misapplication of the *Surowitz* case, see Berger v. Compaq Computer Corp., 257 F.3d 475, 482-83 (5th Cir. 2001) (citing Elliot J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2127 n.254 (1995)):

> As an initial matter, we articulate the adequacy standard outside of any specific statutory context. The district court cited *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, (1966), for the notion that "[a]dequacy is a low threshold." This is a misapplication of *Surowitz*.
>
> Although "often cited inaccurately to support arguments that plaintiffs with little understanding of the facts or theories of their claims and little incentive to monitor the litigation can nonetheless be adequate class representatives," *Surowitz* did not address the adequacy requirement, but concerned only the verification of a complaint. Just as *Surowitz* did not hold, this circuit has never read *Surowitz* so broadly as to support the proposition that a class representative who does not understand any of the legal relationships or comprehend any of the business transactions described in the complaint nonetheless may be "adequate" for purposes of class certification.
>
> To the contrary, we have described "[t]he adequacy requirement [as one that] mandates an inquiry into . . . the willingness and ability of the representatives to take an active role in and control the litigation and to protect the interests of absentees." Likewise, even in *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973), which interpreted rule 23(a)'s adequacy requirement somewhat more loosely, we insisted that "it must appear that the representative[s] will vigorously prosecute the interests of the class through qualified counsel." Both understandings – even accepting the variance between them – require the class representatives to possess a sufficient level of knowledge and understanding to be capable of "controlling" or "prosecuting" the litigation. (citation omitted)

See also Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 484 (5th Cir. 1982) (stating that "[t]he adequacy requirement mandates an inquiry into . . . the willingness and ability of the representative to take an active role in and control the litigation and to protect the interests of absentees . . . .").

representative, then my equally clueless class representative is adequate as well."[99]

Second, although professional courtesy is not a likely reason explaining courts' lack of vigorous inquiry into a class representative's adequacy, it is likely that many judges feel a similar distaste for grilling a proposed class representative. The types of questions relating to adequacy issues invade many people's "comfort zones," including judges, and if a judge is predisposed to believe that the class representative's adequacy does not matter that much, then the judge is perhaps likely to become impatient with the probing of a hapless class representative.

Third, the cursory, presumptive, rubber stamping of the adequacy of class representatives is similarly the result of plaintiff-drafted class certification orders. As indicated above, plaintiff-drafted certification orders will recite, in rote conclusory fashion, that the court finds the class representatives adequate to represent the class and free of conflicts of interest. Again, this is typically set forth without any findings of fact. Although defense counsel may be invited to submit a defense version of the certification order, by the time the court has informed the parties it intends to certify the class, the adequacy of the class representatives has been rendered virtually moot, and defense counsel are unlikely to counter with an order setting forth all the reasons why the class representatives are inadequate, even if the defense believes there are issues surrounding adequacy.

4. Consequences of the Class Representative Adequacy Free Pass

Similar to the way in which courts deal with the adequacy of class counsel, so too do judges deal with the class representatives. Because most courts apply a virtual presumption of class representative adequacy, defense counsel often have an extremely difficult task in raising the issue and persuading courts that problems with designated class representatives actually matter. Instead, courts mostly are inclined to routinely rubber stamp approval of proposed class representatives.

The consequences of judges failing to initiate a probing inquiry regarding class representatives' adequacy are similar to the problems relating to the class counsel determination. Hence, courts tend to discount the class representatives' fiduciary duties in protecting the

99. Mrs. Surowitz is the frequently cited standard by class counsel for evaluating the adequacy of the class representative. For cases invoking *Surowitz* on similar sets of facts, see *supra* note 104.

interests of absent class members. Courts discount the class representatives' role in identifying or averting serious representation problems that may unfold during subsequent class proceedings. These problems range from lack of diligence in prosecuting the action; ineffective assistance of counsel as a consequence of inexperience, underfinancing, or other reasons; abandonment of parties or claims; attorney self-dealing; and collusion or other ethical improprieties; to, most importantly, the conduct and conclusion of settlement negotiations.

III. PROBLEMS OF THE ADEQUACY DETERMINATION IN SETTLEMENT CLASSES

As indicated above, the Supreme Court in *Amchem* resolved the great debate over settlement classes that developed during the mid-1990s.[100] In *Amchem*, the Supreme Court approved the concept of the settlement class and indicated that settlement classes were required to satisfy all the requirements for certification as litigation classes, except for the manageability requirement.[101] As an indirect consequence of the Court's *Amchem* decision, the Advisory Committee on Civil Rules abandoned its proposal to amend Rule 23(b) to explicitly provide for a new category embracing the settlement class.[102]

Pure settlement classes, then, require satisfaction of the same Rule 23(a) threshold requirements, including adequacy. The adequacy inquiry in settlement classes, however, raises additional problems apart from those present in litigation classes. Hence, the adequacy determination in the settlement class context is even more fraught with opportunities for subsequent collateral attack.

A. The Concept of the Settlement Class After Amchem

Settlement classes existed and were court-approved prior to the great debate inspired by the *Georgine-Amchem* litigation. In the pre-*Amchem* era, courts would conditionally or provisionally certify a class, and if during the course of proceedings it appeared that the parties were amenable to settlement, the court would certify a class for settlement purposes. Final certification of the previously certified class would occur at the time of the settlement approval.

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100. *See supra* Part II.

101. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997).

102. However, the Advisory Committee did return to issues relating to class settlement by amending and expanding Rule 23(e) as part of the 2003 rule revision package. *See* FED. R. CIV. P. 23(e) advisory committee's note.

The *Amchem* litigation presented a somewhat stark variation on previously accepted practice because *Amchem* presented the "settlement-only" class.[103] As a consequence, the Court made the additional point that when judges are confronted with settlement-only classes, the other specifications of the rule (apart from the manageability factor) "demand undiluted, or even heightened, attention in the settlement context."[104] The Court indicated that "[s]uch attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold."[105]

As the objectors in the *Amchem* case forcefully argued, the pure settlement-only class raises the specter of an entire array of possible abusive class litigation practices, precisely because the proposed class and counsel previously would not have been subject to judicial scrutiny. With exceptional relevance here, the settlement-only class is created in the absence of any prior judicial oversight or determination of the adequacy of class representation; the adequacy determination comes at the back end of the litigation, not the front end (as is typical for litigation classes). As I argue below, back end determinations of adequacy are highly problematic for a variety of reasons, and they further serve to render settlement classes especially vulnerable to collateral attack.

B. Adequacy Issues in Settlement Classes After Amchem *and* Ortiz

Although the Court's central discussion in *Amchem* addressed the issue of recognizing settlement classes and promulgating standards governing them, the Court also concluded on the merits that the class certification was improper because of a lack of adequate representation.[106] In so doing, the Court seemingly endorsed the *Newberg* approach to the adequacy requirement, indicating that the Rule 23(a)(4) adequacy inquiry "serves to uncover conflicts of interest between named parties and the class they seek to represent."[107]

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103. *Amchem*, 521 U.S. at 592 (noting that the District Court approved the class for settlement only).

104. *Id.* at 620.

105. *Id.*; *see also id.* at 620 n.16 (noting that "proposed settlement classes sometimes warrant more, not less, caution on the question of certification.").

106. *Id.* at 625-27. The Court affirmed the Third Circuit's reversal of the trial court's class certification order.

107. *Id.* at 625 (citing Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157-158 n.13 (1982)).

On the facts, the Court concluded that the interests of the class members with diverse medical conditions were not and could not be aligned within a single class.[108] The Court further concluded that a conflict of interest existed between currently injured claimants and exposure-only or "future" claimants.[109] The Court concluded that the class representatives had failed to adequately represent the class because although the named parties alleged a range of complaints, each served as a representative of the entire class and not a representative for separate constituencies.[110]

The chief lesson drawn from the *Amchem* analysis of the adequacy problem is the Court's suggestion that when faced with a disparate class, the settling parties need to provide "structural assurances of fair and adequate representation,"[111] both in the settlement terms and the structure of the negotiations.[112] Having set forth this broad proposition, the Court provided no examples, in either the negotiations or the settlement terms, as to what might constitute "structural assurances" of adequate representation.[113] In addition, the *Amchem* Court determined the adequacy issue solely with reference to the class representatives; the Court never addressed the issue of the adequacy of class counsel.[114]

Later, the Court revisited the adequacy issue in the context of Rule 23(b)(1)(B) global asbestos settlement classes in *Ortiz*. Confronted with another diverse-injury asbestos settlement, the Court in *Ortiz* substantially reiterated its *Amchem* analysis and reached the same conclusion—namely, that the settlement was defective because of a lack of adequate representation.[115] The Court's adequacy analysis, though, added two new elements. First, the Court indicated that the "structural assurances" suggested in *Amchem* included provisions such as subclassing and separate counsel for those

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108. *Id.* at 627.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. There is some suggestion that subclassing might satisfy the "structural assurances," principle; the Court cites with approval the Second Circuit decision describing the use of subclasses to deal with differences among asbestos claimants. *Id.* (citing *In re* Joint E. and S. Dist. Asbestos Litig., 982 F.2d 721, 742-43 (1992), *modified on reh'g sub nom. In re* Findley, 993 F.2d 7 (1993)).

114. *Id.* at 626 n.20 ("[W]e decline to address adequacy-of-counsel issues discretely in light of our conclusions that common questions of law or fact do not predominate and that the named plaintiffs cannot adequately represent the interests of this enormous class."). Throughout the lengthy *Georgine-Amchem* litigation, the objectors to the *Amchem* settlement had strenuously contended that class counsel were inadequate for a variety of reasons.

115. Ortiz v. Fibreboard Corp, 527 U.S. 815, 856 (1999).

subclasses.[116] Second, the Court indicated its distaste for the fact that the class representatives were not named until after the agreement in principle had been negotiated by counsel.[117] Third, similar to its *Amchem* decision, the Court averred to the principle that adequacy of representation also embraced the competency and conflicts of class counsel without analyzing or deciding that issue.[118]

Perhaps the Court's most important acknowledgment relating to the adequacy issue was the Court's recognition, in both *Amchem* and *Ortiz*, that the fairness of a settlement agreement cannot itself bootstrap a finding of adequacy (or satisfaction of the other class certification requirements).[119] Thus, the Court recognized that adequate representation must be in place during all phases of class proceedings; back end ratification of adequacy may not be sufficient to comply with Rule 23:

> Here, just as in the earlier case, the proponents of the settlement are trying to rewrite Rule 23; each ignores the fact that Rule 23 requires protections under subdivisions (a) and (b) against inequity and potential inequity at the precertification stage, quite independently of the required determination at postcertification fairness review under subdivision (e) that any settlement is fair in an overriding sense.[120]

C. *The Problems of Back end Adequacy Determinations in Settlement Classes*

The Court's *Amchem* and *Ortiz* decisions, then, provide barebones guidance concerning the adequacy requirement for settlement classes. In essence, the Court approximated the Newbergian approach to thinking about adequacy: the standard for adequate class counsel consists of two elements, competency and conflicts, and the standard for adequate class representatives consists of one inquiry, conflicts of interest.

In the relatively sparse analysis devoted to the adequacy issue, the Court basically informed us of the following: (1) in certifying a settlement class, courts must find adequacy of representation; (2) disabling conflicts of interest between the class representatives and class members will defeat class certification; (3) class representatives should be named before the deal is done; (4) class counsel may be found to be inadequate if counsel is not competent and has conflicts of interest; and (5) adequate representation needs to be in place

116. *Id.*
117. *Id.* at 856 n.31.
118. *Id.*
119. *Amchem*, 521 U.S. at, 622; *Ortiz*, 527 U.S. at 858.
120. *Ortiz*, 527 U.S. at 858.

throughout the proceedings, including in the precertification stages of the litigation.[121]

I have argued above that parties and courts tend not to take the adequacy inquiry seriously during the process for certification of litigation classes or during upfront certification.[122] It seems to me that the adequacy requirement is taken even less seriously when certification occurs at the back end of class litigation, especially in the context of settlement-only classes. There are a variety of reasons for this phenomenon.

There are at least two ways in which a settlement class may evolve. In the first instance, a court may certify a conditional class as the precursor to the settlement class.[123] In this scenario, the court may (or may not) have made a prior finding of adequacy of class counsel and the class representatives. If a hearing on conditional certification occurs, one may also assume that the adequacy inquiry is conducted with the same lack of rigor described in the preceding discussion. Moreover, because conditional certification is inherently tentative, the court has no overwhelming incentive to definitively probe adequacy issues.

When a settlement results from conditional certification and the parties move for settlement approval pursuant to Rule 23, the court's prior conclusory findings of adequacy are likely to be bootstrapped onto the court's approval of the settlement without adequate further inquiry. Hence, earlier deficiencies in proving adequacy are likely to be carried over into the settlement approval process without further probing of the adequacy requirement. In addition, neither the parties nor the court has an special interest in extensively probing adequacy in the settlement context, even in the shadow of a potential collateral attack.

In second scenario—the *Amchem*-style, settlement-only context—the adequacy determination is even more likely to be tepid, notwithstanding the Supreme Court's admonitions in both *Amchem* and *Ortiz*.[125] This is because without a front end adequacy determination, none of the parties at the back end have any compelling interest in challenging adequacy. Instead, the parties are aligned in interest in obtaining the court's approval of the settlement. Whereas in front end certifications of litigation classes, defense

121. *See id.*, 527 U.S. at 857-61.

122. *See supra* Part II..

123. *See Amchem*, 521 U.S. at 605.

125. *Id.* at 622; *Ortiz*, 527 U.S. at 858.

counsel are likely to mount an attack against adequacy and the court. at least, is more likely to have some disputed record on this issue, in the settlement-only context defense counsel have no such interest in challenging adequacy.

Compounding this problem is the court's independent interest in settling cases on its docket. Although the court independently is a nominal protector of the class, if the parties come to the court with an agreed settlement, most courts are unlikely to engage in an independent rigorous examination of the structure, content, and provisions of a settlement, let alone the adequacy of the representation in accomplishing that settlement.

In settlement classes, then, objectors (or intervenors) provide the only possible effective guarantee of the adequacy requirement. If no objectors appear to challenge a class settlement, the settlement will be approved on a conclusory record and finding of adequacy. If objectors do appear, however, the barriers to their ability to mount a challenge to adequacy are formidable. Most courts limit the ability of objectors to take discovery, especially relating to such issues at the conduct of prior settlement negotiations. Even influential publications such as the *Manual for Complex Litigation,* approve such discovery limitations on objectors.[127] Because of these limitations, and because many objectors may not have been involved in the litigation prior to settlement, it is extraordinarily difficult for objectors to reconstruct adequacy after-the-fact.

The net result is that in all the different class action scenarios —upfront certification, conditional certification, and back end certification—the litigants and the courts are not likely to engage in a robust determination of the adequacy requirement. This sets the stage for even more complicated issues in the event of a subsequent collateral attack, because a remote forum has to contemplate adequacy issues on a largely conclusory record. And, as the *Agent Orange* litigation demonstrates, collateral attacks that occur years after the fact compound the problem of reconstructing adequacy.

127. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.643 (2004) (citing cases).

IV. ADEQUACY ISSUES IN SETTLEMENT CLASSES: THE *AGENT ORANGE* CASE[128]

The array of issues and problems relating to determining adequacy in class action litigation are amply illustrated by the *Agent Orange* settlement class and the collateral attack that the settlement spawned nearly twenty years after Judge Jack Weinstein gave his final approval in 1984.[129] The *Agent Orange* litigation and settlement class is so interesting precisely because the courts—both trial courts and the Second Circuit—purported to make adequacy determinations at several junctures during the course of that litigation, but those determinations did not insulate the *Agent Orange* settlement from subsequent attack.

The defenders of the *Agent Orange* settlement contended that the settlement was entitled to finality and that the courts had ensured adequacy of representation at many times during the development of litigation. I would suggest, however, that apart from an egregious *Amchem*-style conflict of interest, the *Agent Orange* collateral attack illustrates how difficult it is to determine the adequacy question after the fact, after many years, and on a largely conclusory record.

At every crucial juncture during the *Agent Orange* litigation when the courts should have been vigorously scrutinizing adequacy, the courts failed to do so in a meaningful way. In fairness to Judges Pratt and Weinstein, the courts' adequacy determinations reflect the judicial culture of the early 1980s, when adequacy issues were given even less attention than today. Nonetheless, these failures on the part of the litigants and the judiciary came back to haunt all the participants years after the fact. Furthermore, these failures led to participants in the collateral attack having the near impossible task of attempting to review the litigation through nothing but narrative reconstruction, faulty memory, and evidentiary gaps.

In a sense, the *Agent Orange* litigation embodied almost every variation on the problematic and inadequate assessments of adequacy in both litigation and settlement classes. The *Agent Orange* litigation, it seems, amply demonstrates the problems that courts have with front end adequacy determinations, conditional certification, and back

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128. Portions of this discussion and analysis are adapted from Linda S. Mullenix, *Apocalypse Forever: Revisiting the Adequacy of the* Agent Orange *Settlement, Twenty-Five Years Later*, 5 PREVIEW U.S. SUP. CT. CAS. 274 (2003). For a discussion of the underlying *Stephenson* litigation, see Nagareda, *supra* note 6, at 316-333.

129. *In re* "Agent Orange" Prod. Liab. Lit., 597 F. Supp. 740 (E.D.N.Y. 1984).

132. Mullenix, *supra* note 128, at 274.

end adequacy determinations at settlement class approval. In addition, the *Agent Orange* litigation illustrates the cumulative nature of problems relating to inadequate assessments of adequacy when these issues arise in the context of subsequent collateral attacks and courts are forced to reconstruct prior adequacy determinations.

A. The Issues Before the Supreme Court in the Agent Orange *Appeal*

By the time the challenge to the *Agent Orange* settlement was appealed to the Supreme Court during the 2002-03 Term, the settlement class issues had crystallized into broad but important questions relating to the sanctity of settlement classes. Essentially but simply, the Supreme Court was confronted with the question of whether absent class members are precluded from collaterally attacking the adequacy of representation in a class action settlement, especially where both the trial court and appellate courts had determined adequacy on numerous prior occasions.[132]

In addition, the Court was confronted with the question of whether, if such a collateral attack was permissible, "adequacy of representation" was properly determined by standards prevailing at the time of the original judicial assessment or if those standards might be re-evaluated through the lens of subsequently developed law relating to adequacy concepts. This latter question was especially significant because the *Agent Orange* settlement class was certified during an earlier pre-*Amchem*, pre-*Ortiz* era. Thus Judges Pratt, Weinstein, and the Second Circuit were acting during the early 1980s without the benefit of the Supreme Court's late-1990s wisdom on adequacy issues. Arguably, the *Agent Orange* settlement class was approved during the heyday of a judicially lax approach to adequacy issues.

Thus, the *Agent Orange* appeal raised the question of whether it was permissible, on subsequent collateral attack, for another court to "Monday-morning quarterback" the standards that were applied, or should have been applied, to a court's earlier adequacy determinations. In other words, the Court asked this question: If adequacy standards and expectations are moving targets through time, can a subsequent court find adequacy error in hindsight?

B. The Underlying Factual and Procedural History of the Agent Orange *Class*

The factual and procedural history of the *Agent Orange* litigation is worth some explanation, as this narrative history serves

to illustrate the number of times the judiciary reviewed and approved the adequacy requirement for class certification.

The Dow Chemical and Monsanto Chemical Companies, as well as other defendants in the original *Agent Orange* litigation, pursued the *Agent Orange* appeal to the Supreme Court in order to preserve their class action settlement of *Agent Orange* claims negotiated, approved, implemented in the mid-1980s, and implemented in the ensuing decade.[133] The *Agent Orange* appeal to the Supreme Court during the 2002-03 Term was compelling on several fronts. First, the litigation involved the ongoing, highly emotional claims of Vietnam veterans, many of whom are now in their fifties.[134] In addition, it was not without great irony that Judge Weinstein of the Eastern District of New York had sought to salve the wounds of the Vietnam War with his approval and supervision of the *Agent Orange* class action litigation and the resulting settlement class.[135]

The *Agent Orange* appeal before the Supreme Court began with two separate lawsuits brought by Daniel Stephenson, a Louisiana resident and a civilian pilot, and Joe Issacson, a New Jersey resident and school vice-principal.[136] Stephenson was a helicopter pilot in Vietnam who was exposed to Agent Orange in-country.[137] In 1998, Stephenson was diagnosed with multiple myeloma, a deadly cancer.[138] Issacson served as an Air Force crewman at an airfield that supported Agent Orange missions.[139] In 1996, Issacson was diagnosed with non-Hodgkin's lymphoma, also a deadly cancer.[140]

Stephenson filed a lawsuit in Louisiana federal court in 1998, and Issacson filed a lawsuit in New Jersey state court in 1999 against the corporations that had manufactured the herbicide Agent Orange.[141] Issacson's case was subsequently removed to New Jersey federal court.[142] Each alleged that he had become ill due to exposure to Agent Orange while in Vietnam.[143] Under Louisiana and New Jersey law, neither Stephenson nor Issacson could bring a claim

133. Mullenix, *supra* note 128, at 274.
134. *Id.*
135. *Id.*
136. *Id.* at 275.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*

against the Agent Orange manufacturers until each was actually diagnosed with cancer.[144]

Stephenson and Issacson contended that they had not been adequately represented in the 1985 *Agent Orange* class action settlement because their illnesses did not manifest until after 1994, the cut-off date for direct cash payments to veterans under the settlement.[145] Consequently, if the *Agent Orange* settlement was construed to apply as a complete bar to recovery, Stephenson and Issacson would be incapable of recovering for their deadly diseases.[146]

The *Stephenson* and *Issacson* cases were transferred to the Eastern District of New York, which had continuing supervisory jurisdiction over the *Agent Orange* settlement.[147] On December 13, 1999, Judge Weinstein dismissed the two cases based on the conclusion that the court's approval of the *Agent Orange* settlement was final.[148] Judge Weinstein additionally noted that "you have to attack directly, not by collateral attack some fifteen years after judgment."[149] Stephenson and Issacson appealed the dismissal of their claims.[150] The Second Circuit unanimously held that Stephenson and Issacson were not precluded from litigating the issue of adequate representation and that they could bring a collateral attack on prior holdings that the class representation had been adequate.[151] The court noted that Stephenson and Issacson fell within the settlement class definition and that prior *Agent Orange* trial and appellate decisions had considered and rejected challenges to the settlement based on the adequacy of class representation.[152]

The court further held, however, that none of the earlier decisions had addressed the adequacy of representation for class members whose injuries manifested after 1994 (such as Stephenson and Issacson). Relying on the Supreme Court's decision in *Hansberry v. Lee*,[153] the Second Circuit concluded that if Stephenson and Issacson were not proper parties to the class action judgment, then res judicata could not operate to defeat their claims.[154]

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144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. Judge Weinstein's orders are not reported.
150. Stephenson v. Dow Chem. Co., 273 F.3d 249, 251 (2d Cir. 2001).
151. *Id.* at 261.
152. *Id.* at 260-61.
153. 311 U.S. 32 (1940).
154. *Stephenson*, 273 F.3d at 257-58.

Moreover, the Second Circuit concluded that these cases required the court "to determine the effect of the Supreme Court's landmark class action decisions in *Amchem Products, Inc. v. Windsor*,[155] and *Ortiz v. Fibreboard Corp.*,[156] on a previously settled class action."[157] The Second Circuit also noted that due process requires notice and an opportunity to be heard, and that Stephenson and Issacson had received neither.[158] Thus, in the absence of adequate class representation, the class action settlement could not preclude their current claims.

The Second Circuit's decision was rendered against a backdrop of more than twenty-five years of *Agent Orange* litigation, which constitutes a well-documented, lengthy, and tortuous excursion through the American judicial system.[159] With the end of the Vietnam War in 1975 and the return of all remaining armed forces, the original *Agent Orange* lawsuits were filed in the late 1970s.[160] The Judicial Panel on Multidistrict Litigation created an Agent Orange MDL in 1979, and the individual *Agent Orange* lawsuits were consolidated in the Eastern District of New York under the supervision of Judge Pratt.[161]

In 1980, Judge Pratt conditionally certified a class consisting of "all persons exposed to Agent Orange and various members of their families."[162] In conditionally certifying the class, Judge Pratt considered the requirements of Rule 23(a), which include adequacy of representation.[163] He found this and the other elements of Rule 23(a) satisfied.[164] However, Judge Pratt never entered an order certifying the class. Judge Pratt's entire recitation of the standard governing adequacy was as follows: "[a]dequacy of representation depends on the qualifications and interests of counsel for the class representatives, the absence of antagonism or conflicting interests, and a sharing of interests between class representatives and absentees."[165]

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155. 521 U.S. 591 (1997).
156. 527 U.S. 815 (1999).
157. *Stephenson*, 273 F.3d at 251.
158. *Id.* at 260-61.
159. Mullenix, *supra* note 128, at 275.
160. *Id.*
161. *Id.*
162. *In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762, 787 (E.D.N.Y. 1980).
163. *Id.* at 788.
164. *Id.* at 787-88.
165. *Id.* at 788.

The court's discussion of adequacy comprised one short paragraph.[166] Significantly, at the time of class certification and the finding of adequacy, the class had no named class representatives. Seemingly untroubled by the absence of actual class representatives, Judge Pratt noted:

> [H]ere, the court will select from among the hundreds of plaintiffs representative persons who have a substantial stake in the litigation, who lack conflicts, antagonisms or reasons to be motivated by factors inconsistent with the motives of absentee class members, and who will fairly and adequately protect the interests of the class.[167]

Concluding its analysis of the adequacy requirement, the court stated that the class would be represented by "experienced, capable counsel, Yannacone and Associates, who have shown themselves willing to undertake the considerable commitment of time, energy and money necessary for the vigorous prosecution of the claims here asserted."[168] In hindsight, Judge Pratt's conclusory findings concerning the adequacy of Yannacone & Associates would prove ironic; Yannacone & Associates withdrew as class counsel in September 1983 because of management problems and a lack of financing.[169]

In 1983, Judge Jack Weinstein assumed responsibility over the *Agent Orange* litigation after Judge Pratt was appointed to the Second Circuit.[170] Judge Weinstein revisited the class certification determination and entered a formal order certifying a Rule 23(b)(3) class. In so doing, Judge Weinstein noted that the four prerequisites to class certification, including the adequacy requirement, had been analyzed carefully by the court and found to exist.[171]

Judge Weinstein defined the class to include the following:

> Those persons who were in the United States, New Zealand, or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides .... The class also includes spouses, parents, and children or the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure.[172]

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166. *Id.*

167. *Id.*

168. *Id.*

169. Ryan v. Dow Chem. Co. (*In re* "Agent Orange" Prod. Liab. Litig.), 611 F. Supp. 1452, 1454 (E.D.N.Y. 1985).

170. *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 720 (E.D.N.Y. 1983).

171. *Id.*

172. *Id.* at 729.

Stephenson and Issacson contended that this original class definition did not include veterans, such as themselves, who had not yet manifested any disease.[173]

Judge Weinstein ordered that notice be given of the action, including the right to opt-out of the lawsuit until May 1, 1984, and he approved serving that notice directly, by publication, and by other means. He scheduled trial of the class action for May 7, 1984.[174] Stephenson and Issacson contend that they never received notice of the pending class action or of their right to opt-out.[175] Consequently, they did not opt-out of the class.

In the ensuing weeks, the parties conducted settlement negotiations assisted by three special masters. The parties reached a settlement on the morning of May 7, 1984.[176] The settlement provided that the defendants would pay a lump sum of $180 million into a fund for the benefit of the class, but the settlement did not provide a formula for distribution of the fund to class claimants.[177] The settlement specified that "all members of the Class are forever barred from instituting or maintaining any action against any of the defendants . . . arising out of or relating to, or in the future arising out of or relating to, the subject matter of the Complaint."[178] The settlement also indicated that "the class specifically includes persons who have not yet manifested injury."[179]

Judge Weinstein conducted eleven days of hearings throughout the United States to receive comments relating to the proposed settlement.[180] He ordered plaintiffs' counsel to mail notice of the proposed settlement and fairness hearings to all known members of the class, as well as to provide notice by publication.[181] Again, Stephenson and Issacson contended that they did not receive any notice of the settlement class, the settlement terms, or the class definition.[182] During extensive fairness hearings, Judge Weinstein heard from almost five hundred witnesses, many of whom expressed concern about provision for Vietnam veterans who had not yet

173. Mullenix, *supra* note 128, at 275.
174. *In re* "Agent Orange," 100 F.R.D. at 732.
175. Mullenix, *supra* note 128, at 276.
176. *Id.*
177. *Id.*
178. *In re* "Agent Orange," 597 F. Supp. 740, 864-65 (E.D.N.Y. 1984).
179. *Id.* at 865.
180. Mullenix, *supra* note 128, at 276.
181. *Id.*
182. *Id.*

manifested injury.[183] Some of these witnesses recommended that a subclass be created for such objectors.[184]

Judge Weinstein denied this request for a subclass of claimants who had not yet manifested injury. He concluded that the objectors' views had been taken into account and that "no purpose would have been served by appointing counsel for a subclass of disappointed claimants except to increase expenses to the class and delay proceedings."[185] At the conclusion of the fairness hearings, Judge Weinstein preliminarily approved the settlement under Rule 23(e).[186] Judge Weinstein entered a final order approving the settlement on January 7, 1985.[187]

Objecting class members then moved for reconsideration, contending in part that the class action representatives may have been inadequate in that no class representatives represented class members who were deceased or who had not yet manifested injury. The objectors also contended that there was an intraclass conflict between the living, presently injured claimants and the deceased and not-yet-manifested-injury claimants (called "future claimants").[188] Judge Weinstein denied the motion for reconsideration without opinion.[189]

After approval of the settlement, Judge Weinstein and special master Kenneth Feinberg supervised the implementation and distribution of the settlement funds. The distribution plan provided that 75 percent of the $180 million settlement fund would be distributed directly to survivors of deceased veterans and to veterans who became totally disabled due to illness before January 1, 1995.[190] The remainder of the fund was set aside to support a "class assistance foundation" run by veterans to help class members deal with their medical and other problems.[191] By 1997, all *Agent Orange* settlement funds had been disbursed.

The district court entered a judgment dismissing all the claims of every plaintiff constituting the Rule 23(b)(3) class on the merits and

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183. *Id.*

184. *Id.*

185. *In re* "Agent Orange," 597 F. Supp. 740, 757 (E.D.N.Y. 1984).

186. *Id.* at 746-858. This was pursuant to Rule 23(e) as it existed in 1984-85. *Id.*

187. *In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1296 (E.D.N.Y. 1985), *aff'd in relevant part*, 818 F.2d 112 (2d Cir. 1987).

188. Mullenix, *supra* note 128, at 276.

189. *Id.*

190. *In re* "Agent Orange," 611 F. Supp. at 1410-12.

191. *Id.* at 1432.

with prejudice.[192] The order provided that class members were "forever barred from instituting or maintaining any action against any of the defendants" relating to the subject matter of the complaints.[193]

Objecting class members brought a direct appeal from final approval of the *Agent Orange* class settlement.[194] The objectors again contended that the class should not have been certified because class representation was inadequate.[195] The objectors argued that the injured class representatives had failed to protect the interests of veterans who would manifest injury after 1995, when the settlement fund would be depleted.[196] The Second Circuit considered this and other contentions and upheld the settlement.[197]

In 1989 and 1990, individual veterans brought two new class actions against the Agent Orange manufacturers alleging that they had suffered injuries caused by Agent Orange that did not manifest or were not discovered until after May 7, 1984, the *Agent Orange* settlement date.[198] Judge Weinstein dismissed these cases, holding that the claims were precluded by the *Agent Orange* settlement.[199] The Second Circuit affirmed Judge Weinstein's dismissal, concluding that class members who became ill after the settlement was reached were barred from pursuing individual claims against the Agent Orange manufacturers.[200]

The rejection of these claims and the preclusive effect of the *Agent Orange* settlement set the stage for a revisitation of the same panoply of issues in the *Stephenson* and *Issacson* cases. Five years after two Vietnam veterans were precluded from pursuing their claims, Stephenson and Issacson came forward once again to challenge the fairness and legitimacy of a class action settlement that was negotiated and finalized years ago.[201]

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192. *Ryan v. Dow Chem. Co.*, 618 F. Supp. 623, 624 (E.D.N.Y. 1985).

193. *Id.*

194. *In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 164 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

195. *Id.*

196. *Id.*

197. *Id.* at 167.

198. Ryan v. Dow Chem. Co., 781 F. Supp 902, 912 (E.D.N.Y. 1991).

199. *Id.* at 918-919.

200. Ivy v. Diamond Shamrock Chems. Co. (*In re* "Agent Orange" Prod. Liab. Litig.), 996 F.2d 1425, 1439 (2d Cir. 1993).

201. Mullenix, *supra* note 128, at 276.

C. *Analysis of the Collateral Attack Problem in the* Agent Orange *Appeal*

The Supreme Court appeal in the continuing *Agent Orange* litigation raised fundamental questions about the res judicata effects of class action judgments measured against the due process rights of absent class members. The Court was to have considered two different categories of due process claims: one set of due process claims by the Agent Orange manufacturers and a completely different set by the objecting Vietnam veterans. The Court had the opportunity to weigh the competing interests of the preclusion theory against the due process rights of absent class members to a fair adjudication of their rights.

The petitioners, the Agent Orange manufacturers, essentially asked the Supreme Court to uphold the sanctity of a bargain they and the plaintiffs had negotiated more than fifteen years earlier.[202] The Agent Orange manufacturers argued that the parties aggressively and fairly negotiated the settlement and that it had been subjected to judicial scrutiny several times over.[203] Furthermore, the manufacturers argued that the parties and objectors challenged the adequacy of the class representation several times, and in every instance the trial and appellate courts considered these arguments but nonetheless had approved and upheld the settlement.[204]

The manufacturers argued that, in light of this careful history, the Supreme Court should uphold the fundamental principle that there must be an end to litigation.[205] Therefore, the manufacturers claimed, the Court should give preclusive effect to the final *Agent Orange* judgment that dismissed any and all subsequent claims against the manufacturers. In making this argument, the Agent Orange manufacturers relied on a well-established line of cases dealing with the binding nature and finality of judgments.[206]

In addition, the manufacturers argued that absent class members should have been precluded from collaterally attacking on the grounds of inadequate representation a class action settlement that trial and appellate courts had previously approved.[207] If the Court approved such collateral attack, the manufacturers argued,

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202. *Id.*, at 277.

203. *Id.*

204. *Id.*

205. *Id.*

206. *See* Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394 (1981); Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

207. Mullenix, *supra* note 128, at 277.

there would be no finality to class action settlements, and every such settlement would be vulnerable to adequacy attacks by disgruntled class and non-class members.[208]

On the other hand, the objecting Vietnam veterans argued that they should not have been barred from bringing their own claims for injuries that manifested only after the class settlement date.[209] They contended that giving preclusive effect to the *Agent Orange* settlement would deny them their due process rights because the future claimants were not adequately represented in the original settlement.[210] They argued that preclusion doctrine should never operate to bar a collateral attack against the adequacy of class representation and that recent federal appellate decisions supported the right to this kind of collateral attack.[211]

On the facts, the Vietnam veterans argued that they were denied all four forms of due process rights that adhere in, and are required by, class action litigation. These fundamental due process rights include the right to notice, the opportunity to opt-out, the opportunity to be heard, and the right to adequate representation. In considering these competing claims of the Agent Orange manufacturers and the Vietnam veterans, the Court had the opportunity to revisit landmark class action decisions in which the Court has articulated the due process basis for class litigation, most notably *Hansberry v. Lee* and *Phillips Petroleum Company v. Shutts*.[212]

In *Hansberry*, the Court set forth basic propositions relating to the binding nature of representative actions.[213] Generally, the Court concluded that persons with conflicting interests who are not adequately represented in a prior action cannot be bound by that prior judgment.[214] The Agent Orange manufacturers sought to have *Hansberry* distinguished on its facts as well as because the case was decided prior to the modern class action rule.[215] The Vietnam veterans, on the other hand, contended the *Hansberry* principles were completely on point with their argument that preclusion doctrine

208. *Id.*

209. *Id.*

210. *Id.* at 277-78.

211. *See* Epstein v. MCA, Inc., 179 F.3d 641 (9th Cir. 1999).

212. *See* Hansberry v. Lee, 311 U.S. 32 (1940); Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

213. *Hansberry*, 311 U.S. at 45-46.

214. *Id.*

215. Mullenix, *supra* note 128, at 278.

should not be applied to persons not adequately represented in the original representative action.[216]

In *Shutts*, the Court recognized that notice, the opportunity to be heard, the opportunity to opt-out, and the presence of adequate representation are the fundamental due process components of class litigation.[217] However, the petitioners and respondents in the *Agent Orange* appeal disagreed as to whether a fair reading of *Shutts* permits collateral attack of a class judgment based on the grounds of a lack of adequate representation.[218] The Agent Orange veterans contended that the *Shutts* decision itself illustrated just such a collateral attack.[219] The Agent Orange manufacturers, in contrast, contended that the absent class members' due process rights should be protected by the initial certifying court and not by collateral review.[220]

The Stephenson and Issacson cases were further complicated by years of intervening and developing class action jurisprudence, most notably the Court's decisions in *Amchem* and *Ortiz*.[221] In both cases, the Court expansively discussed fundamental class action principles, including the requirements for adequate representation, in the context of settlement classes, focusing on the problem of conflicts of interest.[222]

The Agent Orange manufacturers contended that it was illegitimate for the Second Circuit or any other court to retrospectively apply the *Amchem* and *Ortiz* principles to invalidate the previous findings of adequacy in the *Agent Orange* settlement.[223] The Agent Orange veterans, on the other hand, contended that neither *Amchem* nor *Ortiz* announced new or novel propositions of law concerning adequacy. Instead, they argued that the basic principles relating to intraclass conflicts existed at the time of the *Agent Orange* settlement. Under existing adequacy principles at that time, they argued, the courts could not have made a finding of adequate representation when the future *Agent Orange* claimants comprised a part of the settlement class.[224]

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216. *Id.*

217. *Shutts*, 472 U.S. at 811-814.

218. Mullenix, *supra* note 128, at 278.

219. *Id.*

220. *Id.*

221. Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).

222. *Amchem*, 521 U.S. at 625-2; *Ortiz*, 527 U.S. at 856.

223. Mullenix, *supra* note 128, at 278.

224. *Id.*

Furthermore, since the *Agent Orange* settlement, federal appellate courts have considered the permissible scope of collateral attacks against class action settlements.[225] In particular, the Agent Orange manufacturers cited the Ninth Circuit's *Epstein* decision for this proposition: "Due process requires that an absent class member's right to adequate representation be protected by the adoption of the appropriate procedures by the certifying court and by the courts that review its determinations; due process does not require collateral second-guessing of those determinations and that review."[226]

The Agent Orange manufacturers contended that Judge Weinstein did adopt and provide all appropriate procedures to protect the rights of absent class members; the Vietnam veterans contended this fundamentally was not true. The veterans contended that the *Epstein* decision reaffirmed the right of collateral attack for a lack of adequacy and that they received no appropriate procedures protecting their rights.[227]

D. Repercussions of the Court's Nondecision In Agent Orange

The Supreme Court ultimately did not decide the various important issues in the Agent Orange appeal; the Court split evenly, with Justice Stevens recusing himself from the case.[228] In a two-paragraph per curiam decision, the divided Court vacated the Second Circuit's judgment with respect to Issacson's case but affirmed the Second Circuit's judgment with respect to Stephenson's case.[230]

The Court's failure to decide the issues in the *Agent Orange* appeal was not only disappointing, but it also left class action practitioners in the lurch concerning preservation of class action settlements, rendering settlements continuously vulnerable to

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225. Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996); Epstein v. MCA, Inc., 179 F.3d 641 (9th Cir. 1999).

226. *Epstein*, 179 F.3d at 648.

227. Mullenix, *supra* note 128, at 278-79.

228. Dow Chem. Co. v. Stephenson (*In re* Agent Orange Prods. Liab. Litig.), 539 U.S. 111, 112 (2003).

230. *Id.* Issacson's case was vacated and remanded for further consideration in light of the Court's decision in *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28 (2002), because of the means by which the case had been removed to federal court. *Id.* The net result was that the Court effectively upheld Stephenson's right to bring a collateral attack against the *Agent Orange* settlement on the various grounds approved by the Second Circuit.

collateral attack. Fundamentally, the Court had the opportunity to determine the scope and effect of res judicata principles as they apply to class action settlements and the permissible extent to which such settlements may be challenged through subsequent collateral attacks. The Court had before it an interesting and compelling battle of competing fairness concerns.

The *Agent Orange* appeal embodied two countervailing policy concerns, both of which were grounded in due process considerations. The first set of policy concerns undergirds the doctrine of res judicata: namely, that there is finality to judgments. Particularly for class action defendants, both the sanctity of res judicata principles and the binding effect of class action judgments are paramount considerations in negotiating and concluding class litigation.

Defendants desire finality of judgments and an end to litigation; the binding effect of class judgments is a due process protection for both plaintiffs and defendants. Defendants cannot achieve this goal if class action settlements are open-ended and vulnerable to collateral attack many years after courts have approved and implemented a class action settlement. For the Agent Orange manufacturers, fairness compelled an end to this litigation after the *Agent Orange* settlement was negotiated, approved, implemented, and terminated.[231] An array of amicus briefs in support of the petitioners urged the Court to contemplate the sweeping effect that an adverse decision would have on the sanctity of all future class settlements.[232]

On the other hand, the second category of policy concerns centers on the due process rights of absent class members. The essence and utility of class action litigation is that it is representational litigation permitting the aggregation of the hundreds or thousands of similar claims. However, courts have repeatedly stressed that the rights of absent class members to have their claims resolved in a fair manner, of which adequate representation is a fundamental predicate, must not be sacrificed by simply maintaining the efficiency of class litigation.[233]

Under this view, no absent class member should be bound to a judgment in which the class member did not receive notice, did not have an opportunity to be heard or opt-out, or was not adequately represented. For Stephenson and Issacson, fairness compelled that they should not have been bound by the *Agent Orange* settlement or barred from pursuing their tort claims because their injuries

231. Mullenix, *supra* note 128, at 279.

232. *Id.*

233. *Id.*

manifested after the settlement cutoff date in a class action in which they contended their interests were not adequately represented.

E. What the Agent Orange *Appeal Teaches About After-the-Fact Adequacy Determinations*

The *Agent Orange* appeal embodied significant legal issues, but the appeal also teaches useful lessons about the difficulties in reconstructing adequacy determinations years later. Although the settlement defenders repeatedly urged that numerous courts on numerous occasions had reviewed adequacy of representation, what is not known about those determinations is cause for concern.

Just exactly how probing and rigorous were the adequacy determinations? What exactly did the parties proffer in support of the adequacy determinations at every stage of the litigation, and how carefully did the court weigh the evidence? Judge Pratt's initial order certifying the class found adequacy of representation based on facts that included an absence of any named class representative, and the presence of class counsel who subsequently withdrew for managerial and financial reasons.[234]

By the time of the 2002-03 *Agent Orange* appeal, the Supreme Court had an almost twenty-year trail of district court orders and appellate decisions that recited conclusory findings of adequacy.[235] What was missing was any knowledge, understanding, or factual record of how those adequacy inquiries were conducted, what evidence was proffered and challenged, and how probing those inquiries were. Should we be persuaded that adequacy concerns were sufficiently addressed through Judge Weinstein's town meetings with veterans, which was one of the major forums where some veterans raised their concerns about lack of adequate representation for the currently uninjured veterans?

Of course, if one subscribes to the notion that the only factor that matters for the adequacy requirement is a determination whether impermissible conflicts of interest exist, this simplifies the adequacy inquiry radically. On the other hand, if one subscribes to the concept that the adequacy requirement involves a more wide-ranging consideration of factors, as I do, then the way in which litigants and courts typically conduct this inquiry undermines the ability to ascertain meaningful adequacy and thereby insulate settlements from collateral attack. If the judicial system does not require a meaningful

234. *See supra* notes 163-169 and accompanying text.

235. *See supra* Part III.

examination of the adequacy requirement as well as the making of a meaningful record, then future courts often have little to work with other than conclusory, meaningless recitations of adequacy.

V. PRESCRIPTIVE STANDARDS AND IMPLEMENTATION FOR ASSESSING ADEQUACY OF REPRESENTATION: ACTUAL AND NOT PRESUMED ADEQUACY

It follows from the discussion above that in order to assure the sanctity of settlement classes from vulnerability to collateral attack, litigants and the judiciary have to take the adequacy requirement more seriously. This involves more meaningful involvement of the class representatives, more rigorous judicial scrutiny of proffered class counsel and class representatives, and more effort on the part of everyone involved in class action litigation.

To begin, courts need to assess the adequacy requirement at the outset of the litigation (at the front end) and not during the development of the litigation or at the time of settlement (the back end). This conclusion is impelled by the notion that absent class members must be protected from the very outset of the litigation and not at any later point.[236] An early and meaningful determination of adequacy is necessary because by the time "adequate" class counsel or "adequate" class representatives are interjected into the proceedings, it may too late to protect the interests of absent class members. Having a determination of adequate class representation from the outset protects against the problem of "closing the barn door after the horse has bolted."

Second, courts need to abandon the hopelessly outdated and inapplicable *Surowitz* paradigm for evaluating the adequacy of the class representative.[237] Mrs. Surowitz and her son-in-law Mr. Brilliant should be banished to the quaint, less-litigious era from which they surfaced.[238] The ghost of Mrs. Surowitz should no longer be permitted to provide the baseline measure of adequacy. In the modern age of settlement classes, courts need to move beyond the view that treats class representatives as "standing" ciphers or potted plants. Similarly, courts should eschew presumptive findings of adequacy, as they often do with regard to the adequacy of class

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236. *See Ortiz*, 527 U.S. at 858 ("Rule 23 requires protections under subdivisions (a) and (b) against inequity and potential inequity at the precertification stage, quite independently of the required determination at postcertification fairness review under subdivision (e) that any settlement is fair in an overriding sense.").

237. *See supra* notes -99 and accompanying text.

238. *Id.*

counsel, and in most jurisdictions, with regard to the class representatives. No one should get a free pass on the adequacy requirement.

Third, courts need to abandon their standard rote and conclusory recitations of findings of adequacy[239] and articulate meaningful standards for the assessment of this requirement. These standards need actaully to relate to a fundamental understanding of what adequate class counsel and class representatives should be and how these representatives should conduct themselves. Adequacy standards need to be tied to their due process underpinnings and to due process concerns of representational litigation. Thus, courts need to go beyond the simple inquiry of whether conflicts of interest exist, either as between counsel and the absent class members or as between the representatives and the absent class members.

Fourth, because so much of the adequacy jurisprudence focuses on the single factor of conflicts of interest, courts need to develop more consistent jurisprudence concerning conflicts of interest that serve to disable a proposed class counsel or class representative from representing the class. The decisional law relating to conflicts of interest is muddied at best and inconsistent at worst. The decisional law is unclear as to whether litigants must demonstrate an actual or potential conflict of interest.[240] In addition, existing doctrinal law is entirely unhelpful in assisting litigants or the court in identifying and understanding when a disabling conflict of interest is present, apart from egregious examples such as the conflict embodied in *Amchem*.[241]

Fifth, courts need to engage in meaningful measures to implement these adequacy standards. As discussed below, this effort involves more than cursory review of pro-offered, self-serving statements of adequacy (on the part of class counsel and class representatives). Courts need to probe beyond patently-coached class representatives who recite four-minute scripts in which they testify to their own desire to vigorously represent the class and their personal freedom from conflicts of interest without any understanding of the script. Courts need to change the ways in which they consider adequacy, and they need to do so at the outset of the litigation. Courts should be required to develop a factual, evidentiary record on the adequacy requirement and to make findings of fact and conclusions of law based on those facts. Finally, the practice of plaintiff-drafted class

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239. *See supra* Parts II, III.

240. *See* FED. R. CIV. P. R. 23(g) advisory committee's note to 2003 amendments (suggesting that potential conflicts of interest count as a disabling factor in assessing appointment of class counsel).

241. Amchem Prods., Inc. v. Windsor, 521 U.S. 625-28 (1997); *see also supra* Part III.A.

certification orders that recite conclusory findings of adequacy that simply repeat Rule 23(a)(4)[242] similarly should be banished.

A. *Standards for Evaluating Adequacy of Class Representation*

1. Adequacy of Class Counsel

As indicated above, judicial assessment of the adequacy of class counsel almost always has consisted of a *pro forma*, cursory blessing by the court as to whoever appeared in court as counsel of record.[243] Prior to the 2003 amendments to Rule 23, judicial "scrutiny" of class counsel was intertwined with the court's assessment of the Rule 23(a)(4) threshold requirements. As stated previously, judicial decisions essentially set forth three chief criteria for evaluating attorney adequacy: (1) experience, (2) resources, and (3) conflicts of interest.[244] Moreover, courts to date have rarely, if ever, found counsel not adequate to represent the class, either due to an abundance of professional courtesy or lack of serious regard for the inquiry.[245]

While the adequacy requirement for class counsel remains incorporated in Rule 23(a)(4), assessment of proposed class counsel is now subject to new criteria set forth in Rule 23(g).[246] In addition to

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242. *See supra* Part II.B.3.

243. *See supra* note 59 and accompanying text.

244. *Id.*

245. *Id.*

246. FED. R. CIV. P. 23(g). The Rule provides:

(1) Appointing Class Counsel.

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) *must consider*:

• the work counsel has done in identifying or investigating potential claims in the action,

• counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,

• counsel's knowledge of the applicable law, and

• the resources counsel will commit to representing the class;

(ii) *may consider* any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

setting forth the fundamental proposition that an attorney appointed to serve as class counsel "must fairly and adequately represent the interests of the class,"[247] the new provision also lists four criteria that courts must consider for assessing the adequacy of proposed class counsel.[248] These include two of the three criteria historically recognized in class action jurisprudence: experience and resources.[249] In addition, courts must consider "the work counsel has done in identifying and investigating potential claims in the action," as well as the counsel's knowledge of the applicable law.[250] Notably absent from this list is any inquiry into potential or actual conflicts of interest.[251]

The new Rule 23(g), however, seemingly vests judges with broad, wide-ranging authority to force proposed class counsel to answer any inquiries that the court might have relating to appointment as class counsel. In the broadest conferral of a judge's authority to inquire into matters relating to class counsel appointment, new Rule 23(g) also permits, but does not require, courts to consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class."[252] Further expanding the scope of the judge's authority, Rule 23(g) permits the court to "direct" potential class counsel to provide any information on any subject pertinent to the appointment.[253] Finally, new Rule 23(g) also permits the court to direct potential class counsel to offer to the court proposed terms for attorney fees and nontaxable costs.[254] In applying Rule 23(g), the Advisory Committee Note indicates that in evaluating prospective class counsel, the court should "weigh all pertinent factors."[255]

Id. (emphasis added).

247. FED. R. CIV. P. 23(g)(1)(B).

248. FED. R. CIV. P. 23(g)(1)(C)(i).

249. *Id.*

250. *Id.*

251. The Advisory Committee Note, rather than the rule provision, makes reference to the obligation of class counsel to represent the interests of all class members, as opposed to the potentially conflicting interests of individual class members. FED. R. CIV. P. 23(g) advisory committee's note. Although the Note makes reference to potentially conflicting interests among class members, the Note does not discuss the parallel problem of potential or actual conflicts of interests as between class counsel and class members.

252. FED. R. CIV. P. 23(g)(1)(C)(ii). The Advisory Committee Note to this provision does not provide many examples of the type of additional information the court might seek, but it does indicate that it might include any agreements concerning the prospective award of attorney fees or the existence and conduct of parallel litigation. FED. R. CIV. P. 23(g) advisory committee's note.

253. FED. R. CIV. P. 23(g)(1)(C)(iii).

254. FED. R. CIV. P. 23(g)(1)(C)(iv).

255. FED. R. CIV. P. 23(g) advisory committee's note.

The Rule 23(g) codification of standards for the appointment of counsel is a tremendous improvement over the patchwork quilt of standards in pre-existing case law. Subdivision (g) now provides a laundry checklist of both required and permissive factors that a court may take into account when assessing the qualifications of class counsel.[256] The inclusion of broad authority to inquire into any matters pertinent to the appointment gives judges a rule-based text from which to conduct a meaningful determination of the adequacy of class counsel.

Rule 23(g) is a vast improvement over the inchoate universe of pre-existing case law, but the Rule 23(g) provisions for appointment of class counsel are not without their own set of potential problems. Rule 23(g)(2) now permits a court to designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.[257] The rule itself does not specify the time period after a class action is filed in which the court is to determine and appoint class counsel,[259] although amended Rule 23(c) indicates that a court order certifying a class must appoint class counsel under Rule 23(g).[260]

The Advisory Committee promulgated this provision in recognition of the situation that multiple attorneys might apply for appointment as class counsel. In order for competing class counsel to conduct initial discovery and develop their applications for appointment, the rule now permits courts to appoint interim counsel while these activities are being conducted.[261] The Advisory Committee Note cautions that the interim counsel, who presumably is not subject to a full-blown adequacy inquiry (or any adequacy inquiry at all), is obligated during this period to act in the best interests of the class.[262]

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256. FED. R. CIV. P. 23(g)(1)(C).

257. FED. R. CIV. P. 23(g)(2)(A).

259. The newly promulgated standard for timing of the class certification decision is "at an early practicable time." FED. R. CIV. P. 23(c)(1)(A).

260. FED. R. CIV. P. 23(c)(1)(B).

261. FED. R. CIV. P. 23(g)(2)(A).

262. *See* FED. R. CIV. P. 23(g) advisory committee's note, which states:

> Rule 23(g)(2)(A) authorizes the court to designate interim counsel to act on behalf of the putative class before the certification decision is made. Failure to make the formal designation does not prevent the attorney who filed the action from proceeding in it. Whether or not formally designated interim counsel, an attorney who acts on behalf of the class before certification must act in the best interests of the class as a whole. For example, an attorney who negotiates a pre-certification settlement must seek a settlement that is fair, reasonable, and adequate for the class.

Notwithstanding the Advisory Note's cautionary warning regarding interim class counsel, the specter of some attorney or group of attorneys developing class litigation without prior juridical scrutiny while a final determination of appointment of counsel is pending raises some cause for concern. Although the Advisory Note counsels that interim counsel have duties to the class, who will be guarding the guardians during this period?

2. Adequacy of the Class Representative

While the 2003 amendments to Rule 23 are a significant advance in providing standards for appointment of class counsel and assuring adequacy, Rule 23 does not anywhere discuss standards for assessing the adequacy of the class representative. Hence, Rule 23 currently seems to lend at least tacit endorsement to the proposition that class representatives are not all that important. This dichotomy between the relative centrality and importance of class counsel and the class representative now has been given additional support by the Rule's fulsome consideration of class counsel standards,[263] and corresponding silence with regard to the class representatives.

Someone needs to resolve the debate concerning the significance and role of class representatives and to choose between the potted-plant theory and active-fiduciary theory. Because the majority of courts currently hew to the potted-plant theory, this contributes to laziness with, inattention to, and disregard of the class representatives. On the other hand, those courts that subscribe to the fiduciary theory have provided a large array of possible pertinent factors that have bearing on the adequacy assessment.[264]

As I have argued, I subscribe to the fiduciary theory of the class representative because it comports with the due process understanding of class action litigation as representational litigation. In light of this belief, perhaps the rulemakers, on the next cycle of Rule 23 amendments,[265] ought to seriously consider enhancing Rule 23

263. FED. R. CIV. P. 23(g)(1)(C).

264. *See supra* notes 75-86.

265. After twelve continuous years of amending Rule 23, one ventures this suggestion to the Advisory Committee hesitantly. I also am not an advocate either of lengthy rules or rules with lists of factors. However, the Advisory Committee now has gone down that path with Rule 23(g). Moreover, standards relating to the adequacy of class representatives cry out for some uniform treatment across federal courts, which is unlikely to occur in absence of a rule.

with a set of factors for courts to consider in evaluating the adequacy of class representatives.[266]

This task should not be difficult to accomplish. The exercise parallels the Advisory Committee's codification of standards for appointment of counsel, and those standards are largely drawn from pre-existing decisional law. Because a parallel and substantial body of case law articulates standards for assessing the adequacy of class representatives, there is good reason to assume that the Advisory Committee is highly capable of similarly codifying these principles as well. Moreover, such a rule amendment will provide a rule basis for litigants and courts to evaluate adequacy of class representatives and will assist in ending the disarray and disagreement across the federal courts as to what counts in ascertaining class representative adequacy.

If, on the other hand, the Advisory Committee on Civil Rules were to conclude that the only relevant consideration for determining the adequacy of class representatives is an impermissible conflict of interest, the adequacy determination would still be assisted if Rule 23 or the Advisory Committee Note so indicated.

B. Implementation of the Standards for Assessing Adequacy of Class Representation

Brevity is certainly possible when outlining recommendations for implementation of a meaningful adequacy standard in the class certification process. Essentially, these suggestions simply may be distilled: everyone needs to take the adequacy requirement seriously and everyone needs actually to perform his or her own job.

1. Class Counsel – Implementing Adequacy

First, class counsel need to take the adequacy of the class representative seriously and to take all measures to ensure an adequate class representative's presence in the class. At the outset, this entails refraining from solicitation of class clients. This further means discussing with an existing client the possibility of pursuing a class action, the nature and function of the class action, and the class representative's role in the litigation. Class representatives should *knowingly consent* to undertaking the role of fiduciary for the class. The plaintiff's law firm Lief, Cabraser engages in a comparable

266. Based on my experience of listening to Advisory Committee discussions and debates over the years, it is my impression that judges prefer rules with standards and guidance for their decisionmaking.

exercise, requiring its class representatives to sign a multiple-page document that discusses both the concept of the class action and the class representative's role. This is a laudable project.

Class representatives should actively be involved in the development and progress of the litigation. This means that counsel should furnish class representatives pleadings, motions and papers in the action as they are generated and before counsel files documents with the court or opposing counsel. Counsel should involve the class representatives in decisionmaking regarding the class action and should educate the class representatives as to the nature of the claims that are pleaded, possible defenses to the claims, and the damages aspects of the litigation. Class representatives do not need to be experts in the law, but they do need to have a layperson's understanding of the litigation that is sufficient to exercise independent control over the attorneys and to enable them to act in the best interest of the entire class.

Counsel need to prepare and make the class representative available for deposition, trial, and even settlement conferences. Needless to say, class representatives need to be informed about ongoing settlement negotiations and the nature and content of possible settlement agreements.

In short, class counsel should take all steps to demonstrate both to the defendants and to the court that the class representative is acting as an independent fiduciary and that he or she has not ceded control of the litigation to the attorneys. Not only do these activities comport with a due process understanding of the class action, but they also are in the plaintiff's counsel's interest insofar as they will insulate the class representatives from challenges as to adequacy.

Regarding class counsel's adequacy, class counsel should properly and completely recite their own ability to serve as class counsel. With Rule 23(g) now in effect, it remains to be seen how courts will implement the new requirements. In making applications for position as class counsel, attorneys should ensure their proffer contains full and complete disclosure of all supporting evidence of competency, experience, resources, and conflicts. Class counsel should be forthcoming with such disclosures rather than obstructionist, and they should be responsive to all requests for information, clarification, and problem solving asked for by the parties or the court.

2. Defense Counsel – Implementing Adequacy

Defense counsel have a somewhat complicated position regarding the adequacy requirement for class certification. If class counsel seek certification of a litigation class, then defense counsel typically will seek to challenge the representatives' adequacy. In such situations, defense counsel have little interest in curing adequacy defects; inadequate class counsel or class representatives form a basis for denial of class certification or reversal on appeal. In other situations, defense counsel may actually desire adequacy-challenged counsel or representatives in order to secure an advantageous negotiation and bargaining position.[268] Furthermore, defense counsel may desire and approve certain actions by class counsel, such as successive repleading of the class complaint to eliminate segments of the class or class claims that might reflect negatively on class counsel's adequacy of representation (but redound to the defendant's advantage).

In the context of settlement classes, defendants have a congruent interest with plaintiffs and the court in ensuring adequacy of class representation. The problem, however, is that until the parties enter into settlement negotiations, defense counsel have little incentive or opportunity to assist in ensuring adequate representation by class representatives. It is not defense counsel's duty to furnish class representatives with pleadings and other papers or to educate continuously class representatives about ongoing litigation.

Defense attorneys can assist in ensuring adequacy of representation by class counsel throughout the settlement negotiation and consummation process. This requires defense counsel to refrain from suggesting or participating in collusive or ethically-challenged deals, self-serving settlements, or settlements that compromise the interests of segments of the class. Defense counsel equally need to be sensitive to conflicts of interest and should negotiate settlements in good faith without compromising the interests of one segment of a class to the detriment of another segment of the class.

3. The Judiciary – Implementing Adequacy

The judiciary can assist in implementing a robust adequacy standard through a few simple measures that are not unduly burdensome and would not overtax even the most resource-strapped state judge. This requires a serious belief in the adequacy

268. *See* Macey & Miller, *supra* note 19, at 63-66.

requirement, an understanding of the due process nature of the requirement, an understanding of its importance in protecting the interests of absent class members, and a consequent commitment to a rigorous examination of adequacy concerns.

Judges should be encouraged to refrain from certifying class actions on paper records or on legal argument from counsel. Either practice is insufficient to permit meaningful examination and discussion of adequacy issues. Surely, attentive listening does not require a vast expenditure of judicial resources. Instead, judges at least should permit, and likely should require, live testimony from proffered class representatives. Such testimony will enable judges to assess better the class representative's knowledge and understanding of class claims, as well as the representative's understanding of his or her role as a fiduciary. Such testimony enables the court to better assess the extent to which the class representatives can carry out their roles as independent protectors of absent class members or the extent to which the class representatives have ceded control of the litigation to class counsel. As is well known, class certification hearings are not subject to the ordinary rules of evidence. There is no reason why a judge should not question actively proffered class representatives in addition to questions from counsel. In this regard, judges should probe beyond coached recitations by class representatives concerning their allegiance to the class. Again, these simple measures should not impose burdens on judges.

Courts should entertain defense cross-examination of class representatives in a meaningful and attentive fashion, and they should not dismiss such inquiries out of hand. Courts should permit defense counsel to make full record of adequacy issues and, if cross-examination reveals problems relating to adequacy, then courts should not certify reflexively such class representatives without further inquiry. Permitting defense attorneys to make a sufficient record of adequacy issues also imposes no additional burdens on judicial officers.

With regard to adequacy of class counsel, courts should implement Rule 23(g) seriously and meaningfully and probe beyond self-serving affidavits in support of appointment as class counsel. Judges should inquire into the nature of class counsel's experience, resources, and other pertinent information. Judges need not conduct independent inquiries, but a probing examination of credentials will serve to ascertain true class identity.

Courts should issue class certification orders that include findings on the adequacy issue and that do not merely recite the language of Rule 24(a)(4). To this end, courts should be encouraged to

cease the practice of requesting plaintiff-drafted certification orders that result in conclusory findings of adequacy.[269] This recommendation does require judicial time and effort; considering the stakes involved and the due process basis, class claimants desire no less judicial energy to ensure fair and adequate representation.

VI. CONCLUSION

The phenomenon of "under the radar" litigation exacerbates all the problems relating to current and future settlement classes. It is well known that much of what occurs in the class action arena is conducted under the radar. That is, many class action suits involve ongoing litigation in which events and outcomes never result in reported orders, decisions, or appellate opinions. Moreover, empirical research into class action litigation is notoriously difficult to conduct, and when such research is attempted, the results may be limited in scope and application.[271]

Consequently, we lack significant information about the true incidence of class action filings, disposition of motions, class certification orders, dismissals, settlements, or compromises. The universe of reported case law provides only a partial insight into class action litigation; the working hypothesis is that reported cases are the proverbial tip of the iceberg.

In addition, analysis and discussion of class action litigation obsessively focuses on federal class actions, slighting any analysis of state class action litigation. This is a tremendous oversight; a substantial number of states have high volumes of class action litigation, which is apparent simply by the number of reported decisions.[272] Similar to the federal phenomenon, however, much of

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269. *See supra* Part II.B.3.

271. *See, e.g.*, DEBORAH R. HENSLER ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN (1999); THOMAS E. WILLGING ET AL., FEDERAL JUDICIAL CENTER, AN EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES (1996), *at* http://classaction.findlaw.com/research/fjcca4.pdf.

272. *See* LINDA S. MULLENIX, STATE CLASS ACTIONS: PRACTICE AND PROCEDURE (2000); SECTION OF LITIGATION, AMERICAN BAR ASSOCIATION, SURVEY OF STATE CLASS ACTION LAW: A REPORT OF THE STATE LAWS SUBCOMMITTEE OF THE CLASS ACTIONS AND DERIVATIVE SUITS COMMITTEE (Thomas R. Grande ed., 2003).

what happens in state class action litigation is also accomplished under the radar and never results in reported decisions.

If both federal and state class action litigation is largely under-reported, then we can only piece together a quilt of anecdotal information about the true conduct of class litigation that occurs under the radar. Further, if reported decisions suggest that attention to adequacy issues is inadequate as evidenced through the decisions' certification orders, then we should be especially concerned in the common situation where no reported decisions exist to subject judicial activity to transparency.

The problem with the adequacy determination is that historically neither courts nor litigants have taken the adequacy requirement very seriously, and this in turn has inspired rote incantations of conclusory or presumptive assertions of adequacy.[273] Adequacy has been a kind of free-rider on the freight train barreling towards class certification or approval of the settlement class. None of the actors in the system has a particular incentive to dwell on adequacy concerns at the outset of the litigation, during development of the lawsuit, or especially when the parties have converged on an agreed settlement. In sum, no actor has a vested interest in adequacy until it becomes an issue, and this is usually too late. Similar to the problem of being partially pregnant, it is difficult to construct adequacy after-the-fact.

To assure that settlement classes in the future are both viable and enduring, all actors involved with class litigation need to assert more effort in ensuring actual, and not presumed, compliance with the rule, especially with regard to the adequacy of representation requirement. The historically prevailing ethos that the adequacy determination somehow is not all that important, coupled with ritual obeisance that it is, needs reformation.

The effort to ensure meaningful adequacy at the front end of class action litigation is in the interests of all actors in the class action arena. Assuring meaningful adequacy at the front end of class action litigation enables and secures the common goal of all: a fair and reasonable settlement class that is capable of withstanding collateral attack. Furthermore, ensuring meaningful adequacy at the front end of class action litigation should avoid and eliminate precisely the type of collateral attack involved in the *Agent Orange* class settlement, one that occurred twenty years after consummation of the deal.[274]

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273. *See supra* notes 59, 70-73 and accompanying text.

274. *See* Dow Chem. Co. v. Stephenson (*In re* Agent Orange Prods. Liab. Litig.), 539 U.S. 111, 111 (2003).