No. 02-271

IN THE

Supreme Court of the United States

IN RE AGENT ORANGE PRODUCT LIABILITY LITIGATION:
DOW CHEMICAL COMPANY, MONSANTO CHEMICAL, 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

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENTS

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ["ATLA"] respectfully submits this brief as *amicus curiae*. Consent of the parties to the filing of this brief has been filed with the Court.[1]

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1 Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyer members primarily represent individual plaintiffs in civil actions.

The Seventh Amendment right to trial by jury, along with the due process right of access to the courts to seek legal redress, has served as the cornerstone of the civil justice system. Those rights provide Americans with the means for vindicating all others.

The companies responsible for mass torts present the justice system with severe challenges. ATLA has never blindly opposed class action settlements as an intelligent means of addressing those challenges, *provided* that the members of the class are afforded the opportunity to make a knowing and intelligent choice between the settlement offer and a tort remedy. In ATLA's view, the court of appeals in this case correctly held that a class action settlement that did not protect the rights of future victims of Agent Orange is subject to collateral attack by those victims seeking to exercise their constitutional right.

SUMMARY OF THE ARGUMENT

1. Petitioners mischaracterize this case as one of mere dissatisfaction with the outcome of a long-closed settlement by litigants seeking a "second bite at the apple" by way of collateral attack. The truth is that by the time the Vietnam veterans in this case showed any signs of cancer allegedly caused by

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a monetary contribution to the preparation or submission of this brief.

Agent Orange, the apples had all been consumed and the tree chopped down and hauled away.

Respondents challenge the settlement as constitutionally infirm from the start. The presently harmed named plaintiffs, with the active participation of the district court, bargained away not only their own rights to seek damages in a jury trial, but also the rights of unknown and unaware class members who would not manifest any symptom of disease until sometime in the future. As to the members of that "futures class," including Respondents, the right to trial by jury was not "preserved" as commanded by the Seventh Amendment. The historical background of that amendment demonstrates the importance of jury trial as a fundamental right. Its denial entitled Respondents to collaterally attack the prior settlement and pursue their legal remedies.

Petitioners also err in their contention that, if collateral attack is permitted, it must ignore the decisions of this Court, rendered after the class was certified and the settlement approved, regarding the due process requirement of adequacy of representation of absent class members. This Court has made clear that its decisions must be applied retrospectively to actions taken prior to the date of those decisions. In civil actions, this rule applies to collateral attacks as well as direct appellate review.

2. Judgments that are obtained in violation of due process are clearly subject to collateral attack. In the context of class actions, due process requires that absent members be given meaningful notice, that named representatives adequately represent the interests of absent members at all times, and, where

claims are for money damages, that class members be afforded the opportunity to opt out of the class.

The class action proceedings in this case failed to satisfy any of the three essential due process requirements. More broadly, a class that is structured to include the personal injury claims of a large number of unknown persons who may manifest injury sometime in the future, cannot satisfy the requirements of due process using the procedures adopted here.

The problems of giving notice to a class of unknown persons who are themselves unaware that they are "injured" are insurmountable. Class representatives and class counsel cannot represent both presently harmed claimants and future victims due to their inherently conflicting interests. Providing the opportunity to opt out is a meaningless gesture for a class member who may manifest some injury sometime in the future. Inherently, members of a futures class lack the crucial information that is essential to making a knowing and intelligent decision whether to opt out of the settlement.

3. Preserving the due process and Seventh Amendment rights of future injury victims need not destroy the usefulness of class actions in addressing the challenges of mass torts. Provision in the settlement for a delayed opt-out – by which a member of a futures class can choose between the settlement plan and a tort remedy – places future victims in greater parity with class members with present harms and ameliorates the conflicts of interest between the classes. Also referred to as a "back-end opt-out," this procedural device is feasible and has gained support among some courts and commentators. It should be employed in class action

settlements such as this case to protect the due process rights of a class of unknown and unknowable future victims of mass torts.

ARGUMENT

I. THE SETTLEMENT OBTAINED IN VIOLATION OF THE FUNDAMENTAL CONSTITUTIONAL RIGHTS OF FUTURE VICTIMS OF AGENT ORANGE IS SUBJECT TO COLLATERAL ATTACK.

Daniel Stephenson and Joe Isaacson, while serving their country in Vietnam, were exposed to Agent Orange. In 1996, Isaacson was diagnosed with non-Hodgkin's lymphoma; Stephenson was diagnosed with multiple myeloma, a bone marrow cancer, in 1998. Both diseases are associated with exposure to Agent Orange.[2]

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[2] The district court's rulings were colored by the court's firm belief that the veterans' suits were "so weak as to be virtually baseless," Pet. at 3, based on extant studies that there was no evidence of "a causal connection between exposure to Agent Orange and the serious adverse health effects claimed by plaintiffs." *In re Agent Orange Prod. Liab. Litig.,* 611 F. Supp. 1223, 1231 (E.D.N.Y. 1985). *See also, In re Agent Orange Prod. Liab. Litig.,* 597 F. Supp. 740, 782-83 (E.D.N.Y. 1984) (same).

That belief, given the long latency period of cancers and some other diseases, proved premature. The National Academy of Sciences, at the direction of Congress, undertook an ongoing study of the health effects in veterans who were exposed to Agent Orange. *See* Pub. L. No. 102-4 (1991). The peer-reviewed study concluded that there is positive evidence of causation of three types of cancer, including non-Hodgkin's lymphoma. There is also evidence of a limited association between Agent Orange and multiple myeloma. National Academy of Sciences,

Most Americans in similar circumstances are entitled to seek legal redress in court and present their case before a jury to hold the manufacturers accountable. Those rights are guaranteed by the Constitution that soldiers fight to defend. Early in our nation's history, Chief Justice Marshall declared:

> [T]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

The district court in this case, however, delivered more tragic news to Stephenson and Isaacson. Their constitutional rights had been bargained away, years before either had any symptom of disease, in a private deal between lawyers representing victims of Agent Orange and the herbicide's manufacturers. With the district court's approval, they traded the constitutional rights not only of those suffering in 1984 from diseases allegedly linked to Agent Orange – who were given a choice to opt out – but also the rights of all veterans who would develop diseases in the future. In exchange, they received a settlement that the lower court characterized as "essentially a payment of nuisance value." *In re Agent Orange*

Institute of Medicine, "Veterans and Agent Orange: Health Effects of Herbicides Used in Vietnam (1994), excerpted in Joint Appendix at 319. Full text available online at http://books.nap.edu/books/0309048877/html/index.html, along with biennial update reports.

Product Liab. Litig., 818 F.2d 145, 151 (2nd Cir. 1987).

Because the settlement violated Respondents' fundamental constitutional rights, the court of appeals correctly permitted Stephenson and Isaacson to collaterally attack the judgment so they could assert their constitutional rights to seek legal redress.

A. The Settlement Was Obtained In Violation of the Constitutional Right To Trial By Jury of Future Victims.

Petitioners mischaracterize Respondents' challenge to the Agent Orange settlement as simple disappointment that, "as matters turned out, they did not receive benefits from the settlement as great as those received by certain other class members." Pet at 2. Petitioners' primary argument is that "after-the-fact dissatisfaction with the outcome of litigation" cannot justify a collateral attack on the judgment, and that "parties do *not* get a second bite at the apple simply because they are unhappy about how the judgment played out over time." Pet. at 22.

Of course, when Stephenson and Isaacson were first diagnosed with cancer, the apples had all been eaten and the tree chopped down and hauled away.

Their challenge is that the settlement was constitutionally infirm from the start and "compromise[d] their Seventh Amendment rights without their consent." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999). Petitioners rely on this Court's decision in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982) that a litigant may not seek a redetermination of the merits of a legal claim

that has been decided by a court of competent jurisdiction. *See* Pet. at 20. However, the Court also made clear that courts "may not grant preclusive effect . . . to a constitutionally infirm judgment." 527 U.S. at 482.

The importance of trial by jury as a fundamental right must not be undervalued if it is to be "preserved," as commanded by the Founders. [3]

Sadly, Americans' right to trial by jury has suffered a "gradual process of judicial erosion." *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 339 (1979) (Rehnquist, C.J., dissenting). At times the jury has even become the object of disparagement, perhaps because its history has become overlooked or unappreciated. *See* Stephan Landsman, *The Civil Jury In America: Scenes From an Unappreciated History,* 44 Hastings L.J. 579 (1993).

A war was fought, and soldiers' lives were lost, to win this right. The American colonists treasured the jury as essential to democratic self-government and a check against oppression. They admired the heroism of Edward Bushnell and the other jurors who refused to convict Quaker William Penn in 1670, though the jurors were harassed, fined, and jailed by the trial judge. *See* John Guinther, THE JURY IN AMERICA ch. 1 (1988).

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[3] In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

U.S. Const., amend vii.

They rejoiced when a jury in 1688 acquitted seven Anglican bishops of seditious libel for opposing James II. The case confirmed their view of the jury "as a bulwark of liberty, as a means of preventing oppression by the Crown." Austin Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 Harv. L. Rev. 669, 676 (1918). "Treatises extolling the jury flooded the market and profoundly influenced eighteenth century American as well as English views about jury trial." *Id.*

They cheered the jury verdicts – including large punitive damage awards – in civil suits by John Wilkes and his printer against officials who conducted an illegal search in their effort to suppress Wilkes' criticism of the government. *Wilkes v. Wood,* Lofft 1, 98 Eng. Rep. 489 (K.B. 1763), and *Huckle v. Money*, 2 Wils. 205, 95 Eng.Rep. 768 (C.P. 1763). Wilkes' case was "a matter of keen interest in the American colonies." Landsman, *supra*, at 591, and "was probably the most famous case in late eighteenth century America, period." Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 772 (1994).

Among grievances the colonists lodged against King George III in the Declaration of Independence was: "For depriving us in many cases, of the benefits of Trial by Jury."

When the Constitutional Convention finished its work without an express guarantee of the right to trial by jury in civil cases, the omission very nearly doomed ratification of the entire constitution. Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 295-98 (1966). Charles W. Wolfram, *The Constitutional History of the Seventh Amendment,* 57 Minn. L. Rev. 639, 672

n.89 (1973). Ultimately, as Justice Story recounts, the Federalists' agreement to adopt a Bill of Rights that included a guarantee of jury trials in civil cases, won support for the new constitution. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 445 (1830).

Mindful of this history, this Court has repeatedly emphasized:

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Dimick v. Schiedt, 293 U.S. 474, 486 (1935), quoted in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959) and in *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry,* 494 U.S. 558, 565 (1990). This Court "has carefully preserved the right to trial by jury where legal rights are at stake." *Terry, supra*, at 565.

The rights of Stephenson and Isaacson, who had no meaningful opportunity to opt out of the settlement nor to exercise a knowing and intelligent waiver, were not "preserved."

Petitioners respond that without the authority to bind all class members, defendants will not enter into such global settlements, depriving the public of the efficiencies of such arrangements. Pet. at 38-40.

Administrative efficiency, though laudable, does not trump the Seventh Amendment. The Court emphasized this point in holding that Congress may not transfer legal claims from Article III courts to non-jury bankruptcy tribunals:

> It may be that providing jury trials in some fraudulent conveyance actions . . . would impede

> the swift resolution of bankruptcy proceedings and increase the expense of Chapter 11 reorganizations. But 'these considerations are insufficient to overcome the clear command of the Seventh Amendment.'

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 63 (1989), quoting *Curtis v. Loether*, 415 U.S. 189, 198 (1974).

As then-Justice Rehnquist once observed:

> [N]o amount of argument that the device provides for more efficiency or more accuracy or is fairer will save it if the degree of invasion of the jury's province is greater than allowed in 1791. To rule otherwise would effectively permit judicial repeal of the Seventh Amendment . . .
>
> [T]he civil jury was surely a burden to the English governors who, in its stead, substituted the vice-admiralty court. But, as with other provisions of the Bill of Rights, the onerous nature of the protection is no license for contracting the right secured by the Amendment.

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 346 (1979) (Rehnquist, C.J., dissenting).

B. The Principles Set Forth By This Court In *Amchem* and *Ortiz* are applicable to this Settlement

Anticipating that this Court may uphold the court of appeals in allowing collateral attack on the settlement, Petitioners present a second question. In determining whether the settlement meets the due process requirement of adequacy of representation under *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), Petitioners contend the court may not apply the principles enunciated by this Court in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and

Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999). Pet. at 46-50. Rather, Petitioners argue the Court must limit itself to case law existing at the time of class certification and settlement in 1983-84. Pet. at 46.[4]

This Court has clearly mandated:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Harper v. *Virginia Dep't of Transp.*, 509 U.S. 86, 97 (1993).

Petitioners place great emphasis on the Court's qualification "*still open on direct review.*" Pet. at 24 n.5. The Court explained, however, that this proviso was animated by "our view of retroactivity in the criminal context." 509 U.S. at 97. The Court referred to Justice Souter's plurality opinion in *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 541 (1991), stating that, although "new rules must apply retroactively to all criminal cases pending on direct review, we have since concluded that new rules will not relate back to convictions challenged on habeas corpus." *Id.* at 540. That distinction, Justice Souter stated, does not apply "in the civil arena." *Id.* Consistent with that view, the Court in *Harper* held, without qualification, "we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases." 509 U.S. at 97. For that reason, Petitioners' heavy

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[4] Presumably, Petitioners also reject the application of this Court's 1985 decision in *Shutts*.

reliance on habeas corpus decisions, *see* Pet. at 48 & 49. n.13, is inapposite.

Petitioners' reliance on this Court's sensible rule that "once suit is barred by res judicata . . . a new rule cannot reopen the door already closed." Pet. at 24 n.5, quoting *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 541 (1991) (opinion of Souter, J.), is similarly misplaced. Where a party is not barred by *res judicata* by virtue of the due process clause and may therefore collaterally attack a prior judgment, that attack is governed by the current decisions of this Court.

It is difficult to discern any principled basis for rejecting this rule in this instance. Petitioners certainly cannot claim to have relied on settled law permitting class litigants to extinguish the constitutional rights of unknown future victims.

The 1966 Advisory Committee expressed doubt that class actions were appropriate at all in mass accident cases. *See Ortiz,* 527 U.S. at n.20. As one scholar has pointed out, the Agent Orange settlement and the asbestos settlements involved in *Amchem* and *Ortiz* are the only global settlements of mass tort class actions involving large numbers of unknown future victims. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action,* 95 Colum. L. Rev. 1343, 1451-52 (1995).

Nor can it be argued that this Court's holding – that the Rules Enabling Act precludes a court from applying Rule 23 in a manner that violates the jury rights of future victims – erected a new principle of law. The right to trial by jury, as described above, is deeply rooted in our historical tradition. Moreover, at the time this settlement was crafted, the Rules

Enabling Act provided that the rules of civil procedure

> shall not abridge, enlarge or modify any substantive right *and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution*.

28 U.S.C. § 2072 (1958 ed.) (emphasis added).[5]

The Due Process guarantee is flexible, but it does not "shift and spring" in and out of existence according to the settlement calendars of the district courts. *Cf. Harper, supra*, at 97.

II. A CLASS ACTION THAT PURPORTS TO INCLUDE THOSE WHO WILL SUFFER COMPENSABLE PERSONAL INJURY ONLY IN THE FUTURE IS STRUCTURALLY AND PROCEDURALLY INCAPABLE OF AFFORDING THOSE VICTIMS DUE PROCESS.

Despite their strenuous argument concerning the importance of res judicata and finality, Petitioners admit, as they must, that "[o]f course, any judgment may be attacked if enforcing it would violate due process." Pet. at 26. Petitioners further state that, looking at the procedures used, not the result obtained in an individual case, *id.* at 30-31, "this Court is justified in saying that there has been

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[5] The Rules Enabling Act was amended in 1988, and the specific reference to the jury right was omitted. The clause apparently was deemed superfluous; Congress could not and did not authorize rules of procedure that violate the Seventh Amendment. "[T]he Constitution needs no statute to remind us that neither a rule nor a statute can upset a constitutional requirement." David D. Siegel, Commentary on 1988 and 1990 Amendments, reprinted in 28 U.S.C.A. § 2072 (1991).

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 [the judgment]." *Id.* at 26, quoting *Hansberry v. Lee*, 311 U.S. 32, 42 (1940).

This is exactly that case.

This Court set forth the minimum procedural due process requirements necessary if res judicata is to bind an absent class action plaintiff:

> If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, . . . 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." 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.

Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 (1985) (citations omitted).

ATLA submits that the class action settlement in this case failed to satisfy any of these three procedural safeguards. Indeed, by certifying a class

that purports to adjudicate the personal injury claims of a large number of unknown persons who may develop some disease at some time in the future, the court made it structurally impossible for the procedures adopted to satisfy minimum due process requirements.

A. Meaningful Notice Cannot Be Provided To Unknown Future Personal Injury Victims.

In ordinary litigation, failure to provide notice and an opportunity to be heard renders a judgment vulnerable to collateral attack. *See, e.g., Griffin v. Griffin*, 327 U.S. 220, 228 (1946) ("Because of the [lack of notice], and to the extent that petitioner was thus deprived of an opportunity to raise defenses . . . there was a want of judicial due process, and hence want of that jurisdiction over the person of petitioner prerequisite to the rendition of a judgment in personam against him."). The Court's *Shutts* opinion, quoted above, makes clear that the same rule applies in class actions. *See e.g., Richards v. Jefferson County*, 517 U.S. 793, 798 (1996), in which a unanimous Court held that it violated due process to bind plaintiffs by a prior judgment of which they had inadequate notice. Justice Stevens wrote, "We have long held, however, that extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is 'fundamental in character.'" *Id.* at 797. *See generally,* Patrick Woolley, *Rethinking the Adequacy of Adequate Representation,* 75 Tex. L. Rev. 571 (1997).

The inherent difficulties of conveying meaningful notice to large numbers of unknown, exposure-only class members are immediately apparent. There is no reliable assurance that notices and media announcements actually reach a

substantial portion of the class. Even more problematic is the fact that, by definition, the members of the class have no symptoms of disease. Many are likely to disregard notices they assume are inapplicable to them.

Finally, as a means of apprising such healthy class members of their opportunity to be heard and participate in the proceedings, notice at this time is a meaningless gesture. Basic information that is crucial and typically available at the time a plaintiff's cause of action accrues – the nature and seriousness of the disease, the medical and other costs it will entail, its impact on plaintiff's life and livelihood – is lacking.

The lower court in the *Amchem* settlement litigation found that these obstacles to providing adequate notice to future victims were "insurmountable." *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 633 (1996). *Accord,* Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction,* 80 Cornell L. Rev. 811, 828 (1995). Although this Court was not required to rule on that issue definitively, Justice Ginsberg, for the Court, recognized "the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous." *Amchem,* 521 U.S. at 628.

ATLA submits that notice to such a class is an empty exercise. This Court has warned, "when notice is a person's due, process which is a mere gesture is not due process." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950).

B. Named Representatives Cannot Provide Adequate Representation of Future Personal Injury Victims.

Petitioners concede that it "is, to be sure, a fundamental tenet of due process that a party may not be bound by a judgment in a representative suit if he or she was not 'adequately represented' in the proceedings leading to that judgment." Pet at 26. This Court has consistently so held. See, e.g., *Richards* v. *Jefferson County*, 517 U.S. 793, 794 (1996); *Shutts*, 472 U.S. at 812; *Hansberry*, 311 U.S. at 41-42.

As this Court made clear in both *Amchem* and *Ortiz*, a class that includes both presently injured plaintiffs and those who will manifest harm only in the future is riven by inherently conflicting interests. Those conflicts make it impossible for the named representatives and counsel for the entire class to provide adequate representation to the members of the futures class. *Amchem,* 521 U.S. at 625-28; *Ortiz,* 527 U.S. at 853.

This conflict is starkly exemplified in this case. The district court initially ruled that representation was adequate, and the court of appeals affirmed based almost entirely on "the centrality of the military contractor defense," which applied to all class members equally, in the class trial, following which individual issues, such as damages, "were to be left to individual trials." *In Re Agent Orange Product Liab. Litig.*, 818 F.2d 145, 150 & 164-65 (2nd Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

When Petitioners agreed to a settlement, offering a fund of $180 million to be distributed among the class, the sole basis for that finding of

adequate representation vanished. The district court itself indicated that its distribution plan involved a zero sum game in which funds allocated to future claimants necessarily diminished funds available to those presently injured. Pet. at 9. The court's distribution plan provided that those manifesting injury after Dec. 31, 1994 would receive nothing, expressly to provide greater compensation "to acutely ill veterans who were most in need of assistance." Pet. at 10. The court was aware that at least some members of the class would be denied compensation, though the court was hopeful that "almost all valid claims will be revealed before that time." *Ryan v. Dow Chemical Co.*, 781 F. Supp. 902, 919 (E.D.N.Y. 1991). All the named class representatives were presently injured claimants. Pet. at 9. Quite obviously, there was not adequate representation – more precisely, there was no representation – of the interests of later-injured class members like Stephenson and Isaacson. The named representatives did not adequately represent the absent class members *"at all times*." *Hansberry v. Lee,* 311 U.S. at 43; *Shutts,* 472 U.S. at 812. (emphasis added).

Petitioners' response is two-fold. First, they assert that Stephenson and Isaacson were required to raise any objection to representation at the proceeding itself or on direct appeal. Having made an actual determination that representation was adequate, that determination precludes any attack in another court. Pet at 26 & 32.

Petitioners ignore the well-settled rule, as stated by Justice Rehnquist for the Court in *Shutts,* that "a court adjudicating a dispute may not be able to predetermine the res judicata effect of its own

judgment." 472 U.S. at 895. This rule is equally well-established in the context of class actions.

> Where a person is not a party to a class action, the judgment therein has conclusive effect against him only if his interests were adequately represented. . . . [A] person as to whom a class action is ineffective *is not required to seek relief during the continuance of the action.*

Restatement of Judgments § 116 comment b, at 563-64 (1942) (emphasis added).

In the absence of minimum contacts with the forum, a court cannot constitutionally compel an absent class member to appear and raise objections to the adequacy of representation. Nor does Rule 23 compel him to do so. Indeed, "an absent class-action plaintiff is not required to do anything." *Shutts*, 472 U.S. at 510. See generally, Patrick Woolley, *The Availability Of Collateral Attack For Inadequate Representation In Class Suits*, 79 Tex. L. Rev. 383 (2000).

The Advisory Committee's Note accompanying the 1966 amendment to Rule 23 confirms that

> [The Rule] does not disturb the recognized principle that the court conducting the [class] action cannot predetermine the res judicata effect of the judgment; this can be tested only in a subsequent action.

Petitioners' second argument is that for the district court to have created subclasses and designated representatives of future victims would have added little to their protection, because all parties shared the same "veil of ignorance" as to who would develop what disease in the future. Pet. at 23. In this, Petitioners may be correct. If so, however, they make it all the clearer that the structure of the

class in this case made impossible for the procedures adopted to afford minimal due process protection to the class of future victims.

C. Future Personal Injury Victims Cannot Be Provided With A Meaningful Opportunity At Settlement To Opt Out.

The third essential requirement of due process is satisfied by "affording absent class members, whose claims for money damages would be entitled to a jury trial an opportunity to remove himself from the class." *Phillips Petroleum v. Shutts*, 472 U.S. 797, 811 (1985). *Cf. Brown v. Ticor Title Ins. Co.,* 982 F.2d 386, 392 (9th Cir. 1992), *cert. dism. as improvidently granted*, 511 U.S. 117 (1994)(where Brown had no opportunity to opt out of class action, "there would be a violation of minimal due process if Brown's damage claims were held barred by *res judicata*.").

The right to opt-out of the class action serves both the command of the Seventh Amendment and "our 'deep- rooted historic tradition that everyone should have his own day in court,'" *Ortiz*, 527 U.S. at 846, quoting *Martin v. Wilks,* 490 U.S. 755, 762 (1989).

Tort victims in particular have a "vital interest" in having some measure of control over litigation that may affect their lives. *Yandle v. PPG Indus. Inc.*, 65 F.R.D. 566, 572 (E.D. Tex. 1974); *Causey v. Pan Am World Airways, Inc.,* 66 F.R.D. 392, 299 (E.D. Va. 1975); *Hobbs v. Northeast Airlines*, 50 F.R.D. 76, 79 (E.D. Pa. 1970); Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion,* 67 N.Y.U. L. Rev 193, 286-87 (1992). *See also* Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. Ill. L. Rev. 69,

74 ("the right to control personally the suit whereby a badly injured person seeks redress from the alleged tortfeasor has long been valued both here and in England.").

Indeed, the district court in this case found in the course of listening to veterans and their families during the fairness hearings that, "[m]any veterans who opposed the settlement did so because they wanted their 'day in court.'" *In re Agent Orange Product Liab. Litig,* 597 F. Supp. 740, 770 (E.D.N.Y. 1984).

Yet, if the court of appeals decision is reversed, veterans like Stephenson and Isaacson who develop disease after the prescribed opt-out period will find their causes of action have been "kidnapped," and they have been "deprived of any freedom of action by being drawn involuntarily into collective litigation." Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 Cornell L. Rev. 811, 821 (1995).

The very structure of a class action that purports to include unknown future victims makes it impossible for the opt-out procedure to protect due process. In Professor Coffee's view, "a future claims class action trivializes the right to opt out." John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action,* 95 Colum. L. Rev. 1343, 1446 (1995).

The obstacles to notifying and informing future victims of their opt-out rights are, as described earlier, insurmountable. *See* Part II., A, above.

More importantly, one who has not manifested any present injury, even if notified, lacks the basic information needed to make an intelligent decision whether to remain in the class or to pursue a tort action that has not, and might not accrue. *See* Brian Wolfman and Alan B. Morrison, *Representing The Unrepresented In Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. Rev. 439, 451-55 (1996). Earlier in this litigation, the appellate court candidly stated that providing an opt-out right to a person "unaware of an injury would probably do no good." *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425, 1435 (2d Cir. 1993), cert. denied, 510 U.S. 1140 (1994).

A leading scholar in the field of class actions pointedly agrees:

> For class members who cannot currently identify themselves for purposes of protecting their interests with respect to a class action purportedly commenced on their behalf, an opt-out right within a court-designated period of time . . . is of no beneficial use.

1 Herbert B. Newberg, CLASS ACTIONS § 1.23 at 1-55 (1992).

This situation is little more than a new variation on an old injustice: rigid statutes of limitations or statutes of "repose" under which a person's cause of action in tort can become time-barred even before any harm occurred or became manifest. The harsh rule was famously lampooned by Judge Frank in *Dincher v. Marlin Firearms Co.*, 198 F.2d 821, 823 (2d Cir. 1952) ("Except in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted . . ."). Nearly every jurisdiction has rejected this harsh result in favor of a "discovery

rule," under which the limitations period does not begin to run until the person knows or should have known of his or her injury. *See, e.g., Urie v. Thompson,* 337 U.S. 163 (1949). Nor is it fair, ATLA submits, to strip victims of cancer or other long-latency diseases of the right to legal redress and a jury trial for failing to opt out of a class action long before they could have known of their injury.

* * *

In sum, a class action that purports to extinguish the jury rights of unknown class members who will manifest injury in the future cannot provide those class members with the essential procedural guarantees of due process. They cannot be bound by the judgment and the court of appeals correctly held that they may vindicate their rights by collateral attack.

III. CLASS ACTION SETTLEMENTS THAT INCLUDE FUTURE PERSONAL INJURY CLAIMANTS CAN PROTECT DUE PROCESS RIGHTS BY PROVIDING A DELAYED OPT-OUT.

Petitioners expend a great deal of energy and ink warning that affirmance of the court of appeals decision will rob the civil justice system and the public of the benefits of global settlements of mass tort litigation. See, e.g., Pet. at 39-40.

As noted earlier, class actions involving large numbers of exposure-only class members who may develop disease in the future have been rare. Nor may courts exceed their authority under the Rules Enabling Act and violate the constitutional rights of

absent class members in pursuit of administrative convenience and efficiency.

Most importantly, however, protecting the constitutional rights of future injury victims need not lead to a "class action mechanism sapped of much of its utility" Pet. at 18. The previous analogy to the discovery rule suggests that class action settlements such as this one can be made consistent with due process and the Seventh Amendment.

ATLA suggests that class actions involving exposure-only class members can safeguard the due process rights of those class members by providing a delayed opt-out as part of the settlement plan. In its simplest form, the opt-out provision is triggered when a member of the futures class develops a disease or harm covered by the settlement plan. At that point, his or her cause of action accrues and the statute of limitations begins to run. Within that period, the plaintiff is offered a choice: accept the compensation offered by the settlement plan or pursue a legal remedy in court.

Such a procedural device, often referred to as a back-end opt-out, minimizes the adverse effects of the time factor. It places those who manifest harms years after approval of the settlement in close parity with those who were members of the presently injured class. It also serves as a check against the inherent "tug" in favor of the presently injured at the expense of futures. *Amchem* at 521 U.S. at 626. A settling defendant desirous of avoiding a stream of post-settlement lawsuits has an interest in assuring that the settlement provisions are sufficiently generous to future victims that they, like the presently injured, will waive their tort remedy in favor of participating in the settlement.

These advantages have persuaded a number of commentators to recommend the use of a delayed opt-out as a means of preserving the rights of future claimants. *See* Brian Wolfman and Alan B. Morrison, *Representing The Unrepresented In Class Actions Seeking Monetary Relief,* 71 N.Y.U. L. Rev. 439, 478 (1996); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action,* 95 Colum. L. Rev. 1343, 1448-52 (1995); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941, 964-68 (1995). Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions,"* 80 Cornell L. Rev. 811, 836 (1995).

Use of such a procedural device to protect the due process rights of a futures class is not simply feasible; it has been put to use. In *Bowling v. Pfizer, Inc.,* 143 F.R.D. 141 (S.D. Ohio 1992), *appeal dism.* 995 F.2d 1066 (6th Cir. 1993), a class action by patients who received defective artificial heart valves, the settlement agreement expressly provides that class members whose heart valves fracture in the future may opt to reject guaranteed compensation and sue for damages at that time. *Id.* at 150. A class action settlement on behalf of women injured by the Dalkon Shield contraceptive device also included a back-end opt-out. *In re A.H. Robins Co., Inc.*, 880 F.2d 709, 745 (4th Cir.), cert. denied, 493 U.S. 959 (1989). A back-end opt-out was similarly provided in the settlement agreement resolving claims by users of the prescription drug combination known as "fen-phen." *In re Diet Drugs Products Liab. Litig.*, 2000 WL 1222042 (E.D.Pa. 2000), at *21.

The settlement at issue in *Ortiz* purported to include such an opt-out. However, the option was so

qualified and restricted that it offered no true recourse to the tort system. 527 U.S. at 847 & n.23. This Court suggests, however, that an unrestricted delayed opt-out would provide sufficient due process protections for "the legal rights of absent class members . . . who by definition may be unidentifiable when the class is certified." *Id.*

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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