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Adequacy of Representation' in Time (Or  
Why the Result in Stephenson is Correct)

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# Adequacy of Representation' in Time (Or Why the Result in Stephenson is Correct)

David A. Dana

## **Abstract**

This essay sketches a Rawlsian defense of allowing subsequent challenges to class action settlements, as in the Stephenson agent orange case and the Homeside Bank Boston case. My normative claim is that the Rawlsian original position is a helpful way of thinking about what a fair distribution among class members entails that is, we should ask whether a settlement conceivably could have been agreed to by class members standing behind a veil of ignorance as to what their particular position or place within the class would be beyond the veil. Subsequent challenges to settlements should be permitted where no reasonable class member standing behind the veil of ignorance, employing maximum decisionmaking, would have consented to the settlement. I also argue that proposed reforms in the manner by which judges approve class action settlements, while perhaps sensible, will not eliminate the problem of inadequate representation, and that the availability of such subsequent challenges based on inadequacy of representation will not appreciably reduce the settlement rate in class actions or otherwise destroy the class action as a dispute resolution mechanism.

## “Adequacy of Representation” in Time (Or Why the Result in *Stephenson* is Correct)

David A. Dana, Northwestern University School of Law

Judges, of course, must certify class actions for the class actions to proceed, and must approve class settlements for those any class settlements to have legal effect. Judges may or may not make explicit findings regarding the adequacy of representation class members received, but even where there are no explicit findings, judicial certification of a class and approval of a class settlement arguably implies a finding of adequacy of representation. Why then should class members ever be able to challenge the settlement in subsequent actions? Why shouldn't they be bound to the settlement if a court explicitly, or even just implicitly, has held that they were adequately represented in the process that produced the settlement?

To answer that question, we must first unpack the concept of “adequate representation.” Adequacy of representation in the class context cannot mean what it means in non-class litigation – that the lawyer faithfully attend to the client's interest, advise the client of the various options available to her, and give her the opportunity to make the ultimate decisions about whether to accept or reject a settlement offer. In the non-class-action litigation context, the client is actually present, or at least could be if she so chooses. It seems reasonable, therefore, that the law hold her to the choices she made even if those choices result in different consequences than those that she anticipated.<sup>1</sup> In the class action context, the client – the class members or at least almost all of them – are not present; indeed, many class members are never aware of even the existence of the class litigation to which they are, in theory, a party. They are represented only virtually, by means of class representatives. And since class representatives are

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<sup>1</sup> One can certainly question how present non-class-action clients actually are in some litigation settings. But, at least compared to class members, and most dramatically class members in “futures” classes, the ordinary plaintiff is more capable of meaningful participation in litigation decisionmaking. At the least, the non-class action client, unlike the class action client, must take some volitional action in the litigation – namely, contract to hire his or her lawyer.

almost always nominal actors,<sup>2</sup> the absent class members are in truth represented only by class counsel, acting, typically, with minimal or no real client input.

Under such circumstances it is ludicrous to tell a class member that, because she somehow “agreed” by means of virtual representation to a settlement of which she may well have been entirely unaware, she must accept little or no or even negative compensation as the dispositive relief for an otherwise cognizable legal wrong to her. To state the point slightly differently: because class members do not hire counsel, because they are absent from the litigation, because they often do not receive even meaningful notice of proposed settlements, and because they do not actually consent to class settlements, it seems fair to hold them to a settlement – and to bar them from later seeking relief notwithstanding a settlement – only if the relief provided to them by the settlement is something that a reasonable person *conceivably* would have accepted, had she been given the choice, in return for ceding for all time her legal claims for redress.

Thus, although the adequacy of representation inquiry certainly entails an examination into the pre-settlement structure of representation and the content of the proceedings, the inquiry also has, or at least should have, something to do with *ex post* substantive outcomes – about what the settlement actually delivers in the way of relief to individual class members. Even if (and its a big if, as I discuss below) a court takes a very hard look at the proposed settlement to try to discern which kinds of class members will get what from the settlement, it may be impossible for the court to discern this information at the time the

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<sup>2</sup> Professor Mullenix argues that class representatives could be a more meaningful source of class member representation if class counsel took more care in the selection process, see [Symposium Contribution], but I am doubtful of this claim. Meaningful participation in class litigation is simply too time-consuming and otherwise costly to be worth the effort for class representatives in class actions involving small individual stakes, and in all class actions there are bound to be issues of typicality – that is, the representatives’ position and interests and tastes are not the same as that of other class members.

approval decision must be made. Adequacy or inadequacy of representation, as a practical matter, sometimes unfolds only over time.

From this perspective, the perspective that adequacy of representation in a class action must mean at least that a rational person could have agreed to accept the relief at issue in return for ceding her legal claims, the Second Circuit's holding in *Dow Chemical v. Stephenson*<sup>3</sup> and the Vermont Supreme Court's decision in *State of Vermont v. Homeside Lending*<sup>4</sup> seem unremarkable, even obviously correct. In *Homeside*, the Vermont Supreme Court held that bank boston customers whose accounts were *reduced* as a result of a class action settlement with the bank had not been adequately represented, and hence could bring a subsequent challenge.<sup>5</sup> In *Stephenson*, the Second Circuit held that veterans exposed to agent orange who became ill more than ten years after the 1984 settlement date,<sup>6</sup> but received no cash payments from the settlement fund,<sup>7</sup> had not been adequately represented, and hence were not barred from bringing a subsequent challenge.<sup>8</sup> It is unreasonable to suppose that class members actually would have agreed to settlement that did nothing but financially penalize them (as in *Homeside*), or that provided them no relief whatever (as in *Stephenson*).

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3 273 F.3d 249., aff'd without opinion (by a 4-4 vote), 123 S.Ct. 2161 (2003).

4 826 A.2d 997 (Vt. 2003).

5 Id. at 1016-17.

6 The class definition in the agent orange litigation was extremely broad, including all exposed military personnel whose exposure occurred between 1961 and 1972, and spouses, parents, and children of the exposed persons who were born before January 1, 1984 and who might suffer derivative injury. 273 F.3d at 252. Thus, read literally, the settlement would treat as a class member a baby born with agent orange-related birth defects on December 31, 1983, even if the effects did not become manifest until after December 31, 1994.

7 The 1984 settlement provided for Dow to pay \$180 million into a settlement fund. Three-quarters of the he money was dedicated to for cash payments to class members who became ill before 1995. Most of the rest ( it is hard to pin down exactly how much) was dedicated to the creation of a medical foundation. Brief for the Petitioners, *Dow v. Stephenson*, 2002 US. Briefs 271, at 9. Nothing in the opinions in the *Stephenson* litigation or the briefs filed in the Supreme Court documents point to any concrete benefits provided by the medical foundation to veterans who became ill after December 31, 1994. Indeed, as far as I know, there I no evidence of concrete benefits provided by the foundation to any class members. Perhaps one could argue that, in 1984, it would have been reasonable to suppose that the foundation would produce concrete, and substantial, benefits for veterans who would become ill after 1994. But I see no support for that view in any of the court filings or opinions.

8. 273 F.3d at 260-61.

Yet the holdings in *Stephenson* and *Homeside*, allowing subsequent challenges, are far from uncontroversial. The Vermont Supreme Court's decision was several years in the making, which suggests that that court regarded the case as difficult. For its part, the Seventh Circuit affirmed a federal district court's dismissal of a subsequent challenge to the bank Boston settlement that had been filed in the Northern District of Illinois before the Vermont state attorney general proceeded with its action in Vermont.<sup>9</sup> And, of course, the Supreme Court in *Stephenson* affirmed the Second Circuit only by a 4 to 4 vote; if Justice Stevens had participated in the decision, *Stephenson* may well have been overruled.

My normative claim is that a rule allowing challenges to settlements that no reasonable class member could have accepted comports with our basic intuitions of fairness and justice; that reforms in the manner by which judges approve class action settlements, while perhaps sensible, will not eliminate the problem of inadequate representation; and that the availability of such subsequent challenges based on inadequacy of representation will not appreciably reduce the settlement rate in class actions or otherwise destroy the class action as a dispute resolution mechanism. To Professor Kahan and Silberman's call for the courts to "Do It Right But Do It Once,"<sup>10</sup> I respond "Try To Do It Right The First Time But If Need Be, Try Again."

#### **A. A (Loose) Rawlsian Approach to Class Actions**

In *A Theory of Justice*<sup>11</sup> and *Justice as Fairness*,<sup>12</sup> Rawls developed a conception of justice – and the just distribution of entitlements within society – by means of resort to a

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<sup>9</sup> Kamilewicz v. Bank Boston Corp., 92 F3d 506 (7<sup>th</sup> Cir. 1996), rehearing en banc denied, 100 F.2d 1348 (7<sup>th</sup> Cir. 1996).

<sup>10</sup> Marcel Kahan & Linda Silberman, the Proper Role for Collateral Attack in Class Actions: A Reply to Allen, Miller, and Morrison, 73 NYU L REV 1193, 1999 (1998).

<sup>11</sup> John Rawls, *A Theory of Justice* (Cambridge, MA Harvard U. Press 1971).

<sup>12</sup> *Justice as Fairness: A Restatement* (Cambridge, MA Harvard U. Press 2001),

hypothetical reality, “the original position.” In the original position, people do not know what their particular characteristics in society will be –their family background, their class, their race, and so on.<sup>13</sup> They also do not have enough information to assess the probabilities of who they might be<sup>14</sup>; for example, they lack any way of knowing whether there is a 1% or 20% chance they will be born with a disability. As Rawls notes, the people in the original position, therefore, must make decisions under “uncertainty” in the sense economists typically deploy that term.<sup>15</sup>

Rawls argues that people in the original position are likely to employ a maximin principle – a principle that maximizes their welfare in the event they should be born into the lowest, most disadvantaged rung in the social hierarchy. In Rawls’ language, the maximin rule “tells us to identify the worst outcome of each available alternative and then to adopt the alternative whose worst outcome is better than the worst outcome of all the other alternatives.”<sup>16</sup> Rawls argues that the maximin principle is consistent with risk neutrality<sup>17</sup>, but one could argue (and some have) that the principle attributes a degree of risk aversion to human beings.

The class action settlement can be conceptualized as presenting a problem of distributive justice among a society of class members and counsel, akin to the broader question of societal distributive justice that Rawls is addressing, and hence suitable for original position/veil of ignorance analysis. The class members and their lawyers must distribute class settlement wealth among themselves. Consent would seem to be the best, and perhaps only

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<sup>13</sup> Justice as Fairness, at 15 (“In the original position, the parties are not allowed to know the social positions or the particular comprehensive doctrines of the persons they represent. They also do not know persons’ race and ethnic group, sex, and various native endowments . . .”).

<sup>14</sup> Justice as Fairness, at 98 (“Since the maxim in rule takes no account of probabilities, that is, of how likely it is that the circumstances obtain for their respective worst outcomes to be realized, the first condition [of decisionmaking behind the veil of ignorance in the original position] is that the parties have no reliable basis for estimating the probabilities of the possible social circumstances that affect the fundamental interests of the persons they represent.”).

<sup>15</sup> Justice as Fairness, at 15-18, 106.

<sup>16</sup> Id. at 96.

<sup>17</sup> Id. at 106-107.

legitimate, means of distributing the wealth, at least if we begin with the liberal conception of each person as fundamentally equal in dignity and autonomy. However, consent, at least actual consent, is unworkable, given the overwhelming transactions costs that would be entailed in reaching agreement. A standard based on what hypothetical agreement would allow – as in the original position exercise – may be the best we can do to obtain a rough sense of the outer limits of what is a fair distribution in the class context.

The notion that individuals are generally risk averse in negotiating hypothetical agreements behind a veil of ignorance -- a notion that, again, may be embedded in the Rawlsian approach, Rawls's assertions to the contrary notwithstanding – is particularly plausible if we posit two things about the people in the original position. First, they believe that individuals in the society beyond the veil could not, as a matter of course, self-insure against risks of losses through personal portfolio diversification. Second, they believe that individuals in the society beyond the veil could not, again as a matter of course, “hedge” risks through the purchase of commercial insurance.<sup>18</sup>

Both of these conditions for risk averse decision-making, it seems to me, would be satisfied by veterans who might become ill from agent orange exposure as they stood behind the hypothetical veil of ignorance at the time of the settlement in 1984. As Rawls emphasizes, people behind the veil “know the general facts about human society,” including “the basis of social organization,” “laws of human psychology,” and indeed “whatever general facts affect the choice . . . .”<sup>19</sup> The veterans behind the veil thus would know that not everyone in the society beyond the veil would be so wealthy as to be able to self-insure against the risk of monetary loss from agent-orange-related disease (although they would not know how wealthy (or not) the

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<sup>18</sup> Cites.

<sup>19</sup> Theory of Justice, at 119.



particular person or persons they represent would be). They also would understand how the commercial insurance markets operate, so they would understand that, once veterans became sick with agent-orange-related disease, they would no longer be able to purchase health and life insurance that might mitigate the economic consequences of the sickness. They also would understand enough about human psychology – about the limits of human beings to seek out, collect and assimilate complicated information, about the tendency of people to avoid thinking about “fuzzy” or highly contested or nonquantifiable risks that might manifest if at all only in the remote future – that they would understand that many veterans who in fact had been exposed to agent orange would not invest the time and resources to learn that they had been exposed and what the exposure might mean for their long-term health and that they had been exposed until it was too late to purchase any additional insurance – that is, until they were ill.

So let us assume, then, that the veterans behind the veil are risk averse, indeed, quite markedly risk averse.. They do not know if they have been exposed to agent orange. They also do not know when, if ever, they would become sick as a result of any exposure. Again, assume “they have no basis for probability calculations.”<sup>20</sup> If class members in the (as it were ) class action original position could not assess the difference in the probability that they would become ill in 1994 and the probability that they would become ill in 1995, would they agree to an arrangement whereby they would receive substantial recovery if they became ill in 1994 but nothing at all if they became ill in 1995? The 1984 settlement cannot be squared with the predicted maximin decisionmaking under a veil of ignorance.

Similarly, the bank boston settlement cannot be squared with the Rawlsian original position approach. Because bank boston customers behind the veil would not know whether the customer(s) they represent would gain or lose money as a result of the settlement at issue in the

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<sup>20</sup> Id. at 134.

bank boston litigation, they would focus, as per the maximin principle, on protecting the customers they represent from the possibility of losing money. They would reject the settlement and demand that every customer gain something by virtue of settlement. It is true that the case for risk-averse decisionmaking in the bank boston case –and other cases involving small sums of money per class member – is weaker than in the agent orange case because self-insurance may be assumed by customers behind the veil to be generally available in the society beyond the veil with respect to very small monetary losses, and in any event risk aversion is generally thought to increase in intensity with the magnitude of the risks.<sup>21</sup> On the other hand, the customers behind the veil also would understand another “law of human psychology” – the endowment effect<sup>22</sup> -- which would lead them to understand that customers who saw their existing accounts reduced by (for example) \$300 would assess that loss as having a greater magnitude than the failure to realize a gain of \$300.

Robert Nagareda, in an important recent article criticizing the result in *Stephenson*, argues that the December 31, 1994 cutoff for monetary relief in the agent orange class settlement was justified because some sort of cutoff – some line – has to be drawn in any arrangement. According to Nagareda, “[t]he essence of any settlement is to . . . draw lines, to create fissures, to make distinctions not already apparent in the litigation . . . .”<sup>23</sup> But class counsel in the agent orange litigation could have settled for relief to be provided for persons who became sick on or before December 31, 1994, but left out of the settlement those who might become sick after December 31, 1994. Under such circumstances, veterans who became sick after 1994 would not have been forced to fight the claim that they had implicitly consented to a settlement that gave

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21 Cites.

22 Cites.

23 Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 321 (2003).

them nothing; they could sue for relief without facing the obstacle of preclusion. Of course, Dow in 1984 might have resisted paying as much for a settlement that left unresolved any claims of people who might become sick after 1994, but such resistance would have been proof that the possibility of veterans becoming ill after 1994 was a realistic one in the mind of the party that arguably had the best (if still radically incomplete) information about agent orange and its effects.

This Rawlsian approach to adequacy of representation might be criticized as so blurry, so open-ended, that it could be used to challenge any distributive arrangement as unjust. But the argument I am making here is that settlements should be subject to challenge to the extent they could not, by any stretch of reasoning, be justified as the hypothetical bargain that class members in an original position would have accepted. Thus, the burden of persuasion, and a substantial burden at that, would be on the party challenging the settlement as based on inadequate representation. The set of class action settlements that would be vulnerable under this approach thus should be relatively small.

Nonetheless, the Rawlsian original position approach, to be sure, does introduce some line-drawing problems – that is, unless we strictly limit the approach to cases where some class members are accorded zero or negative relief. A rule allowing subsequent review only in negative or zero recovery cases, while appealing from an ease-of-administration perspective, has the disadvantage of precluding subsequent challenges even in some problematic cases, e.g., cases involving settlements in which some injured class members receive a great deal of money while others with equally severe injuries receive only a nominal sum, say, \$500 or \$1,000. In the end, there is an unavoidable tradeoff to be made, and a balance to be struck, between considerations of administration and considerations of fairness and hence legitimacy.

Another possible objection to the preceding analysis is that it overstates the extent to which class members are absent, and understates the extent to which class members consent, if only implicitly, to proposed class action settlements.. In some cases at least, class members do receive notice and an opportunity to opt out of class litigation. In such cases, can the class members' decision *not* to opt out be construed as implicit consent to the terms of the settlement, such that there is no need to resort to discussion of hypothetical grants of consent?. In my view, the answer, in general, is no.<sup>24</sup>

For an opt out to qualify as proof of implicit consent to a settlement, the class member would have to receive genuinely comprehensible notice of the existence of the class at a time when the class member could reasonably be expected to understand she falls within the class definition; and genuinely comprehensible notice of the proposed settlement, including sufficient information for her to readily discern what she would receive or not receive depending on plainly-articulated contingencies. In addition, the class member would have to be afforded a reasonable opportunity to opt out of the class after receiving the notice of the proposed settlement.

These conditions were not met in either the bank boston or agent orange class actions. Indeed, because the agent orange litigation included “futures” (who did not even understand themselves to be injured parties as of 1984, and who therefore did not self-identify as class members<sup>25</sup>), it is hard to even imagine how any of the conditions listed above could have been met in the agent orange litigation.

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<sup>24</sup> For a contrary view, see Marcel Kahan & Linda Silverman, *Matsushita and Beyond: The Role of the State Courts in Class Actions Involving Exclusive Federal Claims*, 1996 SUP. CT. REV. 219, 268.

<sup>25</sup> See, e.g., Brief of Appellant Isaacson in *Stephenson v. Dow*, Second Circuit, Jan. 23, 2001, available at 2001 WL 34455606, at 5-6 (explaining that “[b]ecause Isaacson was not aware of any injury until his cancer diagnosis in 1996, he had no reason in the early 1980s to file a lawsuit related to Agent Orange, consult with an attorney, or contact the Veterans Administration regarding his exposure to Agent Orange in Vietnam.”).

Moreover, the bank boston and agent orange litigation aside, notice and opt-out procedures, as currently understood and implemented, generally have limited utility for class members. Class action notices, regarding either the proposed certification of a class or proposed adoption of a settlement, are often so convoluted that few lawyers or law professors can understand them. Some class actions do not afford an opt out right at either the time of certification or proposed settlement, and an opt out at the latter time is not required by Federal Rule 23 for any sort of class action.<sup>26</sup>

Perhaps notice and opt-out procedures could be enhanced, but enhancements will not solve the problem of the absence of meaningful consent in class actions. For one thing, as already suggested, cases, notice and opt out procedures vis-à-vis “futures” are inherently unhelpful because futures do not self-identify and hence cannot be expected to seek out and receive information regarding class action proceedings. As the Second Circuit in *Stephenson* suggested, it is “likely” that “effective” notice can never be provided to persons who have been exposed to a toxin but have not yet suffered from the resulting disease or disability.<sup>27</sup>

Serious enhancements in notice and opt-out procedures for “presents” hold somewhat greater promise. Enhancements would entail increased litigation/administrative costs, and are likely to be opposed by plaintiffs lawyers who would perceive those increased costs as cutting into the pools available for class member recovery and class counsels’ fees. And even if

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<sup>26</sup> See Fed. R. Civ. P. 23(h)(1)(3) (providing that for a (b) (3) class action, a court may refuse to approve a settlement “ unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.”). It is not obvious why, given the judicial incentives discussed below in Part B, we would expect many judges to demand a second opt-out opportunity for class members as a prerequisite for granting approval to a proposed settlement

<sup>27</sup> 273 F.3d at 261 n8 (citing *Amchem Products, Inc. v. Windsor*, 521 US 591, 628(1997)). As the Court in *Amchem* explained, “[m]any people in the exposure-only category . . . may not even know of their exposure, or realize the extent of the harm that might occur. Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out. Family members . . . may themselves fall prey to disease or may ultimately have ripe claims for loss of consortium. Yet large numbers of people in this category – future spouses and children . . . – could not be alerted to their class membership.” 521 U.S. at 628.

cost objections could be surmounted, the enhanced notice and opt out procedures still would be inadequate basis upon which to presume express or implied consent as to “presents” in those (many) cases in which the proposed class action settlement at issue does not provide for particular relief for particular class members or groups of class members, but instead sets up what is, in effect, administrative processes for the evaluation and payment of individual claims. How an administrative process set up by a proposed settlement actually will translate into an aggregate amount of relief and particular distributions of relief to particular class members is (generally, at any rate) unknowable at the time the settlement is approved. A standard of meaningful consent, informed consent, requires more than class members’ right to opt out of a proposed settlement whose consequences for them is unknowable at the time they must decide whether to exercise their right.

Contrary to Nagareda’s claims, analogizing class settlements to administrative agency regulations does not show why class actions should be protected against subsequent challenges. Quite the contrary is true: class action settlements are (as Nagareda suggests) arguably akin to administrative regulations,<sup>28</sup> but administrative law allows affected person and entities to challenge a regulation *twice*: once, in a facial challenge, after the regulation has been promulgated but not applied (which is akin to the time when the settlement is proposed for judicial approval), and a second time, in an as-applied challenge, once the regulation has been applied to the particular affected person or entity bringing suit (which is akin to when the particular class member receives his or her particular relief in accordance with the judicially-approved settlement). In other words, the analogy to administrative law supports a rule permitting subsequent challenges to class settlements based on inadequacy of representation.

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<sup>28</sup> See Nagareda, *supra* note [ ], at 355 (explaining that the “settlements characteristically generated by class actions operate in much the same manner as agency rules”).

## B. Why Not Just Improve Initial Judicial Review?

One standard response to *Stephenson*-like claims for subsequent review is that such review would be unnecessary if initial judicial review – judicial review in the first litigation, the original class action -- were improved. I certainly believe (as do most observers) that the initial review of proposed class settlements could be improved, but, for the reasons stated below, I do not think any realistically achievable improvements would obviate the need for subsequent review of class action settlements based on inadequacy of representation.

There are fundamental – structural – reasons why the initial review of class settlements always will be less-than-searching in many cases. As suggested above, sometimes no one may understand, when a settlement is proposed, that the settlement as applied will entail unjust levels of relief for some class members (although this was hardly the case in the bank boston or agent orange litigation – there the problems with the proposed settlement were foreseeable at the time of judicial review and approval). Even when class counsel and/or defendants have concrete information that should give rise to adequacy concerns on the part of the judge reviewing a proposed settlement, they do not have any incentive to provide such information to the judge. After all, class counsel and the defendants have agreed to a settlement, and the very existence of the agreement shows that both class counsel and the defendants believe the deal is a good one for them. Class counsel and defendants have every reason to obscure, if they can do so lawfully, any information that might undermine their deal with each other.

For their part, judges are not well-positioned to ferret out information both class counsel and defendants do not wish to disclose or (if already disclosed) highlight. Despite the foray of some trial judges into complex institutional litigation and the use of special masters, most trial judges do not have the resources, temperament or training to seek out information on

their own. In our legal system, judges primarily rely on the parties before them to develop opposing views and factual support. When the parties (for all practical purposes, class counsel and defendants) agree, a very natural response for a trial judge (typically burdened by a heavy caseload) is to approve the settlement without much delay.<sup>29</sup> And, assuming there is anyone with the resources and standing to appeal, appellate courts are constrained by the record on appeal, which, for the reasons just stated, may contain no hard information which would support overruling the trial court's approval of the class settlement.

Judges, of course, vary a great deal from one another, and there are examples of judges who have scrutinized class settlements for adequacy, and have rejected proposed settlements or (in the case of appellate judges) set aside approvals of settlements. But for an *ex post* check (in the form of a right to subsequent challenges based on inadequacy of representation) to be socially desirable (on net), what matters is not that some judges will engage in a searching inquiry of the adequacy of representation when presented with a class settlement, but rather that some will not, and that the benefits (in terms here primarily of fairness and legitimacy) exceed the costs of trying to make up for the failures in the initial review of class settlements.<sup>30</sup>

Moreover, there is reason to suspect that judges are sometimes "chosen" for class action litigation because they are known to be predisposed to approve class settlements without much

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<sup>29</sup> There appears to be very broad agreement among commentators that judges have powerful incentives to approve class action settlements. See Susan Koniak & George Cohen, Under Cloak of Settlement, 82 U VA L REV 1051,1122-1132 (1996).(discussing "Blind, Not Merely Blindfolded, Judges," and arguing that judges have a "strong predisposition toward settlements" that stems from judicial self-interest) Patrick Woolley, The Availability of Collateral Attack for Inadequate Representation in Class Suits, 79 TEX. L. REV. 383, [ ] (2000); John C. Coffee, Class Wars, 95 COLUM L. REV. 1343, 1348 (1995); Samuel Issacharoff, Class Action Conflicts, 30 UC David L Rev. 805, 822 (1997).

<sup>30</sup> See Ashby Jones, A Class Act?, American Lawyer and Corporate Counsel (10/8/2003), available at [www.law.com](http://www.law.com)(reporting that "in the past three years alone . . . federal district and appellate courts have shot down parts of or entire class action settlements in California, Florida, Illinois, Maine, Missouri, Pennsylvania, Tennessee, and Washington state.").



scrutiny. At least under current law, plaintiffs' lawyers have quite broad discretion to choose the courts where they will bring class actions, particularly nationwide class actions. It stands to reason – and anecdotal evidence suggests – that lawyers select courts in which some or all of the sitting judges are known to be sympathetic to approving class action settlements. Madison County, Illinois is a famous example of this phenomenon.<sup>31</sup>

The Supreme Court's recent opinions in *Amchem Products, Inc. v. Windsor*<sup>32</sup> and *Ortiz v. Fibreboard Corp.*<sup>33</sup>, may have reinforced the ability of lawyers to select federal judges who are predisposed to lax-review of proposed settlements. *Amchem* and *Ortiz*'s broad language regarding the importance of adequacy of representation and the threat of collusion between class counsel and defendants<sup>34</sup> provide support, if often only indirect or atmospheric support, for intense-scrutiny judges – judges predisposed to invest and engage in tough scrutiny in class action cases-- to seriously question proposed class certifications and to deny certification. At the same time, *Amchem* and *Ortiz*'s fairly narrow, fact-specific, and arguably formalistic holdings<sup>35</sup> certainly allow lax-scrutiny judges -- judges predisposed to engage in lax scrutiny in class action cases --to carry on as before *Amchem* and *Ortiz*, and readily grant class certification. As a result,

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<sup>31</sup> See Lester Brickman, Anatomy of a Madison County (Illinois) Class action: A Study of Pathology, Civil Justice Report No. 6, August 2002, Manhattan Institute for Policy Research, available at [www.manhattan-institute.org](http://www.manhattan-institute.org).

<sup>32</sup> 521 U.S. 591 (1997).

<sup>33</sup> 527 U.S. 815 (1999).

<sup>34</sup> See, e.g., *Ortiz*, 527 U.S. at 528 (emphasizing the due process concerns implicated by aggregate actions and the due process rationales underlying and giving force to the adequacy of representation requirement) and *id.* at 852 (expressing skepticism that class counsel can be expected to negotiate the best possible deal for all class members “given the potential for gigantic fees” that might be lost if no settlement can be reached).

<sup>35</sup> *Amchem* and *Ortiz*'s holdings plausibly could be read as pertaining only to the construction of Fed. R. Civ. P. 23, and not the federal constitution, in which case the cases would be inapplicable to state class actions. See, e.g., *Amchem*, 521 U.S. at 527 (“This case concerns the legitimacy under Rule 23 of the Federal Rules of Civil procedure of a class-action certification sought to achieve global settlement of current and future-related asbestos claims.”). In addition, the cases could be read as limited to their facts – settlement class actions in which there are separate subclasses and counsel for presents and futures – and as requiring only that, in the future, the procedural formalities of separate subclasses and counsel for presents and futures be observed. See *Ortiz*, 527 U.S. at 856 (describing the holding in *Amchem* to be that “a class divided between holders of present and future claims . . . requires division into homogeneous subclasses under Rule 23©(4)(B), with separate representation . . .”).

when certification is granted, the judge is likely to be a lax-scrutiny judge, or at least that is more likely to be true after *Amchem* and *Ortiz* than it was before. When certification is denied, class counsel is free to try with another judge in another court, since denial of certification has no preclusive effect. *Amchem* and *Ortiz*, translated into the realities of class action practice, thus may have reduced the risk to class counsel that a class action will be certified but then a proposed settlement rejected by the court as inadequate.<sup>36</sup>

Some commentators have argued that judicial review of settlements can be improved by the introduction of more voices into the settlement approval process. For example, Nagareda suggests that competitor plaintiffs law firms should be induced to present critiques of proposed settlements by the promise that, if the settlement is disapproved, these competitor firms will be appointed the new class counsel.<sup>37</sup> But if judges are taking the course of least resistance in approving settlements without searching review, would they not continue to do so despite the voices of competitor law firms? Why would anything change simply because the objectors now might be entitled to an automatic status as replacement counsel if they scuttle the settlement? Wouldn't competitor law firms lack the information in the possession of class counsel and defendants that they need to make strong arguments<sup>38</sup>? And couldn't competitor law firms' motives be questioned at least as readily as those of class counsel and defendants? And given the uphill battle facing competitor firms in scuttling proposed settlements, wouldn't competitor firms regard it as more sensible to take side payments from class counsel in return for

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<sup>36</sup> My analysis here is admittedly highly speculative: to give the analysis more substance one would want to know at least four things – the rate of denial of class certification, pre-*Amchem/Ortiz* and post, and the rate of denial of approval of class settlements, pre-*Amchem/Ortiz* and post. As far as I know, however, there are no studies estimating those rates. This analysis is also inapplicable to so-called settlement classes, for which certification and approval of settlement are sought at the same time.

<sup>37</sup> Nagareda, *supra* note [ ], at 293.

<sup>38</sup> See Edward Brunet, *Class Action Objectors: Extortionists, Free Riders, or Fairness Guarantors*, 2003 U.C. Leg. Forum 403, 413-14 (explaining that objectors are “outside the settlement process, and may lack the information needed to effectively evaluate a settlement”).

withdrawing their challenges to settlements? Nagareda's novel proposal, if adopted, might do more to change the distribution of wealth among plaintiffs lawyers than it would to ensure better representation for absent class members.

Nagareda also suggests certain formal requirements to improve judicial review of settlements, most notably a requirement of a reasoned explanation in support of the settlement.<sup>39</sup> But class counsel and defendants already do (typically) provide reasoned explanations for their proposed settlements, which judges (typically) build on in approving settlements. A reasoned explanation, by itself, is easy to produce: the important question is whether there is anyone in the process with the resources, information, incentives, and command to judicial attention to critically evaluate the proffered reasoned explanation. And, as discussed above, it is far from obvious that there currently are such people involved in class action litigation, or that there would be if Nagareda's counsel-replacement proposal became law.

One group that could significantly improve the quality of judicial review of class action settlements are state attorney generals. Unlike private lawyers, state attorney generals are not presumed to be acting on profit motives, and cannot (lawfully) take side payments. Because of their status as public officials entrusted with safeguarding the public interest, state AGs' views command respect; judges are quite accustomed to taking what they say very seriously. The principal constraint on state attorney generals as a force to compel more meaningful review of proposed class settlements is resources: state attorney generals offices have broad agendas, and from either the perspective of a model of political behavior that emphasizes ideological/public interest motivations or one that emphasizes politicians' self-interest in accruing fame/power and winning reelection, investing a great deal of time and money in monitoring proposed class action



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<sup>39</sup> Nagareda, *supra* note [ ], at 357-59.

settlements may not be an attractive course for most state attorney generals.<sup>40</sup> I have been unable to locate any statistics, but my impression from lawyers in class action practice is that state attorney generals appear as objectors or otherwise seek to provide input in very few class actions.

State attorney generals arguably could have a more meaningful role in pursuing subsequent challenges to approved settlements than in participating in the initial proceedings regarding proposed class settlements. Compared to the set of proposed class settlements that might affect (for example) state attorney generals' traditional interest in consumer protection, the set of consummated class settlements where the injustice of the settlement has become manifest once class members have received their "relief" is bound to be much smaller. State attorney generals cannot possibly try to monitor and understand all of the proposed class settlements that may affect consumers but they can, perhaps, look seriously at the relatively few in which a number of class members have voiced complaints about what the class settlement actually afforded them (e.g., coupons of minimal or no value). And where the aggrieved class members cannot attract private counsel to represent them in the difficult task of challenging a judicially-approved settlement as inadequate, the state attorney generals can step in (as in *Homeside*) and use their credibility as public officials as a means to command the court's attention. Here, too, however, there is not much evidence that I could locate that state attorney generals actually have taken on this role.

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<sup>40</sup> The potential payoffs for state attorney generals, in terms of favorably publicity, would seem to be greater in launching class actions on their own or, to limit their financial/resource risks, in conjunction with plaintiffs law firms, as in the tobacco litigation. For contrasting views of state AG-plaintiffs lawyer joint efforts in bringing class actions, see David Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of Parens Patriae Litigation By Contingency Fee*, 51 DePaul L. Rev. 315 (2001); John Coffee, Jr., "When Smoke Gets in Your Eyes": Myth and Reality About the Synthesis of Private Counsel and Public Client, 51 DePaul L. Rev. 241 (2001).

### **C. What Would The Availability of *Ex Post* Challenges to Class Action Settlements Do to *Ex Ante* Rates of Class Action Litigation and Settlement?**

Some academic commentators, as well as the petitioners and amici in *Stephenson*, have argued that permitting subsequent challenges to class settlements based on inadequacy of representation will undermine the value of the class action settlement for defendants. According to this view, defendants will be dissuaded from settling class actions if those settlements could be challenged later, on adequacy of representation grounds.<sup>41</sup> The commentators and petitioners' concerns are, at best, exaggerated.

The academic commentators and the petitioners in *Stephenson* assume, albeit implicitly, that the threat of subsequent challenges to class action settlements can have only one of two effects: plaintiffs lawyers will forego using the class action device as a means of dispute resolution because class actions will not be worth the effort unless they can offer challenge-proof settlements to defendants, or plaintiffs lawyers and defendants will still litigate class actions in the same numbers but, rather than settling, proceed to judgment. The former effect might be considered undesirable because, on one view, class actions are more “efficient” than multiple individual actions that, at least sometimes, might take the place of class actions. The latter effect might be considered undesirable because litigation costs are transaction costs that, by themselves, do not advance any of the possible objectives of the tort system.

But even assuming *arguendo* that fewer class actions or fewer settlements in class actions would be a bad thing, those are not the only possible effects of the threat of subsequent

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<sup>41</sup> See, e.g., Brief of Washington As Amicus Curiae In Support of Petitioners, *Dow v. Stephenson*, 2002 U.S. Briefs 271, at 20 (predicting “a decrease in settlement rates” that “will serve only to further clog the nation’s courts”); Brief for Petitioners, *Dow v. Stephenson*, at 39 (arguing that allowing subsequent review will have “pernicious consequences” and that “the threat of such litigation . . . would make it significantly more difficult for parties to settle class action lawsuits”); Kahan & Silberman, *supra* note [ ], at 779; Allen, 73 NYU L REV at 1159-60.

challenges based on claims of inadequacy of representation. Another possibility is that class counsel and defendants will respond to the threat by making their settlements less susceptible to subsequent challenges. The easiest way for them to do that is to try to ensure that every group included in the class will (absent unforeseen circumstances) receive some meaningful relief at least roughly proportional to their injuries, and that groups to whom defendants are unwilling to promise such relief will be excluded explicitly from the class and the class settlement. In the bank boston litigation, for example, class counsel and defendants could have greatly reduced the chance of a subsequent challenge by simply excluding from the class anyone who would receive negative “relief” under the relief formula in the settlement. Similarly, in the agent orange litigation, class counsel and the defendants could have lessened the risk of subsequent challenges by excluding from the class those who might become ill after 1994, rather than including them in the class but denying them any monetary relief. The threat of subsequent challenge presumably also would prompt class counsel to take more care in producing comprehensible class notices and notices of settlement, and in supporting opt-out rights at the time of proposed settlements.

Of course, it may be impossible for class counsel and defendants to make class settlements challenge-proof, if only because they themselves may not be able to anticipate all the ways in which administration of relief under the settlement might disadvantage certain class members. The availability of challenges to class action settlements creates a risk, albeit a small risk, that even settlements negotiated with the best of intentions will be undone. The availability of such challenges thus does reduce the expected value or payoff for defendants of settling, as opposed to going to trial. But my contention is that the unavoidable risk posed by the threat of subsequent challenges – the risk that remains even after class counsel and defendants make all

reasonable efforts to ensure adequacy of representation of all class members – is simply not large enough to have much effect on expected values and hence litigation decisions.

To see why this is so, recall who would bring any subsequent challenges to class actions – in almost all cases, plaintiffs lawyers, almost all of whom are (presumably) driven by economic/profit maximization concerns. Even where class counsel and defendants did not do anything to ensure adequacy of representation in the original proceeding, a court hearing a subsequent challenge is going to be predisposed *not* to second guess the approval of the settlement by the first court, and plaintiffs’ lawyers are going to appreciate that fact. Hence, plaintiffs lawyers are likely to view subsequent challenges as unattractive prospects for making money and hence will avoid them.

Why do I believe that courts are unlikely to embrace subsequent challenges even when, as a matter of formal doctrine, aggrieved class members are permitted to bring such actions? For one thing, there is such a thing as judicial comity: as a matter of normative commitment, judges in one court do not like to criticize judges in another court if they can avoid doing so. Moreover, judges’ own incentives to avoid burdensome tasks and free up time to meet pressing aspects of their caseload (such as criminal actions) favor their *not* embracing challenges to class settlements. When a judge rules that a class settlement was based on adequate representation, the judge is done with her work – the case disappears from her docket. If the judge instead rules that the previous class settlement was based on inadequate representation, then the judge must address the substance of the subsequent challenge, and may become entangled in everything from overseeing discovery disputes to summary judgment motions to settlement conferences. In all but a few cases -- outlier cases of judicial behavior -- *stark* inadequacy of representation in the initial

class action proceeding (as was at issue in *Homeside* and *Stephenson*) will be required to overcome judicial resistance to become mired in the merits of subsequent challenges to class settlements.

My claims are supported by the available empirical data. Until 1997, when the Ninth Circuit issued its decision in *Epstein v. MCA, Inc.*,<sup>42</sup> the settled rule in every circuit in this country was that any absentee (nonparticipating) class member who was purportedly bound by a class action settlement could maintain suit on the underlying claims in a new action provided that she could show that she had not been adequately represented in the original action.<sup>43</sup> *Epstein* called that rule into question, certainly in the Ninth Circuit and to a lesser extent elsewhere. But prior to 1997, in the federal courts at least, there was no significant controversy about the availability of subsequent challenges. Yet the number of subsequent challenges brought was few indeed, perhaps fewer than fifty in total.<sup>44</sup> These numbers suggest that plaintiffs lawyers understand that subsequent challenges, in virtually all cases, are simply not worth pursuing, given other available opportunities. The principal drawback to using subsequent challenges as a check on inadequacy of representation in class actions is that it will be (and has been) too weak a check, rather than too strong a one. But we are at least better off with a less-than-fully effective check than none at all.

#### D. The Inconsistency in the Case Against Allowing Subsequent Challenges

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42 179 F.3d 641 (9<sup>th</sup> Cir. 1999).

43 See e.g., *Wright, Miller & Cooper, Federal Practice and Procedure*, Section 4455, at 484-87 (2002) (describing the *Epstein* approach as a new approach and contrasting it unfavorably with the traditional approach allowing adequacy to be challenged in a collateral proceeding)<sup>45</sup>; *Newberg on Class Actions*, Section 1625, at 16-133, 16-137 (3rd ed. 1992) (explaining that Rule 23 does not disturb the recognized principle that the court conducting the action cannot predetermine the res judicata effect of the judgment and that due process of law would be violated for the class judgment to be held binding unless the court applying *res judicata* could conclude that the class was adequately represented in the first suit).

44 See Woolley, *supra* note [ ], at [ ] n.268 (reporting on the findings of a westlaw survey that identified only 44 subsequent challenges); see also Mollie A. Murphy, *The Intersystem Class Settlement: Of Comity, Consent, and Collusion*, 47 U. KAN. L. REV. 413, 469 (1999) (explaining that “[c]ollateral attack has been used relatively sparingly to attack the adequacy of representation”).



There is an important inconsistency in the arguments advanced against allowing subsequent challenges in cases such as *Stephenson*. On the one hand, opponents of allowing subsequent challenges argue that it was just for Judge Weinstein to have approved a settlement denying relief to veterans who might manifest injury after 1994 because the claims of any such veterans would have been so rife with causation problems as to be (in expected monetary values, calculated in 1984) worthless; thus the denial of relief to such veterans via class action settlement was not, in substance, taking anything of value away from anyone.<sup>45</sup> At the same time, opponents of allowing subsequent challenges suggest that defendants will offer much less – perhaps much, much less – to settle claims that leave open contingencies, such as, for example, the contingency of lawsuits by veterans who have been exposed to agent orange and who might become ill after 1994.<sup>46</sup>

Critics of the result in *Stephenson* (and more broadly of allowing subsequent review) cannot have it both ways. If in 1984 the claims of the veterans who might become ill after 1994 had little or no real expected value, then Dow, presumably a risk-neutral, economically rational corporate actor, would not have valued a settlement that included such veterans much differently than a settlement that excluded such veterans. On the other hand, if the claims of those veterans who might become ill after 1994 had substantial expected value as of 1984, then Dow presumably paid much more for a settlement including those veterans than it would have paid for a settlement that excluded them. In that case, however, the veterans who became ill before 1994 (and class counsel), in effect, were allocated the settlement value of the claims of the veterans who became ill after 1994. This seems obviously wrong: settlements are

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45 Nagareda, *supra* [ ], at 322 (explaining that “[t]he ten-year term for cash benefits under the Agent Orange class settlement appears far from arbitrary . . . when one considers that any veteran would have had an exceedingly weak scientific case on the causation element, at least as of 1984, and that the ten-year term for cash benefits extended to more than two decades after the last alleged exposure of class members.”).

46 Brief for Petitioners, *Dow v. Stephenson*, at 39.

not supposed to be vehicles for the non-consensual redistribution of the settlement value of the claims of one group of plaintiffs to another group of plaintiffs.

I suppose one might argue that corporate defendants value finality above all, and non-final settlements are just worth a great deal less, solely by virtue of their non-finality, than final ones. But a settlement that excluded veterans who might become sick after 1994 would be as final as a settlement that included people who might become sick after 1994. The former settlement would simply be narrower in scope of coverage than the latter. Breadth of scope of coverage and degree of finality with respect to covered claims are two distinct variables. Settlements vary tremendously in scope: some settlements cover a few kinds of claims, some many, some embrace all potential claimants, others only some potential claimants. No single settlement could ever resolve a corporation's risks of liability for every conceivable claim by every conceivable claimant. Corporations all the time enter into settlements that only cover some of the claims in a given category, or only some of the potential claimants within a given category.

Moreover, even as to the variable of finality *per se*, the claim that corporations view finality as a good in itself runs afoul of a dominant conception of corporate actors (especially large corporate actors, such as Dow) as risk neutral, rational actors. From that conception, a settlement that has a 10% chance of being undone surely has less value than one that has no chance of being undone, but it may have *close* to 90% of the value of a challenge-proof settlement. In addition, inasmuch as corporations are run by managers, and managers (if anything) tend to "under-discount" risks to the corporation that would affect the corporation (if at all) in the relatively distant future (when the managers likely will not be there), we might expect

mangers to place less weight than the rational actor model predicts on the possibility of settlements being challenged successfully in, as in the *Stephenson* example, ten years time.

In sum, subsequent review based on adequacy of representation concerns, as in *Homeside* and *Stephenson*, comports with our basic intuitions of fairness – intuitions that the Rawlsian original position powerfully captures. Such review, moreover, is justified notwithstanding (wholly admirable) efforts to improve initial judicial review of class action settlements, and such review will not undermine the class action as a dispute resolution mechanism: the number of subsequent review cases will (as in the past) be relatively few, and the number of cases in which a court is willing to hold for the plaintiffs in a subsequent review challenge will be even fewer.