South Carolina Law Review

Volume 55
Issue 3 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*

Article 6

Spring 2004

Dow Chemical Co. v. Stephenson: Class Action Catch 22

Sara Maurer

Follow this and additional works at: https://scholarcommons.sc.edu/sclr

 Part of the Law Commons

Recommended Citation

Maurer, Sara (2004) "Dow Chemical Co. v. Stephenson: Class Action Catch 22," *South Carolina Law Review*: Vol. 55 : Iss. 3 , Article 6.
Available at: https://scholarcommons.sc.edu/sclr/vol55/iss3/6

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact digres@mailbox.sc.edu.

DOW CHEMICAL CO. V. STEPHENSON: CLASS ACTION CATCH 22

I. INTRODUCTION

In *Dow Chemical Co. v. Stephenson*,[1] an equally divided United States Supreme Court affirmed a Second Circuit Court of Appeals decision that held that a 1984 global settlement of a class action against manufacturers of the toxic herbicide "Agent Orange" does not bar a 1999 product liability action by a veteran whose injuries became apparent only after the complete diminution of the settlement fund.[2]

During service in the Vietnam War, several hundred thousand soldiers were exposed to Agent Orange. In 1978, many of these veterans and their families filed suits in various state and federal courts against chemical companies, alleging that their exposure to Agent Orange caused their injuries.[3] The cases were consolidated and the plaintiffs' class was certified as including both currently injured veterans and exposure-only veterans.[4] Before trial, the parties reached a settlement to cover all claims arising out of the exposure; the settlement was subsequently approved as fair, reasonable, and adequate.[5] In 1989 and 1990, after the settlement, two groups of veterans displayed injuries and sued the same companies that had previously settled with the class.[6] A district court dismissed these plaintiffs' claims as barred by the original settlement.[7] The United States Court of Appeals for the Second Circuit affirmed the district court's dismissal, expressly rejecting the argument that the veterans, Ivy and Hartman, were inadequately represented as future claimants in the original class action.[8] In 1998 and 1999, two more veterans, Stephenson and Isaacson, sued for injuries resulting from their exposure to Agent Orange.[9] The district court also dismissed these claims as barred by the prior settlement, rejecting the argument that the plaintiffs were inadequately represented in the original settlement.[10] However, relying on *Amchem Products, Inc. v. Windsor*[11] and *Ortiz*

---

1. 123 S. Ct. 2161 (2003).
2. *Id.* at 2161–62.
3. *In re* "Agent Orange" Prod. Liab. Litig., 635 F.2d 987, 988 (2d Cir. 1980).
4. *In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 755 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987).
5. *Id.* at 748.
6. *In re* "Agent Orange" Prod. Liab. Litig., 996 F.2d 1425, 1428, 1430 (2d Cir. 1993).
7. *Id.*
8. *Id.* at 1437.
9. Stephenson v. Dow Chem. Co., 273 F.3d 249, 255–56 (2d Cir. 2001).
10. *Id.* at 256.
11. 521 U.S. 591, 627 (1997) (holding that a class with currently injured plaintiffs and plaintiffs at risk of future injury defeats adequate representation because of the inherent conflict between the two subclasses). *See infra* notes 101–07 and accompanying text.

Published by Scholar Commons, 2004

v. Fibreboard Corp.,[12] both decided after the original Agent Orange cases, the Second Circuit vacated and remanded the case to the district court, holding that the plaintiffs were inadequately represented in the original litigation and permitting the collateral attack.[13]

The practical effect of the Supreme Court's divided decision affirming the Second Circuit leaves several important issues undecided. The Supreme Court did not explicitly resolve the issues of collateral attack and adequacy of representation, and thus, the decision of the Second Circuit stands. As a result of the Supreme Court's holding, the plaintiff can proceed with a collateral attack against the defendant, Dow Chemical Co. ("Dow"), claiming inadequate representation. Dow, however, arguably settled the same claim twelve years ago in the expectation that it would be a final judgment.

Although an open and controversial issue, the district court correctly dismissed the plaintiff's claim because the prior settlement barred his suit. The Second Circuit's decision, if followed, has negative ramifications. Most notably, the decision will jeopardize other class settlements by allowing post-hoc assessments involving new law and new principles. The decision disrupts the well-established principles of res judicata and finality, goes against the principles underlying class actions and settlements, lowers the incentive to make future settlements, and works an injustice to Dow, who relied on the settlement as final. This places Dow and future defendants in an awkward "catch 22," because they will have to decide between proceeding to trial and perhaps risking huge judgments, or settling and risking that later plaintiffs will circumvent the settlement and sue again. Thus, in neither alternative are Dow and future defendants fully protected. Instead, they find themselves in a catch 22 where no decision is completely safe.

In a recent case in South Carolina, *Hospitality Management Associates, Inc. v. Shell Oil Co.*,[14] the Supreme Court of South Carolina denied a collateral attack and held that the appropriate scope of review for collateral attacks on the due process rulings of two other state court nationwide class action settlements was a limited one, in which the court would only take into consideration "whether the procedures in the prior litigation allowed a full and fair opportunity to litigate the due process issues."[15] Although no case in the Fourth Circuit has addressed whether or not a plaintiff can collaterally attack settlements in mass tort claims, the potential for the situation to arise provides good cause for South Carolina attorneys to be aware of the 2003 *Dow Chemical* decision and its implications on class action settlements. Settlements in mass tort litigation have been prolific, and the possibility exists that

12. 527 U.S. 815, 856 (1999) (following *Amchem* that a class consisting of holders of present and future claims requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel). *See infra* notes 108–09 and accompanying text.

13. *Stephenson*, 273 F.3d at 261.

14. No. 25764, 2003 WL 23147500 (S.C. Jan. 12, 2004).

15. *Id.* at *12.

an absent class member may seek to challenge the finality of such cases. Under *Amchem* and *Ortiz* future classes will not contain the inherently conflicting present and future claimants; however, the question remains whether courts will allow parties to retroactively attack settlements reached before these decisions. The Fourth Circuit should not follow the Second Circuit in retroactively applying such principles.

This Note argues that the Second Circuit opinion sets a dangerous precedent that the Supreme Court should reject. Further, the Fourth Circuit should reject the Second Circuit's reasoning if the issue arises. Part II of this Note examines the background of Agent Orange litigation and the original plaintiffs' case. Part III explores the aspects and complications of the Second Circuit's decision allowing a future plaintiff to pursue a collateral attack to challenge the adequacy of representation. Part IV concludes that the consequences of allowing such a collateral attack outweigh the interest in the plaintiff's due process rights. Part V challenges the Second Circuit's use of *Amchem* and *Ortiz* to retroactively apply new principles and subsequent facts to settled cases, and Part VI discusses the consequences of the Second Circuit's allowance of a collateral attack and the retroactive application of new law.

II. BACKGROUND

A. Original Agent Orange Litigation

During their service in Vietnam, several hundred thousand soldiers were exposed to Agent Orange, a chemical containing the toxic by-product dioxin.[16] Beginning in 1978, several individual veterans and their families filed suits in various state and federal courts against chemical companies alleging that their exposure to Agent Orange caused them injuries.[17] All of these cases were consolidated in a multidistrict litigation proceeding[18] and transferred to the Eastern District of New York, with jurisdiction based on diversity.[19]

---

16. *In re* "Agent Orange" Prod. Liab. Litig., 996 F.2d 1425, 1428 (2d Cir. 1993) (giving a complete history of all Agent Orange litigation).

17. *In re* "Agent Orange" Prod. Liab. Litig., 635 F.2d 987, 988 (2d Cir. 1980).

18. 28 U.S.C. § 1407 provides for transferring related cases pending in different districts to a single district for pretrial proceedings. This section is designed both to promote judicial economy and to avoid conflict and duplication in discovery by consolidating related actions for pretrial purposes. *In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 750–51 (E.D.N.Y. 1984), *aff'd*, 818 F. 2d 145 (2d Cir. 1987) (citing 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3861 (1976)). Once a case has been transferred, the transferee court has complete jurisdiction for pretrial purposes. It can grant summary judgment or approve a settlement. Moreover, the transferee court can handle matters relating to class action certification to prevent inconsistent rulings and to promote judicial efficiency. *Id.* at 751–52 (citing *In re* Piper Aircraft Distribution Sys. Antitrust Litig., 405 F. Supp. 1402, 1403–04 (J.P.M.L. 1975)).

19. *In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. at 751.

In 1983, the district court certified the following class:

> [T]hose persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides, including those composed in whole or in part of 2, 4, 5-trichlorophenoxyacetic acid or containing some amount of 2, 3, 7, 8-tetrachlorodibenzo-p-dioxin. The class also includes spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure.[20]

In warranting class certification, the district court found that the plaintiffs met the prerequisites of both Rule 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure.[21] Furthermore, the court ordered extensive notice by mail, radio, television, magazine, and newspaper.[22] Pursuant to Rule 23(b), the notice provided that plaintiffs not wishing to be considered part of the class had to affirmatively opt out of the class by means set forth in the notice.[23]

In 1984, before trial was to begin, the parties reached a settlement that would establish a $180 million[24] settlement fund to cover all claims arising out of Agent

---

20. *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 729 (E.D.N.Y. 1983). In his opinion, Chief Judge Weinstein justified class action certification by noting the extreme burden on the court system to try these suits on a one-by-one basis and the encouragement of settlement that certification fosters. *Id.* at 720–21.

21. *Id.* at 721, 724. Rule 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims . . . of the representative parties are typical of the claims of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a). In reference to Rule 23(b)(3), the court found

> (1) that the affirmative defenses and the question of general causation are common to the class, (2) that those questions predominate over any questions affecting individual members, and (3) given the enormous potential size of plaintiffs' case and the judicial economies that would result from a class trial, a class action is superior to all other methods for a 'fair and efficient adjudication of the controversy.'

Id. at 724 (quoting FED. R. CIV. P. 23(b)(1)(A)).

22. *Id.* at 729–30.

23. *Id.* at 731. The court ordered summary judgment against those plaintiffs who opted out on grounds of lack of proof of causation, lack of proof of which manufacturer was responsible, and that the military contractor defense barred their claims. *In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 187, 189 (2d Cir. 1987).

24. *In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 151 (2d Cir. 1987) (noting that this amount is a "nuisance value," given that there were over 240,000 claimants, because their cases were weak due both to difficulties in proving causation and the existence and likely success of the military

Orange exposure, $10 million of which was reserved to indemnify defendants against any future identical state court judgments.[25] The settlement agreement specifically included "persons who have not yet manifested injury,"[26] and the court approved it as fair, reasonable, and adequate.[27]

The distribution plan for the fund provided that seventy-five percent be directly distributed to disabled veterans and to survivors of deceased veterans, and the remaining twenty-five percent be used to create an assistance foundation (Agent Orange Class Assistance Program) to fund projects that would serve the interests of the class as a whole.[28] Payments to the injured veterans were to extend for only ten years, until December 31, 1994, whereas the assistance program would benefit class members who would become sick after December 31, 1994.[29] The court of appeals upheld the settlement, rejecting an argument that "the diverse interests of the class make adequate representation virtually impossible."[30] Judge Weinstein of the district court determined that this argument failed because the various common weaknesses of the plaintiffs' claims were identical to all plaintiffs, and the court of appeals agreed.[31] Thus, the court certified the class because all of the members had the same inherent problems with their claims. The settlement and distribution scheme then became final, binding all members of the class, including presently injured and exposure-only plaintiffs. The defendants could not be sued again by any veteran exposed to Agent Orange.

B. First Attempt at Collateral Attack Denied: The Ivy and Hartman Litigation

In 1989 and 1990, two veterans, Ivy and Hartman, manifested injuries after the settlement date and sued the same companies that had previously settled with the class.[32] They both brought class action suits in state court against these companies, relying explicitly on state law.[33] However, the defendants removed the cases to federal court and the Judicial Panel on Multidistrict Litigation transferred the cases to the Eastern District of New York, the same court where the original litigation

---

contractor defense).

25. *In re* "Agent Orange" Prod. Liab. Litig., 996 F.2d 1425, 1429 (2d Cir. 1993).

26. *In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 865 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987).

27. *Id.* at 748.

28. *In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d at 158.

29. *In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1396, 1417 (E.D.N.Y. 1985).

30. *In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d at 167.

31. *See id.* at 171–74. Common weaknesses of plaintiffs' claims include difficulty of proving details about exposure, difficulty of proving causation, and the shared military contractor defense. *Id.* at 172–73.

32. *In re* "Agent Orange" Prod. Liab. Litig., 996 F.2d 1425, 1430 (2d Cir. 1993).

33. *Id.*

occurred.[34] The district court dismissed their claims as barred by both the original Agent Orange settlement and the previous court's order enjoining future suits by class members.[35]

The court of appeals affirmed the district court's dismissal and expressly rejected the plaintiffs' argument that they had been inadequately represented as "at-risk"[36] class members (or future claimants) in connection with the original class action.[37] The court justified the lack of separate counsel for class members whose symptoms would manifest after the 1984 settlement by noting the nature of the settlement plan as well as the inherent proof problems in all of the class members' claims:

> [T]he fundamental fairness of the *Agent Orange I* settlement remains unshaken. Notwithstanding the legal and scientific developments of the past nine years, the chances of recovery are nearly as speculative today as they were at the time of settlement. Appellants' challenges to the adequacy of their representation therefore must be rejected. . . . The unique circumstances surrounding *Agent Orange I*—in particular, the even-handed treatment of both identified and unidentified legitimate claimants in the *Agent Orange I* settlement and the dim prospects of success both then and now—rendered additional protections unnecessary. The representation in *Agent Orange I* was more than adequate to protect appellants' interests.[38]

Thus, the court succinctly dismissed this subsequent attempt at a collateral attack against the defendants, including Dow, who appeared in the original Agent Orange litigation.

During the ten year period of the settlement fund (1988 through 1997),[39] $196.5 million was distributed as cash payments to approximately 52,000 class members.[40] The program paid approximately $52 million to "after-manifested" claimants, whose deaths or disabilities occurred after the settlement date, while the Class

---

34. *Id.*

35. *Id.*

36. The court held that "injury occurs when a deleterious substance enters a person's body, even though its adverse effects are not immediately apparent." *Id.* at 1433. Thus, although these plaintiffs were already injured within the meaning of the class and were considered members of the class at the time of settlement, they had not yet manifested symptoms.

37. *Id.* at 1436.

38. *In re* "Agent Orange" Prod. Liab. Litig., 996 F.2d 1425, 1437 (2d Cir. 1993).

39. The ten year period was postponed due to the appeals process and began in 1988 after the approval of the settlement by the court of appeals in 1987. Stephenson v. Dow Chem. Co., 273 F.3d 249, 255 (2d Cir. 2001).

40. *Id.*

Assistance Program distributed approximately $71.3 million.[41]

C. *Second Attempt at Collateral Attack Allowed:* Stephenson v. Dow Chemical Co.

Stephenson served in Vietnam from 1965 to 1970, during which time he was in regular contact with Agent Orange.[42] In 1998, he was diagnosed with bone marrow cancer and in 1999 filed suit in federal court in the Western District of Louisiana. The Multidistrict Litigation Panel transferred the case to Judge Weinstein in the Eastern District of New York,[43] who oversaw the previous litigation.

Isaacson served in Vietnam from 1968 to 1969; one of his tasks was spraying Agent Orange.[44] He was diagnosed with non-Hodgkins lymphoma in 1996 and brought suit in state court in 1998, where his claim was removed to federal court under the All Writs Act[45] and joined with Stephenson's federal court claim that was transferred to Judge Weinstein.[46]

As would be expected based on the voluminous history of the Agent Orange litigation, the district court granted a 12(b)(6) dismissal under the Federal Rules of Civil Procedure, "rejecting plaintiffs' argument that they were inadequately represented and concluding that plaintiffs' suit was an impermissible collateral attack on the prior settlement."[47]

Instead of following this well-established reasoning, the Second Circuit Court of Appeals vacated and remanded the district court's dismissal, holding that the suit was a permissible collateral attack.[48] The Second Circuit concluded "that the

---

41. *Id.*

42. *Id.*

43. *Id.* at 256.

44. *Id.* at 255.

45. "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (2000). The United States Supreme Court vacated and remanded Isaacson's claim back to state court in light of *Syngenta Crop Prot., Inc. v. Henson*, 123 S. Ct. 366 (2002) (holding that the All Writs Act cannot be used to remove a state court claim if the federal court would not otherwise have original jurisdiction under 28 U.S.C. § 1441). Dow Chem. Co. v. Stephenson, 123 S. Ct. 2161, 2161 (2003). The court in *Syngenta* noted that "section 1441 requires that a federal court have original jurisdiction over an action in order for it to be removed from a state court. The All Writs Act . . . is not a substitute for that requirement." *Syngenta*, 123 S. Ct. at 371. The *Syngenta* court looked to the plain meaning of the Act, which "authorizes writs 'in aid of [the courts'] respective jurisdictions' without creating any federal subject matter jurisdiction." *Id.* at 369 (quoting 28 U.S.C. § 1651(a)). However, if a state court action might frustrate a district court's prior orders, the All Writs Act authorizes an injunction to stop the party from pursuing his action in state court. *Id. See generally* 19 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 204 (3d ed. 1997) (discussing extraordinary writs).

46. Stephenson v. Dow Chem. Co., 273 F.3d 249, 256 (2d Cir. 2001).

47. *Id.* at 256.

48. *Id.* at 261.

plaintiffs' collateral attack, which seeks only to prevent the prior settlement from operating as res judicata to their claims, is permissible."[49] The court gave two reasons for this conclusion: (1) neither the Supreme Court nor the district court has considered the adequacy of representation for plaintiffs whose injuries manifested after the depletion of the settlement fund;[50] and (2) collateral attacks on the adequacy of representation have been allowed in other circuits.[51] Thus, the plaintiffs' argument that they were not proper parties to the judgment was enough to sustain a collateral attack against Dow.

The Second Circuit then determined that the plaintiffs were not adequately represented at trial because of the *Amchem Products, Inc. v. Windsor*[52] and *Ortiz v. Fibreboard Corp.*[53] decisions, which found that "Rule 23(a)(4)'s requirement that the named parties 'will fairly and adequately protect the interests of the class' had not been satisfied" when a class included currently injured and exposure-only plaintiffs.[54] Thus, the court held that these two cases, decided years after the settlement was final, indicated that the plaintiffs Stephenson and Isaacson were not adequately represented in the original Agent Orange litigation.[55]

On appeal, the Supreme Court gave no guidance. In its two-sentence opinion, the Court held: "With respect to respondent Daniel Raymond Stephenson . . . the judgment is affirmed by an equally divided court."[56] The Supreme Court remanded Isaacson's claim.[57] Thus, Stephenson is allowed to proceed with his collateral attack against Dow. More importantly, the Second Circuit's analysis, with its many foreseeable and detrimental consequences, will stand until the issue arises again and the Supreme Court decides to rule definitively.

III. COLLATERAL ATTACK ON ADEQUACY OF REPRESENTATION

The Second Circuit's opinion raises serious questions about class action settlements and their supposed finality. Moreover, the equally divided affirmance by the Supreme Court leaves the issue open and lends no guidance on these important issues.

---

49. *Id.* at 257.

50. *Id.* at 257–58.

51. *Id.* at 258–59 (citing Gonzales v. Cassidy, 474 F.2d 67, 72 (5th Cir. 1973); Williams v. Gen. Elec. Capital Auto Lease, Inc., 159 F.3d 266 (7th Cir. 1998); Twigg v. Sears, Roebuck & Co., 153 F.3d 1222, 1226 (11th Cir. 1998); Crawford v. Honig, 37 F.3d 485, 488 (9th Cir. 1994)).

52. 521 U.S. 591 (1997) (holding that a class with currently injured and exposure-only plaintiffs in an asbestos class action creates an inherent conflict and thus the adequacy of representation requirement is not met); *see* discussion *infra* Part IV.A.

53. 527 U.S. 815, 856 (1999) ("A class divided between holders of present and future claims . . . requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel.").

54. *Stephenson*, 527 F.3d at 260.

55. *Id.* at 261.

56. Dow Chem. Co. v. Stephenson, 123 S. Ct. 2161, 2161–62 (2003).

57. *Id.* at 2161.

A. *Adequacy of Representation is Res Judicata*

Permitting this collateral attack under the guise of protecting a plaintiff's due process rights is error. Previous courts held that all of the members of the class, including the plaintiff, were adequately represented; therefore, the issue is res judicata. The collateral attack allowed by the Second Circuit and the Supreme Court actually violates Dow's due process rights to finality and creates a broad umbrella under which certain unsatisfied class members can challenge the res judicata effect of a final judgment.

Res judicata provides that a matter already litigated and resolved, including class action settlements, is binding on all parties and cannot be relitigated.[58] In the long and detailed history of the Agent Orange litigation, the due process rights of the class members had been decided twice before.[59] First, the district court analyzed the Rule 23(a) requirements, including 23(a)(4)'s adequacy of representation, and found that all requirements were met.[60] Next, when the certification and settlement plan were reviewed on appeal, the Second Circuit revisited the adequacy of representation and expressly rejected the appellant's argument that the "diverse interests of the class make adequate representation virtually impossible."[61] The Second Circuit again rejected the same argument brought in the subsequent Ivy and Hartman suits. The court said that no subclass of future claimants with separate representation was necessary and reiterated the "fundamental fairness" of the settlement.[62]

These specific rejections of the "adequacy of representation" argument should have been extremely persuasive in the *Stephenson* case. At the time of the settlement, both the Ivy and Hartman plaintiffs and Stephenson were at-risk future claimants who the court refused to find needed sub-classification or separate counsel to receive adequate representation.[63] Thus, the decision in Stephenson's case directly contradicts the same court's reasoning just years earlier. There is no real difference between the Ivy and Hartman plaintiffs and Stephenson: they all were in the same position at the finalization of the settlement. The only distinguishing fact is that Stephenson manifested injury after the depletion of the settlement fund, but this should not make a difference. Their outcomes should have been the same. The reference to funda-mental fairness in the Ivy and Hartman appeal is ironic considering the essence of due process with respect to Dow. By determining that Rule 23 of the Federal Rules of Civil Procedure had been satisfied, the court authoritatively concluded that all the class members' due process rights

58. Petition for Writ of Certiorari at 11, Dow Chem. Co. v. Stephenson, 123 S. Ct. 2161 (2003) (No. 02-271).

59. *See supra* notes 20, 26, 36 and accompanying text.

60. *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 721 (E.D.N.Y. 1983).

61. *In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 167 (2d Cir. 1987).

62. *In re* "Agent Orange" Prod. Liab. Litig., 996 F.2d 1425, 1436–37 (2d Cir. 1993).

63. *Id.*

had been honored and respected. Conversely, while the *Stephenson* court appears extremely concerned with class members' due process rights (even though they had the opportunity to opt out, object, or appeal), it summarily disregards any question as to Dow's due process rights in the finality of its settlement payment.[64]

Considering the definition of the class,[65] the Second Circuit's reasoning in Stephenson's case is not well thought-out or thorough. The court gives no consideration to Dow's reliance on the class definition or the multiple decisions[66] holding that the representation of the entire class was adequate. Further unfairness exists in that Dow has relied on the judgment for over fifteen years.

The Second Circuit permits collateral attack on a broad ground, allowing a subsequent challenge for a slight variation that the lower court did not originally perceive. The court of appeals specifically held that the plaintiff can proceed because "neither this Court [n]or the district court has addressed specifically the adequacy of representation for those members of the class whose injuries manifested after depletion of the settlement funds."[67] This implies that the original district court, in 1980, should have considered the possibility of class members manifesting injuries ten-plus years later. This is a heavy burden. The essence of a settlement—a decision based on the present value of the suit—is destroyed. Settlement is a risk taken by all parties. The Second Circuit's ruling allows the plaintiffs to hedge their bets both by taking advantage of subsequent circumstances and by allowing them to renege on the original bet.

The plaintiffs claim they were not aware of the Agent Orange litigation and were not injured at the time so that settlement without them was improper and a violation of due process.[68] However, the notice given at the time was the best notice practicable under the circumstances.[69] The notice included mail to all who served in Vietnam during the time in question, as well as multiple national media advertisements.[70] Arguably, the court could have done little more to ensure absolute notice. In addition, it is odd that the plaintiffs were unaware of the litigation considering the heightened public interest and the likelihood that these plaintiffs had acquaintances or old friends who were similarly situated.

---

64. Stephenson v. Dow Chem. Co., 273 F.3d 249, 257 (2d Cir. 2001) (assuming plaintiffs were not part of the class at all and thus, the injunction associated with the settlement would not be binding on them). Presumably Dow has no finality interest because these plaintiffs were never a party to the original action.

65. *See supra* text accompanying note 4.

66. Five decisions determined that the class representation was adequate: (1) the district court in the original litigation, (2) the court of appeals in the original litigation, (3) the district court in *Ivy* and *Hartman*, (4) the court of appeals in *Ivy* and *Hartman*, and (5) the district court in *Stephenson*.

67. *Stephenson*, 273 F.3d at 257–58.

68. Brief in Opposition at 1, Dow Chem. Co. v. Stephenson, 123 S. Ct. 2161 (2003) (No. 02-271).

69. *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 729 (E.D.N.Y. 1983).

70. *Id.* at 729–30.

B. *Conflict with Other Circuits and South Carolina*

The plaintiffs maintain that "[j]udgment in a class action is not secure from collateral attack unless the absentees were adequately and vigorously represented" and that this requirement was not fulfilled in this case.[71]

The Second Circuit's rejection of the application of res judicata to collateral attacks when the plaintiffs had the opportunity to opt out, object, or appeal conflicts with other circuits that limit the scope of collateral attack to plaintiffs who were not given an opportunity to object.[72] In *Epstein v. MCA, Inc.*,[73] the United States Court of Appeals for the Ninth Circuit rejected the argument that a certifying court's determination of the adequacy of representation is subject to collateral review.[74] The *Epstein* court succinctly held:

> Simply put, the absent class members' due process right to adequate representation is protected not by collateral review, but by the certifying court initially, and thereafter by appeal within the state system and by direct review in the United States Supreme Court . . . . [D]ue process does not require collateral second-guessing of those determinations and that review.[75]

Likewise, the United States Court of Appeals for the First Circuit rejected a broad notion of collateral attack by holding that a court-approved settlement may apply against an absent class member "so long as *acceptable procedural safeguards* have been employed."[76] The court also stated that the dissatisfied party's recourse was to object and appeal, not to collaterally attack "in the vain pursuit of back-door relief."[77] Unlike the *Stephenson* case, *Nottingham* involved a situation where the plaintiffs were not even afforded the opportunity to opt out and the court still barred

---

71. Brief in Opposition at 11, Dow Chem. Co. v. Stephenson, 123 S. Ct. 2161 (2003) (No. 02-271) (quoting Van Gemert v. Boeing Co., 590 F.2d 433, 440 (2d Cir. 1978), *aff'd* 444 U.S. 472 (1980)); *see also* Williams v. Gen. Elec. Capital Auto Lease, Inc., 159 F.3d 266, 269 (7th Cir. 1998) ("[T]he unnamed class member can raise a collateral attack based on due process."); Crawford v. Honig, 37 F.3d 485, 488 (9th Cir. 1994) (holding collateral attacks permissible when plaintiff's interests are not represented); Gonzales v. Cassidy, 474 F.2d 67, 72 (5th Cir. 1973) (providing test for collateral review of adequate representation).

72. Petition for Writ of Certiorari at 12–14, Dow Chem. Co. v. Stephenson, 123 S. Ct. 2161 (2003) (No. 02-271) (citing Epstein v. MCA, Inc., 179 F.3d 641 (9th Cir. 1999), *cert. denied*, 528 U.S. 1004 (1999); Nottingham Partners v. Trans-Lux Corp., 925 F.2d 29 (1st Cir. 1991); Grimes v. Vitalink Communications Corp., 17 F.3d 1553 (3d Cir. 1994)).

73. 179 F.3d 641 (9th Cir. 1999).

74. *Id.* at 648.

75. *Id.* (citing Grimes v. Vitalink Communications Corp., 17 F.3d 1553, 1558 (3d Cir. 1994)).

76. Nottingham Partners v. Trans-Lux Corp., 925 F.2d 29, 33 (1st Cir. 1991) (emphasis added).

77. *Id.*

the attempt at collateral attack.[78]

Additionally, the United States Court of Appeals for the Third Circuit stated that "all ordinary class members are bound by the deal struck by their named representatives in the event the court determines that they were adequately and fairly represented during the course of the negotiations."[79] The court also noted that once the dissatisfied class members challenged on direct appeals, they were granted all the process that was due.[80] Thus, a subsequent collateral attack as to the adequacy of representation was not afforded the absent class members because the issues were addressed and objections heard in the original court that certified and approved the class settlement.

The Supreme Court of South Carolina also followed the *Epstein* reasoning that "broad collateral review of the due process requirements is not available."[81] In *Hospitality Management Associates Inc. v. Shell Oil Co.*, the court held that both Tennessee and Alabama state court-approved class action settlements were entitled to full faith and credit because, in conducting the limited scope of collateral review, the state supreme court found minimal due process had been afforded absent class members.[82] In this case, building owners sued Shell for defective plumbing systems and Shell argued they were precluded from suing because they were class members in the Tennessee and Alabama settlements.[83] The owners argued that as absent class members in those settlements they were not afforded due process because of lack of sufficient notice and inadequate representation.[84] The court acknowledged the difference in opinion as to what the appropriate scope of review should be: "[I]t remains an open, and hotly litigated, question as to whether limited collateral review is required . . . or whether a broader, merits-oriented collateral review is permitted."[85] The court held that "only a limited collateral review is appropriate" and agreed with *Epstein* that "due process requires that an absent class member's rights are protected by the adoption and utilization of appropriate procedures by the certifying court; thereafter, the merits of the certifying court's determinations are subject to direct appellate review."[86]

---

78. *Id.* at 32. Rule 23 of the Federal Rules of Civil Procedure only requires the opt-out option in Rule 23(b)(3) class actions. In this case, the court certified the class pursuant to Delaware Chancery Court Rule 23(b)(2), which mirrors Federal Rule 23(b)(2). *Id.* at 31. Rule 23(c)(3) states in part: "The judgment in an action maintained as a class action under subdivision (b)(1) and (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class . . . ." FED. R. CIV. P. 23(c)(3). Thus, it was within the court's discretion in this case either to grant or to deny opt-out status.

79. *Grimes*, 17 F.3d at 1558.

80. *Id.*

81. Hospitality Mgmt. Assocs., Inc. v. Shell Oil Co., No. 25764, 2003 WL 23147500, at *5 (S.C. Jan. 12, 2004).

82. *Id.* at *1.

83. *Id.*

84. *Id.* at *4.

85. *Id.* at *7.

86. *Id.* at *8.

In the *Stephenson* decision, the Second Circuit relied on *Hansberry v. Lee*[87] to support its holding that Stephenson's collateral attack was proper.[88] However, the United States Supreme Court in *Hansberry* also said that "there has been a failure of due process *only* in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it."[89] The courts in the original *Stephenson* litigation thoroughly analyzed the due process requirements of Rule 23 and addressed the adequacy of the class representation. The plaintiffs contended, however, that due process requires the analysis of specific situations.[90] Thus, the court of appeals sets a high standard in requiring a court to take into consideration things it could not possibly know.[91] Specifically, under this standard the district court needed to know that the settlement fund would be depleted before certain class members' injuries manifested.

Fundamental fairness to class members does not require this further judicial proceeding. Due process of law only requires the "conscientious application by the court of the requirements of Rule 23, [and] fundamental fairness does not demand anything more."[92] The *Stephenson* court allows a member of the class who did not actually appear in the suit prior to final judgment to question the representation. The court "reinvent[s] the problem of inefficiency and second guessing that is solved by the rule of finality and recognition of judgments."[93]

The Second Circuit insists that *Stephenson* is different because the plaintiffs argue that they were not proper parties to the settlement instead of attacking the finality of the settlement itself.[94] However, the settlement was all-inclusive because it included *all* veterans exposed to Agent Orange, whether the individual veterans had manifested injury or not. These plaintiffs, as veterans clearly fitting the class description, were members of the class and were bound both by the settlement and the original court's determinations on adequacy of representation. As noted earlier, this same court's decision regarding the Ivy and Hartman attempt at collateral attack flies in the face of the *Stephenson* holding. At the time of certification and settlement, both sets of plaintiffs were in the same situation: they had only been exposed to Agent Orange. The Ivy and Hartman plaintiffs' injuries manifested after the settlement date, as did the injuries of the plaintiffs in *Stephenson*. Also, the Ivy and Hartman plaintiffs attacked adequacy of representation, as did the *Stephenson*

87. 311 U.S. 32 (1940).

88. Stephenson v. Dow Chem. Co., 273 F.3d 249, 258 (2d Cir. 2001).

89. *Hansberry*, 311 U.S. at 42, *quoted in* Epstein v. MCA, Inc., 179 F.3d 641, 648 (9th Cir. 1999) (emphasis added).

90. Brief in Opposition at 2, Dow Chem. Co. v. Stephenson, 123 S. Ct. 2161 (2003) (No. 02-271).

91. *Id.*

92. William T. Allen, *Finality of Judgments in Class Actions: A Comment on* Epstein v. MCA, Inc., 73 N.Y.U. L. REV. 1149, 1160 (1998).

93. *Id.* at 1159–60.

94. Stephenson v. Dow Chem. Co., 273 F.3d 249, 259 (2d Cir. 2001).

plaintiffs.

Stephenson and Isaacson argued that the facts in their cases were so egregious that to disallow their suit would be a flagrant violation of their rights.[95] Nonetheless, while the facts were serious, they were no more so than in other tort cases. The plaintiffs' case is sympathetic; however, the problems with the merits of their claim outweigh this argument. These problems deal with proof of causation, proof of which manufacturer was responsible, and the military contractor defense that would arguably bar their claims.[96] The court should remember the context. The plaintiffs should not be able to upset another's due process rights solely on the visage of serious illness.

Because multidistrict litigation allows courts to transfer actions, a strong need exists for uniformity among the circuits so that plaintiffs will not shop around for a favorable court.[97] Other circuits give strong deference to a lower court's settlement determinations.[98] However, the Second Circuit's ruling creates a system more accepting of collateral attacks, and this departure from holdings of other circuits could foster forum shopping in future objections to various aspects of class actions. Further consequences of the Second Circuit's holding include encouraging absent class members to withhold any objection and drastically reducing the incentive for defendants to settle.[99] Allowing collateral attacks disrupts 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.

IV. RETROACTIVITY OF NEW LEGAL PRINCIPLES AND SUBSEQUENT FACTS

A. New Legal Principles

In addition to the ramifications of allowing collateral attacks of already decided issues like adequacy of representation, the Second Circuit's analysis breeds more

---

95. Brief in Opposition at 2, Dow Chem. Co. v. Stephenson, 123 S. Ct. 2161 (2003) (No. 02-271).

96. *In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 187, 189 (2d Cir. 1987).

97. Petition for Writ of Certiorari at 18, Dow Chem. Co. v. Stephenson, 123 S. Ct. 2161 (2003) (No. 02-271).

98. *Id.* at 12–18 (citing Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 279–80 (7th Cir. 2002) (noting special duty of district judge as fiduciary in relying on its prior determinations)); *see also* Epstein v. MCA, Inc., 179 F.3d 641, 648–50 (9th Cir. 1999) (holding that as long as lower court complied with due process, collateral attack was barred); Grimes v. Vitalink Communications Corp., 17 F.3d 1553, 1558 (3d Cir. 1994) (holding that opportunity provided in lower Delaware state court proceeding comported with due process); Nottingham Partners v. Trans-Lux Corp., 925 F.2d 29, 33 (1st Cir. 1991) (giving deference to due process determinations by Delaware courts).

99. Petition for Writ of Certiorari at 16, Dow Chem. Co. v. Stephenson, 123 S. Ct. 2161 (2003) (No. 02-271).

negative consequences. In determining that the plaintiffs were not barred by res judicata because they were not adequately represented as proper parties in the class, the court relied on two United States Supreme Court decisions defining and laying out new guidelines for Rule 23.[100]

First, the Second Circuit used the ruling in *Amchem Products, Inc. v. Windsor*[101] to reopen the prior final judgment of the Dow settlement. *Amchem* involved a class action certification seeking to settle globally current and future asbestos claims. The district court certified the class, but the appellate court vacated, holding that the certification failed to meet the requirements of Rule 23.[102] The Supreme Court agreed with the appellate court and held that such a "sprawling" class did not meet "Rule 23(a)(4)'s requirement that the named parties 'will fairly and adequately protect the interests of the class.'"[103] The Court found an inherent conflict in a class made up of currently injured and exposure-only plaintiffs:

> Named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. 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.[104]

Despite the new standard set, the Court in *Amchem* emphasized that there was no assurance of adequate protection in either the terms of the settlement or in the structure of the negotiations.[105] Perhaps if the negotiations and terms of the settlement were more detailed and thorough, as in *Stephenson*, the class would have constituted adequate representation.

The dissent in *Amchem* questioned the Court's ruling on adequacy on the grounds that the district court was in the best position to determine the question of adequacy because the answer depends on the circumstances of each case.[106] The dissent thinks this conflict will always exist to some extent in mass tort cases, and further, some otherwise unattainable benefits may exist for the future claimants for being part of the class; namely, assets will not be exhausted before their claims materialize and the statute of limitations may be extended.[107]

The second case on which the Second Circuit relied was *Ortiz v. Fibreboard*

---

100. Stephenson v. Dow Chem. Co., 273 F.3d 249, 259 (2d Cir. 2001).
101. 521 U.S. 591 (1997).
102. *Id.* at 597.
103. *Stephenson*, 273 F.3d at 260 (quoting *Amchem*, 521 U.S. at 625–26).
104. *Amchem*, 521 U.S. at 626.
105. *Id.* at 627.
106. *Id.* at 636 (Breyer, J., dissenting).
107. *Id.* at 637 (Breyer, J., dissenting).

Corp.[108] The *Ortiz* Court observed the new rule defined in *Amchem*, maintaining: "[I]t is obvious after *Amchem* that a class divided between holders of present and future claims (some of the latter involving no physical injury and attributable to claimants not yet born) requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel."[109] In *Stephenson*, the Second Circuit relied on this new principle that an inherent conflict exists when current claimants and future claimants are members of the same class.

In *Hospitality Management Associates, Inc.*, the Supreme Court of South Carolina noted that the *Amchem* ruling of inherent conflict in classes with both present and future claimants came *after* the settlements being challenged.[110] However, the court dismissed the argument that prevailed in the Second Circuit that *Amchem* be applied retroactively to find inadequate representation.[111] It reasoned that the limited scope of review applied on collateral attack did not require such application.[112] The court found it "patent that both [Tennessee and Alabama] courts had procedures in place to ensure adequate representation."[113]

Importantly, the *Amchem* and *Ortiz* plaintiffs differ from the Agent Orange plaintiffs in that the conflict between class members in *Amchem* and *Ortiz* rested on the strength of their claims.[114] The groups were much broader due to the asbestos nature of the litigation and the fight revolved around who had strong claims and who had weak claims.[115] Conversely, the district court and the court of appeals in the Agent Orange litigation both noted that all class members had poor chances of success through litigation.[116] Also, Agent Orange class members were easily identifiable because they all had served in Vietnam. Asbestos was much more widespread with more possible sources. The Agent Orange court developed a neutral distribution plan after they reached settlement, something the asbestos class lacked. These differences may explain the Court's language in *Amchem* regarding adequacy of representation and may account for its holding that an inherent lack of adequate representation exists.

Even assuming that the same inherent conflict principle would invalidate the Agent Orange certification and settlement if brought today, the *Stephenson* court should not have used new interpretations of the standards of Rule 23 to determine

---

108. 527 U.S. 815 (1999).

109. *Id.* at 856 (citing *Amchem*, 521 U.S. at 627).

110. Hospitality Mgmt. Assocs., Inc v. Shell Oil, Co., No. 25764, 2003 WL 23147500, at *11 (S.C. Jan. 12, 2004).

111. *Id.* at *12.

112. *Id.* ("In addition, we believe the arguments raised by respondents on *Amchem's* applicability do not require resolution for our limited review.").

113. *Id.*

114. Petition for Writ of Certiorari at 24, Dow Chem. Co. v. Stephenson, 123 S. Ct. 2161 (2003) (No. 02-271).

115. *Id.*

116. *Id.*

whether they were met more than ten years earlier. The court's reinterpretation of Rule 23 in *Stephenson* goes against both due process protection from retroactive litigation and notions of fundamental fairness. Dow relied on the judgment as final, yet the court allowed the plaintiffs to take advantage of subsequent case law to reopen the case.

B. Factual Hindsight

The Second Circuit partially relied on factual hindsight in determining that the plaintiffs' collateral attacks could proceed because the plaintiffs were inadequately represented.[117] Such reliance misses the mark. At the time of the certification and settlement, only two types of possible class members existed: those who had current claims and those who had potential future claims. At the time of settlement, the *Stephenson* plaintiffs were in the same position as all other individuals with exposure-only possible future claims. The court deemed them all adequately represented.

Following this reasoning puts potential plaintiffs in a win-win situation, allowing them to take advantage of membership in a class settlement while simultaneously allowing them to reserve the right to later deny that membership in light of subsequent events. Under this interpretation, plaintiffs take no risk. Conversely, defendants face all of the risk and may ultimately be liable to the same parties with whom they have already settled. This risk imbalance could result in hostile and hesitant negotiations because the defendant must see into the future to consider all possible factual occurrences that could spark subsequent litigation. At the very least, this promotes inefficient settlement. Defendants will end up settling for less and will face more suits and challenges to the previous settlement, a result that goes against the judicial economy that class action litigation is supposed to create.

The Second Circuit's finding of inadequate representation relied the rest of the way on the *Amchem* and *Ortiz* decisions. The court regarded the idea that an inherent conflict exists in a class with current claimants and future claimants as new law, referring to the decisions as "landmark class action decisions."[118]

By applying such new law in a collateral attack, the court goes against the well-settled principle that courts rarely should apply new laws retroactively.[119] The

---

117. Brief for the Petitioners at 46, Dow Chem. Co. v. Stephenson, 123 S. Ct. 2161 (2003) (No. 02-271).

118. Stephenson v. Dow Chem. Co., 273 F.3d 249, 251 (2d Cir. 2001) (citing Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997); Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999)).

119. Brief for the Petitioners at 47–48, Dow Chem. Co. v. Stephenson, 123 S. Ct. 2161 (2003) (No. 02-271) (citing Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 758 (1995)); *see also* Teague v. Lane, 489 U.S. 288, 308 (1989) ("[It] has long been established that a final civil judgment entered under a given rule of law may withstand subsequent judicial change in that rule."); James B. Beam Distilling Co. v. Georgia., 501 U.S. 529, 541 (1991) ("[R]etroactivity in civil cases must be limited by the need for finality.").

doctrine against the retroactive application of new laws is founded in the Due Process Clause of the Fourteenth Amendment of the United States Constitution: "The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation . . . ."[120] This doctrine is invaluable:

> The presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen. That presumption "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." This doctrine finds expression in several provisions of our Constitution. . . . In both the civil and the criminal context, the Constitution places limits on the sovereign's ability to use its lawmaking power to modify bargains . . . .[121]

All parties at the time of both the original class certification and the settlement had current law at their disposal. To allow one party to take advantage of a favorable change in how the law is interpreted would be to deny the others their due process of law. Although plaintiffs find themselves in a hampered position, it violates fundamental fairness to sacrifice Dow's due process rights to accommodate the plaintiffs, who took their chances by not opting out of or objecting to the class and now regret that choice.

The Second Circuit should not have disregarded the adequacy determinations already decided twice before. The court summarily justified the oversight of prior determinations *in light of* subsequent events. The court should have accorded greater weight to the opinions of the courts below.

C. Substantial Consequences of Retroactivity

The continuation of this collateral attack violates Dow's due process rights. The implication of the Supreme Court's decision is absurd: In order for Dow to have settled completely the Agent Orange litigation, it would have had to consider every possible change in the law that could undo the finality of the settlement. This is obviously impossible, yet the Court seems to set this standard. The settlement in this case was final thirteen years before the Court decided *Amchem* and fifteen years before *Ortiz*. Best stated, "[T]he res judicata consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case."[122]

---

120. Lynce v. Mathis, 519 U.S. 433, 440 n.12 (1997) (citing Landgraf v. USI Film Prod., 511 U.S. 244, 266 (1994)).

121. *Id.* at 439–40 (quoting *Landgraf*, 511 U.S. at 265).

122. Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981), *quoted in* Petition for Writ of Certiorari at 24, Dow Chem. Co. v. Stephenson, 123 S. Ct. 2161 (2003) (No. 02-271) (noting a special need for strict application of res judicata in complex multiple party litigation).

V. CONSEQUENCES OF COLLATERAL ATTACK AND APPLICATION OF SUBSEQUENT LAW

Class actions aim to advance "the efficiency and economy of litigation."[123] They exist to enhance access to the courts, to look out for the interests of absentees, and to protect defendants from inconsistent obligations.[124] Allowing an absent class member to subsequently challenge a judgment based on new interpretations of the law in a collateral attack defeats the purposes underlying class actions.

The implications of *Stephenson* seriously impair the goals of class actions by allowing multiple judgments on the same issue. Further, judicial economy is not saved when the parties and courts expend resources to deal with litigation on a class level, only to have class members bring a collateral challenge anyway. Likewise, the defendants are not shielded from contradicting judgments. Rather, they now must consider the possibility that dissatisfied class members could bring collateral attacks against them.[125]

Similarly, settlement will be hindered. The law encourages settlement to avoid drawn-out litigation in pursuit of the same judicial efficiency of the class action vehicle. However, defendants may be less likely to engage in settlement negotiations if uncertainty exists as to whether parties can sue again after settlement. At the very least, the *Stephenson* decision compromises the settlement tool. Defendants will settle for as little as possible in anticipation of identical future attacks, and thus, the plaintiffs may not be sufficiently compensated. The holding in this case dramatically lowers the incentive for a defendant to settle.

Further, the Second Circuit's holding undermines the principles of res judicata and finality. The legislature, through the principle of res judicata, has recognized the need for finality in judicial proceedings "to secure the peace and repose of society by the settlement of matters capable of judicial determination."[126] Finality is fair to the parties, fosters respect for and reliance upon court judgments, and aids the efficiency of the judicial system by avoiding overcrowded court dockets. Finality is not served if a judgment or a settlement is always subject to changed circumstances or law. Again, in the settlement context, a defendant has no incentive to settle if an unhappy party can later disturb the settlement. In this case, an injustice befalls Dow, who relied on the settlement as final.

Finally, and most importantly, post-hoc assessments involving new law and new principles could jeopardize other class settlements. The number of possible collateral attacks on various judgments and settlements is infinite, and the Second Circuit's application of subsequent interpretation of the law, with no careful

---

123. Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 159 (1982); *see also* 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.02 (3d ed. 1999) (listing purposes of class actions).

124. United States Parole Comm'n v. Geraghty, 445 U.S. 388, 402–03 (1980).

125. Petition for Writ of Certiorari at 25, Dow Chem. Co. v. Stephenson, 123 S. Ct. 2161 (2003) (No. 02-271).

126. S. Pac. R.R. Co. v. United States, 168 U.S. 1, 49 (1897).

forethought, could lead other plaintiffs to lodge collateral attacks as well.

Although the *Stephenson* decision raises serious questions from the standpoint of the defendant's due process rights, the plaintiffs are not entirely forgotten. In this particular case, an unfairness seems to work the plaintiffs, who manifested their injuries after the expiration and depletion of the settlement fund. Why the fund expired when it did, after only ten years, is unknown. One possible explanation is the noted weakness of the entire class claim in proving causation. Furthermore, after ten years, causation would be even more difficult to prove. However, according to the certifying and approving courts, the entire class was provided due process at the time. Despite sympathy for the plaintiffs' illnesses, future considerations of efficiency and stability in the law should have dictated that the plaintiffs' claims expired.

Is there a potential solution without the negative ramifications discussed above? Perhaps this is just a rare case. Certainly the case is unique with regard to the parties involved,[127] the types of claims, the difficulties with proof, and the time frame of the distribution plan. Perhaps this decision will provide only a narrow exception to the otherwise stable rule of res judicata and finality in class action settlements. However, it is unlikely that other dissatisfied class members in other class action proceedings will consider the conclusions reached by the Second Circuit in such a light. In any event, even a narrow exception will inevitably open the door for parties to argue for future exceptions. A natural fear is that the exceptions will eventually swallow the rule, and efficient class actions and settlements will become obsolete.

IV. CONCLUSION

The Agent Orange litigation saga is long and complicated. The United States Supreme Court affirmed, by an equally divided vote, the Second Circuit Court of Appeals' decision that absent class members can collaterally attack the adequacy of representation nearly eighteen years after a final settlement, despite the fact that an opposite determination had already been made several times. The Second Circuit also held that subsequent law applied in determining the adequacy of representation and thus applied facts and law arising after the fact that were in the plaintiffs' favor. The court applied *Amchem* and *Ortiz* in deciding that the plaintiffs were not adequately represented and could pursue their claims.

Holding that plaintiffs can collaterally attack a settlement flies in the face of decisions from other circuits, such as *Epstein* (Ninth Circuit),[128] *Nottingham* (First

127. *In re* Agent Orange Prod. Liab. Litig., 818 F.2d 145, 148 (1987) (observing "the nationwide interest in this litigation and the strong emotions these proceedings have generated among Vietnam veterans and their families").

128. Epstein v. MCA, Inc., 179 F.3d 641 (9th Cir. 1999), *cert. denied*, 528 U.S. 1004 (1999).

Circuit),[129] and *Grimes* (Third Circuit),[130] all holding that a dissatisfied party's recourse is through direct appeals and opportunities to opt-out. Thus, a potential forum shopping problem arises, and class action plaintiffs may overload the Second Circuit.

The Supreme Court of South Carolina began in the right direction by opting against a broad scope of collateral review in *Hospitality Management Associates, Inc.*[131] In doing so, it limited the scope of collateral review of due process rulings of other state courts to whether there were adequate due process safeguards in place by the ruling court at the time. Further, it rejected applying *Amchem* at all, holding that the limited review did not require application of *Amchem*.

The Fourth Circuit should not follow the Second Circuit and should instead build on South Carolina's holding. If an absent and unsatisfied class member attempts to collaterally attack a class action settlement claiming inadequate representation because of subsequent facts or because of the subsequent principles established in *Amchem* and *Ortiz*, the Fourth Circuit should dismiss the claim. This is necessary to protect the longstanding justifications and interests in the class action vehicle.

There is a possibility that the Second Circuit specifically tailored the holding of this case to the unique facts of the Agent Orange litigation and that the court will not apply the holding broadly. However, this is unlikely, and even if the holding constitutes a narrow exception, it opens the door for other dissatisfied class members to argue for future exceptions until the general rule disappears, at which point the problems and interests that led the legislature to create class actions and settlements will resurface.

The Second Circuit's decision in *Stephenson* seriously impairs the class action device and inhibits settlement. It defeats the interest in encouraging settlement of class actions because plaintiffs can sue again later. The decision works an injustice on Dow and future defendants, who cannot settle with complete confidence that the settlement is final because they face the possibility of numerous collateral attacks. These consequences have crucial implications on the fundamental purposes of res judicata and finality, class actions and settlements, and judicial efficiency.

Ironically, defendants assume all the risk and yet find themselves placed in a position where they cannot possibly "win." For defendants, it is a "catch 22": if they settle, it may not be final, and if they do not settle, they risk huge verdicts for the plaintiffs. Hopefully, the United States Supreme Court will revisit this issue and set a definitive precedent.

Sara Maurer

129. Nottingham Partners v. Trans-Lux Corp., 925 F.2d 29 (1st Cir. 1991).
130. Grimes v. Vitalink Communications Corp., 17 F.3d 1553 (3d Cir. 1994).
131. No. 25764, 2003 WL 23147500, at *11 (S.C. Jan. 12, 2004).