No. 02-271

IN THE
Supreme Court of the United States

IN RE AGENT ORANGE PRODUCT LIABILITY LITIGATION

DOW CHEMICAL COMPANY, MONSANTO COMPANY, *et al.*
Petitioners,

v.

DANIEL RAYMOND STEPHENSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: December 19, 2002

QUESTION PRESENTED

Amicus curiae addresses the following issue:

Whether absent class members are precluded from relitigating the issue of adequacy of representation through a collateral attack on a class settlement, after class members had a full opportunity to opt out, object, and appeal, and after both the trial court and the court of appeals, in the course of approving the settlement, expressly determined that the class representatives adequately represented the entire class.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases:

Page

Statutes and Constitutional Provisions:

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF THE *AMICUS CURIAE*

The Washington Legal Foundation is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to advancing the interests of the free-enterprise system and to ensuring that economic development is not impeded by excessive litigation.

In particular, WLF has appeared before this Court as well as other federal and State courts in cases touching upon the *res judicata* effect of class action litigation. *See, e.g., Matsushita Electric Industrial Co. v. Epstein,* 516 U.S. 367 (1996); *Epstein v. MCA, Inc.,* 179 F.3d 641 (9th Cir.), *cert. denied,* 528 U.S. 1004 (1999).

WLF is concerned that the decision below, if allowed to stand, will throw into question the finality of class action settlements and thus discourage litigants from entering into such settlements. Moreover, WLF believes that the decision below is terribly unfair to defendants in certified class actions; the decision threatens to place many such defendants in a heads-I-win-tails-you-lose situation, in which they have nothing to gain and everything to lose by litigating class claims.

---

[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other that WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

WLF has no direct interest in the outcome of this lawsuit or any other suits raising similar issues. WLF is filing this brief with the consent of all parties. Copies of the consent letters have been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of brevity, WLF hereby incorporates by reference the Statement of the Case contained in the brief of Petitioners.

In brief, Petitioners Daniel Stephenson and Joe Isaacson are Vietnam War veterans who allege that they were injured by exposure to Agent Orange while serving in the military in Vietnam.[2] They filed separate lawsuits against the manufacturers of Agent Orange, alleging that their injuries were the result of the manufacturers' tortious conduct.

The issue before the Court is whether the claims of Stephenson and Isaacson are barred by a class action settlement entered into in 1984. The certified class in the prior suit included all United States military personnel "assigned to or near Vietnam at any time from 1961 to 1972, who alleged personal injury from exposure to" Agent Orange. Petition Appendix ("Pet. App.") 68a. The class, which was certified in 1983 over the vigorous objection of the defendant manufacturers, *id.* at 45a-76a, included both Stephenson and Isaacson – even though at the time they had not been diagnosed with the diseases that they attribute to

---

[2] Stephenson was diagnosed in February 1998 with multiple myeloma, a bone marrow cancer. In 1996, Isaacson was diagnosed with non-Hodgkins lymphoma. Both contend that their diseases were a direct result of their exposure to Agent Orange 30 years earlier.

their Agent Orange exposure. The settlement provided for payment of $180 million by the defendants into a settlement fund. Seventy-five percent of those funds were to be paid to survivors of deceased class members and to class members who became totally disabled before 1995 (10 years after the settlement), without regard to any demonstration that the class members had been injured by exposure to Agent Orange. The remaining 25% of the funds were to be used to establish a foundation for the benefit of all class members, to assist them in dealing with medical and related problems. *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 151, 158 (2d Cir. 1987), *cert. denied*, 474 U.S. 1004 (1988).

Following extensive hearings, the district court approved the settlement as fair to all class members, an approval that was later affirmed by the Second Circuit. *Id.* at 163-74. Both the district court and the appeals court explicitly rejected challenges to adequacy of representation by plaintiffs' counsel and named plaintiffs. *Id.* at 167. While the settlement explicitly recognized that some class members qualified for immediate direct payments from the settlement fund (due to their disability or death) and other did not (and might never be entitled to such payments), the courts determined that the potential class conflicts created by such differences were not sufficient to call into question the adequacy of representation. *Id.* The appeals court agreed with the district court that there were no significant differences in the strength of the claims of the various class members (the court viewed all the claims as uniformly weak) and thus that it was fair and reasonable to base compensation on injuries actually suffered or to be suffered by 1994. *Id.*

In reliance on that approval, the Agent Orange manufacturers paid $180 million to settle the claims of all class members.[3]

The manufacturers' litigation peace did not last long. Within two years, two new tort actions were filed by Vietnam veterans who claimed injury due to Agent Orange exposure; they asserted that they did not discover their injuries until after the 1984 settlement was reached. They asserted, *inter alia*, that they had not been adequately represented in the prior action. The district court and appeals court rejected that assertion, finding that "the fundamental fairness of the *Agent Orange I* settlement remains unshaken" and that "[t]he representation in *Agent Orange I* was more than adequate to protect appellants' interests." *In re Agent Orange Prod. Liab. Litig.,* 996 F.2d 1425, 1437 (2d Cir. 1993), *cert. denied,* 510 U.S. 1140 (1994). The appeals court agreed with the district court that the conflict between those who had suffered injury by 1984 and those who had not was "nonexistent," because "[t]he relevant latency periods and the age of the veterans ensure that almost all valid claims will be revealed before" 1994, when eligibility for compensation from the settlement fund was scheduled to end. *Id.* at 1436. The appeals court also found that all class members, even those without injury as of 1984, had received adequate notice of the class action. *Id.* at 1435.

The claims of Respondents Stephenson and Isaacson (filed in February 1999 and August 1998, respectively) were

---

[3] A small number of individuals opted out of the class. Their claims were ultimately dismissed on summary judgment; the Second Circuit affirmed the dismissal on the basis that their claims were barred by the military contractor defense. *In re Agent Orange Prod. Liab. Litig.,* 818 F.2d 187, 189 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988).

transferred to the U.S. District Court for the Eastern District of New York by the MDL Panel. Pet. App. 10a. In December 1999, the district court granted Petitioners' Rule 12(b)(6) motion to dismiss, finding that Respondents' claim that they were inadequately represented in the initial class action ("*Agent Orange I*") amounted to an impermissible collateral attack on the prior settlement. *Id.* 39a-41a.

In November 2001, the Second Circuit reversed and remanded the case to the district court for further proceedings. *Id.* 1a-20a. The court stated that its decision was mandated by this Court's decisions in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). *Id.* 2a. Although conceding that it had rejected challenges to adequacy of representation in both its 1985 and 1994 Agent Orange decisions, the appeals court noted that neither it nor the district court had ever explicitly held that there was adequate representation in *Agent Orange I* for those absent class members whose injuries were not manifested by 1984 *and* would not manifest themselves until after the depletion of settlement funds in 1994, 10 years later. *Id.* 13a. Citing *Hansberry v. Lee,* 311 U.S. 21 (1940), the appeals court held that permitting collateral attack on an adequacy of representation determination "is amply supported by precedent." *Id.* 14a. The court then concluded that Stephenson's and Isaacson's interests conflicted with those of the class representatives (based on the failure of the *Agent Orange I* settlement to provide for compensation for those whose injury manifested itself after 1994), and thus that *Amchem* and *Ortiz* required a finding that they were not adequately represented in *Agent Orange I*. *Id.* 19a. The court concluded that due process bars application of *res judicata* principals to absent class members who were not

adequately represented, and thus that Stephenson and Isaacson were not bound by the *Agent Orange I* settlement agreement. *Id.* 18a. The court also opined that the notice provided to Respondents may have been insufficient to bind them to the settlement, but it declined to decide that issue in light of its inadequacy of representation determination. *Id.* 19a n.8.

SUMMARY OF ARGUMENT

The Second Circuit permitted Respondents' claims to go forward despite their membership in a plaintiff class whose claims were settled in 1984. In the course of doing so, the court articulated an extremely generous standard for permitting collateral attacks on settled class actions. That standard draws no support from any of this Court's case law. To the contrary, the Court has repeatedly made clear that issues that have been fully and fairly litigated in a court of competent jurisdiction cannot be re-opened on collateral review. While due process mandates that an absent class member cannot be bound by any class action judgment in the absence of adequate representation, the adequacy of class representation is to be decided by the certifying court, and that decision is not to be second-guessed by other courts.

Many years after the trial court determined that the class plaintiffs could adequately represent the interests of the entire class, this Court's decisions in *Amchem* and *Ortiz* provided significant additional guidance to trial courts faced with adequacy of representation issues. It may be that if the trial court had had the benefit of those decisions in 1984, it would not have approved the class-wide settlement. But neither *Amchem* nor *Ortiz* speaks to the issue of collateral attacks on class action judgments; in the absence of any evidence that

the district court's 1984 approval of the settlement was procedural deficient, there can be no basis for overturning that decision on collateral review.

Moreover, the Second Circuit's decision places class action defendants at a decided procedural disadvantage. They face the prospect of paying large settlements or damage awards without any assurance that those payments will bring an end to litigation. At the very least, the Second Circuit's decision is likely to discourage settlements by defendants who are unwilling to commit significant sums to the settlement if there is a significant possibility that absent class members can avoid the *res judicata* bar by asserting inadequate representation or inadequate notice.

ARGUMENT

I. A CLASS ACTION SETTLEMENT APPROVED FOLLOWING CAREFUL CONSIDERATION OF ADEQUACY OF REPRESENTATION OF ALL CLASS MEMBERS PRECLUDES RELITIGATION OF THE ADEQUACY ISSUE

As the Second Circuit recognized, once a judgment has been entered in a class action, *res judicata* generally applies to bind absent class members to the judgment, except where to do so would violate due process. *Id.* 18a. One of the requirements of the Due Process Clause is that "the named plaintiff at all times adequately represents the interests of the absent class members." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813 (1985). But the district court found in 1984 that the named plaintiffs adequately represented the interests of all absent class members in *Agent Orange I*; that finding was affirmed on appeal by the Second Circuit, and

was reiterated by both the district court and the Second Circuit in 1991-93. Under those circumstances, the district court quite properly applied *res judicata* to dismiss Respondents' claims.

The Second Circuit asserted that *res judicata* is never a bar to a collateral challenge to a finding that absent class members were adequately represented. *Id.* 14a. That remarkable assertion draws no support from this Court's case law. To the contrary, the case law makes clear that if the initial adequacy of representation finding was made by a court operating in a procedurally adequate manner, the finding is not subject to collateral attack. Any other rule of law would significantly undermine the finality of all class action judgments.

A. Absent Class Members Receive All the Process They Are Due When the Certifying Court Examines Whether Their Interests Are Adequately Represented

The Court's most comprehensive discussion of the due process rights of absent class members is set forth in *Shutts*. The Court held that due process demands that, if a court wishes to bind absent plaintiffs concerning "a claim for money damages or similar relief at law," the absent plaintiffs must be afforded the following protections:

> The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity

> to present their objections." *Mullane* [*v. Central Hanover Bank & Trust Co.*], 339 U.S. [306,] 314-315 [1950]. . . . The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.

Shutts, 472 U.S. at 812.

But nothing in *Shutts* suggests that absent class plaintiffs seeking to avoid being bound by a class action judgment may raise such due process concerns in a collateral attack on the judgment. *Shutts* itself was a direct appeal from a class action judgment entered by a Kansas court and thus had no occasion to discuss collateral challenges. More importantly, *Shutts*'s discussion the adequacy of representation issue makes clear that the Court contemplated that it was the duty of the *trial judge* to protect the rights of absent class plaintiffs, and that the adequacy issue was to be determined by that judge in connection with his class certification decision. *See, e.g., Shutts*, 472 U.S. at 809. That focus on the role of the trial judge as the champion of the rights of absent class plaintiffs is inconsistent with Respondents' assertion that they are always free to challenge the *res judicata* effect of a judgment arising from a proceeding in which neither they nor their surrogates directly participated.

The Court has repeatedly stressed the obligation of a court to uphold another court's judgments with respect to any

issue that has been fully and fairly litigated and finally decided. That obligation even extends to issues involving the first court's jurisdiction to decide the issue:

> This Court has long recognized that "[the] principles of res judicata apply to questions of jurisdiction as well as to other issues." *American Surety Co. v. Baldwin*, 287 U.S. 156, 166 (1932). *See also Treinies v. Sunshine Mining Co.,* 308 U.S. 66, 78 (1939); *Davis v. Davis*, 305 U.S. 32 (1938). Any doubt about this proposition was definitively laid to rest in *Durfee v. Duke,* [375 U.S. 106, 111 (1963)], where this Court held that "a judgment is entitled to full faith and credit -- even as to questions of jurisdiction -- when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment." The North Carolina courts, therefore, should have determined in the first instance whether the Rehabilitation Court [the Indiana court whose judgment was being collaterally attacked] fully and fairly considered the question of subject matter jurisdiction over the North Carolina deposit, with respect to pre-rehabilitation claims of the parties before it. If the matter was fully considered and finally determined in the rehabilitation proceedings, the judgment was entitled to full faith and credit in the North Carolina courts.

Underwriters Nat'l Assurance Co. v. North Carolina Life and Accidental Health Ins. Gty. Ass'n, 455 U.S. 691, 706-07 (1982).

If a litigant is not entitled to collaterally challenge a judgment on the ground that the issuing court lacked subject

matter jurisdiction to render the judgment -- provided only that the rendering court has fully and fairly considered the jurisdictional issue -- then surely there can be no basis for allowing absent class plaintiffs to collaterally challenge a class action judgment on the basis of inadequacy of representation where the adequacy issue has been fully and fairly considered. Even if no litigant challenges adequacy of representation in connection with approval of a class action settlement (and there *were* such challenges in *Agent Orange I*), the trial court's independent obligation to examine the adequacy of representation issue before approving a settlement ensures that the interests of absent class members are treated fairly. That is all the process that is due to absent class members. *See also Matsushita Electric,* 516 U.S. at 374 ("[A] judgment entered in a class action, like any other judgment entered in a state judicial proceeding, is presumptively entitled to full faith and credit under the [Full Faith and Credit] Act," 28 U.S.C. § 1738.).

Possibly in an effort to limit the scope of the collateral challenges it was sanctioning, the Second Circuit noted that neither it (in its prior decisions) nor the district court had ever stated explicitly that there was adequate representation for absent class members whose injuries were not manifested by 1984 *and* would not manifest themselves until after the depletion of settlement funds in 1994, 10 years later. Pet. App. 13a.[4] But there is no question that both courts

[4] It is far from clear that the appeals court's decision was in any way dependent on the absence of a prior finding that *explicitly* referenced absent class members in Respondents' precise situation. The court never suggested that the presence of such a finding would have precluded collateral review of the adequacy determination. Indeed, the appeals court's ringing endorsement of collateral challenges to

(continued…)

considered the adequacy of representation issue at great length and ultimately determined -- on multiple occasions -- that *all* absent class members were adequately represented. *See, e.g., In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425, 1435-37 (2d Cir. 1993), *cert. denied,* 510 U.S. 1140 (1994). Given the evidence that both courts fully and fairly considered the issue and finally decided that all absent class members were adequately represented, the courts' failure also to state that every conceivable subclass of absent class plaintiffs was adequately represented is of no constitutional significance. Certainly, there can be no claim that the courts did not contemplate that *some* of the absent class members whose injuries had not become manifest as of 1984 might not develop any symptoms of their injuries until after 1994. For example, the Second Circuit in 1993 quoted the district court as recognizing that possibility but nonetheless finding no inadequacy of representation because even among those Vietnam veterans still in good health as of 1984, virtually all injuries attributable to Agent Orange exposure would have been manifested by 1994:

> In many cases the conflict between the interests of present and future claimants is more imagined than real. In the instant case, for example, the injustice wrought upon the plaintiffs is nonexistent. These plaintiffs, like all class members who suffer death or disability before the end of 1994, are eligible for compensation from the Agent Orange Payment Fund. *The relevant latency period and the age of the veterans ensure that almost all valid claims will be revealed before that time.*

---

[4](...continued)
adequacy of representation determinations, Pet. App. 14a, indicates that the court did not intend to limit its holding in this manner.

Id. at 1435-36 (quoting district court, 781 F. Supp. 902, 919 (E.D.N.Y. 1991)) (emphasis added).[5]

In support of its contention that absent class members are permitted to collaterally attack a class action judgment based on inadequacy of representation, the Second Circuit relied heavily on this Court's decision in *Hansberry*. Pet. App. 14a. That reliance was misplaced. *Hansberry* involved property owners who were appealing an Illinois Supreme Court determination that they were bound by a judgment rendered in an earlier litigation to which they were not parties, but which the Illinois court determined was a class action that bound a defendant class that included the property owners. The Court held that due process prohibited Illinois from binding the property owners in this manner. *Hansberry*, 311 U.S. at 119-20. But while the Court questioned both the adequacy of notice to the property owners and the adequacy of representation, the Court did not establish any generalized right to collateral challenge. To the contrary, the Court held, "[T]here 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." *Id.* at

---

[5] The quoted language illustrates the incorrectness of Respondents' repeated claim that absent class members in their position received little of value from the *Agent Orange I* settlement. Stephenson and Isaacson, like every other absent class member who had been exposed to Agent Orange but who had not manifested any symptoms of injury as of 1984, were in effect granted a 10-year insurance policy against death or disability. That Stephenson and Isaacson were lucky enough not to have suffered death or disability during 1984-1994 does not in any way diminish the value of that insurance.

118.[6] In other words, the Court limited collateral challenges to class action judgments to those cases in which the judgment was entered in a *procedurally* deficient manner. It did not sanction such challenges (as the Second Circuit apparently thought) whenever the absent class member believes she was inadequately represented or did not receive adequate notice.

The Court confirmed that limited reading of *Hansberry* in *Richards v. Jefferson County,* 517 U.S. 793 (1996). *Richards* involved a challenge to an occupational tax imposed by a county government; the government asserted that *res judicata* barred the challenge because an earlier challenge to the tax had been denied. Citing *Hansberry,* the Court held that the second challenge was not barred because none of the plaintiffs in the first suit was purporting to act on behalf of a class that included the plaintiffs in the second suit. *Richards*, 517 U.S. at 1767-68. Because a principal plaintiff in the first suit (the acting director of finance for the City of

---

[6] The Court held that the initial Illinois proceeding failed to meet that due process standard because, *inter alia*: (1) the plaintiffs in the initial proceeding "did not designate the defendants in the suit as a class or seek any injunction or other relief against others than the named defendants, and the decree which was entered did not purport to bind others"; and (2) there was some question whether the named defendants really had an interest in protecting their property rights against contractual interference: "even though nominal defendants, it does not appear that their interest in defeating the contract outweighed their interest in establishing its validity." *Id.* at 120. The facts in this case are not even remotely similar: there was never any question in this case that the named plaintiffs intended this case to proceed as a class action that would be binding on absent class members, and the district court certified the class and approved the settlement only after satisfying itself that the named plaintiffs adequately represented the class.

Birmingham) had not purported to represent the *Richards* plaintiffs:

> [T]here is no reason to suppose that the *Bedingfield* court [the court hearing the first case] took care to protect the interests of petitioners in the manner suggested by *Hansberry*. Not is there any reason to suppose that the individual [plaintiff] taxpayers in *Bedingfield* understood their suit to be on behalf of absent county taxpayers. Thus, to contend that the plaintiffs in *Bedingfield* somehow represented petitioners, let alone represented them in a constitutionally adequate manner, would be "to attribute to them a power that it cannot be said that they had assumed to exercise." *Hansberry*, 311 U.S., at 46.

Richards, 517 U.S. at 1768. In other words, the plaintiffs in the second action could not, consistently with due process, be bound by the first action because *procedures* adopted in the first action were not designed to protect the rights of those sought to be bound -- *not* because *Hansberry* grants absent class plaintiffs a generalized right to collaterally challenge class action judgments based on alleged inadequacy of notice or alleged inadequacy of representation.[7]

---

[7] Because the Second Circuit did not base its decision on any inadequacy of notice to the class, that issue is not before the Court. *See* Pet. App. 19a n.8. WLF notes, however, that both the district court and the Second Circuit have on prior occasions determined, after full and fair consideration, that notice to the class was sufficient to satisfy due process concerns. *See, e.g., In re Agent Orange Prod. Liab. Litig.,* 996 F.2d 1425, 1435 (2d Cir. 1993), *cert. denied,* 510 U.S. 1140 (1994). Respondents have not pointed to any procedural deficiencies in the manner in which the district court and Second (continued…)

In sum, Respondents are bound by the *Agent Orange I* judgment in the absence of evidence of any deficiency in the procedures by which the courts determined that all absent class members had been adequately represented.

B. *Amchem* and *Ortiz* Do Not Purport to Confer Any Right to Collaterally Attack Class Action Judgments Based on Inadequacy of Representation

The Second Circuit's opinion makes clear its belief that the decision to allow Respondents' claims to go forward was mandated by this Court's recent *Amchem* and *Ortiz* decisions. Indeed, the very first sentence in the opinion states, "This appeal requires us to determine the effect of the Supreme Court's landmark class action decisions in [*Amchem*] and [*Ortiz*] on a previously settled class action concerning exposure to Agent Orange during the Vietnam War." Pet. App. 1a-2a. A significant portion of the remainder of the opinion is devoted to explaining why, in the Second Circuit's view, *Amchem* and *Ortiz* prevent application of *res judicata* to this case.

The Second Circuit has read far too much into *Amchem* and *Ortiz*. Both cases arose in the context of direct appeals from district court orders approving class action settlements. While in each case the Court determined that the settlement should not have been approved because not all absent class plaintiffs were adequately represented, neither case so much as mentions the subject of collateral attacks on approved class action settlements.

---

[7](...continued)
Circuit arrived at those determinations.

Amchem held that Rule 23 prohibited approval of the settlement of a Rule 23(b)(3) class action involving (possibly) millions of individuals who had been exposed to asbestos manufactured by one or more of 20 companies. The Court held that the named plaintiffs could not adequately represent the plaintiff class because the interests of those within the class were antagonistic to one another (e.g., the goals of those who had already been injured were far different from the goals of those who had been exposed to asbestos but had not yet suffered any injury). *Amchem*, 521 U.S. at 626. *Ortiz* reached a similar result with respect to efforts to gain approval of a settlement of a massive Rule 23(b)(1) "limited fund" class action. *Ortiz*, 527 U.S. at 864-65.

It may well be that the district court, had *Amchem* and *Ortiz* already been decided at the time of *Agent Orange I*, would not have approved the proposed settlement. Certainly, in light of *Amchem* and *Ortiz*, there is some reason to question whether the class plaintiffs adequately represented the entire class. But that is not the issue before this Court. The district court, after a full and fair airing of the issue, determined that the class plaintiffs did adequately represent the class, and that determination was affirmed on direct appeal. As explained above, that determination is no longer open to challenge in the absence of evidence of a deficiency in the procedures employed in arriving at the determination.

It is worth noting that the evidence here regarding the adequacy of representation was far stronger than in either *Amchem* or *Ortiz*. While the interests of injured plaintiffs and exposure-only plaintiffs were in direct conflict with one another in *Amchem* and *Ortiz*, that conflict is far more muted here. First, as noted above, the district court determined that virtually all exposure-only class members who would

eventually suffer disability or death due to their exposure to Agent Orange would do so by 1994; thus, the district court held, the settlement in effect provided equal funding to virtually all injured class members, regardless of the date of disability or death. Second, the district court and Second Circuit determined that all class members were alike in one very important respect: all of their claims were quite weak. *In re Agent Orange Prod. Liab. Litig.,* 818 F.2d 145, 167 (2d Cir. 1987), *cert. denied,* 474 U.S. 1004 (1988). In its latest decision, the Second Circuit refused to examine the relative weakness of the claims of the various class members. The court stated that Petitioners' argument in support of such an examination "misses the mark," arguing that such an examination is not relevant in "assessing adequacy of representation and intra-class conflicts." Pet. App. 20a. With all due respect, it is the Second Circuit's argument that misses the mark. If the claims of all members of a class are uniformly weak, the potential for intra-class conflicts is reduced considerably.

But the Court need not address the issue of intra-class conflicts in order to rule for Petitioners. It is enough that the issue of adequacy of representation was addressed extensively on numerous occasions in the past 20 years, and on each occasion (prior to the decision below) the issue was decided adversely to Respondents. In the absence of any evidence that the process by which the courts arrived at those determinations was procedural deficient, Respondents have received all the process to which they are due and thus are bound by the judgment in Agent Orange I.

II. THE DECISION BELOW IS UNFAIR TO DEFENDANTS AND WILL UNNECESSARILY DISCOURAGE THE SETTLEMENT OF CLASS ACTIONS

An inevitable result of the Second Circuit's decision, if allowed to stand, will be to increase the uncertainty surrounding all class action judgments. No longer can the parties to such judgments rest assured that the litigation has thereby been brought an end; the Second Circuit's open-ended endorsement of collateral challenges to class action judgments means that such judgments are subject to being re-opened years down the road by absent class members challenging the adequacy of notice or of representation.

That result is particularly unfair to defendant who (as was true here) never agreed to certification of the class action. As a result of a decision to certify a large plaintiff class, defendants often face "intense pressure" to enter into a class-wide settlement because of the potential of an enormous damage award if the case goes to trial. *See Matter of Rhone-Poulenc Rorer, Inc.,* 51 F.3d 1293, 1298 (7th Cir.), *cert. denied,* 516 U.S. 867 (1995). Yet, pursuant to the Second Circuit's decision, such defendants have no assurance that funds paid out pursuant to such settlements will actually achieve the desired litigation cease-fire.

Indeed, defendants in a certified class action may well find themselves in an untenable heads-I-win-tails-you-lose situation, even if the class certification order is affirmed on direct appeal. If the defendant loses at trial, he will be expected to pay damages to all class members. But any victory at trial for the defendant (or a class-wide settlement) may turn out to be pyrrhic if absent class members are free

to file a new suit raising identical claims, and then to assert that they are not bound by the judgment because of inadequacy of class notice or representation.

As the Court noted in *Shutts,* a class action defendant has a strong interest in ensuring that the entire plaintiff class is as bound by any judgment entered in the case as it is. *Shutts,* 472 U.S. at 805 ("Whether it wins or loses on the merits, [a class action defendant] has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as [the defendant] is bound."). That interest is upset by the Second Circuit's decision. It thereby transforms Rule 23 from a device designed to facilitate the efficient adjudication of similar claims into a one-sided procedure that places defendants at a decided disadvantage.

At the very least, one can expect the Second Circuit's decision to discourage appreciably the settlement of class action suits. Defendants will have far less reason to commit significant sums to the settlement of such suits if they can have no assurance that absent class members will be barred from renewing settled claims. Such a decrease in settlement rates will serve only to further clog our nation's courts and to delay the receipt of compensation by injured plaintiffs with valid claims.

CONCLUSION

The Washington Legal Foundation respectfully requests that the judgment of the court of appeals be reversed.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302