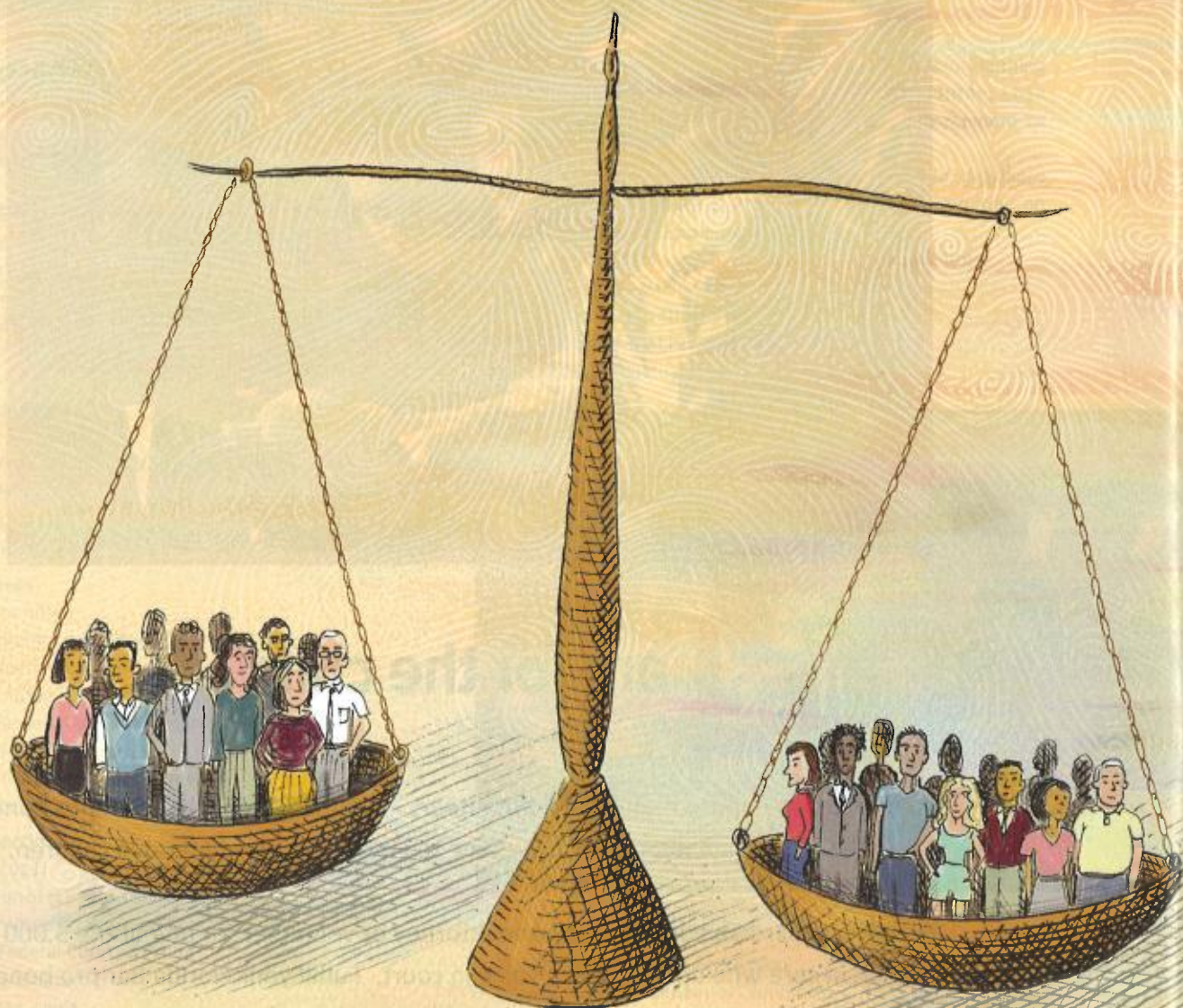




Collateral Attacks *on* *Class Resolutions*

by Frank Burt, Brian P. Perryman, and Thaddeus H. Ewald

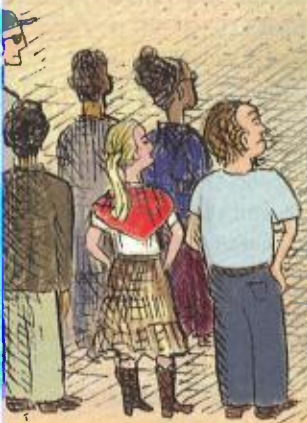


Illustration by Barbara Kelley

In 1940, *Hansberry v. Lee*, 311 U.S. 32 (1940), established the basic constitutional foundation for the class action device: Members of a class who are not parties to the litigation may only be bound by a judgment in the litigation “where they are *in fact adequately represented*” by class members who are parties to the litigation.¹ Although no court has definitively established when representation is “adequate,” the U.S. Supreme Court stated that a “selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires.”² The *Hansberry* court held that class action judgments will only be valid when “the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation.”³ Forty-five years later, in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the Supreme Court identified three basic due process elements for use of the class device: 1) The class member “must receive notice plus an opportunity to be heard and participate in the litigation”; 2) the class member must receive “an opportunity to remove himself from the class”; and 3) the named plaintiff must “at all times adequately represent the interests of the absent class members.”⁴

As the class device has evolved, courts have struggled to balance the interests in finality of class judgments with the due process right of every putative class member to their individual day in court. After *Shutts*, courts have disagreed whether challenges based on the basic due process elements may be raised by collateral attack in a subsequent proceeding and, if so, how.⁵ Most often arising in the settlement context, many courts have found that a judicial finding of adequate representation during a fairness hearing in the first proceeding precludes a later collateral attack on the class judgment in a second proceeding. This is consistent with the tenet that courts “do not, of course, judge the propriety of a class certification by hindsight.”⁶ But not all courts agree, with some allowing searching collateral attacks based on *Shutts*’ “at all times” language,⁷ unless the challenging class member had been put “on notice” of the alleged “inadequacy” during the class proceeding.⁸ These courts assert that the “at all times” phrase from *Shutts* means that the “duty to represent absent class members adequately is a continuing one.”⁹ This tension in approach culminated in a series of decisions attempting to define adequate representation, the most seminal of which was the Ninth Circuit opinion (albeit divided) in *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th

Cir. 1999),¹⁰ limiting the scope of an individual class member’s ability to collaterally attack a judgment.

Since *Epstein*, courts have issued diverging opinions on whether finality in class judgments trumps allowing class members broad latitude to collaterally attack judgments. The issue also has attracted considerable academic consideration.¹¹ The question is whether the collateral court is constrained to a limited review, considering only whether the class action court utilized adequate procedures to assure itself that the *Shutts* due process requirements had been met, or instead, whether it may engage in a broader, merits-based due process review. Although a majority of courts have answered this question by providing for limited collateral review, practitioners should take precautions to protect their clients’ class action resolutions from collateral attack in the courts that allow a more probing due process review.

Adequate Representation

Adequate representation of absent class members is perhaps the most important due process requirement in *Shutts*.¹² Adequate representation does not exist unless there were either “special procedures to protect the nonparties’ interests” or “an understanding by the concerned parties that the first suit was brought in a representative capacity.”¹³ To achieve representational adequacy, class representatives must fairly and adequately protect the interests

of all class members,¹⁴ including protecting their interest against the potentially competing interests of class counsel.¹⁵ This requires that actual and potential conflicts of interest between the representative plaintiffs and unnamed class members be addressed.¹⁶

Of course, the larger the class, the greater the likelihood that class members will have divergent or conflicting interests that threaten adequacy. Discrete, separately represented subclasses may be used to ensure that varying groups receive the same level of adequate representation. For example, in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), more than half of the proposed class representatives that were included alleged they or their family members had already suffered injuries as a result of exposure to asbestos, while the remaining proposed class representatives alleged they or their family members had merely been exposed to asbestos, but had not yet suffered any asbestos-related injury.¹⁷ The parties, with diverse or nonexistent medical conditions, attempted to represent the interests of a single, massive class, leaving a disparity of interest between class members who were currently injured and those whose injuries had not yet manifested.¹⁸ The *Amchem* court explained that while members of a

The question is whether the collateral court is constrained to a limited review, considering only whether the class action court utilized adequate procedures to assure itself that the Shutts due process requirements had been met, or instead, whether it may engage in a broader, merits-based due process review.

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class are typically united in seeking the maximum possible recovery, a class judgment may fail to satisfy adequacy concerns when it makes distinctions between "how recovery is to be allocated among different kinds of plaintiffs, decisions that necessarily favor some claimants over others."¹⁹ There, the proposed settlement recognized four categories of "compensable disease" — mesothelioma, lung cancer, certain other cancers, and nonmalignant conditions — for which specified ranges of damages were available.²⁰ The allocations were particularly inadequate for some of the class members whose claims received no compensation.²¹

Two years later, in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), the Court addressed a similar putative class that included both individuals (or their family members) who had present injuries as well as potential future claimants.²² Relying on the then-recent *Amchem* decision, the Court explained that the divergent interests of the presently injured and those facing potential future injuries "require[d] division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel."²³ It is important to note, however, that the *Ortiz* Court was confronting the certification of a Rule 23(b)(1)(B) "limited fund" class action rather than the Rule 23(a)(4) adequate representation prerequisite.²⁴

While the Court in *Ortiz* opined that the conflict of interest "was as contrary to the equitable obligation entailed by the limited fund rationale as it was to the requirements of structural protection applicable to all class actions under Rule 23(a)(4),"²⁵ some

courts have used this difference to distinguish *Ortiz*. The 11th Circuit, in *Juris v. Inamed Corp.*, 685 F.3d 1294 (11th Cir. 2012), suggested that *Amchem* and *Ortiz* together "appear to hold that Rule 23(a)(4) calls for some type of adequate structural protection, which would include, but may not necessarily require, formally designated subclasses."²⁶ The court distinguished those two cases, both dealing with Rule 23 pre-certification requirements on direct appeal, from the context of the case before it, a collateral challenge based on an allegation by an absent class member that her due process rights were violated during the direct case.²⁷ In *Juris*, while there were no formally designated subclasses, the named class representatives included individuals with no manifested injury, with moderate injuries, and with severe injuries.²⁸ Additionally, separate counsel was specifically brought in to represent plaintiffs with only potential future injuries in order to avoid the problem encountered in *Amchem*.²⁹

More recently, the Second Circuit reversed approval of a settlement judgment because it found the "unitary representation" of the plaintiffs was "inadequate."³⁰ It described the interests of the class representatives as "antagonistic" to the interests of some of the class members they purported to represent.³¹ A court will examine a settlement's substance for evidence of prejudice to the interests of a subset of class members when assessing the representation's adequacy.³² Any "benefits of litigation peace" cannot supersede class members' due process right to adequate representation.³³

Adequate Notice

Sufficient notice is another one of the key *Shutts* due process requirements.³⁴ Rule 23(c)(2) requires that the notice of Rule 23(b)(3) class actions be the "best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."³⁵ To determine whether a notice is sufficient to confer jurisdiction by consent, class members must be able to evaluate the proceeding to which they are consenting. In determining whether notice is sufficient, courts consider both the "mode of dissemination and its content."³⁶

Notice to the class need only be "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."³⁷ The notice must describe the claims asserted and contain information reasonably necessary to allow class members to decide whether to remain a class member and be bound by any final judgment.³⁸ In addition, the notice must be written in objective, neutral terms understandable by the average class member.³⁹ The standard then is that the notice "must contain information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the class and be bound by the final judgment."⁴⁰ The notice need not include every material fact or be overly detailed.⁴¹

The mode of dissemination is somewhat flexible, as it is sometimes difficult or impossible to give actual notice to each and every class member.⁴² Notice sent via U.S. mail, however, usually suffices.⁴³ The parties are expected to act reasonably in selecting the means likely to inform the affected persons, although actual notice may not reach every member.⁴⁴ Instead, the notice plan is assessed as a whole. Notice must only be reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections.⁴⁵ A key question for

potential collateral attack purposes is whether the purported inadequacy was encompassed and sufficiently described within the class notice.

Circuit Split on Collateral Attack

Preclusion principles apply to all class judgments — litigated and settled — and restrict class members from reasserting claims that a court has resolved by a prior judgment.⁴⁶ Class members have certain options to protect their due process rights.⁴⁷ In a class certified under Rule 23(b) (3), class members may opt out to avoid being bound by the final judgment.⁴⁸ In some circuits, they may also advance a collateral attack on some portion of the proceeding resulting in the class judgment.⁴⁹ This option arises if they can demonstrate that their due process rights were violated because the named plaintiffs failed to adequately represent them, or they failed to receive adequate notice of the particular feature of the proceeding that they challenge.⁵⁰ However, courts are split on the scope of that potential collateral review.

One side of the split falls in line with Judge O'Scannlain's opinion in *Epstein*, wherein the Ninth Circuit imposed a very narrow standard of collateral review focusing solely on "whether the procedures in the prior litigation afforded the party against whom the earlier judgment is asserted a 'full and fair opportunity' to litigate the claim or issue."⁵¹ *Epstein* found that *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996), implicitly prescribes a limited, procedure-only review — that each member had the opportunity to raise the purported defect during the litigation.⁵² Due process rights to adequate representation and adequate notice are protected initially by the certifying court, not by "collateral second-guessing of those determinations."⁵³ In this view, class action judgments carry final preclusive effect, and class members are precluded from collaterally attacking a judgment in the absence of some demonstrated procedural defect. Allowing a collateral attack on the prior judgment "would result in creating elements

of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of res judicata to avert."⁵⁴

Judge Thomas dissented from the majority opinion in *Epstein*. In his view, *Amchem* "heralded a new era of judicial scrutiny of class action certification and settlement," and the majority opinion "marks a significant retreat from that philosophy, sanctioning a class settlement obtained without any record evidence that the class representatives were even members of the class."⁵⁵ Judge Thomas found nothing in *Matsushita* "that relieves us of our responsibility to examine the merits of the due process argument fully and fairly."⁵⁶ To the contrary, Judge Thomas reasoned, *Matsushita* sent an "unmistakable signal" to do just that.⁵⁷

The relative merits of the *Epstein* rule notwithstanding, it has its own limitations. A possible exception to is when the court that entered the judgment made no findings regarding whether the class member received the requisite notice, opportunity to be heard, and adequate representation. For instance, the Ninth Circuit has permitted the collateral review of a Kansas court's approval of the settlement in a class action (*Benney*) because "the Kansas court made no finding that the *Benney* [c]lass [p]laintiff's representation of the class was adequate" as to certain claims.⁵⁸ The Ninth Circuit found it to be a "proper subject for collateral review" because the question of adequate representation "was not addressed with any specificity by the Kansas court."⁵⁹

Alternatively, the Second Circuit determined in *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2d Cir. 2001), that if an alleged defect was not actually litigated in the original proceeding, then the second court was free to review the issue de novo.⁶⁰ The *Stephenson* court explained that this would not violate a defendant's due process rights by exposing her to double liability, as it is "not duplicative if plaintiffs were never proper parties to the prior judgment in the first place."⁶¹ *Stephenson's* approach — permitting broad collat-

eral review — is far more protective of class members, although it may leave defendants vulnerable to future claims. The Supreme Court granted a petition for writ of certiorari from the Second Circuit's decision, but it split evenly on the question,⁶² so the Supreme Court's decision lacks precedential value.⁶³

Post-*Epstein* Developments

While the Supreme Court has yet to definitively rule on this circuit split, the law on collateral attacks has continued to evolve since *Epstein* and *Stephenson*. The majority of courts have followed the *Epstein* view⁶⁴ that "the absent class members' due process rights to adequate representation and adequate notice are 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 [U.S.] Supreme Court."⁶⁵ These courts find there is no justification for allowing the litigation to be effectively reopened in the collateral proceeding when substantially all of a class member's interests were vigorously presented in the class litigation by the various parties.⁶⁶ This approach focuses on whether appropriate procedures were applied in the certifying court and by the courts that review those determinations.⁶⁷ As *Hansberry* explained, "there has been a failure of due process only in those cases where it cannot be said that the procedure adopted...fairly ensures the protection of the interests of absent parties who are to be bound by it."⁶⁸ As a result, most courts find that proceedings in the first case need not comply with more than the minimal due process procedural requirements ensconced in Rule 23(b).⁶⁹ When the *Shutts* due process prerequisites on notice, opportunity to be heard and opt-out, and review of adequate representation have been satisfied, collateral attack is foreclosed. The *Shutts* requirements are based on substantive rights of due process that "must be granted at a meaningful time and in a meaningful manner."⁷⁰

Furthermore, the majority view is reflected in the American Law Institute's 2010 restatement of class action law, *Principles of the Law of*

Aggregate Litigation.⁷¹ The ALI's restatement specifically limits challenges to a class action settlement to direct appeal, with two narrow exceptions: 1) challenges "before the court in which the settlement occurred on grounds generally applicable" under the governing procedural rules for obtaining relief from judgment; or 2) challenges "before the same or a different court on the ground that the settlement court lacked personal or subject-matter jurisdiction, failed to make the necessary findings of adequate representation, or failed to afford class members reasonable notice and an opportunity to be heard as required by applicable law."⁷²

Other opinions line up with *Stephenson* and find that the scope of a subsequent due process collateral attack may include reexamining the original court's factual findings with regard to adequacy.⁷³ For example, one Minnesota court determined that the doctrines of res judicata and collateral estoppel should not be applied rigidly; rather, the focus should be on whether preclusion would be an injustice to the

class member.⁷⁴ In *Gooch v. Life Investors Insurance Co. of America*, 672 F.3d 402 (6th Cir. 2012), the Sixth Circuit held that it was "not persuaded" by the *Epstein* decision and that a court may freely review the substance of whether a prior class settlement complied with the due process clause, even while conceding that such free-ranging review "may not promote judicial 'efficiency' or protect the 'finality' of the original judgment."⁷⁵ In the Sixth Circuit's view, therefore, class members may indirectly challenge the validity of a judgment in a class action by mounting a collateral attack on the adequacy of the class representation or settlement notice.⁷⁶

Regarding the adequacy of representation, the Fifth Circuit in *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973), considered a collateral attack to relieve a class member from a class judgment where the representative plaintiff failed to appeal an adverse judgment.⁷⁷ The court invoked a two-prong test to determine whether adequacy of representation was satisfied: "(1) Did the trial court in the first

suit correctly determine, initially, that the representative would adequately represent the class?," and "(2) [d]oes it appear, after termination of the suit, that the class representative adequately protected the interest of the class?"⁷⁸ The first question involves a collateral review of the trial court's determination to permit the suit to proceed as a class action, while the second involves a review of "the class representative's conduct of the entire suit — an inquiry which is not required to be made by the trial court but which is appropriate in a collateral attack on the judgment."⁷⁹ The Fifth Circuit then proposed that the "primary criterion for determining whether the class representative had adequately represented his class for purposes of res judicata is whether the representative, through qualified counsel, vigorously and tenaciously protected the interests of the class. A court must view the representative's conduct of the entire litigation with this criterion as its guidepost."⁸⁰

This second adequacy inquiry following final judgment "necessarily



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requires a hindsight approach to the issue of adequate representation,” and does not in any way reflect on the district court’s conclusion at the outset that the class representative would adequately represent the class.⁸¹ After considering these standards, the *Gonzales* court concluded that the representative’s failure to appeal an order denying retroactive relief to all class members other than the representative constituted inadequate representation of the class.⁸²

But other courts have rejected these types of challenges to the adequacy of representation based on the class representative’s decision not to appeal a judgment.⁸³

In the *Juris* opinion, the 11th Circuit rejected a challenger’s argument that representation was inadequate because the representative failed to appeal certification of a mandatory limited-fund, settlement-only class and approval of a settlement.⁸⁴ The court found adequate representation because counsel’s failure to appeal was not motivated by any benefit to some class members to the detriment of others.⁸⁵ Even though courts have reached different conclusions regarding whether representation was adequate in the cases at hand, cases like *Gonzales* and *Juris* embody the *Stephenson* approach of allowing searching inquiries into the first proceeding’s compliance with *Shutts*’ due process requirements.⁸⁶

Juris is also noteworthy because it offers an example of an opinion considering a substantive collateral attack based on both adequacy of representation and adequacy of notice.⁸⁷ In addition to rejecting the adequacy of representation argument, the court also rejected the challenger’s argument that notice was inadequate

because it was never received.⁸⁸ The 11th Circuit found adequate notice because receipt of notice was not required under the “best [notice] practicable under the circumstances” standard.⁸⁹

Lessons for the Class Action Practitioner

Those who practice in the class action arena should not grow complacent with what seems to be a trend against permitting collateral attacks based on inadequate representation or inadequate notice. The casebooks are littered with the open graves of class actions once thought interred by final judgments. With a modest amount of forethought, however, practitioners need not whistle past this legal graveyard. They can instead save their clients from it.

The circumstances of negotiated class action settlements present the clearest route. If they are not resolved on early dispositive motions, most class actions are settled. Class settlements must, of course, be judicially approved.⁹⁰ In effecting court approval, it is customary for the parties to jointly participate in drafting proposed approval orders and final judgments. These documents are usually filled with dry, terse, conclusory language reciting what the parties hope the court will ultimately adopt as its findings of fact and conclusions of law. With respect to the due process considerations of adequate representation and notice, such proposed orders and judgments ordinarily pay only lip service to these issues, if they address them at all. A typical approval order might say nothing more on adequacy of representation than “the claims of the [c]lass [r]epresentative are typical of the claims of the [c]lass,

and the [c]lass [r]epresentative will fairly and adequately protect the interests of the [c]lass.”⁹¹ An even briefer variation may be that “[p]laintiff is a typical and adequate [c]lass [r]epresentative.” Likewise, a typical approval order might say nothing more on adequate notice than “the [c]lass [n]otice constitutes the best notice practicable under the circumstances.”⁹² In the right court, language like this might suffice to withstand a collateral attack. In the wrong court, however, such empty genuflections might open the door to great mischief.

The Ninth Circuit’s decision in *Hesse v. Sprint Corp.*, 598 F.3d 581 (9th Cir. 2010), exemplifies the problem with inserting perfunctory findings into proposed approval orders. There, in approving an earlier class settlement, a Kansas state court found without further elaboration that “[t]he adequacy of representation requirement is met here because the named [c]lass [r]epresentatives have the same interests as the members of the [c]lass.”⁹³ But the Kansas state court’s findings were insufficient to demonstrate that the class representative (the *Benney* plaintiff) adequately represented the entire class.⁹⁴ This rote language did not constitute “an explicit finding that the *Benney* [p]laintiff was an adequate representative of the class” or certain claims.⁹⁵ “Because that question was not addressed with any specificity by the Kansas court,” the Ninth Circuit concluded, “it is a proper subject for collateral review.”⁹⁶

This result could have been avoided had the parties drafted a proposed approval order containing more substance. The Ninth Circuit, after all, espouses the view that “absent class members’ due process right to ad-

equate representation is protected not by collateral review, but by the certifying court initially.⁹⁷ To avoid this and similar results, defense counsel should insist upon a proposed order explicitly finding the class representative had no conflicts of interest, structural or personal, with any class members; that he had vigorously directed and prosecuted the lawsuit (or at least made sufficient credible threats to inspire the settlement); that he had properly investigated the merits of his claims and the defendant's defenses, through formal or informal discovery; that he pursued all credible claims; and that he settled solely because of the risk of an adverse judgment. Ideally, the proposed order should be fleshed out with appropriate factual and procedural background. Specificity, not empty legal conclusions, should be the goal. This ideal applies equally to the adequate notice requirement. A proposed order should describe with specificity how notice was or will be provided, including the content included or to be included in the notice; to whom notice was sent or attempted to be sent; and the extent of efforts counsel underwent or will undergo to provide the best notice practicable.

Another, more recent, example comes from the Eighth Circuit. In *In re Target Corp. Customer Data Security Breach Litigation*, 847 F.3d 608, 612 (8th Cir. 2017), an objector to the class settlement argued that, in its preliminary certification order, the district court did not conduct a "rigorous analysis" of Rule 23(a) before concluding that the plaintiffs adequately represented the class. The appellate court accepted this argument, ruling that the district court's certification of the settlement class did not meet that standard.⁹⁸ In its preliminary order, the district court replaced analysis of the certification prerequisites "with a recitation of Rule 23 and a conclusion that certification is proper."⁹⁹ Parroting Rule 23's terms, the district court found "the [s]ettlement [c]lass [r]epresentatives and settlement [c]lass [c]ounsel will fairly and adequately protect the interests of the [s]ettlement [c]lass as the [s]ettlement [c]lass [r]epresentatives have no interest antagonistic to or in conflict with the [s]ettlement [c]lass

and have retained experienced and competent counsel to prosecute this matter on behalf of the [s]ettlement [c]lass."¹⁰⁰

These statements, the Eighth Circuit ruled, "are conclusions, not reasons."¹⁰¹ This boilerplate language was drafted, perhaps unsurprisingly, by counsel for the settling parties in a proposed preliminary approval order, an inspection of the docket reveals.¹⁰² Counsel could have avoided this result by amplifying the plaintiffs' representations of their adequacy while clarifying that the defense offered no position concerning the adequacy issue.

In short, defense counsel should be vigilant in protecting their client's settlement from possible future attacks. For their part, plaintiff's counsel, who have no legitimate objection to including specific findings, must concur that the class representative — their own client — is providing adequate representation. Many plaintiffs' counsel would prefer to burnish their own case and credentials, anyway.

Contested class judgments present a more difficult, albeit rarer, problem. In contested matters, the court entering judgment does not typically solicit or receive from the parties proposed orders certifying the class or disposing of the case. Moreover, in contested matters, final judgments are almost invariably entered following heavily litigated motions for class certification. Pre-certification, defense counsel has little desire to encourage a well-reasoned opinion explaining why the named plaintiff is an adequate, typical class representative. The defendant may wish to preserve a possible appeal from a deficient order granting class certification. Post-certification, however, the analysis can change. Defense counsel may wish to prevail upon the court in advance of (or even after) a final judgment to make supplemental findings regarding the class representative's adequacy. Such findings could inoculate against a later collateral attack. Such a request, however, may also interfere with the defendant's desire to appeal the class certification order, especially if the defendant intends to specifically appeal the adequacy issue.

Conclusion

As *Hansberry* established decades ago, a court may obtain personal jurisdiction over absent class members only if the class representative adequately represents them; "an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection."¹⁰³ There can be no viable class judgment without a finding of compliance with *Shutts*' due process elements. By permitting a narrow review of a trial court's "procedures" to test that compliance, the majority of courts have limited class members' ability to collaterally attack class judgments. That right arose from *Hansberry*, was reiterated in *Ortiz*, and remains a key feature of class litigation. Ultimately, until the Supreme Court decides the extent to which absent class members can collaterally attack class judgments, this issue will remain a troubling and unsettled aspect of class action law, particularly for defendants who wish to finally rinse out nationwide exposures in a single class settlement judgment. □

¹ *Hansberry*, 311 U.S. at 41, 42-44 (emphasis added). The rationale usually given for "adequate representation" is that typical class representatives, by pursuing their own interests, will litigate common questions. 2 ALBA CONTE, ET AL., *NEWBERG ON CLASS ACTIONS* §4.47 (4th ed. 2002).

² *Hansberry*, 311 U.S. at 45.

³ *Id.* at 41.

⁴ *Shutts*, 472 U.S. at 811-12; see also *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848, n.24 (1999). The protections are specific to Rule 23(b)(3) classes. See *Shutts*, 472 U.S. at 812, n.3 ("Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments. We intimate no view concerning other types of class actions, such as those seeking equitable relief."). Rule 23(b)(2) class members do not have the ability to opt out. Additionally, the *Shutts* court made clear that personal jurisdiction over absent class members without minimum contacts with the forum is based on consent, which is evidenced by plaintiffs being provided with notice and an opportunity to request exclusion within a reasonable period of time. *Id.* at 814.

⁵ *Shutts* left unresolved the scope of any collateral review for satisfaction of due process requirements, and in *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996), the Supreme Court avoided

expressly defining the scope of collateral review for *Shutts* due process compliance.

⁶ *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160 (1982).

⁷ *Shutts*, 472 U.S. at 812; see also note 4 and accompanying text.

⁸ While U.S. CONST. art. IV, and the Full Faith and Credit Act, 28 U.S.C. §1738, require courts to give full faith and credit to state courts' judgments, it is settled law that a "constitutionally infirm judgment" is not entitled to full faith and credit. See, e.g., *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 482 (1982); *State v. Homeside Lending, Inc.*, 826 A.2d 997, 1005 (Vt. 2003). For the class judgment to acquire the presumption of full faith and credit, the court entering the judgment must have complied with the due process clause. See *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1226 (11th Cir. 1998) ("Before the bar of claim preclusion may be applied to the claim of an absent class member, it must be demonstrated that invocation of the bar is consistent with due process, and an absent class member may collaterally attack the prior judgment on the ground that to apply claim preclusion would deny him due process.") (citations omitted).

⁹ *Matsushita*, 516 U.S. at 395 (Ginsburg, J., concurring in part, dissenting in part); see also *Gonzales v. Cassidy*, 474 F.2d 67, 75 (5th Cir. 1973) (failure to pursue appeal rendered initially adequate class representation inadequate, such that judgment did not bind the class); *Wolfert ex rel. Estate of Wolfert v. Transamerica Home First, Inc.*, 439 F.3d 165, 173 (2d Cir. 2006) ("Of course, not every variation between the interests of an absent class member and those of the class generally will render the class representatives inadequate. The adequacy-of-representation determination turns on whether the interests of the class were 'compatible' with those of the party attempting to attack the class action judgment collaterally.")

¹⁰ See also note 5 (explaining the *Matsushita* court's analysis did not entail a consideration of *Shutts* due process compliance).

¹¹ See, e.g., Patrick Woolley, *Collateral Attack and the Role of Adequate Representation in Class Suits for Money Damages*, 58 U. KAN. L. REV. 917 (2010); see also *id.* at 917-18, n. 3-6 (collecting scholarly works on the topic).

¹² *Shutts*, 472 U.S. at 812.

¹³ *Taylor v. Sturgell*, 553 U.S. 880, 897 (2008) (citing *Richards v. Jefferson Cty.*, 517 U.S. 793, 801-802 (1996)).

¹⁴ See, e.g., *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1077-78 (2d Cir. 1995); *Kamilezicz v. Bank of Bos. Corp.*, 100 F.3d 1348, 1350 (7th Cir. 1996) (Easterbrook, J., dissenting); *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 338 (4th Cir. 1998) (basic due process requires that class representatives "possess undivided loyalties to absent class members"). Class counsel have duties of loyalty to each member of the class, and must not act based on interests antagonistic to any of them. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 n.20 (1997) ("The adequacy heading also factors in

competency and conflicts of class counsel.").

¹⁵ See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 852-53 (1999) ("Class counsel thus had great incentive to reach any agreement in the global settlement negotiations that they thought might survive a Rule 23(e) fairness hearing, rather than the best possible arrangement for the substantially unidentified global settlement class.").

¹⁶ *Amchem*, 521 U.S. at 594-95, 626-28.

¹⁷ *Id.* at 603.

¹⁸ See *id.* at 626.

¹⁹ *Id.* at 610.

²⁰ *Id.* at 603. The stipulation did recognize another category, "exceptional" medical claims, for which the settlement did not otherwise provide recovery; however, the settlement did cap the number of those types of claims it would cover as well as the dollar amount of recovery. *Id.* at 603-04.

²¹ *Id.* at 604 (mentioning claims cognizable under applicable state law that still received no compensation, such as loss of consortium by family members and increased risk of cancer or other asbestos-related injury by asbestos-exposed individuals).

²² See *Ortiz*, 527 U.S. at 854 ("[T]he class includes those with present claims never filed, present claims withdrawn without prejudice, and future claimants.").

²³ *Id.* at 856 (citing *Amchem*, 521 U.S. at 627).

²⁴ See *id.* at 856-57; see also *Juris v. Inamed Corp.*, 685 F.3d 1294, 1323 (11th Cir. 2012) (distinguishing *Ortiz* because it "involved Rule 23(b)(1)(B) certification requirements, as opposed to Rule 23(a)(4)").

²⁵ *Ortiz*, 527 U.S. at 856-57.

²⁶ *Juris*, 685 F.3d at 1323.

²⁷ *Id.* at 1323-24.

²⁸ *Id.* at 1324.

²⁹ *Id.*

³⁰ *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223, 233 (2d Cir. 2016) (hereinafter *Payment Card*).

³¹ *Id.* ("The [s]ettlement [a]greement does manifest tension on an 'essential allocation decision': [M]erchants in the (b)(3) class would share in up to \$7.25 billion of damages, while merchants in the (b)(2) class would enjoy the benefit of some temporary changes to the defendants' network rules. The same counsel represented both the (b)(3) and the (b)(2) classes. The class counsel and class representatives who negotiated and entered into the [s]ettlement [a]greement were in the position to trade diminution of (b)(2) relief for increase of (b)(3) relief.").

³² *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 252 (2d Cir. 2011).

³³ *Payment Card*, 827 F.3d at 236, 240.

³⁴ *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (class notice "must be the best practicable, 'reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314-15 (1950))).

³⁵ FED. R. CIV. P. 23(c)(2)(B). For Rule 23(b)(1) and 23(b)(2) class actions, see FED. R. CIV. P. 23(c)(2)(A) ("[T]he court may direct appropriate notice to the class."). For class settlements, see FED. R. CIV. P. 23(e)(1) ("The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.").

³⁶ *In re Diet Drugs Prods. Liab. Litig.*, 226 F.R.D. 498, 517-18 (E.D. Pa. 2005).

³⁷ *Mullane*, 339 U.S. at 314, 318. "[R]easonable effort," for which there is no exact definition, should be used to identify potential class members. *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1097-99 (5th Cir. 1977) ("In every case, reasonableness, is a function of anticipated results, costs, and amount involved."); see also *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-77 (1974) (finding that individual notice was the "best notice practicable" where names and addresses of class members were easily ascertainable, despite there being over two million class members); *Schroeder v. City of New York*, 371 U.S. 208, 212-13 (1962) (finding that notice published in newspapers and on signs and poles was "not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question.").

³⁸ *Nissan Motor*, 552 F.2d at 1104-05.

³⁹ *Id.* at 1104.

⁴⁰ *Id.* at 1105.

⁴¹ *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1239 (11th Cir. 2011) (quoting *Nissan Motor*, 552 F.2d at 1104-05); *Greco v. Ginn Dev. Co.*, 635 F. App'x 628, 633 (11th Cir. 2015) (quoting *Faught*, 668 F.3d at 1239).

⁴² See, e.g., *Wyatt ex rel. Rawlins v. Sawyer*, 105 F. Supp. 2d 1234 (M.D. Ala. 2000) (approving class settlement between state mental health department and patients when notices were posted in the living areas of the department's live-in facilities; were hand-delivered to certain patients; were delivered orally to certain patients for whom hand delivery was not feasible for clinical purposes; were mailed to certain identified guardians of patients; were mailed to consumer and advocacy organizations whose constituencies included potential class members; and were published in newspapers serving the cities' housing).

⁴³ See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) ("[A] fully descriptive notice...sent by first-class mail to each class member, with an explanation of the right to 'opt out,' satisfies due process.").

⁴⁴ *Weigner v. City of New York*, 852 F.2d 646, 649 (2d Cir. 1988); see also *Juris v. Inamed Corp.*, 685 F.3d 1294, 1321 (11th Cir. 2012) ("Courts have consistently recognized that, even in Rule 23(b)(3) class actions, due process does not require that class members actually receive notice."); *Reppert v. Marvin Lumber & Cedar Co.*, 359 F.3d 53, 56-57 (1st Cir. 2004) (finding that Massachusetts consumers had adequate notice through newspaper notices, "even though [certain] individuals never actually receive notice").

⁴⁵ *In re Integra Realty Res., Inc.*, 262 F.3d 1089, 1110 (10th Cir. 2001) (quoting *Mul-lane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313-15 (1950)).

⁴⁶ *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008) ("Representative suits with preclusive effect on nonparties include properly conducted class actions."); accord *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 260 (2d Cir. 2001) ("Res judicata generally applies to bind absent class members except where to do so would violate due process" and "[d]ue process requires adequate representation 'at all times' throughout the litigation."), *aff'd in part by an equally divided court and vacated in part*, *Dow Chem. Co. v. Stephenson*, 539 U.S. 111 (2003).

⁴⁷ See, e.g., *Day v. Persels & Assocs., LLC*, 729 F.3d 1309, 1321 (11th Cir. 2013) (identifying the primary manners by opting out or collaterally challenging "a matter on which there was a potential (or, in the light of the fully developed record, an actual) significant intra-class conflict and that the notice the absentee[s] received was inadequate to inform [them] of the conflict") (quoting *Williams v. Gen. Elec. Capital Auto Lease, Inc.*, 159 F.3d 266, 269-70 (7th Cir. 1998)).

⁴⁸ See *Shutts*, 472 U.S. at 798.

⁴⁹ See *Williams*, 159 F.3d at 269-70; *Day*, 729 F.3d at 1321.

⁵⁰ See *Hansberry v. Lee*, 311 U.S. 32, 39 (1940).

⁵¹ *Epstein v. MCA, Inc.*, 179 F.3d 641, 648-49 (9th Cir. 1999).

⁵² *Id.* at 648. *Epstein* also arguably hinged its "procedures-only" analysis on the availability of direct appellate relief for absent class members. This has implications in those circuits where objectors in a Rule 23(b)(3) class have opt-out rights but no *Devlin* direct right of appeal. See, e.g., *Hege v. Aegon USA, LLC*, 780 F. Supp. 2d 416, 428-29 (D.S.C. 2011).

⁵³ *Epstein*, 179 F.3d at 648.

⁵⁴ *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398-99 (1981) (quoting *Reed v. Allen*, 286 U.S. 191, 201 (1932)).

⁵⁵ *Epstein*, 179 F.3d at 651 (Thomas, J., dissenting).

⁵⁶ *Id.* at 652.

⁵⁷ *Id.*

⁵⁸ *Hesse v. Sprint Corp.*, 598 F.3d 581, 588 (9th Cir. 2010).

⁵⁹ *Id.*

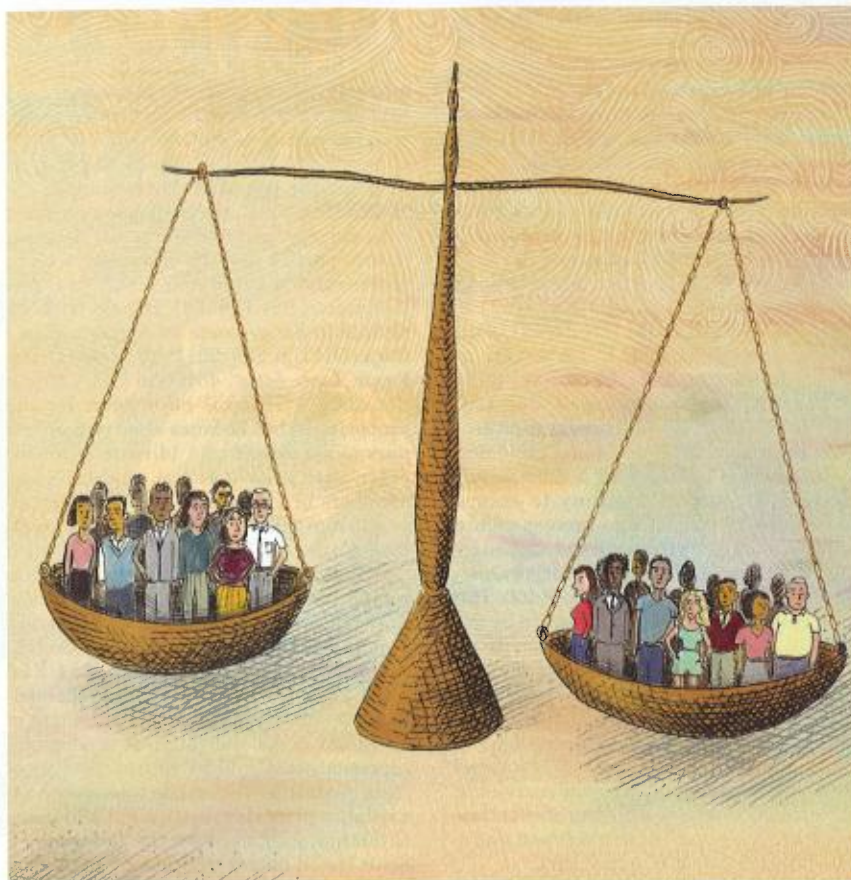
⁶⁰ *Stephenson*, 273 F.3d at 259 ("We therefore hold that a collateral attack to contest the application of res judicata is available.").

⁶¹ *Id.*

⁶² *Dow Chem. Co. v. Stephenson*, 539 U.S. 111, 112 (2003).

⁶³ See, e.g., *United States v. Pink*, 315 U.S. 203, 216 (1942) ("[T]he lack of an agreement by a majority of the [Supreme] Court on the principles of law involved prevents it from being an authoritative determination for other cases.").

⁶⁴ JAY TIDMARSH & ROGER H. TRANGSRUD, *MODERN COMPLEX LITIGATION* 542 (2d ed. 2010) ("It is fair to say...that the cases are strongly trending toward the *Epstein* approach and away from *Stephenson*."); see also, e.g., *Gough v. Transamerica Life*



Ins. Co., 781 F. Supp. 2d 498, 505 (W.D. Ky. 2011) (finding that "only a limited collateral review of the *Shutts* due process requirements is appropriate"); *Moody v. Sears Roebuck & Co.*, 664 S.E.2d 569, 580-81 (N.C. Ct. App. 2008) (finding trial court erred by "undertaking a broad collateral review" of the original court's due process analysis).

⁶⁵ *Epstein v. MCA, Inc.*, 179 F.3d 641, 648 (9th Cir. 1999) ("[N]owhere in *Shutts* did the Court state or imply that where the certifying court makes a determination of the adequacy of representation in accord with *Shutts*, this determination is subject to collateral review. *Shutts* in fact implies that such review is unwarranted by emphasizing that the certifying court is charged with protecting the interests of the absent class members."); see *Hesse v. Sprint Corp.*, 598 F.3d 581, 588 (9th Cir. 2010); *Epstein*, 179 F.3d at 648 (citing *Grimes v. Vitalink Commc'ns Corp.*, 17 F.3d 1553, 1558 (3d Cir. 1994) approvingly as "refusing to allow absent class members collaterally to challenge adequacy of representation because the opportunity to challenge that determination by appeal to [the] Delaware Supreme Court, and thereafter to the [U.S.] Supreme Court, 'granted all the process that was due'"); *Nathan v. Rowan*, 651 F.2d 1223, 1227-28 (6th Cir. 1981) (certifying court's findings of adequate representation were made after an examination of the record and could not be collaterally attacked); *Weaver v. AEGON USA, LLC*, No. 14-CV-03436, 2015 WL 5691836, at *27 (D.S.C.

Sept. 28, 2015) (finding that the proper collateral review is to determine whether the prior court used adequate procedures to satisfy the constitutional due process requirements); *Gough*, 781 F. Supp. 2d at 505 (holding that the reviewing court may not reconsider the merits of a claim and the original judgment is entitled to full faith and credit if the appropriate procedures were followed); *Fine v. Am. Online, Inc.*, 743 N.E.2d 416, 420-24 (Ohio Ct. App. 2000) (asserting that "the appropriate collateral review involves an examination of *procedural* due process and nothing more [such that] absent class members' objections to the determinations of the certifying court may be properly remedied on appeal within the forum state's judicial system and to the [U.S.] Supreme Court").

⁶⁶ See, e.g., *Wallace B. Roderick Revocable Living Tr. v. XTO Energy*, 679 F. Supp. 2d 1287, 1304-07 (D. Kan. 2010) ("The court has here reviewed extensively the litigation in [the relevant proceedings], and finds that in both cases the matters were vigorously and effectively contested by counsel.").

⁶⁷ See *Weaver*, 2015 WL 5691836 at *27 ("[T]his [c]ourt has already rejected the broad, 'merits-based' collateral review...in favor of a collateral review simply to determine whether the [highest reviewing state court] used adequate procedures to satisfy *Shutts*"); *Epstein*, 179 F.3d at 648 ("[D]ue process does not require collateral second-guessing of those determinations and that review."); *Lamarque v. Fairbanks Capital*

Corp., 927 A.2d 753 (R.I. 2007) (“The due process rights of absent class members are protected by the adoption of appropriate procedures by the certifying court, and, thereafter, by appellate review.”); *Hosp. Mgmt. Assocs., Inc. v. Shell Oil Co.*, 591 S.E.2d 611, 616-20 (S.C. 2004) (finding “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.”).

⁶⁸ *Hansberry v. Lee*, 311 U.S. 32, 42 (1940) (citing *Chicago, B. & Q.R. Co. v. City of Chicago*, 166, 226, 235 (1897)).

⁶⁹ See, e.g., *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008) (“[T]he procedural protections prescribed in” Rule 23 are “grounded in due process.”); *Fine*, 743 N.E.2d at 423 (describing court’s “only” duty to ensure procedures to protect due process rights were established by the state and applied by the court, quoting Illinois law largely mirroring language of FED. R. Civ. P. 23). The adequacy inquiry is not fully defined by the scope of Rule 23 because application of the rules, including Rule 23, “shall not abridge, enlarge or modify any substantive right.” 28 U.S.C. §2072(b) (2016). Indeed, class actions may “achieve economies of time, effort, and expense,” but only when those goals can be achieved “without sacrificing procedural fairness or bringing about other undesirable results.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997).

⁷⁰ *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

⁷¹ PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION §3.14 (2010) (hereinafter PRINCIPLES); see also TIDMARSH & TRANGSRUD, MODERN COMPLEX LITIGATION at 543 (“The American Law Institute has weighed in on the side of severely restricting the right of class members to attack a class judgment or settlement collaterally.”). Indeed, even the reporters’ notes attached to §3.14 of the PRINCIPLES OF AGGREGATE LITIGATION note the section “rejects postjudgment challenges authorized by the Second Circuit in *Stephenson*” and “is to endorse the emerging understanding of preclusion in the context of aggregate litigation.”

⁷² PRINCIPLES at §3.14(a)(1)-(2). It should be noted that the second exception allowing for attacks when the settlement court “failed to make necessary findings of adequate representation” parallels the possible exception to the *Epstein* rule discussed above. See notes 58-59 and accompanying text; see also *Hesse v. Sprint Corp.*, 598 F.3d 581, 588 (9th Cir. 2010).

⁷³ See, e.g., *Gooch v. Life Inv’rs Ins. Co. of Am.*, 672 F.3d 402, 420-22 (6th Cir. 2012); *Hege v. Aegon USA, LLC*, 780 F. Supp. 2d 416, 428-29 (D.S.C. 2011).

⁷⁴ *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004).

⁷⁵ *Gooch*, 672 F.3d at 420-21.

⁷⁶ *Id.* at 421.

⁷⁷ *Gonzales*, 474 F.2d at 75-76.

⁷⁸ *Id.* at 72.

⁷⁹ *Id.*

⁸⁰ *Id.* at 75.

⁸¹ *Id.* at 73, n.11.

⁸² *Id.* at 75-76.

⁸³ See, e.g., *In re Baycol Prods. Litig.*, 593 F.3d 716, 725 (8th Cir. 2010) (“Although respondents argue inadequacy based on [the class representative’s] failure to appeal the denial of certification, adequacy of representation does not depend on whether the putative representative appealed. The point of the adequacy inquiry is ‘to uncover conflicts of interest between named parties and the class they seek to represent.’” (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997))), *rev’d on other grounds by Smith v. Bayer Corp.*, 564 U.S. 299 (2011); *In re Diet Drugs Prods. Liab. Litig.*, 431 F.3d 141, 148 (3d Cir. 2005) (“There is no support for the proposition that because a party does not pursue an appeal of a [d]istrict [c]ourt’s order, that order does not bind the class members or cannot be considered for its preclusive effect.”); *Shults v. Champion Int’l Corp.*, 35 F.3d 1056, 1061-62 (6th Cir. 1994) (rejecting argument that class representatives were inadequate because they failed to appeal), *abrogated on other grounds by Devlin v. Scardelletti*, 536 U.S. 1 (2002); cf. *Nathan v. Rowan*, 651 F.2d 1223, 1228 (6th Cir. 1981) (class representative’s “failure to appeal the judgment of dismissal is not indicative of inadequate representation”). Most courts also reject class plaintiffs’ request for discovery regarding a prior class settlement and grant summary judgment in the defendant’s favor based on *res judicata* by reviewing the pleadings, observing that retrial of the prior class action “is not compelled or supported by the requirements of due process.” See *Wallace B. Roderick Revocable Living Tr. v. XTO Energy*, 679 F. Supp. 2d 1287, 1301 (D. Kan. 2010).

⁸⁴ *Juris v. Inamed Corp.*, 685 F.3d 1294, 1327-29 (11th Cir. 2012).

⁸⁵ *Id.* at 1327-28.

⁸⁶ See also *Brown v. Tigor Title Ins. Co.*, 982 F.2d 386, 390 (9th Cir. 1992). But cf. *Frank v. United Airlines, Inc.*, 216 F.3d 845, 852 (9th Cir. 2000) (“[W]hen the class representatives chose not to appeal the adverse ruling on the facial validity of the weight policy, they abandoned any representation of the interests of those present and potential future class members in order to protect present class members seeking back pay and reinstatement.”).

⁸⁷ *Juris*, 685 F.3d at 1316-29.

⁸⁸ *Id.* at 1321.

⁸⁹ *Id.*

⁹⁰ See FED. R. Civ. P. 23(e) (“The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court’s approval.”).

⁹¹ See, e.g., *Balmoral Home, Inc. v. CMK Healthcare Training Ctr.*, No. 13-C-3995, 2014 WL 11348989, at *1 (N.D. Ill. Aug. 24, 2014) (“The [c]ourt makes a preliminary finding that this action satisfies the applicable prerequisites for class action treatment under FED. R. Civ. P. 23(a) and (b). The class as defined in the [s]ettlement [a]greement (the “[c]lass”) is so numerous that joinder of all members is not practicable, there are questions of law and fact common to the [c]lass, the claims of the

[c]lass [r]epresentative are typical of the claims of the [c]lass, and the [c]lass [r]epresentative will fairly and adequately protect the interests of the [c]lass”); *Wolfe v. Anchor Drilling Fluids USA, Inc.*, No. 4:15-CV-1344, 2015 WL 12778393, at *2 (S.D. Tex. Dec. 7, 2015) (“The [c]ourt finds that final certification of the Rule 23 classes, solely for purposes of settlement, is appropriate in that...claims of the [c]lass [r]epresentative are typical of the claims of the Rule 23 [c]lass [m]embers [and] the [c]lass [r]epresentative and [c]lass [c]ounsel have fairly and adequately represented and protected the interests of the Rule 23 [c]lass [m]embers.”).

⁹² See, e.g., *Wolfe*, 2015 WL 12778393, at *2 (“The [c]ourt finds that the [c]lass [n]otice...was sent by mail and email in an adequate and sufficient manner; and that such [c]lass [n]otice constitutes the best notice practicable under the circumstances and satisfies the requirements of due process and Rule 23.”).

⁹³ Petition for Writ of Certiorari at 7-8, *Sprint Spectrum, L.P. v. Hesse*, 562 U.S. 1003, 2010 WL 3000934, at *7-8 (2010).

⁹⁴ *Hesse v. Sprint Corp.*, 598 F.3d 581, 588 (9th Cir. 2010).

⁹⁵ *Id.*

⁹⁶ *Id.* (emphasis added).

⁹⁷ *Epstein v. MCA, Inc.*, 179 F.3d 641, 648 (9th Cir. 1999).

⁹⁸ *In re Target Corp.*, 847 F.3d at 612-13.

⁹⁹ *Id.* at 612.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See Proposed Order Certifying a Settlement Class, Preliminarily Approving Class Action Settlement and Directing Notice to the Settlement Class, *In re Target Corp. Customer Data Sec. Breach Litig.*, MDL No. 14-2522 (PAM/JJK) (D. Minn. Mar. 18, 2015), ECF No. 358-1 Ex. 7.

¹⁰³ *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985).

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