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A perceptible shift in the view of class actions has occurred over the past twenty years. Originally hailed as an important vehicle to remedy racism, sexism, and other civil rights violations, class actions today are the subject of ridicule, derision, and repeated calls for curbing practices tagged as "abusive"—practices ranging from forum shopping to attorney's fees to collateral attacks against class judgments, all of which tend to be ascribed to greedy lawyers representing undeserving plaintiffs. Recent congressional legislation has addressed issues regarding forum shopping and attorney's fees; recent legal commentary has addressed issues of finality and collateral attack. This Article, in a limited manner, joins the debate concerning the ability to collaterally attack a class judgment by adding an overlooked perspective: arguing that adequacy of representation, a prerequisite to a binding class judgment, is an obligation not only of class counsel, the class representatives, and the court, but also of the defendant.

I. INTRODUCTION

A perceptible shift in the view of class actions[1] has occurred over the past twenty years. Originally hailed as an important vehicle to remedy racism, sexism, and other civil rights violations,[2] class actions today are the subject of

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[1] This Article assumes a plaintiff class. Although the Federal Rules of Civil Procedure expressly authorize both plaintiff and defendant classes, plaintiff classes are far more common. *See* FED. R. CIV. P. 23(a) ("One or more members of a class may sue *or be sued* as representative parties . . . .") (emphasis added); 1 HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 3:2, at 215-16 (4th ed. 2002) ("Another type of class is the defendant class. An individual or a class plaintiff may sue a named defendant as representative of a class of other defendants similarly situated."); *see also* Robert R. Simpson & Craig Lyle Perra, *Defendant Class Actions*, 32 CONN. L. REV. 1319, 1322-23 (2000) (noting that defendant class actions are rare).

[2] *See* DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 12 (2000) ("[T]he race relations echo of [the 1960s] was always in the committee room. If there was [a] single, undoubted goal of the committee, the energizing force which motivated the whole rule, it was the firm determination to create a class action system which could deal with civil rights and, explicitly, segregation.") (quoting John Frank, Advisory Committee member); Kevin R. Johnson, *International Human Rights Class Actions: New Frontiers for Group Litigation*, 2004 MICH. ST. L. REV. 643, 645.

> Class actions long have been a favorite tool of social reformers in the United States. The Supreme Court has, for decades, addressed class actions brought with the hope of bringing about social change, with the 1954 decision of Brown v. Board of Education

ridicule,[3] derision,[4] and repeated calls for curbing practices tagged as "abusive"—practices ranging from forum shopping to attorney's fees to collateral attacks against class judgments, all of which tend to be ascribed to greedy lawyers representing undeserving plaintiffs. Recent congressional legislation has addressed forum shopping and attorney's fees; recent legal commentary has addressed issues of finality and collateral attack. This Article joins the debate, in a limited manner, addressing the ability to collaterally attack a class judgment from an overlooked perspective: defendants' obligation to ensure adequacy of representation, a prerequisite to a binding class judgment.

Adequate representation is essential to a valid and enforceable class judgment. When a lack of adequate representation of plaintiff class members renders a class judgment unenforceable with respect to one or more of these class members, the blame tends to be ascribed to class counsel with accompanying accusations of shoddy lawyering, ethical lapses, poor selection of class representatives, failure to anticipate potential claimant groups, or a combination of these faults. Indeed, class counsel are the current scapegoats with respect to criticisms of class actions as a general matter.[5] Undoubtedly there are occasions

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being, perhaps, the most famous example. The bread-and-butter of civil rights attorneys, class actions are commonly employed procedural tools in employment discrimination, prison reform, and welfare litigation, to name a few examples.

Johnson, *supra*, at 645; *see also* 3B JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE CIVIL ¶ 23.02-6 (2d ed. 1995) (stating that the "specific purpose" of Rule 23 was to ensure that class actions would be available to enforce civil rights statutes); STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 239-45, 259-64 (1987) (noting that class actions were seen as a method for furthering social change, especially in the area of civil rights); Jack Greenberg, *Civil Rights Class Actions: Procedural Means of Obtaining Substance*, 39 ARIZ. L. REV. 575, 577 (1997) ("Civil rights and class actions have an historic partnership."); David Hill Koysza, Note, *Preventing Defendants from Mooting Class Actions By Picking Off Named Plaintiffs*, 53 DUKE L.J. 781, 784-85 (2003) ("[C]lass actions have become a significant means by which to implement some of the nation's most important civil rights legislation.").

[3] *See* Christopher M. Fairman, *An Invitation to the Rulemakers—Strike Rule 9(b)*, 38 U.C. DAVIS L. REV. 281, 294-95 (2004) (noting "the McDonald's child-obesity class action" has been offered as a "poster child[] for frivolousness"); Steven B. Hantler & Robert E. Norton, *Coupon Settlements: The Emperor's Clothes of Class Actions*, 18 GEO. J. LEGAL ETHICS 1343, 1345 (2005) ("Rather than being a way to settle honest disputes between a company and its customers, most coupon settlements degenerate into another get-rich-quick scheme for plaintiffs' lawyers.").

[4] *See* Todd A. Smith, *A New ATLA: Changing the Debate*, TRIAL, May 2005, at 9 (noting that during his reelection campaign, George W. Bush "suggested that most litigation—particularly medical malpractice and asbestos cases and class actions—is made up of 'junk and frivolous lawsuits'").

[5] *See* White House Press Release, President Bush's Second Term Accomplishments and Agenda, 2005 WLNR 12220959 (Aug. 3, 2005) (stating that the Class Action Fairness Act "helps prevent abusive class action lawsuits that result in large fees for lawyers and minimal awards for injured parties"); *see also* Timothy L. O'Brien & Jonathan D. Glater, *Robin Hoods or Legal Hoods?, The Government Takes Aim at a Class-Action Powerhouse*, N.Y. TIMES, Jul. 17, 2005, at 1 ("To critics, [class counsel] embody what they say is amiss with modern class action suits: shifty and belligerent

when inadequate representation can be traced back exclusively to class counsel's failings. The publicized cases, however, typically have involved collusion between class counsel and defense counsel, and inadequate court oversight,[6] rather than solely class counsel's shortcomings.

The tendency to attribute to class counsel any failures in achieving adequate representation is prevalent not only in the political realm, but also in legal commentary, which tends to emphasize class counsel's responsibilities.[7] Certainly class counsel's responsibility to ensure that absent class members are accorded adequate representation is a serious and central due process obligation—indeed, class counsel owes a fiduciary duty to the absent class members.[8] I do not mean to suggest that the defendant's obligation rises to this level. But the current commentary ignores the role of defendants in ensuring adequacy of representation. To the extent that defendants are discussed, the commentary tends to emphasize defendant expectations that the settlement will stand,[9] rather than examining the defendant's potential role in the settlement's failure.

The subject of this Symposium is *Phillips Petroleum Co. v. Shutts*, which celebrated its twentieth anniversary in 2005.[10] The *Shutts* decision is well known

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legal tactics, excessive paydays for lawyers and repeated blackmailing of straight-arrow corporations.").

[6] *See, e.g.*, Susan P. Koniak, *Feasting While the Widow Weeps*: Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045, 1048 (1995) (noting "the collusion between class counsel and the defendants; the district court's willingness to turn a blind eye to the facts and neglect the law; the spectacle of lawyers telling contradictory stories about their actions to a tribunal that didn't seem to care which story the lawyers told or how often the story changed").

[7] *See* Marcel Kahan & Linda Silberman, Matsushita *and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims*, 1996 SUP. CT. REV. 219, 243 (discussing only class counsel's incentives to point out any shortcomings in proposed settlements—and stating that this only occurs "during the adversarial proceedings that precede the settlement").

[8] *See In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 801 (3d Cir. 1995) ("[C]lass attorneys . . . owe the entire class a fiduciary duty once the class complaint is filed."); Dondore v. NGK Metals Corp., 152 F. Supp. 2d 662, 665 (E.D. Pa. 2001) (noting "putative class members stand at least in a fiduciary relationship with class counsel"); Wagner v. Lehman Bros. Kuhn Loeb, 646 F. Supp. 643, 661 (N.D. Ill. 1986) (stating class counsel "stands in a fiduciary relationship with the absent class"); *see also* MANUAL FOR COMPLEX LITIGATION (THIRD) § 30 (1995) (stating that "attorneys and parties seeking to represent the class assume fiduciary responsibilities"); 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, 678, 727 n.25 (1986) ("It is generally recognized that [class] counsel's fiduciary obligation runs to the class and not simply to the named plaintiff."); Stephen B. Murray & Linda S. Harang, *Selection of Class Counsel: Is It a Selection of Counsel for the Class, or a Selection of Counsel with Class?*, 74 TUL. L. REV. 2089, 2097 (2000) ("Attorneys filing a suit seeking class action management have a fiduciary obligation that extends to all persons or entities who can fairly be included within the class definition . . .").

[9] *See* 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, 784 (1998) (stating that the availability of collateral attack "increases defendant's exposure to damages").

[10] Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

for its discussions regarding both choice of law and personal jurisdiction.[11] However, the language in *Shutts* that is of particular interest to this Article pertains to adequacy of representation—specifically, language indicating that the responsibility for adequate representation does not fall exclusively upon the class representative, class counsel, and the court, but also extends to the defendants.

Shutts repeatedly notes defendants' practical interest in ensuring the adequacy of representation of absent class members, and suggests that attaining adequacy of representation is a collaborative effort, in which both plaintiffs and defendants work together with the judge to ensure that the absent class members' interests have been properly represented and protected—and that the litigation will produce a judgment fully binding the class and giving repose to defendants that the matter is fully and finally resolved.[12] Indeed, ensuring adequate representation, an essential element of a valid and binding class action settlement or judgment, is as much in the defendant's interest as the plaintiff's. The defendant will be bound by the class judgment. If the defendant expects the absent class members to be correspondingly bound, those class members must have been adequately represented in the class litigation or the ensuing judgment will be void as to them for lack of due process. Since the defense to a collateral attack is to argue that the class member was adequately represented, it is in the defendant's interest to scrutinize potential inadequacies in representation and to bring problems to the court's attention. Imposing an obligation on defendants in the adequacy inquiry is additionally supported by the benefits that adequacy accords to defendants, as well as the practicalities and theoretical underpinnings of class litigation. Accordingly, this Article argues that any serious discussion or proposal concerning limits on the availability of the collateral attack device must take into account the defendant's obligation in the adequacy of representation inquiry to avoid insulating defendants who contributed, directly or indirectly, to the underlying adequacy problem.

Part II examines the general background of adequacy of representation in the federal rules and the relevant Supreme Court jurisprudence.[13] Part III analyzes the intersection of adequate representation with the collateral attack device.[14] Part IV analyzes the significance of the defendant's contribution toward achieving adequacy of representation.[15]

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[11] *See generally* Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1 (1986) (exploring the effect of *Shutts* on choice of law and personal jurisdiction issues in class actions).

[12] *Shutts*, 472 U.S. at 821.

[13] *See infra* notes 16-61 and accompanying text (providing a brief background regarding adequacy of representation).

[14] *See infra* notes 62-112 and accompanying text (examining the intersection of adequate representation with collateral attack).

[15] *See infra* notes 113-152 and accompanying text (analyzing the role of the defendant in achieving adequacy of representation).

II. A BRIEF BACKGROUND REGARDING ADEQUACY OF REPRESENTATION

Rule 23 of the Federal Rules of Civil Procedure is one of the primary provisions governing class actions in the federal courts.[16] Adequacy of representation is a Rule 23 prerequisite to the ability to bring a class action,[17] and a due process prerequisite to a binding class judgment.[18] Rule 23 expressly places a duty on the class representatives,[19] class counsel,[20] and the court[21] to ensure that absent class members are adequately represented. Due to the representative nature of class actions, in which individuals who are not present and do not actively participate in the class litigation may nevertheless potentially be bound by the class judgment,[22] adequate representation is the most important safeguard of absent class members' interests.[23]

In 1940, the United States Supreme Court, in *Hansberry v. Lee*, upheld the use of the collateral attack to challenge the application of a prior class judgment

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[16] FED. R. CIV. P. 23. Rule 23, of course, is not the exclusive path to class actions, which also can be brought, for example, under the Private Securities Litigation Reform Act, Pub. L. No. 104-67, 202 Stat. 737 (1995) (codified as amended at 15 U.S.C. § 786-4 (2005)), and 42 U.S.C. § 1983.

[17] FED. R. CIV. P. 23(a)(4) (providing that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if . . . the representative parties will fairly and adequately protect the interests of the class").

[18] *See* Hansberry v. Lee, 311 U.S. 32, 38 (1940).

[19] FED. R. CIV. P. 23(a)(4).

[20] FED. R. CIV. P. 23(g)(1)(B) ("An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class."). Although Rule 23 added this express provision in 2003, courts had long implied class counsel's duty to provide adequate representation under Rule 23(a)(4).

[21] FED. R. CIV. P. 23(e)(1)(C) ("The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate."); *see also* FED. R. CIV. P. 23(g)(1)(C) (stating that in appointing class counsel, the court must consider certain factors and may consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class"); FED. R. CIV. P. 23(g)(2)(B) ("If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class."); *see also* Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 HARV. L. REV. 589, 602 (1974) [hereinafter Note, *Collateral Attack*] (noting "the active role which rule 23 imposes upon the original trial court—its authority and continuous obligation to examine and ensure the adequacy of the representation and notice provided absent class members").

[22] *See* Debra Lyn Bassett, *When Reform Is Not Enough: Assuring More than Merely "Adequate" Representation in Class Actions*, 38 GA. L. REV. 927, 930-31 (2004).

[23] *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 (1985) ("minimal procedural due process" requires notice, an opportunity to be heard, an opportunity to opt out, and adequate representation). As a practical matter, not every class member will actually receive notice, and even for those who do, relatively few will undertake the burden and expense of entering an appearance or opting out. Thus, adequacy of representation is the ultimate due process safeguard.

and emphasized the centrality of adequate representation as a prerequisite to a binding class judgment.[24]

> It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. . . . To these general rules there is a recognized exception that . . . the judgment in a "class" or "representative" suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it. . . . [M]embers of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present. . . .[25]

In *Hansberry*, the plaintiffs sought to enforce a racially restrictive covenant against the Hansberrys, an African-American family, in Illinois state court.[26] The Hansberrys defended against enforcement of the covenant by arguing that the requisite number of landowners had not signed the agreement, rendering the covenant unenforceable on its face.[27] In rebuttal, the plaintiffs asserted that the number of signers was noncontestable because a previous Illinois state court lawsuit, *Burke v. Kleiman*,[28] had already determined that issue.[29] The Hansberrys argued they were not parties to, and thus could not be bound by, the *Burke v. Kleiman* litigation. Accordingly, the Hansberrys contended, "[D]enial of their right to litigate, in the present suit, the issue of performance of the condition precedent to the validity of the agreement would be a denial of due process of law guaranteed by the Fourteenth Amendment."[30] The Supreme Court agreed.

The *Hansberry* Court observed that "[t]hose who sought to secure [the restrictive agreement's] benefits by enforcing it could not be said to be in the same class with or represent those whose interest was in resisting performance."[31] Thus, "[i]n seeking to enforce the agreement the plaintiffs in [the *Burke v. Kleiman*] suit were not representing the [Hansberrys] here whose substantial interest is in resisting performance."[32] Because the Hansberrys' interests were not adequately represented in *Burke v. Kleiman*, enforcing the *Burke* judgment against the Hansberrys would not comport with "that due process which the Fifth and Fourteenth Amendments requires."[33] With respect to the collateral attack procedure, the Supreme Court acknowledged that the Illinois Supreme Court "thought" that the determination in *Burke v. Kleiman*, "because

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[24] Hansberry v. Lee, 311 U.S. 32, 38 (1940).
[25] *Id.* at 40-43.
[26] *Id.* at 37-38.
[27] *Id.* at 38.
[28] 277 Ill. App. 519 (1934).
[29] *Hansberry*, 311 U.S. at 38.
[30] *Id.*
[31] *Id.* at 44.
[32] *Id.* at 45-46.
[33] *Id.* at 41.

of the representative character of the suit, . . . was binding on [the Hansberrys] until set aside by a direct attack on the first judgment,"[34] but nevertheless undertook the collateral review of due process,[35] ultimately concluding that "a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires."[36]

In *Hansberry v. Lee*, the Hansberrys did not institute the lawsuit—Lee sued to enforce the racially restrictive covenant. This distinction, however, does not affect its impact on the availability of the collateral attack. Lee asserted that the Hansberrys were bound by a determination issued in a prior case, and the Hansberrys replied that they were not so bound. The adequacy challenge—whether the *Burke* judgment bound the Hansberrys—did not arise as part of the *Burke* litigation, but instead arose in a "collateral" proceeding (i.e., the *Hansberry v. Lee* litigation). *Burke* had upheld the racially restrictive covenant, and Lee sought to enforce precisely the same covenant. Yet the Supreme Court did not perfunctorily state that *Burke* decided this issue, end of story. Instead, the Court closely examined whether the Hansberrys' interests were adequately represented in *Burke*.[37]

Nearly sixty years elapsed before the United States Supreme Court revisited the question of adequacy of representation in a meaningful way in *Amchem Products, Inc. v. Windsor*,[38] and *Ortiz v. Fibreboard Corp.*[39] Both *Amchem* and *Ortiz* involved challenges, based on adequacy of representation, to class-wide settlements of asbestos litigation. Despite the desirability of settlement, particularly in these cases which, as the Court observed, were part of "the elephantine mass of asbestos cases,"[40] the Court rejected both settlements for lack of adequate representation.

In *Amchem*, the Court noted that adequate representation required "uncover[ing] conflicts of interest,"[41] an alignment and interrelation of

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[34] *Hansberry*, 311 U.S. at 40.

[35] *Id.* ("[W]hen the judgment of a state court, ascribing to the judgment of another court the binding force and effect of *res judicata*, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes.").

[36] *Id.* at 45.

[37] *Id.* at 44 ("Those who sought to secure [the covenant's] benefits by enforcing it could not be said to be in the same class with or represent those whose interest was in resisting performance . . ."); *see also* Note, *Collateral Attack*, *supra* note 21, at 594 ("*Hansberry* stands for the . . . proposition that class action judgments may be attacked collaterally for failure to satisfy due process on the ground that the interests of absent class members have not been adequately represented.").

[38] 521 U.S. 591 (1997).

[39] 527 U.S. 815 (1999).

[40] *Id.* at 821.

[41] *Amchem*, 521 U.S. at 625.

interests,[42] and examining the "competency and conflicts of class counsel."[43] In particular, the Court noted that a "class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members,"[44] and that a necessary inquiry is "whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence."[45] Adequate representation was lacking in the *Amchem* settlement due to the diversity of interests within the class.

> In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future. . . . The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected. Although the named parties allege a range of complaints, each served generally as representative for the whole, not for a separate constituency.[46]

This diversity of interests among the class members, particularly between current claimants and future claimants, required the use of subclasses.[47] The Court observed that "the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups."[48]

The settlement context presented by *Amchem* and *Ortiz* did not authorize reduced scrutiny of adequacy of representation. Rather than glossing over the adequacy of representation inquiry in a settlement context, the Court stated that courts must duly and fully analyze adequacy of representation in an "undiluted, even heightened" manner.[49] Indeed, in *Ortiz* the Supreme Court took the opportunity to insist upon the primacy of adequate representation and expressly rejected the perceived fairness of the settlement as a substitute for adequacy of representation. The Court emphasized that a "settlement's fairness under Rule 23(e) does not dispense with the requirements of Rules 23(a) and (b)."[50]

> [T]he District Court took no steps at the outset to ensure that the potentially conflicting interests of easily identifiable categories of claimants be protected

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[42] *Id.* at 626 & n.20.
[43] *Id.* at 626 n.20.
[44] *Id.* 625-26 (quoting E. Tex. Motor Freight Sys. v. Rodriguez, 431 U.S. 395, 403 (1977)).
[45] *Id.* at 626 n.20.
[46] *Amchem*, 521 U.S. at 626-27.
[47] *Id.* (discussing subclasses).
[48] *Id.* at 627 (quoting *In re* Joint E. and S. Dist. Asbestos Litig., 982 F.2d 721, 742-43 (2d Cir. 1992)).
[49] *Id.* at 620.
[50] Ortiz v. Fibreboard Corp., 527 U.S. 815, 863-64 (1999).

> by provisional certification of subclasses under Rule 23(c)(4), relying instead on its post hoc findings at the fairness hearing that these subclasses in fact had been adequately represented.[51]

The Supreme Court imposed an affirmative duty on the courts to determine the existence of adequate representation rather than relying on the representations or assurances of counsel. The Court emphasized that courts must "rigorous[ly] adhere[] to those provisions of [Rule 23] 'designed to protect absentees,'"[52] and also noted that "the moment of certification requires 'heightened attention' . . . to the justifications for binding the class members."[53] Thus, adequate representation does not necessarily follow from the fact of settlement, even if the settlement contains seemingly desirable terms and both counsel appear satisfied with the result.

The primary focus of adequate representation involves protecting absent class members—those who were neither specifically named in the lawsuit nor actively participated in the litigation, but who come within the class definition and thus purportedly are bound by the class judgment.[54] Since a class action seeks to hold to a judgment individuals who played no role in the underlying litigation, adequate representation serves as a barometer of the fairness of doing so.[55] The primacy of adequate representation is reflected in the ability to challenge adequacy of representation at any stage of a class action,[56] and the ability to collaterally attack a class action judgment largely depends on whether the challenger's interests were adequately represented in the first lawsuit.[57]

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[51] *Id.* at 831-32.

[52] *Id.* at 849.

[53] *Id.*

[54] *See* Bassett, *supra* note 22, at 930-31.

[55] *See id.* at 929-30 (noting that the Supreme Court has equated adequate representation with fairness).

[56] *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) (stating that "the Due Process Clause . . . requires that the named plaintiff at all times adequately represent the interests of the absent class members"); *see also* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 395 (1996) (Ginsburg, J., concurring and dissenting) ("As the *Shutts* Court's phrase 'at all times' indicates, the class representative's duty to represent absent class members adequately is a continuing one."); Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX. L. REV. 383, 399 (2000) (noting that "courts are obliged to monitor the adequacy of representation throughout the proceedings").

[57] *See Matsushita*, 516 U.S. at 396 (Ginsburg, J., concurring and dissenting) ("Final judgments . . . remain vulnerable to collateral attack for failure to satisfy the adequate representation requirement."); *see also* Graham C. Lilly, *Modeling Class Actions: The Representative Suit as an Analytic Tool*, 81 NEB. L. REV. 1008, 1029 (2003) (noting that "the adequacy of representation by the class representative and class counsel . . . determine[s] the preclusive effect of a class action judgment").

> [T]he basic constitutional principle has been to permit unnamed class members to challenge the adequacy of their representation in a collateral trial. If the court finds that the class (or certain members within it) was inadequately represented, the

Despite the necessity of adequate representation to a binding class judgment, the term "adequacy of representation" is not well-defined. Neither Rule 23 itself nor case law provides an effective definition, and "the law remains remarkably unsettled with respect to what qualifies as inadequate representation."[58]

The leading federal court treatise states that "[w]hat constitutes adequate representation is a question of fact that depends on the circumstances of each case."[59] I previously have identified perspectives, factors, and process considerations for ensuring adequacy of representation, gleaned from the Supreme Court's jurisprudence:

> The relevant perspectives include a comparison of the benefits accruing to class counsel with those to the class representatives and other class members; a comparison of the benefits accruing to the class representatives with those to other class members; and an evaluation from each diverse perspective or subgroup within the class. The factors include the competency of class counsel; vigorous prosecution by the class representative and class counsel; conflicts of interest among class members, the class representatives, or class counsel; and an alignment and interrelation of interests among class members and the class representatives. Due to the lack of definitive substantive guidance, the process and procedures involved in ascertaining and protecting adequacy of representation are particularly important.
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> The process of ensuring adequacy of representation involves a tripartite system of safeguards—three levels of overlapping protection for absent class members: (1) the class representative, (2) class counsel, and (3) court oversight. . . .When all three safeguards are operating optimally, adequacy of representation is most likely to be achieved.[60]

In light of these perspectives, factors, and process considerations, adequate representation is unlikely simply to fall into place without thoughtful, careful, conscientious effort and focus. This is consistent with the gravity of concluding

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> judgment as to the class (or individual within it) will be invalidated under the Due Process Clause.

Lilly, *supra*, at 1037 (citations omitted).

[58] Woolley, *supra* note 56, at 387; *see also* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 428 (2000) (noting that adequacy of representation "is not self-defining"); Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 HOFSTRA L. REV. 129, 158 (2001) ("[T]he courts manage not to create any law of adequacy, leaping as they do from the actions of counsel to the conclusion that those actions are adequate without pausing to explain the content of the standard they purport to be applying."); Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 288 (2003) ("For all the agreement on the centrality of adequate representation to the modern class action—indeed, on its constitutional status—there remains remarkably little agreement on the content of that concept or how to enforce it.").

[59] 7A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE 2d § 1765, at 322 (3d ed. 2005).

[60] Bassett, *supra* note 22, at 948-49 (citations omitted).

that individuals who did not personally participate in a lawsuit, and did not retain an attorney to represent their interests, nevertheless had the equivalent of their "day in court" such that they should be bound by that lawsuit's result.[61]

III. ADEQUATE REPRESENTATION AND COLLATERAL ATTACK

For the defendant in a plaintiff class action, the practical significance of adequacy of representation becomes most acute after the court enters a class judgment—at which point the issue becomes whether the judgment will bind all of the class members so that the matter is fully and finally resolved. Although a defendant's challenges to adequacy of representation in the beginning stages of class litigation[62] are often viewed with skepticism[63]—and legitimately so, at least in some instances[64]—ultimately the defendant has a vested interest in ensuring

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[61] *See* Martin v. Wilks, 490 U.S. 755, 762 (1989) (describing adequacy of representation as grounded in the entitlement to "a day in court").

[62] *See* ROBERT H. KLONOFF, *Class Certification Requirements: Implicit Requirements and Rule 23(a) and Class Certification Requirements: Rule 23(b)*, SG013 ALI-ABA 479, 492 (2001) ("The law governing adequacy of representation reveals an apparent anomaly: In most cases, the defendants are the ones who seek to challenge adequacy. But do defendants really want to exclude inadequate representatives or class counsel? Or would they prefer weak, ineffective representatives and class counsel?").

[63] *See id.* at 493 (noting that "courts sometimes view defendants' challenges [to adequacy of representation] with skepticism, reasoning that defendants' real goal is not an altruistic concern for the welfare of absent class members, but to see that no class is certified").

[64] *See id.* at 492 ("It is undoubtedly true that, in some cases, a defendant's motivation is not to secure the substitution of adequate plaintiffs and counsel, but to obtain dismissal of the class suit altogether."); *see also* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 64 (1991) ("[T]he defendant cannot be expected to serve the class . . . interests when challenging the typicality or adequacy of representation. Instead, the defendant is likely to act strategically to serve its own interests and harm those of the class.").

> [D]efendants often have little incentive to challenge the adequacy of named plaintiffs who in fact are inadequate representatives of the class . . . . Other things being equal, the quality of representation of the class . . . will be lower with an inadequate representative plaintiff than with an adequate one. Because defendants are in an adversary relationship with the class . . . they can be expected to be pleased when the named plaintiff is an inadequate representative. Certainly they are not going to bring this matter to the attention of the court with a request that the named plaintiff be replaced, at least not unless they believe that they can gain some strategic benefit from doing so.

Id. at 65.

> [I]t is often the defendant, preferring not to be successfully sued by anyone, who supposedly undertakes to assist the court in determining whether a putative class should be certified. When it comes, for instance, to determining whether "the representative parties will fairly and adequately protect the interests of the class," . . .

the adequacy of representation of absent class members, because it is the lack of adequacy that opens the door to a successful collateral attack against the class judgment.

A collateral attack is "[a]n attack on a judgment in a proceeding other than a direct appeal; esp., an attempt to undermine a judgment through a judicial proceeding in which the ground of the proceeding (or a defense in the proceeding) is that the judgment is ineffective."[65] Since a class judgment ordinarily will bind all class members to that result,[66] the ability to collaterally attack a class action judgment largely depends on whether the challenger's interests were adequately represented in the first lawsuit.[67] The Supreme Court has assured the availability of collateral attack to safeguard due process for absent class members for more than sixty-five years—ever since its decision in *Hansberry v. Lee*.[68]

> it is a bit like permitting a fox, although with pious countenance, to take charge of the chicken house.

Eggleston v. Chicago Journeymen Plumbers, 657 F.2d 890, 895 (7th Cir. 1981).

[65] BLACK'S LAW DICTIONARY 237 (5th ed. 1979).

[66] *See* Hansberry v. Lee, 311 U.S. 32, 42-43 (1940) ("It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present. . . ."); Lilly, *supra* note 57, at 1009, 1019 ("American law generally holds that when a properly structured class action is resolved by a judicial judgment, the entire class is bound. . . . [T]hroughout the history of the modern class action in the United States, the Supreme Court has accepted the binding effect of the class judgment on absentees.").

> Preclusion by representation lies at the heart of the modern class action developed by such procedural rules as Civil Rule 23. The central purpose of each of the various forms of class action is to establish a judgment that will bind not only the representative parties but also all nonparticipating members of the class certified by the court.

18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4455, at 448 (3d ed. 2002).

[67] *See* Matsushita Elec. Indus. Co. Ltd. v. Epstein, 516 U.S. 367, 396 (1996) (Ginsburg, J., concurring and dissenting) ("Final judgments . . . remain vulnerable to collateral attack for failure to satisfy the adequate representation requirement."); *see also* 18A WRIGHT ET AL., *supra* note 66, § 4455, at 448 ("The most important requirement of preclusion is that the named parties afford adequate representation.").

> [T]he basic constitutional principle has been to permit unnamed class members to challenge the adequacy of their representation in a collateral trial. If the court finds that the class (or certain members within it) was inadequately represented, the judgment as to the class (or individual within it) will be invalidated under the Due Process Clause.

Lilly, *supra* note 57, at 1037 (citations omitted).

[68] Hansberry v. Lee, 311 U.S. 32 (1940).

Stephenson v. Dow Chemical Co. provides a relatively recent example of a collateral attack in the class action context.[69] *Stephenson* involved a collateral attack against the class action settlement in *In re "Agent Orange" Products Liability Litigation.*[70] In *Agent Orange*, the court took an "aggregate" approach, certifying a class that included those who served in the military "from 1961 to 1972 who were injured while in or near Vietnam by exposure to 'Agent Orange'" as well as their families.[71] The court-approved settlement in *Agent Orange* provided that the defendants would create a $180 million settlement fund.[72] Three-quarters of the fund monies were distributed directly "to exposed veterans who suffer from long-term total disabilities and to the surviving spouses or children of exposed veterans who have died."[73] The remaining one-quarter of the fund monies was allocated primarily to the "Agent Orange Class Assistance Program," aimed at providing grants to agencies serving Vietnam veterans and their families.[74] After these allocations, $10 million remained as a reserve for future claims.[75]

The *Agent Orange* settlement expressly stated that the class "specifically includes persons who have not yet manifested injury,"[76] yet set aside only $10 million to pay such claims. This $10 million subsequently was transferred to the "Agent Orange Class Assistance Program" rather than kept as a reserve for future claimants.[77] Moreover, the settlement "only provided for recovery for those whose death or disability was discovered prior to 1994. . . . No provision was made for post-1994 claimants, and the settlement fund was permitted to terminate in 1994."[78] In a challenge to the *Agent Orange* settlement filed before the expiration of the settlement fund, the court justified the 1994 cutoff by noting

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[69] Stephenson v. Dow Chem. Co., 273 F.3d 249 (2d Cir. 2001), *aff'd by an equally divided Court*, 539 U.S. 111 (2003).

[70] *In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762 (E.D.N.Y. 1980).

[71] *In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 867 app. B (E.D.N.Y. 1984).

[72] *See id.* at 863 app. B.

[73] *Stephenson*, 273 F.3d at 253 (quoting *In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 158 (2d Cir. 1987)).

[74] *Id.*; *see also In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1396, 1432 (E.D.N.Y. 1985) (noting that the priorities of the "Agent Orange Class Assistance Program" included "the establishment of legal and social service projects to benefit Vietnam veterans exposed to Agent Orange and suffering some disability and their families," and that the first funding priority should be "[c]hildren with birth defects born to class member veterans").

[75] *See In re* "Agent Orange," 597 F. Supp. at 870 app. B (stating, in the class action settlement notice, that a portion of the settlement fund "will be set aside for future payment to those class members who have not, as yet, manifested adverse health effects but who may manifest such effects in the future"); *see also Stephenson*, 273 F.3d at 252 ("The settlement provided that defendants would pay $180 million into a settlement fund, $10 million of which would indemnify defendants against future state court actions alleging the same claims.").

[76] *In re* "Agent Orange," 597 F. Supp. at 865 app. A.

[77] *See* Susan P. Koniak, *How Like A Winter? The Plight of Absent Class Members Denied Adequate Representation*, 79 NOTRE DAME L. REV. 1787, 1820 n.193 (2004).

[78] *Stephenson*, 273 F.3d at 260-61; *see also id.* at 253 (noting that no payments for "death or disability occurring after December 31, 1994" were permitted under the settlement).

that "[t]he relevant latency periods and the age of the veterans ensure that almost all valid claims will be revealed before that time."[79]

Future claimants were not a separate subclass in the *Agent Orange* case; indeed, there were no subclasses of any type.[80] The adequacy of representation issue is obvious; the expectation of fewer claims after 1994 would justify maintaining a smaller post-1994 reserve, rather than eliminating the reserve altogether.[81] Having intentionally and specifically been swept within the class settlement, the future claimants who became ill after 1994 had the right to adequate representation.[82] Both the litigants and the court, however, were focused on disposing of the claims—a focus which, as in *Amchem*, came at the expense of neglecting the key requirement of adequate representation.

The circumstances of Daniel Stephenson highlighted the settlement's deficiencies in providing adequate representation. Stephenson was exposed to Agent Orange during his tour of duty in Vietnam, but did not become ill or develop symptoms from that exposure until 1998—after the 1994 termination of the settlement fund.[83] Stephenson sued the manufacturers of Agent Orange, but the defendants argued that the *Agent Orange* settlement precluded Stephenson's suit.[84] Although the district court dismissed Stephenson's suit,[85] the Second Circuit concluded that Stephenson had been denied due process due to lack of adequate representation and therefore was not bound by the *Agent Orange* settlement[86]—a result affirmed by a 4-4 Supreme Court split.[87]

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[79] *In re* "Agent Orange" Prod. Liab. Litig., 781 F. Supp. 902, 919 (E.D.N.Y. 1991).

[80] *See Stephenson*, 273 F.3d at 252, 259-60.

[81] In a subsequent law review article, Judge Weinstein, the district court judge who approved the *Agent Orange* settlement, stated his belief that the claims in the *Agent Orange* lawsuit lacked merit. *See* Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 543 (1994) (stating that, with respect to the *Agent Orange* litigation, "the law and science, in my view, did not support a viable cause of action"). As Professor Koniak has observed, if the court believed the claims lacked merit, the proper result would have been to dismiss the entire lawsuit; a belief that the claims lacked merit would not excuse or justify inadequate representation. *See* Koniak, *supra* note 77, at 1826 & n.217.

[82] *See* Koniak, *supra* note 77, at 1821 ("[I]f the post-1994s . . . had been adequately represented, this deal would have provided something of substance for them—or their lawyer would have insisted that they be left out of it altogether. Put another way, such blatant bias for the presents, the near-futures and the non-injured—at the expense of people like Stephenson—demonstrates that Stephenson was not adequately represented.").

[83] *See Stephenson*, 273 F.3d at 255 (noting that "Stephenson served in Vietnam from 1965 to 1970, serving both on the ground in Vietnam and as a helicopter pilot in Vietnam. . . . . On February 19, 1998, he was diagnosed with multiple myeloma . . . ."); Koniak, *supra* note 77, at 1818 ("In 1998, Stephenson was diagnosed with multiple myeloma, a deadly cancer that some studies connect to Agent Orange exposure.").

[84] *Stephenson*, 273 F.3d at 256.

[85] *See id.* at 251 (vacating "the district court's dismissal").

[86] *Id.* at 261.

[87] Dow Chem. Co. v. Stephenson, 539 U.S. 111, 112 (2003) (per curiam) (stating that "the judgment is affirmed by an equally divided Court").

Despite a purportedly widespread concern that many class counsel are more interested in obtaining a large fee for themselves rather than achieving the best possible result for the class members[88]—which would suggest corresponding grave deficiencies in adequacy of representation—a growing number of commentators would deny affected class members any remedy by severely limiting, if not outright prohibiting, the ability to collaterally attack a class judgment.[89] Recent commentary has criticized the ability to collaterally attack a class judgment,[90] including the collateral attack permitted in the *Stephenson* case.[91]

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[88] *See* Coffee, *supra* note 58, at 371-72 ("[W]here the plaintiffs' attorney was once seen as a public-regarding private attorney general, increasingly the more standard depiction is as a profit-seeking entrepreneur, capable of opportunistic actions and often willing to subordinate the interests of class members to the attorney's own economic self-interest.").

[89] *See infra* note 90 and accompanying text (discussing commentary critical of collateral attacks against class judgments).

[90] *See, e.g.*, William T. Allen, *Finality of Judgments in Class Actions: A Comment on* Epstein v. MCA, Inc., 73 N.Y.U. L. REV. 1149, 1163-64 (1998) (criticizing the suggestion that class members should be able to attack adequacy of counsel collaterally); Kevin R. Bernier, Note, *The Inadequacy of the Broad Collateral Attack*: Stephenson v. Dow Chemical Company *and Its Effect on Class Action Settlements*, 84 B.U. L. REV. 1023 (2004) (arguing that the Supreme Court should adopt a limited standard for collateral attacks against class judgments); Marcel Kahan & Linda Silberman, *The Proper Role for Collateral Attack in Class Actions: A Reply to Allen, Miller, and Morrison*, 73 N.Y.U. L. REV. 1193 (1998) (responding to previous articles regarding the ability to collaterally attack a class judgment by arguing that those positions are inconsistent with the language and effect of existing case law); Kahan & Silberman, *supra* note 9, at 779-83 (criticizing broad right to mount collateral attack upon adequacy of representation); Kahan & Silberman, *supra* note 7, at 262-66 (arguing that "adequacy of representation should be raised directly, and not be permitted to be raised collaterally" when class members had a "fair opportunity to raise the issue"); Lilly, *supra* note 57, at 1047 (noting that allowing collateral attacks "upon adequacy of representation in the class forum contradicts modern understandings of class actions"); Geoffrey P. Miller, *Full Faith and Credit to Settlements in Overlapping Class Actions: A Reply to Professors Kahan and Silberman*, 73 N.Y.U. L. REV. 1167, 1175 (1998) (calling for counsel "to establish a full record on adequacy in the fairness hearing"); Nagareda, *supra* note 58, at 366 (stating that he "share[s the] inclination" of commentators who have called for limits on the ability to collaterally attack class judgments). *But see* Koniak, *supra* note 77, at 1794 ("Those who argue against an unfettered right of absentees to mount a collateral attack based on inadequacy of representation bemoan the lack of finality to class action settlements that right creates. Due process is, however, always in tension with efficiency, speed and finality."); Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1200 (1998) (supporting the right to collaterally attack class judgments based on inadequate representation); Woolley, *supra* note 56, at 433-38 (arguing that the ability to mount a collateral attack on a judgment is an important safeguard to ensure that class members receive a hearing on the merits of a case); *see also* Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 807 (2005) (seeming to suggest a middle ground by proposing a "modest form of adequacy based collateral challenge, which leaves intact the claims actually litigated in the original action, [and thereby] poses none of the threats to finality and predictability that are associated with full-scale collateral attacks"). According to Professor Wolff:

The arguments proffered in favor of limiting collateral attack uniformly include the goal of finality of judgments and the impact of the ability to collaterally attack a class judgment upon class action settlements—and a surprising, but necessarily concomitant, discounting of the constitutionally-mandated due process prerequisite of adequate representation. Those seeking to limit the ability to collaterally attack a class judgment argue that, in effect, other considerations—judicial economy, court congestion, the promotion of settlements, and the desirability of finality—should outweigh the adequate representation of absent class members.[92]

> Allowing collateral attacks disrupts [some of] the goals of class action litigation and settlement. Efficiency and judicial administration are not served when any class member can question the finality of a judgment. Also, defendants will be less likely to settle if there exists the possibility that the settlement will not end the litigation with finality.[93]

Interestingly, the proposals to limit collateral attacks focus on the purported burdens that collateral attacks pose to defendants without regard to whether the defendant contributed to the lack of adequate representation and thereby played a significant role in the creation of the problem. The omission of this consideration is notable in light of the widespread publicity involving several cases where the defendants had participated in, or largely created, the adequacy problem. For example, the class settlement at issue in *Amchem Products, Inc. v. Windsor*[94]

> In addition to the familiar limitations on claim and issue preclusion that F2 courts already apply, a court that is asked to give effect to a class action judgment may need to ask what prospective constraints the rendering court should have imposed upon the judgment in order for the representation of all class members to have been minimally adequate in the initial proceeding. Where the failure of the F1 court to apply such a constraint has resulted in the inadequate representation of class members' interests, the F2 court should limit the preclusive effect of the judgment as if the initial tribunal had acted properly. The F2 court would not reopen claims actually adjudicated in the first action, as in a full-scale collateral attack. Rather, the court would constrain the judgment's effect upon the claims not litigated in that action to the extent necessary to cure the prejudice that the absentees would otherwise suffer from the inadequate representation of their interests.

Wolff, *supra*, at 803-04.

[91] *See, e.g.*, Nagareda, *supra* note 58, at 316-20 (criticizing the Second Circuit's decision in *Stephenson* and characterizing the Supreme Court's deadlock as a "missed opportunity"); Bernier, *supra* note 90, at 1024 (arguing that by deadlocking in *Stephenson*, "the Supreme Court missed an opportunity" and should adopt a limited standard for collateral attacks against class judgments).

[92] *See* Debra Lyn Bassett, *Constructing Class Action Reality* (forthcoming manuscript) (arguing that proponents of restricting collateral attack promote considerations of efficiency and finality over adequacy of representation).

[93] Sara Maurer, Dow Chemical Co. v. Stephenson: *Class Action Catch 22*, 55 S.C. L. REV. 467, 480 (2004); *see also* Nagareda, *supra* note 58, at 289 (noting that "finality is what the settling defendant seeks to purchase").

[94] 521 U.S. 591 (1997).

was, as chronicled by Professor Koniak,[95] the result of the defendants' insistence on a global settlement and the defendants' participation in the crafting of two agreements with very different terms.

> Once upon a time, not so long ago, twenty companies faced the prospect of defending against millions of legal claims brought in connection with their asbestos products. Many thousands of these cases were already pending. The rest would be filed in years to come. The companies wanted out of this mess, and they found a way. They settled almost all of these claims—most of those that were pending and almost all of those that had not yet been filed. The key was to craft two deals: a class action and another deal.[96]

In *Amchem*, the lawyers involved in the settlement—both class counsel and defense counsel—crafted two deals.[97] One deal was the global settlement for which they sought court approval in the *Amchem* case; the other deal involved pre-existing clients—the clients whom class counsel and others were representing at the time defense counsel approached them about a global settlement.[98] The two deals had different terms, and the pre-existing clients received the better deal.[99]

> Both deals covered people with a wide range of diseases caused by asbestos: mesothelioma, lung cancer, and the full range of nonmalignant asbestos diseases—from disease that seriously affects one's ability to breathe to disease that leaves marks on the lungs but does not result in severe breathing impairment. Although the deals covered the same sorts of people with the same sorts of diseases, the deals had different terms. For example, it appears that the people covered by the class action got considerably less money than the people with the same diseases who were covered by the other deal. . . .
>
> [The class] excluded over fourteen thousand of [class counsel's] clients and many, if not most, of the clients of other asbestos lawyers. These clients—and their lawyers—got the deal with more money. . . .
>
> [The defendant asbestos companies] refused to settle the bulk of the existing cases without some guarantee about the future. . . . They also wanted control over the number of cases they would face each year and, preferably, control over how much money they would have to pay out each year. They determined that the best way to get what they wanted was through a "settlement class action"—a class action put together solely for the purpose of achieving settlement.[100]

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[95] *See* Koniak, *supra* note 6, at 1051.
[96] *Id.*
[97] *Id.*
[98] *Id.* at 1052.
[99] *Id.* at 1053.
[100] Koniak, *supra* note 6, at 1052-53.

In light of defendants' typical possession of the crucial evidence,[101] and defendants' typical desire for a global settlement,[102] current proposals to limit collateral attack would appear to provide an unwarranted windfall to defendants, in which defendants could knowingly participate in an unfair settlement agreement, but then would largely be sheltered from due process challenges to the judgment.

Moreover, there is a peculiar twist to the animated commentary concerning collateral attacks: despite the clamor, collateral attacks against class judgments are uncommon.[103] This relative rarity renders curious the volume—in terms of both number and intensity[104]—of the reaction against collateral attacks of class judgments. Perhaps the limited number of collateral attacks signifies that the class action device is working well and that the publicized instances of attorney greed, collusion among counsel, and poor court oversight are simply overblown. If so, the calls to restrict collateral attacks are misdirected and unnecessary. If, however, the publicized problems of exorbitant attorney fees,[105] coupon settlements,[106] and gerry-rigged settlements benefiting class counsel at the

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[101] *See infra* note 133 and accompanying text (noting defendants' typical possession, control, or access to most critical evidence).

[102] *See* John C. Coffee, Jr., *Conflicts, Consent, and Allocation After* Amchem Products—*Or, Why Attorneys Still Need Consent to Give Away Their Clients' Money*, 84 VA. L. REV. 1541, 1548 (1998) (noting "[d]efendants' desire . . . for a global settlement"); *id.* ("[O]nce defendants decide to settle, they understandably want to achieve global peace . . . ."); *see also* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1352 (1995) [hereinafter Coffee, *Class Wars*] (noting that in "large claimant" classes, defendants "hope to reach a 'reasonable' global settlement").

[103] *See* Koniak, *supra* note 77, at 1857 ("[T]here is no evidence whatsoever that absent class members are clogging the courts with collateral attacks anywhere. And they never have."); Mollie A. Murphy, *The Intersystem Class Settlement: Of Comity, Consent, and Collusion*, 47 U. KAN. L. REV. 413, 469 (1999) ("Collateral attack has been used relatively sparingly to attack . . . adequacy of representation . . . ."); Woolley, *supra* note 56, at 443 ("Notwithstanding the longstanding availability of collateral attack, such attacks have not been common . . . .").

[104] *See* Wolff, *supra* note 90, at 718-19 (noting the "intensity" of the focus on the binding effect of class action judgments).

[105] *See, e.g.*, Michael H. Dessent, *Joe Six-Pack*, United States v. O'Hagan, *and Private Securities Litigation Reform: A Line Must Be Drawn*, 40 ARIZ. L. REV. 1137, 1150 (1998) (noting class actions' "potential for exorbitant attorneys' fees"); Koysza, *supra* note 2, at 782-83 ("The pages of reputable journals and reporters are filled with descriptions of 'litigation-mad, bottom-feeding, money-hungry, professional plaintiffs' lawyers.' . . . Newspapers ridicule the frivolous claims and exorbitant attorneys' fees so often associated with class actions."); Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 164 (2003) (noting "excessive fees for class counsel"); Roger Parloff, *Coughing It Up*, N.Y. TIMES, Sept. 24, 2000, at 17 (commenting on the "troublesome knots in the logic behind the litigation that [tobacco class action plaintiffs' attorney Ron] Motley led, which is scheduled to earn his small firm in Charleston, S.C., more than $1 billion in fees.").

[106] *See* Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 995 (2002) ("Although coupon-based settlements may at first appear to be a reasonable mechanism to compensate class members,

expense of class members[107] (or unfairly benefiting some class members more than others[108]) are genuine concerns rather than merely isolated incidents, the collateral attack is the class members' remedy for such abuses. Restricting the availability of collateral attack condemns class members denied due process to an unfair judgment without recourse.

The motivation behind the seeming incongruity of pairing vociferous criticisms of class counsel with calls for restricting collateral attacks, may actually be a consistent one—a motivation, ultimately, of garnering public and political support[109] for shifting policies to favor corporate defendants at the expense of individuals harmed by those very corporations.[110] The recent "Class Action Fairness Act of 2005," for example, moved many class actions out of the state courts and into the federal courts, at the behest of the business community, because federal courts were believed to be less receptive to class action litigation.[111] Politicians who champion corporate interests routinely assert that class counsel's financial self-interest tends to override adequate representation

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coupons are in fact often worthless despite their deceptively high face value. In many cases, the coupons are laden with restrictions intended to make redemption difficult."). *See generally* Note, *In-Kind Class Action Settlements*, 109 HARV. L. REV. 810 (1996) (discussing coupon settlements and citing cases and commentary).

[107] *See* Kahan & Silberman, *supra* note 7, at 232 (noting the danger in class actions "that unscrupulous class counsel will settle a class claim for a generous attorney fee, but a paltry recovery").

[108] *See* Koniak, *supra* note 6, at 1054 (describing how class counsel "gerrymandered the class for profit" by manipulating the class definition so as to exclude their pre-existing clients from the proposed global settlement); Koniak & Cohen, *supra* note 58, at 158-59 (providing examples of class counsel "negotiating a class settlement that leaves some members of the class paying more in attorneys' fees than they receive in recovery; negotiating a deal for the class that is worse than the deal simultaneously negotiated by the same lawyers for identically situated people outside the class; [and] negotiating a deal that gives members of the class with no viable claims as good a recovery as those with viable, even strong, claims ").

[109] *See* O'Brien & Glater, *supra* note 5, at 1 (noting that class actions have been the subject of "partisan legislative battles for more than a decade," and that "Republicans, heavily financed by corporate coffers, have sought to rein in the plaintiffs' bar").

[110] *See* Koniak, *supra* note 77, at 1792 (noting that, "when Stephenson went to the Supreme Court, the business community came out in force to argue against the right of collateral attack").

[111] *See* Jed Graham & Sean Higgins, *Bush Adds Energy, Trade to Long List of 2nd-Term Wins*, INVESTOR'S BUS. DAILY, Jul. 29, 2005, at A01 (noting that the Class Action Fairness Act "shifts most large class-action lawsuits involving parties in multiple states to federal courts, which are more skeptical of such suits"); Joanne Gray, *Recent Supreme Court Decision Will Make It Easier for Companies to Litigate Class Actions and Multi-Party Claims in Federal Court*, MONDAQ BUS. BRIEFING, Jul. 1, 2005, *available at* 2005 WLNR 10370994 (noting that the Class Action Fairness Act "makes it easier for defendants in multi-plaintiff actions to have their cases heard in federal courts—often a more attractive forum than their state counterparts"); Michele Heller, *Next in Line on Senate Panel, A "Catalyst" for Bills, Deals*, AM. BANKER, Jun. 3, 2005, at 4 (noting that the Class Action Fairness Act "mov[es] more cases from state to federal courts, which generally pose higher hurdles for plaintiffs"); *Phillip Morris Sued for False Advertising*, KANSAS CITY STAR, Jul. 26, 2005, at D16 (reporting that "[b]usiness interests lobbied heavily for the [Class Action Fairness Act] . . . . Federal courts are generally seen as less hospitable to class actions than state courts.").

concerns, resulting in minimal awards for injured parties.[112] Those "minimal awards," of course, also benefit corporate defendants by resulting in potentially smaller payouts. The economic bottom line of a potentially smaller payout already provides a powerful motivation for defendants to sweep additional potential claimant groups under the rug, and the relatively small number of collateral attacks reduces the likelihood that defendants will suffer any consequences for doing so. Although lobbying by corporations may indeed eventually lead to further legislative modifications to the class action device, the focus here is upon the law of class actions as it is, rather than what it might become—and, in particular, the significance of some overlooked language in one of the Supreme Court's most prominent class action decisions, which is the subject of the next Section.

This Article addresses these issues from a somewhat different perspective: the clamor against the availability of collateral attack asserts that defendants should be able to rely on the finality of class action judgments to preclude subsequent challenges. It follows that since effective, binding class judgments and settlements are clearly in defendants' interests, defendants should have a corresponding obligation to help assure the prerequisite to a binding judgment—the prerequisite of adequate representation of the plaintiff class.

IV. ADEQUACY OF REPRESENTATION AND THE DEFENDANT'S OBLIGATION

Phillips Petroleum Co. v. Shutts,[113] the subject of this Symposium, is well known for its contributions to choice of law and personal jurisdiction.[114] However, the language in *Shutts* that is of particular interest to this Article pertains to adequacy of representation—specifically, language indicating that the responsibility for adequate representation does not fall exclusively upon the class representative, class counsel, and the court, but also extends to the defendants. Imposing an obligation on defendants for adequate representation is consistent with the language in *Shutts*, with the benefits that accrue to defendants from binding class judgments, and with the practicalities and theoretical underpinnings of class litigation.

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[112] *See* White House Press Release, *President Bush's Second Term Accomplishments and Agenda*, 2005 WLNR 12220959, Aug. 3, 2005 (stating that the Class Action Fairness Act "helps prevent abusive class action lawsuits that result in large fees for lawyers and minimal awards for injured parties").

[113] Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

[114] *See generally* Miller & Crump, *supra* note 11, at 1 (exploring the effect of *Shutts* on choice of law and personal jurisdiction issues in class actions).

A. Language in *Shutts*

The *Shutts* case involved a (b)(3)-type class action filed in Kansas state court by gas company investors seeking to recover interest on delayed royalty payments.[115] The 28,000-plus member class resided "in all 50 States, the District of Columbia, and several foreign countries,"[116] and the claims averaged $100 per class member.[117]

The defendant, whose loss in the Kansas trial court was affirmed by the Kansas Supreme Court, challenged the judgment on due process and choice of law grounds before the United States Supreme Court.[118] The Court rejected the defendant's due process contention, but sustained the defendant's choice of law argument.[119]

Phillips Petroleum argued that out-of-state class members could not be deemed to have consented to the Kansas court's jurisdiction merely by their failure to opt out of the class, and therefore personal jurisdiction existed over those out-of-state plaintiffs only if they had minimum contacts with the State of Kansas.[120] Without those minimum contacts, the defendant argued, Kansas had "exceeded its jurisdictional reach and thereby violated the due process rights of the absent plaintiffs."[121] Approximately ninety-seven percent of the class had no pre-litigation nexus with Kansas.[122]

Phillips Petroleum's attempt to challenge the Kansas court's personal jurisdiction over out-of-state class members, of course, seemed to raise a potential standing issue—the defendant, in essence, was "assert[ing] the rights of its adversary, the plaintiff class, in order to defeat the judgment in favor of the class."[123] A unanimous Court held that Phillips Petroleum had standing to raise the jurisdictional issue with respect to the out-of-state class members.

> Respondents may be correct that petitioner does not possess standing *jus tertii*, but this is not the issue. Petitioner seeks to vindicate its own interests.

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[115] *Shutts*, 472 U.S. at 799. A Rule 23(b)(3) class action requires that questions of law or fact common to the class predominate over questions affecting only individual members, and that the class action is a superior method for obtaining a fair and efficient adjudication of such issues. FED. R. CIV. P. 23(b)(3). Rule 23(b)(3) lists four non-exhaustive factors for the court to consider in determining whether class action treatment would be superior: (1) the interest of class members in individually controlling the litigation; (2) the extent and nature of any ongoing litigation; (3) the desirability of concentrating litigation in a particular forum; and (4) the difficulties in managing a class action. *Id.*

[116] *Shutts*, 472 U.S. at 799.

[117] *Id.* at 801, 809.

[118] *Id.* at 799.

[119] *Id.* The Kansas court had held that Kansas law applied to all of the transactions, and as to this point the Supreme Court reversed and remanded for further proceedings. *Id.* at 799, 823.

[120] *Shutts*, 472 U.S. at 806.

[121] *Id.*

[122] *See id.* at 801.

[123] *Id.* at 804.

> As a class-action defendant petitioner is in a unique predicament. If Kansas does not possess jurisdiction over this plaintiff class, petitioner will be bound to 28,100 judgment holders scattered across the globe, but none of these will be bound by the Kansas decree. Petitioner could be subject to numerous later individual suits by these class members because a judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit elsewhere and thus has no res judicata effect as to that party. Whether it wins or loses on the merits, petitioner has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as petitioner is bound.
>
> While it is true that a court adjudicating a dispute may not be able to predetermine the res judicata effect of its own judgment, petitioner has alleged that it would be obviously and immediately injured if this class-action judgment against it became final without binding the plaintiff class. We think that such an injury is sufficient to give petitioner standing on its own right to raise the jurisdiction claim in this Court.[124]

In *Shutts*, the Court, perhaps without specifically aiming to emphasize defendants' responsibilities in class actions, identified an important role for defendants in ensuring valid and binding class judgments.

> Whether it wins or loses on the merits, petitioner [the defendant] has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as petitioner is bound. . . .
>
> The absent parties would be bound by the decree so long as the named parties adequately represented the absent class and the prosecution of the litigation was within the common interest. . . .
>
> A plaintiff class . . . cannot first be certified unless *the judge, with the aid of the* named plaintiffs and *defendant, conducts an inquiry* into the common nature of the named plaintiffs' and the absent plaintiffs' claims, the *adequacy of representation*, the jurisdiction possessed over the class, and any other matters that will bear upon proper representation of the absent plaintiffs' interest. . . . The court and named plaintiffs protect [the absent plaintiff's] interests. Indeed, the class-action defendant itself has a great interest in ensuring that the absent plaintiff's claims are properly before the forum.[125]

Just as the defendant in *Shutts* had an interest in obtaining personal jurisdiction over absent class members so as to ensure a binding class judgment, defendants similarly have an interest in assuring the adequacy of representation of those same absent class members—for precisely the same reason. The *Shutts* Court's discussion regarding the significance to the defendant of securing a binding judgment applies just as fully to potential adequacy of representation issues as to potential personal jurisdiction issues. In the aftermath of *Shutts*, so

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[124] *Id.* at 805.

[125] *Shutts*, 472 U.S. at 805, 808, 809 (emphasis added).

long as "minimal procedural due process" protections—all of which are incorporated in Rule 23—have been provided, class actions in which the class members are United States citizens[126] are unlikely to raise personal jurisdiction issues due to the presumption of consent. Adequacy of representation, on the other hand, has proven more amorphous and thus adequacy issues continue to arise.

Due to the difficulties in defining, recognizing, and securing adequacy of representation, the suggestion in *Shutts* that the adequacy inquiry requires a collaborative effort is eminently practical. *Shutts*' use of the word "aid" is distinctive.[127] Perhaps some would contend that the language from *Shutts* is nothing more than the unremarkable observation that courts rely on counsel to frame the issues and present the facts.[128] However, to "aid" the judge in the adequacy inquiry suggests more than merely raising a perfunctory challenge to the class representative in a routine attempt to avoid class certification—rather, the defendant must "aid" or assist the judge in ascertaining whether adequate representation exists.[129] To "aid" is to help, suggesting that although the defendant might initially employ traditional advocacy methods, the defendant would have a continuing duty to bring to the judge's attention any matters impacting on the adequacy of representation inquiry.

In particular, the approach commonly taken by defendants at the outset of class litigation—what might be called an "advocacy" approach because the underlying motivation often is to derail the class litigation altogether[130]—needs supplementation. After the court has certified the class and a class judgment is virtually assured (and thus after the advocacy approach has largely lost its usefulness), a shift in the defendant's thinking about adequacy of representation becomes appropriate. With a class resolution looming, the defendant's strategy should correspondingly shift to ensuring that the resolution will be binding, for which adequacy of representation is a prerequisite.

The *Shutts* Court referred—repeatedly—to the defendant's interest in ensuring adequate representation and, thereby, a binding class judgment. The defendant will be bound by the class judgment. If the defendant expects the absent class members to be correspondingly bound, those class members must have been adequately represented in the class litigation or the ensuing judgment

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[126] *See* Debra Lyn Bassett, *U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction*, 72 FORDHAM L. REV. 41, 44 (2003) (arguing that "the presence of non-U.S. claimants in class litigation requires additional due process protections" beyond those set forth in *Shutts*).

[127] *Shutts*, 472 U.S. at 809.

[128] *See* Kahan & Silberman, *supra* note 7, at 242 (noting that courts "assess the legal and factual strength of the asserted claims" based on information provided by class counsel and defense counsel).

[129] In *Shutts*, the Court noted that the defendant had alleged "that the absent plaintiffs would not be adequately represented and were not amenable to jurisdiction." 472 U.S. at 810.

[130] *See supra* notes 62-64 and accompanying text (noting that, at least in some instances, a defendant's challenge to adequacy of representation is motivated by a desire to obtain an outright dismissal of the class litigation).

will be void as to them for lack of due process.[131] Since the defense to a collateral attack is to argue that the class member was adequately represented, it is in the defendant's interest to scrutinize potential inadequacies in representation and to bring problems to the court's attention. Imposing an obligation on defendants in the adequacy inquiry is additionally supported by the benefits that adequacy accords to defendants, as well as the practicalities and theoretical underpinnings of class litigation.

B. Benefits to Defendants

The benefits accruing to defendants from adequate representation also support a corresponding obligation. Prohibiting collateral attacks directly benefits defendants.[132] Generally, as a practical matter, a class member has no reason to challenge a class judgment for providing a personal recovery that is too generous because such a legal challenge is unnecessary—the individual can simply decline (or return) all or part of her award. Instead, legal challenges will result from personal recoveries that are perceived as insufficient. Since the benefit of constraining collateral attacks would disproportionately favor defendants, and since most evidence typically is within the defendant's exclusive control,[133] it is both practical and appropriate to impose on defendants a shared obligation for adequate representation.

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[131] Prior to 1971, collateral estoppel required mutuality, thus limiting collateral estoppel to situations where both adversaries were parties to the prior proceeding in which the issue was decided. However, the Supreme Court overruled the mutuality requirement in 1971. Blonder-Tongue Labs., Inc. v. University of Ill. Found., 402 U.S. 313 (1971); *see also* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (authorizing the use of nonmutual offensive collateral estoppel in the context of class actions). Accordingly, although some plaintiff class members may not be bound by the class judgment due to a lack of adequate representation, collateral estoppel may nevertheless continue to bind the defendant.

[132] *See* Kahan & Silberman, *supra* note 9, at 779 & n.66 (noting that collateral attacks "increase the expected liability of defendants"; the availability of the collateral attack device sometimes requires defendants to "'buy off' later 'objectors' to the settlement"; and "rais[ing] their objections in a collateral proceeding" may provide class members with greater bargaining power, to defendants' disadvantage); *see also* Note, *Collateral Attack*, *supra* note 21, at 601 (noting that "defendants will be loath to offer substantial sums in compromise unless they can rely upon the judgment to bind all the class members").

[133] *See, e.g.*, Tutton v. Garland Indep. Sch. Dist., 733 F. Supp. 1113, 1118 (N.D. Tex. 1990) (courts should exercise caution in discrimination actions, where defendants usually control evidence and will not admit wrongdoing); 2 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1659 (3d ed. 1996) (observing that "most relevant evidence typically already is within the defendant's control"); Carrie A. Daniel, *Guide to Defeating the Heeding Presumption in Failure-to-warn Cases*, 70 DEF. COUNS. J. 250, 253 (2003) (noting that "defendants typically hold most of the product evidence"); Leslie M. Kelleher, *The December 1993 Amendments to the Federal Rules of Civil Procedure—A Critical Analysis*, 12 TOURO L. REV. 7, 100 (1995) (stating that "evidence is peculiarly within the knowledge and control of the defendants . . . in class action suits, securities fraud suits, and civil rights suits"); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our*

C. Practicalities and Theoretical Underpinnings of Class Litigation

Finally, and most importantly, the practicalities and theoretical underpinnings of class litigation support imposing some obligation on defendants for adequate representation. In traditional, non-class litigation, for the most part each side fends for itself—indeed, one side often enjoys the benefits of her opponent's missteps with impunity. With this backdrop, it is not surprising that defendants often view adequacy of representation solely as class counsel's burden and responsibility, and thereby file an interceding adequacy challenge only for purposes of delay,[134] or with the hope of convincing the court to dismiss the case outright.[135]

In practice, counsel for defendants often take a shortsighted approach to class-wide settlements by treating them in the same manner as settlements with a single individual. In individual settlements, defendants generally need not watch out for the individual's interests because those interests are assumed to be protected by the individual's attorney.[136] Far too many defendants approach class-wide settlements in a similar manner, and thereby assume that the interests of the class members are being protected by class counsel. This leaves the defendant free to focus solely on the financial bottom line—the settlement amount.

The class action, however, is a distinctive device. As a representative action, class actions differ significantly from non-class litigation because the majority of those who ostensibly will be bound by the judgment are not named in the lawsuit and do not personally appear or participate in the litigation.[137] Due to their absence, such class members ordinarily will not be bound by the litigation's outcome—unless they were accorded due process by virtue of the participation of parties in the lawsuit who adequately represented the absentees' interests.[138]

Day in Court and Jury Trial Commitments?, 78 N.Y.U. L. REV. 982, 1070 (2003) (noting that evidence regarding motive or intent "is usually in the defendant's exclusive control or knowledge").

[134] *See, e.g.*, Cook Inv. Co. v. Harvey, 20 FED. R. SERV. 2d (Callaghan) 612, 614 (N.D. Ohio 1975) (finding many of the defendant's contentions regarding adequacy of representation meritless, and concluding that "these are tactics of obfuscation and delay"); *see also* Neil L. Rock, Note, *Class Action Counsel as Named Plaintiff: Double Trouble*, 56 FORDHAM L. REV. 111, 127 (1987) ("When defendants object to the adequacy of representation, their primary motive often is to have certification denied to delay or actually prevent a legitimate class action lawsuit.").

[135] *See supra* notes 62-64 and accompanying text (noting that, at least in some instances, a defendant's challenge to adequacy of representation is motivated by a desire to obtain an outright dismissal of the class litigation).

[136] *See* Wolff, *supra* note 90, at 721 (noting that "an individual litigant in a civil proceeding does not enjoy any right of adequate representation that could enable him to escape the effects of a judgment, and hence assumes the risk that his lawyers will make bad litigation choices on his behalf").

[137] *See* Bassett, *supra* note 22, at 930-31.

[138] *See supra* notes 24-25 and accompanying text (discussing necessity of adequate representation under Hansberry v. Lee); *see also* Kahan & Silberman, *supra* note 7, at 262 ("As a matter of due process, class action judgments and settlements can bind absent class members only when there has been adequate representation . . . .").

Although collateral attacks on class judgments are infrequent, the safeguards for ensuring adequacy of representation can fall short in practice. Indeed, despite the commands of Rule 23 and the Supreme Court to ensure that absent class members are adequately represented, a confluence of factors renders attaining this goal difficult. One of these factors involves the contrary incentives motivating each of the major players in a class action—class counsel's incentive to "achieve the greatest possible personal profit in the shortest amount of time"[139]; the defendant's incentive to pay out as little as possible[140]; and the court's incentive to dispose of the matter as efficiently as possible.[141]

Court oversight plays a critical role in ensuring adequate representation,[142] and although conscientious judges will follow the Supreme Court's directive to engage in a "rigorous analysis" of adequacy of representation,[143] judges can find their efforts hamstrung when counsel are not forthcoming with respect to all of the facts and the potential issues or problems. For example, judges are dependent on counsel's development of the underlying record in assessing the adequacy of the representation.[144]

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[139] Jeannette Cox, Note, *Information Famine, Due Process, and the Revised Class Action Rule: When Should Courts Provide a Second Opportunity to Opt Out?*, 80 NOTRE DAME L. REV. 377, 396 (2004).

[140] *See* Coffee, *Class Wars*, *supra* note 102, at 1361 (noting that "defendants can economize on settlement costs by offering a reduced amount per known claim and by seeking to underestimate the number of future claimants expected to develop injuries and thus achieve a low-cost global settlement").

[141] *See* Woolley, *supra* note 56, at 434 ("Given the incentives that influence judges in class suits, even highly conscientious judges may be unduly biased toward finding that a class member has been adequately represented.").

> [J]udicial approval appears to be highly imperfect as a protection for the plaintiffs' interests, for several reasons. First, and most important, the judge herself has a powerful interest in approving the settlement. Judges' calendars are crowded with cases . . . . If the judge approves the settlement, the result will be to remove a potentially complex and time-consuming case from the judge's calendar; if she rejects it she faces a substantial probability of further litigation. . . . Moreover, trial judges are heavily conditioned by the ethos of their jobs to view settlements as desirable; they routinely encourage settlement in other contexts.

Macey & Miller, *supra* note 64, at 45-46.

[142] *See* Bassett, *supra* note 22, at 982 (noting that "the ultimate responsibility for adequacy lies at the final stop: the judiciary. A conscientious judge can greatly increase the likelihood of adequacy of representation and a subsequent binding judgment.").

[143] *See* Gen. Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982) (requiring "rigorous analysis"); *see also* Ortiz v. Fibreboard Corp., 527 U.S. 815, 849 (1999) (requiring "rigorous adherence to those provisions of [Rule 23] 'designed to protect absentees'"); Weber v. Goodman, 9 F. Supp. 2d 163, 167 (E.D.N.Y. 1998) (citing "rigorous analysis" standard). *See generally* Bassett, *supra* note 22, at 983-88 (discussing court oversight of adequacy of representation and the "rigorous analysis" standard).

[144] *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.641 (2004) ("Counsel for the parties are the main [*sic*] court's source of information about the settlement."); *see also* Cox, *supra* note 139,

> [T]rial courts may simply lack information to make an informed evaluation of the fairness of the settlement. Typically, when a case is settled well in advance of trial, the only information available to the judge is found in papers filed in court—pleadings, briefs, and supporting materials filed on motions—and materials submitted to the judge in connection with the settlement hearing. Such evidence is likely to be highly incomplete and, in the case of materials submitted to support the proposed settlement, biased in favor of the settlement. The matters on which the judge must rule are also highly subjective and imprecise. Even if the judge had adequate information on which to decide, it would be difficult to make reliable estimates of the settlement value of a case.[145]

Complicating and compounding this problem is the fact that the literature is replete with suggestions that many judges do not undertake a searching inquiry—or any truly serious inquiry—into adequacy of representation.

> [S]ettlement hearings are typically pep rallies jointly orchestrated by plaintiffs' counsel and defense counsel. Because both parties desire that the settlement be approved, they have every incentive to present it as entirely fair. Objectors to the settlement, on the other hand, are uncommon; those who do object are often either disgruntled plaintiffs' attorneys who have fallen out with others in the plaintiffs' consortium, or naïve class members who demonstrate their ignorance of the issues in dispute. The deck is heavily stacked toward approval of the settlement.
>
> Trial courts happily play along with the camaraderie. In approving settlement, courts often engage in paeans of praise for counsel or lambaste anyone rash enough to object to the settlement. Not surprisingly, it is uncommon to find cases where trial courts reject settlements that are presented to them by defense counsel and plaintiffs' attorneys. Given that settlements are nearly always approved, one might well question the efficacy of judicial review of class action and derivative settlements.[146]

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at 397 (noting that courts "often lack adequate information to probe settlement agreements for potential fairness concerns not brought to their attention by class counsel"). This same dependency exists with respect to the disclosures required under Rule 23(e)(2), which requires the parties to file "a statement identifying any agreement made in connection with the proposed settlement." FED. R. CIV. P. 23(e)(2). The rule intends that parties identify all agreements and undertakings "that, although seemingly separate, may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others. Doubts should be resolved in favor of identification." *Id.* at advisory committee's note. However, such disclosures are necessarily within the parties' control, and "Rule 23(e)(2) does not specify sanctions for failure to identify an agreement or an understanding connected with the settlement." MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra*, § 21.631.

[145] Macey & Miller, *supra* note 64, at 46.

[146] *Id.* at 46-47; *see also* Cumberland Farms, Inc. v. Browning-Ferris Indus., 120 F.R.D. 642 (E.D. Pa. 1988) (adequacy of representation with respect to class counsel *assumed* from defendant's failure to challenge); Macey & Miller, *supra*, at 64 ("In practice, . . . the courts tend to play a passive role, focusing on questions of typicality and adequacy only when they are specifically raised by defendants."). Such an approach, of course, is contrary to the Supreme Court's directive

Accordingly, and at the risk of grave understatement, assuring that absent class members are adequately represented is a challenge under the best of circumstances. Inadequate court oversight increases the danger of inadequate representation, and the frequency with which this problem is mentioned in the legal literature undermines any suggestion that courts' adequacy findings should be treated as preclusive.[147] Treating adequacy of representation as a collaborative effort—at least at the settlement hearing stage—can lead to more (and more detailed) discussions concerning the facts, the settlement, and the implications of the settlement for absent class members generally and subsets of the class specifically. Due to the difficulties inherent in determining adequacy of representation, the unusual nature of the class action device requires the efforts of all involved in order to achieve a binding judgment.

Including defendants within this collaborative umbrella is also consistent with the *Restatement (Second) of Judgments*. Section 41 provides that class representatives generally bind similarly situated class members to the ensuing class judgment.[148] Section 42, however, provides exceptions to this general rule, including an exception for inadequacy of representation.[149] Moreover, the

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that "actual, not presumed, conformance with Rule 23(a) [is] indispensable." Gen. Tel. Co. v. Falcon, 457 U.S. 147, 160 (1982).

[147] *See* Woolley, *supra* note 56, at 433 ("[T]he literature shows that when judges use the class device they are loath to question the fairness of a settlement or the quality of representation afforded the class."). Other motivations also render troublesome the notion of treating the court's adequacy findings as preclusive.

> The critical problem with treating the findings of class courts as preclusive on the question of adequacy is that judges presiding over a class may be unduly reluctant to find inadequate representation. A finding that class counsel has not provided adequate representation to the class, for example, may require replacement of class counsel with all the disruption that such a substitution would entail. Alternatively, a finding that a part of the class has not been adequately represented might require the appointment of additional class counsel. At best, additional counsel would complicate a court's ability to manage an already unwieldy piece of litigation. . . . It would be unrealistic to believe that judges are not influenced by the consequences of their decisions.

Id. at 432-33.

[148] RESTATEMENT (SECOND) OF JUDGMENTS § 41 (1982).

> A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of a judgment as though he were a party. A person is represented by a party who is: . . . (e) The representative of a class of persons similarly situated, designated as such with the approval of the court, of which the person is a member.

Id. § 41(1)(e).

[149] *Id.* § 42.

> A person is not bound by a judgment for or against a party who purports to represent him if: . . . (d) With respect to the representative of a class, there was such a

comments to this section state that the judgment is not binding on a purportedly represented person when, to the knowledge of the opposing party, the representative seeks to advance his own interest at the expense of the represented person.

> [A] fiduciary does not bind those for whom he acts as against third parties who are aware of the fiduciary's failure to fulfill his responsibility. As applied to litigation, this principle implies that a judgment is not binding on the represented person where it is the product of collusion between the representative and the opposing party, or where, to the knowledge of the opposing party, the representative seeks to further his own interest at the expense of the represented person. . . .[150]

Thus, the Restatement gives a defendant no place to hide when the defendant knew that the class members were not accorded adequacy of representation—under such circumstances, the judgment is not binding on the inadequately represented class members.

These Restatement provisions lead to two related points. First, with respect to the recent commentary that would restrict the ability to collaterally attack a class judgment, adopting such recommendations would, in many cases, eliminate the accountability expressly provided by the Restatement. In other words, restricting the availability of collateral attack often would deny a remedy to class members denied due process under circumstances where, under the Restatement, the judgment would not be binding because the defendant knew of the adequacy problem. Of all the participants in class litigation, it typically is the defendant who has the best access to, and the most knowledge of, the underlying facts.[151] Armed with this information, the defendant is the participant most likely to know when claimants have been omitted or shortchanged. Under the existing system, in light of the relative rarity of collateral attacks against class judgments, defendants may elect to remain mum concerning potential adequacy issues and take their chances that no subsequent challenge to the judgment will be mounted. The proposed restrictions upon collateral attack, however, would increase the defendant's incentive to remain silent about potential adequacy problems because the potential for "getting caught," i.e. a collateral attack, would be reduced even further.

Second, the Restatement's determination that it is improper to permit an opposing party to obtain a benefit (i.e. a binding judgment), when that opposing

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> substantial divergence of interest between him and the members of the class, or a group within the class, that he could not fairly represent them with respect to the matters as to which the judgment is subsequently invoked . . . .

Id. § 42(1)(d); *see also id.* § 41, cmt. a (noting that if circumstances exist that satisfy § 42, "the represented person may avoid being bound either by appearing in the action before rendition of the judgment or by attacking the judgment by subsequent proceedings").

[150] *Id.* § 42, cmt. f.

[151] *See supra* note 133 and accompanying text (noting defendants' typical possession, control, or access to most critical evidence).

party knew that adequacy of representation was lacking, strengthens the justification for viewing adequacy of representation as a collaborative effort. If a defendant knows or should know that a particular claimant group is being omitted or shortchanged under the settlement agreement, but the defendant elects to proceed in order to minimize its liability, that defendant should not be permitted to complain when the omitted or shortchanged claimant group learns of the deficiency—nor should that defendant receive unwarranted insulation from challenges to the class judgment due to restrictions on collateral attacks.

Since defendants directly benefit from a binding class judgment, it is in defendants' best interests to pursue adequacy of representation actively, rather than focusing solely on how to minimize the payout amount. Imposing an obligation on defendants to help ensure adequate representation will help to increase the likelihood of achieving adequate representation, and avoids insulating defendants who contributed to the inadequacy problem.[152]

V. CONCLUSION

To those who would be inclined to reject out-of-hand any suggestion that defendants should bear some responsibility in the adequacy inquiry, let me ask: In light of the constitutionally-mandated, due process nature of adequacy of representation; the fact that adequate representation substitutes for absent class members' "day in court"; and the staggering volume of reports and commentary accusing class counsel and the courts of laziness and self-interest, does it make

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[152] Language to this effect—suggesting that ensuring adequacy of representation requires a collaborative effort—appears in several cases, but in each instance the analysis stopped before reaching the potential role of the defendant.

> The rationale underlying the constitutional basis for adequate class representation was articulated by the Court of Appeals for the District of Columbia Circuit: "Class actions involve the delegation of authority to a named representative to pursue a common goal. In this pursuit, it is not only the duty of the class representative to ensure the absent members' interests are adequately protected; it is a responsibility that the process of class adjudication as a whole must shoulder."

Prezant v. DeAngelis, 636 A.2d 915, 923-24 (Del. 1994) (quoting Nat'l Ass'n of Reg'l Med. Programs, Inc. v. Mathews, 551 F.2d 340, 346 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 954 (1977)); *see also* Note, *Structuring Pretrial: Problems of Information and Due Process*, 89 HARV. L. REV. 1391, 1411 (1976) ("Although the requirement of adequate representation is often associated with a duty the class representative must discharge, it is in fact not a duty of a single individual, but a requirement that must be met by the process of class adjudication taken as a whole."). Indeed, absent such an obligation, defendants will be tempted to obscure or downplay information likely to require a larger payout, and restrictions on the availability of collateral attack would reward them for doing so. *See generally* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 238 (2004) (analogizing the idea of procedural justice to "the familiar procedure for dividing a cake: the person who slices the cake picks last"). In a variant on Professor Solum's argument, absent imposing an obligation on defendants for adequate representation, defendants get to slice the cake and pick first.

more sense (1) to restrict the remedy for inadequate representation by limiting the availability of collateral attack, or (2) to impose some duty for adequacy upon the party who, in most cases, has control over most of the evidence; has a great deal of control over the amount, terms, and conditions of settlement; and is perhaps the one who benefits most from a binding class judgment?

The responsibility for ensuring adequacy of representation for absent class members—which is a due process prerequisite to a binding class judgment—is largely ascribed to class counsel. Yet language in Rule 23 expressly imposes responsibilities upon the class representatives, class counsel, and the court to assure that the interests of absent class members are adequately represented, and language from *Shutts* suggests that the court's review of the adequacy of representation is informed through the collaboration and input of both plaintiffs and defendants. This obligation of the defendant in ascertaining adequacy of representation has been largely overlooked, particularly in discussions regarding the potential imposition of restrictions upon the opportunity to collaterally attack a class judgment, which tend to focus on the burdens on defendants created by collateral attacks without regard to whether the defendant contributed to the lack of adequate representation and thereby played a significant role in the creation of the problem. Since the benefits of restrictions on collateral attacks primarily benefit defendants, and since the imposition of an obligation on defendants for ensuring adequate representation is consistent with *Shutts* and with the practicalities and theoretical underpinnings of class litigation, any restrictions on collateral attack should also take into account the defendant's underlying obligation to ensure adequacy of representation.