Fairness and Due Process in Class Settlements: Analyzing *Amchem* and *Stephenson*

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Introduction

In 1997, the Supreme Court released a landmark decision in aggregate litigation, *Amchem Products, Inc. v. Windsor*.[1] *Amchem* clarified that Federal Rule of Civil Procedure 23 applies to settlement classes or classes certified in the courts for the sole purpose of legitimizing a private settlement agreement.[2] In doing so, the Court declared that the terms of a settlement could not modify Rule 23 in certifying a class.[3] However, in 2003, with a chance to solidify the *Amchem* decision, the Court deadlocked and affirmed[4] *Stephenson v. Dow Chemical Co*., a Second Circuit decision relying on a private settlement to defeat an earlier certification.[5] A question thus arose about the extent to which courts may permissibly consider the settlement to certify or defeat settlement class actions. After nearly twenty years, the *Amchem-Stephenson* divide needs a definitive answer.

This Note argues that *Stephenson* was wrongly decided. The Second Circuit inappropriately reconsidered an earlier class certification by relying on a settlement term to create an issue of adequate representation. Although *Stephenson* arose in a slightly different procedural context, the Supreme Court's decision in *Amchem* nevertheless forecloses any reliance on a settlement term to approve or defeat a certification. While *Stephenson* has appeal to protect the interests of ill-informed class members and claimants with latent injuries, courts are not free to disregard Rule 23's requirements for certification to import a question of fairness into the analysis. *Stephenson's* decision—along with more recent cases employing a similar logic—violate the Rules Enabling Act's pellucid dictate not to "abridge, enlarge or modify any substantive right."[6]

Section I of this Note provides a brief overview of the history of the class action, and the requirements for certification under Rule 23(a) and (b)(3). Section II analyzes how major mass tort incidents implicated the class action and analyzes the

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1. Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).
2. *See id.* at 619–620.
3. *See id.* at 620–22.
4. *See* Dow Chem. Co. v. Stephenson, 539 U.S. 111, 112 (2003).
5. *See* Stephenson v. Dow Chem. Co., 273 F.3d 249 (2d Cir. 2001).
6. 28 U.S.C. § 2072(a)–(b).

divergent decisions in *Amchem* and *Stephenson*. Section III analyzes the merits and drawbacks of the *Amchem* and *Stephenson* approaches to review settlement class actions. Section IV analyzes recent decisions relying on a *Stephenson*-like rationale in approving settlement classes. Section V analyzes why the Second Circuit's decision in *Stephenson* was wrongly decided according to the Rules Enabling Act and offers a proposal to close the gap between the approaches in *Amchem* and *Stephenson*.

I. OVERVIEW OF THE CLASS ACTION

A. THE HISTORY OF CLASS ACTIONS

Before proceeding to discuss the gap between *Amchem* and *Stephenson*, it is necessary to understand how and why the class action device developed. At English common law, courts believed that only persons with "direct and immediate legal rights" affected by a judgment needed to be parties.[7] Accordingly, the courts fashioned a compulsory joinder rule, requiring "all parties materially interested" be joined and bound by the judgment.[8] However, such a compulsory joinder rule had drawbacks. Particularly, if the joinder of all relevant parties proved impossible, the court withheld relief from all parties.[9] Conversely, if joinder proved possible, the suit became intractable.[10]

Realizing the faults of this litigation system, the English courts adopted a "rule of convenience," the so-called "Bills of Peace."[11] The Bills of Peace allowed suits in equity to proceed by representative action, meaning that one person similarly situated to other interested parties could bring an action on their behalf and bind their interests to the judgment.[12] This system unburdened potential plaintiffs and courts and sowed the seeds of aggregate litigation. By 1873, the Bills of Peace proved as much, becoming a tool for suits in equity and at law.[13]

In the United States, which hewed closely to the English common law system, the trajectory of class-based litigation also started with a compulsory joinder rule.[14] Unsurprisingly, the strictures of compulsory joinder gave way in 1842 with the adoption of Federal Equity Rule 48.[15] By 1938, as law and equity merged in the judicial system, the Federal Equity Rules became the Federal Rules of

7. WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 1:12 (6th ed. 2022).
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *See id.* § 1:13.
15. *See id.* After the adoption of Rule 48, considerable confusion followed as to the preclusive effects of a representative action because the Rule purported *not* to bind the absent interested parties. Thus, in 1912, Rule 48 gave way to Equity Rule 38 to try to remedy confusing language. However, confusion persisted even after the later adoption of Federal Rule of Civil Procedure 23. *See id.*

Civil Procedure.[16] Since then, Rule 23 has assumed its long-standing place in class action litigation, albeit not without hiccups.

Indeed, the original Rule 23 gave American courts headaches by categorizing permissible representative actions and their effects in one of three classes: true, hybrid, and spurious.[17] Heavy criticism followed the adoption of the 1938 Rule 23 as it became mired in obscurity[18] and dysfunction[19] in its unhelpful categories.

In 1940, recognizing the considerable issues dogging aggregate litigation under the newly formed Rules, the Supreme Court provided a guiding principle in *Hansberry v. Lee*.[20] In *Hansberry*, the Court confronted an agreement by landowners to restrict land sales to non-white persons in an Illinois neighborhood.[21] However, the agreement required the assent of ninety-five percent of the landowners.[22] In an earlier action, *Burke v. Kleiman*—which was deemed "false and fraudulent"—Lee received a favorable judgment averring the agreement received the requisite assent.[23] Therefore, with an allegedly enforceable agreement, Lee sought enforcement against Hansberry, a Black man, and his family.[24] When Hansberry contested enforcement, Lee won on *res judicata* grounds to bar relitigating the *Burke* claims even though Hansberry was not a party or in privity with a party in *Burke*.[25]

The Supreme Court, defining a keystone principle of modern class actions, reversed the Illinois courts on adequate representation grounds.[26] While "members of a class not present parties" to litigation may be bound when "they are in fact adequately represented by parties who are present," the Court found no such representation for Hansberry.[27] Indeed, in *Burke*, the Court felt that Lee did not adequately represent Hansberry because Lee, "who sought to secure [the agreement's] benefits . . . could not be said to be in the same class" as anyone "interested in challenging the validity of the agreement . . . ."[28] This key passage signaled a new due process protection for absent class members: where litigation

16. *See id.*

17. *See id.* § 1:14. Because the modern Rule 23 substantially eliminated the issues common to the 1938 version, it makes little sense to dwell on their text.

18. *See id.* (noting that "true" actions under the 1938 Rule 23 used confusing terms like "joint" or "common," which proved difficult for courts to parse).

19. *See id.* (quoting Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 546–47 (1974)) (noting that "spurious" actions under the 1938 Rule 23 were often seen as merely "permissive joinder" and non-binding on non-intervenors).

20. Hansberry v. Lee, 311 U.S. 32 (1940).

21. *See id.* at 37–38.

22. *See id.*

23. *See id.* at 38–39.

24. *See id.* at 38.

25. *See* Hansberry v. Lee, 311 U.S. 32, 38-40 (1940).

26. *See id.* at 42–44.

27. *See id.*

28. *Id.* at 44.

interests are divergent to such a magnitude that one party cannot reasonably be said to represent the interests of the absent, *res judicata does not apply*.

The *Hansberry* principle of adequate representation animated the decisive 1966 amendments to Rule 23.[29] Thus, it was hardly surprising that the 1966 amendments "stress adequate representation and class solidarity as conditions for aggregate treatment."[30] However, despite a substantial change and the swirling frustrations around Rule 23 before the amendments, the revisions arrived with little fanfare.[31] Indeed, although Rule 23(b)(3) is now regarded as the "most consequential part of [R]ule [23]," the famed lawyer Charles Alan Wright felt it would have little impact in an innocent world.[32]

B. RULE 23 AND THE REQUIREMENTS FOR CLASS CERTIFICATION

Although great difficulties followed in the years after the newly amended Rule 23 emerged,[33] there has not been a full-scale revision of the Rule's text. Aside from adequate representation, Rule 23 classes must satisfy the criteria under Rule 23(a): numerosity, commonality, typicality, and adequate representation.[34] Numerosity, often a reflexive requirement in class settings, generally requires a "non-speculative, good faith estimate" that the members of the class number above forty.[35] Commonality requires that there is a "common question, that when answered as to one class member, will advance the resolution of the claims of the other[s] . . . ."[36] Typicality requires "that the claims or defenses of the representative parties [are] typical of the claims or defenses of the class."[37] Commonality and typicality often push to ensure that there will be adequate representation or the alignment of interests in the *Hansberry* sense.[38] However, adequate representation also requires that class representatives and counsel are

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29. *See* David Marcus, *The History of the Modern Class Action, Part I: Sturm Und Drang, 1953-1980*, 90 WASH. U. L. REV. 587, 601, 604 (2013). Indeed, records show that *Hansberry* became disruptive to the categories set out in the earlier rendition of Rule 23. For instance, many judges would recast decisions involving spurious rights—essentially, opt-in actions—to ensure adequate representation would accord *res judicata* to future litigants.

30. *Id*. at 604–05.

31. *See id*. 605–06.

32. *Id*. at 609 (citing Charles Alan Wright, *Recent Changes in the Federal Rules of Civil Procedure*, 42 F.R.D. 552, 567 (1966)) (explaining that people will likely not adopt (b)(3) classes because it "simply isn't worth it.").

33. *See generally id*. at 610–22.

34. *See* MCLAUGHLIN ON CLASS ACTIONS § 4:1 (18th ed. 2021).

35. *See id*. § 4:5.

36. *Id*. § 4:7 (citing Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 369 (2011)).

37. *Id*. § 4:16 (citing *In re* Fyre Festival Litigation, No. 17-cv-3296 (PKC), 2020 WL 7318276, at *5 (S.D. N.Y. Dec. 11, 2020)).

38. *See* Hansberry v. Lee, 311 U.S. 32, 44–45 (1940); 1 MCLAUGHLIN, *supra* note 34, at § 4:1 (citing *Dukes*, 564 U.S. at 349 n.5) (explaining that commonality and typicality tend to merge, and that those requirements also tend to merge with the adequacy of representation requirement).

aligned and that class counsel "will prosecute the action throughout its duration fairly, vigorously, and competently on behalf of the class."[39]

Rule 23 also recategorized the types of classes available. A Rule 23(b)(1) class exists for when "individual litigation might create serious hardship for other class members or for the defendants."[40] A Rule 23(b)(2) class exists "to promote remedial efficacy by facilitating the grant of classwide injunctive remedy" when such would be difficult in individual actions.[41] Finally, and critical to this Note, a Rule 23(b)(3) class "authorizes class actions that achieve efficiency and decisional consistency by aggregating suits with common questions into a single adjudication" such that the litigation is "cost justified."[42] As the description of the (b)(3) class suggests, these classes often appear in "large-scale, complex litigation for monetary damages."[43] To have such a (b)(3) class, the class must show that (1) common questions predominate over individual ones and (2) that class treatment is superior to individual adjudications and other forms of aggregate resolution.[44]

As judicial rhetoric and turbulence cooled, Rule 23 took shape as a tool for both plaintiff- and defendant-side attorneys to come to efficient and global claims outcomes,[45] backstopped by due process protections ensuring that the classes

39. MCLAUGHLIN, *supra* note 34, § 4:26 (first citing Taylor v. Sturgell, 553 U.S. 880, 900 (2008) (explaining that a party and counsel must be aligned); and then citing *In re* Hyundai & Kia Fuel Econ. Litig., 926 F.3d 539, 566 (9th Cir. 2019) (explaining that counsel must "vigorously" prosecute the action for their clients)).

40. Robert G. Bone, *Walking the Class Action Maze: Toward a More Functional Rule 23*, 46 U. MICH. J. L. REFORM 1097, 1102 (2013) (citing Fed. R. Civ. P. 23 advisory committee's notes, subdivision (b)(1) (1966)).

41. *Id.* (citing David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 702–708 (2011)).

42. *Id.* at 1102–03 (citing Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1968)).

43. MCLAUGHLIN, *supra* note 34, § 5:22 (citing Allison v. Citgo Petrol. Corp., 151 F.3d 402, 412 (5th Cir. 1998)).

44. *Id.* (citing Fed. R. Civ. P. 23(b)(3)). The first requirement of a Rule 23(b)(3) class generally supersedes the commonality inquiry posited by Rule 23(a)(2). *See id.* § 4:7 (citing Lienhart v. Dryvit Sys., Inc., 255 F.3d 138, 146 n.4 (4th Cir. 2001)). Moreover, the predominance requirement is stringent, requiring that the common question presented and "subject to generalized, classwide proof," predominate over "those issues that require individualized proof." *Id.* § 5:23 (18th ed. 2021) (citing Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 453 (2016)). This often means that the evidence adduced for the class *must be capable* of being used to make the same case in an individual action. *See id.* (citing Dancel v. Groupon, Inc., 949 F.3d 999, 1008 (7th Cir. 2019)). The Supreme Court has also discussed the non-exhaustive factors to prove superiority under Rule 23(b)(3), which is often a problem that would arise if predominance were not met. For a greater discussion on these factors, see Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615–16 (1997).

45. *See* Marcus, *supra* note 29, at 645–46. Attorneys on both sides of a case began to see merit in the central goals of class actions, for various reasons the Court has captured since 1966. *See* Devlin v. Scardelletti, 536 U.S. 1, 10 (2002) (describing that a major goal of class actions is to "simplify litigation involving a large number of class members with similar claims . . . ."); *Amchem*, 521 U.S. at 617 (describing that the 1966 amendments to Rule 23 "had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all'") (quoting Kaplan, *supra* note 42, at 497).

were constitutionally firm and binding.[46] However, as Rule 23 took root, its potential applications sowed the seeds for a new fight: Rule 23 in mass torts.[47]

II. MASS TORTS AND SETTLEMENT CLASS ACTIONS: COMPETING DOCTRINES

The class action, specifically Rule 23(b)(3) classes, became a dominant tool for mass torts primarily due to "[i]nstitutional need" and "burgeoning tort dockets" nationwide.[48] However, one area of mass torts particularly shaped the issue addressed by this Note: asbestos. Asbestos is a "ubiquitous pollutant of the air we breathe, the food we eat, and the water we drink."[49] Although once thought to endanger only a subset of the population, it became *startlingly* clear that asbestos infiltrated "20% of *all* U.S. public and commercial buildings, a total of 733,000 structures."[50] Asbestos's omnipresence caused most Americans to inhale a million asbestos fibers annually, with each inhalation risking asbestosis, mesothelioma, and various cancers.[51]

Unsurprisingly, asbestos product manufacturers found themselves inundated by nationwide lawsuits. In one instance, Fibreboard Corporation faced more than 200,000 lawsuits.[52] In another, Amchem Products, along with twenty other companies, faced litigation from an anticipated "100,000 class members" and expected financial ramifications "in excess of $1 billion."[53] The avalanche of tort suits appeared destined for class action resolution.

However, "[n]owhere do class actions seem a more alien force than in the torts system."[54] Class actions require commonality amongst class members,[55] and Rule 23(b)(3) *heightens* that standard to ensure commonality predominates over

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46. The Supreme Court, since the adoption of the 1966 amendments to Rule 23, has repeatedly emphasized the importance of Rule 23 requirements to ensuring due process. *See* Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 159–60 (1982) (emphasizing the importance of ensuring "common questions of law or fact" are raised by a class representative to ensure they are common and typical with the class to serve as an adequate representative, or else risk compromising the "the efficiency and economy" of class actions); Kremer v. Chem. Constr. Corp., 456 U.S. 461, 482 (1982) (explaining that a courts are not required to afford preclusive effects to judgments by other courts if they were constitutionally infirm, or otherwise failing to accord due process protections); Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 806–08, 811–12, 816, 818, 822–23 (1985) (explaining the due process requirements for plaintiffs in a class action for monetary damages (primarily, a 23(b)(3) action), and affording defendants the right to raise due process claims for plaintiffs which could threaten a judgment).

47. Marcus, *supra* note 29, at 646.

48. David Marcus, *The History of the Modern Class Action, Part II: Litigation and Legitimacy, 1981-1994*, 84 FORDHAM. L. REV. 1745, 1820–21 (2018).

49. 60 AM. JUR. TRIALS 73 § 1 (1996) (citing Joseph Hooper, *The Asbestos Mess*, N.Y. TIMES MAGAZINE, Nov. 25, 1990).

50. *Id.* (citing Hooper, *supra* note 49) (emphasis added).

51. *See id.*

52. *Id.* at § 60.

53. *Id.*

54. David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 562 (1987).

55. *See* Fed. R. Civ. P. 23(a)(2).

individual questions of law or fact.[56] Therefore, "mass tort cases involving personal injury claims" often fly in the face of collective action because they "pose daunting problems of causation" that make "case-by-case, particularized adjudication" all the more apt.[57]

A. THE SUPREME COURT HAS ITS SAY: *AMCHEM*

During the height of the nationwide asbestos litigation, the judiciary consolidated "all asbestos cases then filed, but not yet on trial" via Multidistrict Litigation to the Eastern District of Pennsylvania.[58] Once consolidated, counsel for plaintiffs and defendants began settlement negotiations to address current *and* future claims.[59] Initial attempts at such a global settlement failed, but soon separate settlements arose between those who filed and those who had not.[60]

This latter group of plaintiffs, who had yet to file, were the focus of the *Amchem* decision. Rather than create a class for litigation purposes, defendants worked with a group of plaintiffs to certify a class to obtain a court-approved settlement.[61] This proposed settlement class included (1) those occupationally exposed to defendants' asbestos products and (2) those people exposed due to the occupational exposure of their spouse or family member.[62] Of these putative class members, "[m]ore than half" had a present injury from asbestos, whereas the remaining class "had not yet manifested" injury.[63] Moreover, the class asserted numerous state-law tort claims, including negligent failure to warn and negligent infliction of emotional distress.[64]

The contemplated settlement sought to create an administrative scheme of scheduled and fixed ("not adjustable for inflation") payments based on a compensable disease.[65] The settlement provided "no compensation for certain kinds of claims, even if otherwise applicable state law recognizes such claims."[66] Notably, acceptance of the settlement largely precluded class members from pursuing

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56. *See* Fed. R. Civ. P. 23(b)(3); *see also* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 609 (1997) (noting that "Rule 23(a)(2)'s 'commonality' requirement is subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement" of predominance).

57. Rosenberg, *supra* note 54, at 562–63.

58. *Amchem*, 521 U.S. at 599.

59. *See id.* at 599–600.

60. *See id.* at 600–01.

61. *See id.* at 601–02. This action by the defendants and the class constitutes the so-called settlement class. These classes are created to avoid litigation while obtaining on the record approval from a court supporting findings of due process in the class and fairness in the settlement. *See* Gregory M. Wirt, *Missed Opportunity: Stephenson v. Dow Chemical Co. and the Finality of Class Action* Settlement, 109 DICK. L. REV. 1297, 1299 (2005).

62. *Amchem*, 521 U.S. at 602.

63. *Id.* at 603.

64. *See id.*

65. *See id.* at 603–04.

66. *Id.* at 604.

claims in perpetuity.[67] However, defendants could withdraw from the settlement within ten years without penalty.[68]

The *Amchem* class portended challenges as constructed. First, the class had different time horizons, given the dichotomic interests of those presently harmed and those with the potential for future harm. In theory, a presently harmed class member requires rapid relief to address their severe illness. Conversely, a class member with latent harms may be more apt to negotiate longer to obtain assurances for future inflation-adjusted relief. Therefore, the *Amchem* class was challenging to certify because classwide differences were such that class representatives and counsel would struggle to ensure adequate representation in the *Hansberry* sense.[69] Illustrative of this intra-class conflict is that the settlement provided a fund "not adjustable for inflation," which would necessarily harm future claimants.[70]

Second, the various state-law tort claims presented significant difficulties because such claims require *individualized* determinations of causation and injury.[71] The inherent individualism animating tort claims makes it hard to imagine a common question of law or fact uniting the claims of the putative class members. Moreover, the settlement, which purported to artificially resolve concerns about commonality by restricting specific claims, even if available amongst different states, likely violates the tenet of adequate representation again.[72]

None of these certification concerns are mere conjecture. Indeed, settlement objectors strenuously protested certification on these grounds, but to no avail.[73] Instead, the district court certified the settlement class under Rule 23(b)(3).[74] The district court found predominance satisfied because the class members all shared asbestos exposure, and sought compensation without the high litigation costs.[75]

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67. *See id.*

68. *See id.* at 604–05. The withdrawal and preclusion provisions insulated defendants from new scientific discoveries that could require settlement modification or new lawsuits. In essence, defendants could withdraw from the settlement if they saw their liability rise due to asbestos injuries *and* be free from suits from class members with renewed or newly manifesting harms.

69. Hansberry v. Lee, 311 U.S. 32, 44–45 (1940). The time horizon differences—a major reason animating the decision in *Amchem*—are just one reason for frustration with the balance the class action strikes between overall justice and individual justice. *See* Hon. Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97, 109–10 (2013); J. Maria Glover, *Mass Litigation Governance in the Post-Class Action Era: The Problems and Promise of Non-removable State Actions in Multi-district Litigation*, 5 J. TORT L. 1, 36 n.127 (2014).

70. *Amchem*, 521 U.S. at 604.

71. Rosenberg, *supra* note 54, at 562–63.

72. *See Amchem*, 521 U.S. at 604. By removing various claim options, class counsel failed to afford each class member their full right to relief, thus failing to represent their interests fully, fairly, and adequately. *See also* Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 816, 818, 822–23 (1985) (explaining that failing to review if certain State claims conflicted with a single State's laws, applied to the whole class, would violate due process because members of the class may lose their full right to recovery).

73. *Amchem*, 521 U.S. at 606–08.

74. *See id.* at 607–08.

75. *See id.*

The district court also found no issues with the representation.[76] As framed by the district court, the alignment of the class in asbestos exposure and the interest in acquiring compensation in the settlement was sufficient to overcome the inherent challenges to certification. At bottom, the district court raised the question of whether a *fair deal* in a settlement justifies class certification.

The United States Court of Appeals for the Third Circuit vacated the certification as the objectors appealed and ably explained that the requirements of Rule 23(a) and (b)(3) must be satisfied to certify a settlement class as if it was slated for litigation.[77] Importantly, as the central feature of *Amchem*, the Third Circuit held that certification must be met "without taking into account the settlement."[78] In short, the Third Circuit held that even a fair deal could not abrogate Rule 23.

On certiorari, the Supreme Court affirmed in full.[79] Paramount here, the Court's decision in *Amchem Products, Inc. v. Windsor* affirmed the Third Circuit's holding that the settlement *cannot* push the certification question.[80] For settlement classes, the Court emphasized that while the class is not for litigation, that is no excuse for failing to adhere to Rule 23(a) and (b)'s terms.[81] Indeed, Rule 23 "demand[s] undiluted, even heightened, attention in the settlement context."[82] The Court explained that the questions of due process inherent in Rule 23 are separate from those of fairness in the settlement.[83] The Court's decision denied using a settlement to *cure* due process concerns in a class, even if the deal is fair.

The decision in *Amchem* arguably left open a final question the Court left unaddressed: whether a class settlement may *create* due process issues sufficient to derail certification. However, it logically follows from *Amchem's* reasoning that a settlement cannot create due process problems because Rule 23's scheme prevents settlement consideration until after certification. Moreover, if the class's interests are aligned such that common questions predominate and adequate representation is inherently possible at certification, it strains reason to suggest a settlement undermines due process thereafter on any appeal. Perhaps, at a fairness hearing, the settlement is found to be unfair, but that does not result in the conclusion that the class is incapable of being adequately represented—a distinct

76. *See id.*

77. *See id.* at 608–09.

78. *Id.* at 609 (quoting Georgine v. Amchem Prod., Inc., 83 F.3d 610, 626 (3d Cir. 1996)) (internal quotations omitted).

79. *Id.* at 612.

80. *See id.* at 619–20. In rather confusing language, the Court seemed to carve out a small exception to this general prohibition: allowing consideration of the settlement terms to explain *why interests were inadequately represented*. *See id.* at 619–20. However, that exception *does not* permit a court to use the terms to *cure a certification problem*, but only to *explain a preexisting one*.

81. *See id.* at 620.

82. *Id.*

83. *See id.* at 620–21. The Court emphasized that modifying the certification process to import the fairness inquiries of Rule 23(e) would violate the Rules Enabling Act, which admonishes the courts that procedure "shall not abridge . . . any substantive right." *Id.* at 620 (quoting 28 U.S.C. § 2072(b)).

question of due process.[84] The due process questions embodied in Rule 23 demand that no issues capable of derailing the adequacy of representation inhere in the class. Therefore, it would be a bewildering result if, by a mere settlement term, the inherent fractures of the class were to suddenly manifest. In *Amchem's* aftermath, the widespread belief was that the decision "all but killed the mass tort class action," particularly regarding settlement classes.[85]

B. THE IMMUTABLE RULE OF *AMCHEM*? NOT SO FAST: *STEPHENSON* AND *DOW CHEMICAL*

The *Amchem* decision was emphatic. The Court did not blink at denying some of the most aggrieved in society—those injured by asbestos—at least some measure of compensation. Instead, the Court gave due process in droves. One could reason that *Amchem* decisively removed the settlement from destroying a valid certification.

However, another mass tort saga appeared to threaten that understanding: the Agent Orange litigation.[86] Agent Orange is "one of the most toxic substances ever developed by man."[87] Unsurprisingly, Agent Orange led to a slew of litigation,[88] particularly in lower courts of the United States Court of Appeals for the Second Circuit, and led to a global settlement against Agent Orange manufacturers in 1984.[89]

The original classes included those exposed to Agent Orange because of their military service and family members exposed and injured by the servicemember's exposure who had brought various tort claims against Agent Orange manufacturers.[90] Once the class met the requirements of Rule 23(a) and (b)(3), the threat of trial resulted in a settlement.[91] The settlement provided for a $180 million fund, paid out over ten years[92]—until the end of 1994—with seventy-five percent paid to the class.[93] The district court approved the settlement as fair, and

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84. *See* Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 113 (2d Cir. 2005) (recasting a due process challenge against a settlement term to one challenging the "Settlement's fairness").

85. David Marcus, *The Short Life and Long Afterlife of the Mass Tort Class Action*, 165 U. PA. L. REV. 1565, 1596 (2017).

86. Agent Orange was a herbicide developed for use in the Vietnam War to defoliate the dense jungle hampering military efforts. *See In re* Agent Orange Prod. Liab. Litig., 597 F. Supp. 740, 776 (E.D.N.Y. 1984).

87. *In re* Agent Orange Prod. Liab. Litig., 635 F.2d 987, 989 (2d Cir. 1980).

88. *In re* Agent Orange Prod. Liab. Litig., 611 F. Supp. 1396, 1401 (E.D.N.Y. 1985) (noting that 245,000 claims had been filed related to Agent Orange injuries).

89. *See* Stephenson v. Dow Chem. Co., 273 F.3d 249, 251 (2d Cir. 2001).

90. *See id.* at 252.

91. *See id.* This class was certified prior to *Amchem* and included *both* presently injured and individuals likely to manifest a future injury. Had these earlier cases been certified post-*Amchem*, it is likely the dichotomic interests could have invalidated the class, absent sub-classing.

92. This fund period, perhaps arbitrary, recognized the considerable issue of conflicting scientific evidence regarding Agent Orange's latency period. *See* William Scott, *Competing Paradigms in the Assessment of Latent Disorders: The Case of Agent Orange*, 35 SOC. PROBS. 145, 158 (1998). Therefore, the agreed period likely represented a best guess as to the latency period.

93. *See Stephenson*, 273 F.3d at 252–53.

the Second Circuit affirmed.[94] Shortly after, the Second Circuit shrugged off a direct appeal to certification on adequate representation grounds and denied two putative class actions on *res judicata* grounds.[95]

In 1996 and 1998, after the settlement fund ran its course, two members of the original settlement manifested injuries: Daniel Stephenson, a Vietnam veteran exposed to Agent Orange, developed multiple myeloma, and Joe Isaacson, another exposed veteran, developed non-Hodgkin's lymphoma.[96] The two filed separate actions, later consolidated in the same district court as the original Agent Orange actions.[97] The district court denied the claims, again on *res judicata* grounds, in light of the settlement, over objections by the two men that the original class inadequately represented them because the settlement did not provide recovery beyond the fund period.[98]

In a "controversial decision,"[99] the Second Circuit vacated the dismissal of the actions.[100] While recognizing that both Stephenson and Isaacson were members of the 1984 settlement—having failed to opt out—the Second Circuit purported to rely on *Amchem* "to suggest that Stephenson and Isaacson were not adequately represented" because the 1984 settlement failed to ensure funding beyond ten years.[101] The Second Circuit's decision not only overturned its previous findings that the class was certified correctly but asserted that a settlement term—the result of scientific uncertainty—rendered the class improper.

The procedural posture of *Stephenson* is complicated; the Circuits have split on the issue of collateral attack under which *Stephenson* arose.[102] However, even assuming collateral attack was permissible in *Stephenson*, the attack proceeded on grounds foreclosed by *Amchem*.[103] While the Second Circuit painted

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94. *See id*.

95. *See id*. at 253–55.

96. *See id*. at 255.

97. *See id*. at 256–57.

98. *See id*. at 257. The litigation here arose under a so-called collateral attack. These arise when a class is challenged for failing to provide adequate representation *after* direct appeals are exhausted. *See* Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX. L. REV. 383, 384 (2000).

99. 2 MCLAUGHLIN, *supra* note 34, § 6:30 (18th ed. 2021).

100. *See Stephenson*, 273 F.3d at 256.

101. *Id*. at 260–61 (emphasis added).

102. *See* Woolley, *supra* note 98, at 384–86 & n.3 (surveying the burgeoning split on the availability of collateral review).

103. Importantly, the Second Circuit seems to suggest that this collateral attack would be permissible under other Circuits' decisions allowing collateral attacks when no determination on adequate representation had been made. Yet, the logic fails because the Second Circuit *had* made such a determination during a period of *scientific uncertainty*. Therefore, while the science changed, that is hardly grounds to suggest a determination was never made. A determination was made, just on evidence the Second Circuit now disfavors. *See Stephenson*, 273 F.3d at 258 & n.6; *see also In re* Agent Orange Prod. Liab. Litig., 996 F.2d 1425, 1435–36 (1993) ("These plaintiffs, like all class members who suffer death or disability before the end of 1994, are eligible for compensation from the Agent Orange Payment Fund. *The relevant latency periods and the age of the veterans ensure that almost all valid claims will be revealed before that time*.") (emphasis added).

Stephenson and Isaacson's claim to concern their improper inclusion as "parties" for *res judicata* purposes, the Second Circuit's opinion belies that notion.[104] Indeed, in earlier litigation related to the adequacy of representation, the Second Circuit barred the challenge because the claimants were eligible "for compensation from the settlement fund" and were, therefore, parties.[105] In that vein, the Second Circuit inarguably accounted for the settlement to affirm the earlier certification and conflated the settlement with a due process problem related to party status. If *Amchem* had been in force, that affirmance was error.[106]

Thus, in *Stephenson*, the Second Circuit's logic unravels. Stephenson and Isaacson's collateral attack was hardly about party status but more about the issue the Second Circuit fondly considered in earlier challenges: the settlement. Undisputedly, Stephenson and Isaacson fell within the class definition of the 1984 settlement,[107] and that settlement provided compensation based on the original understanding of Agent Orange's latency period.[108] Nevertheless, the Second Circuit vacated the dismissals for a failure of representation precisely because it conflated due process issues with *post-hoc* issues of settlement fairness. In short, the Second Circuit believed that because the settlement failed to provide compensation, that created an adequacy problem meriting attack.[109]

The logic underlying the Second Circuit's decision returns the discussion to an earlier point: if the issue potentially derailing certification *did not* or *could not* inhere at the time, then no Rule 23 issue existed. As *Amchem* clarified, a settlement's fairness and terms are *irrelevant* to that analysis.[110] Therefore, even if a valid collateral attack opportunity existed, the terms of that attack were undoubtedly foreclosed. If due process was not an issue in *Stephenson*, then the reasons for *Stephenson's* quirky decision remain. Presumptively, *Stephenson's* approach seemed empathetic to the plight of class members with changed circumstances and seemed animated by fairness issues and concerns that strict application of *Amchem* might withhold recovery. That fairness ideal permeates settlement classes today.[111]

Nevertheless, the Second Circuit's use of the settlement to overturn its findings perfectly teed up the Supreme Court to affirm *Amchem* as the law of the land.

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104. *See Stephenson*, 273 F.3d at 259.

105. *See id.* at 260 n.7.

106. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 619–20 (1997).

107. *See Stephenson*, 273 F.3d at 260.

108. *See* discussion *supra* note 103.

109. *See Stephenson*, 273 F.3d at 260–61. Although the Second Circuit attempts to rely on *Amchem* for finding an adequate representation problem, the opinion runs headlong into an order of operations problem. Chiefly, *Stephenson never* made a finding of an intra-class conflict prior to homing in on a settlement term. *See id.* Therefore, the failure to do so seems to take *Stephenson* without the ambit of *Amchem's* lone settlement carve out. *See Amchem*, 521 U.S. at 619–20. *Even if* one felt that this analysis is wrong, much pause should be given to *ex post facto* application of *Amchem*, especially in the class context.

110. *See Amchem*, 521 U.S. at 619–21.

111. *See* discussion *infra* SECTION IV.

Instead, the Court lent *Stephenson* life; an equally divided Court affirmed, per curiam.[112]

III. THE MERITS OF THE COMPETING DOCTRINES

Amchem and *Stephenson* remain two decisions fundamentally at odds. However, this Note would be remiss if it failed to ventilate the reasons for and against each approach.

A. *AMCHEM*: THE CONSISTENT DOCTRINE

A core principle of the *Amchem* decision is that certification and settlement fairness are separate.[113] The holding in *Amchem* derives from the scheme of Rule 23. For instance, Rule 23's certification provisions do not mention the settlement.[114] Instead, the issue of approving settlements arises under the so-called fairness hearing, enshrined in Rule 23(e).[115] The Court, in *Amchem*, thus did not create a dichotomy between certification and settlement review out of whole cloth. Rule 23 clarifies that Rule 23(e) is "an additional requirement, not a superseding direction . . . ."[116]

The schematic protection that *Amchem* provides also bolsters the confidence of settling defendants. If defendants, working through class counsel, can devise a cohesive class consistent with Rule 23, they have the assurance that a settlement would only have one more hurdle: the fairness hearing. In other words, Rule 23 assures defendants that due process backs a settlement after certification.

Therefore, it is reasonable to presume that Rule 23 and *Amchem* incentivize defendants to negotiate a fair deal because preclusion will necessarily follow if the class is defined correctly.[117] For class members, *Amchem* thus ensures defendants will settle appropriately and not shortchange the class out of fear of later litigation reopening their finances to potential ruinous consequences, either to the defendants themselves or the public, who will necessarily bear the burden in the marketplace.[118]

B. *AMCHEM*: THE CONSEQUENCES OF STRICT DUE PROCESS

Of course, the *Amchem* approach has drawbacks. Chiefly, strict adherence to *Amchem* likely disallows numerous settlement classes for mass torts. *Amchem's* animating logic is to provide due process, which the Court felt could not be

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

113. *See Amchem*, 521 U.S. at 621.

114. *See* Fed. R. Civ. P. 23(a); Fed. R. Civ. P. 23(b)(3).

115. *See* Fed. R. Civ. P. 23(e).

116. *Amchem*, 521 U.S. at 621.

117. *See* Wirt, *supra* note 61, at 1299; *cf.* Sara Maurer, *Dow Chemical Co. v. Stephenson: Class Action Catch 22*, 55 S.C. L. REV. 467, 483 (2004).

118. *See* Maurer, *supra* note 117, at 483. One could expect that a defendant whose liability increases due to an upset settlement would find a way to pass on the liability to consumers in the marketplace.

provided in traditional mass tort actions, without modifications to the class definition because of differing state laws, the nature of tort actions, and the dichotomous nature of present and future claimants.[119] However, by stripping the class action device in favor of due process, *Amchem* likely places compensation to those who have suffered terrible personal injuries and deserve relief out of reach. Therefore, the paramount purpose of the class action, efficiency, is unsettled by removing global resolution of thousands of personal injury claims from Rule 23's ambit.[120]

Moreover, *Amchem* does not account for changes in conditions that may, *post-hoc*, make a settlement unfair, such as scientific advances or the unearthing of new evidence. The scheme of Rule 23 plays a significant role in worsening *Amchem's* rigidity. At certification under Rule 23(b)(3), absent class members receive a chance peculiar to such class actions: the right to opt out.[121] However, the chance to opt out, particularly in settlement classes, occurs when most class members do not know "either the value of their claims or the adequacy of class representation."[122] Therefore, presuming that most class members are ill-informed and unlikely to exercise their opt-out right or object, *Amchem* still binds the class even if circumstances change in the fullness of time.

It is easy to imagine cases where *Amchem's* rigidity could have perverse consequences. Such a case could mirror *Stephenson*, where new, post-settlement evidence comes to light and casts substantial doubt on the settlement's fairness. For instance, imagine a scenario where fracking causes property damage to several homes.[123] Though a settlement would compensate for damages, if later evidence unearths a contaminated water supply causing severe illnesses among the same residents, *Amchem* would penalize those who failed to opt-out and later seek to challenge the settlement even if the harms were unforeseen.

C. *STEPHENSON*: CORRECTING THE NOTICE PROBLEM

The latter criticism of *Amchem* is, of course, the illuminating logic of *Stephenson*. Indeed, *Stephenson* might be desirable because class actions are immune from the so-called aggregate settlement rule, enshrined in Model Rule 1.8(g).[124] Typically, the aggregate settlement rule requires the informed

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119. *See Amchem*, 521 U.S. at 626–27. However, changes to the structure of classes also bear costs, including lost bargaining power for class members or some class members being left out of the action because their inclusion portends a difficult certification.

120. *See* Wirt, *supra* note 61, at 1305.

121. *See* Fed. R. Civ. P. 23(b)(3).

122. George Rutherglen, *Better Late Than Never: Notice and Opt Out at the Settlement Stage of Class Actions*, 71 N.Y.U. L. REV. 258, 267–68 (1996).

123. For purposes of this hypothetical, assume the tortious act occurred in a large town in a single state and there was clear causation. Moreover, assume a settlement with a claims release related to the incident was reached and approved as fair, reasonable, and adequate.

124. *See* MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2018) [hereinafter MODEL RULES].

consent of those subject to an aggregate settlement.[125] However, the rule's terms seem to confine it to non-class applications because class actions fail to provide any mechanism for informed consent.[126] Critically, the rule's likely inapplicability to the class setting leaves notice to the strictures of case law and Rule 23.[127] To compound the notice problem, it is unclear how to satisfy the case law's due process jurisprudence concerning notice.[128]

Prudential[129] illustrates the notice problem Stephenson sought to address. In *Prudential*, a district court certified a settlement class under Rule 23(b)(3) after a class of life insurance policyholders challenged Prudential's sales practices as fraudulent and deceptive.[130] In exchange for the benefits of the settlement,[131] Prudential obtained a release stating that "Class Members hereby expressly agree that they shall not . . . institute, maintain or assert . . . any and all causes of action, claims . . . that have been, [or] could have been, asserted" in connection with the transactions.[132] Notably, notice to the class incorporated Prudential's release language, as did the district court's final order.[133]

Therefore, to avoid this release language—or so it seemed—class members needed to exclude themselves from the class. Indeed, the class notice explained that "policyholders who owned more than one policy could 'choose to remain a Class Member with respect to some Policies, but . . . exclude [themselves] from the Class with respect to other Policies.'"[134] Under this partial opt-out provision, the Lowe family excluded two policies from the pending settlement class.[135] Nearly a year later, the Lowes instituted an action concerning those excluded policies on similar grounds as the now-precluded claims.[136] However, because the action *only* dealt with the excluded policies, overlapping evidence was the only relationship this action had to the precluded claims.[137] Indeed, the Lowe's complaint expressly stated that "*the facts surrounding [the precluded policies] were relevant to our claims [regarding the excluded policies]*."[138]

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125. *See* MODEL RULES R. 1.8(g).

126. *See* Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME. L. REV. 1769, 1810–12 & n.157 (2005). Importantly, the informed consent required by the aggregate settlement rule is *distinct* from opt-out rights. Class members not only receive, arguably, less explanation of the settlement in the class context because class counsel does not provide one-on-one counseling but are only given the choice between accepting or rejecting—by opting-out—the settlement, informed or not.

127. *See* Rutherglen, *supra* note 122, at 264–67.

128. *See id.* at 264.

129. *See In re* Prudential Ins. Co. of Am. Sales Pracs. Litig., 261 F.3d 355 (3d Cir. 2001).

130. *See id.* at 358–61.

131. The Third Circuit did not elucidate the precise benefits the settlement gave to class members. *See id.*

132. *Id.* at 360 (internal quotations omitted).

133. *See id.*

134. *Id.* (alteration in original).

135. *See id.* at 361.

136. *See id.* at 361–62.

137. *See id.* at 362–63.

138. *Id.* at 362 (alteration in original).

As a general matter, the Lowe's position does not seem tenuous. If Prudential permitted partial opt-outs, it would strain credulity that its release was so broad as to bar common evidence. However, the court in *Prudential* felt differently. The court denied the Lowe's attempt to buoy their claims based "upon the common nucleus of operative facts" underlying their claims and the precluded claims.[139]

While it is true that the release stated that class members, *regardless of opt-out status*, were barred from using any evidence "relating to the facts and circumstances underlying the claims and causes of action in this lawsuit or the Release Transactions," it is certainly fair to wonder if it is reasonable to believe class members understood the release's breadth.[140] Moreover, it is equally plausible that the Lowes have a colorable, *post-hoc* grievance against such a provision as negotiated because it renders their opt-out right illusory. Therefore, for those in the class with no intention of opting-out, their litigation interests seemed widely misaligned with those who may seek a partial opt-out.[141] However, in this situation, *Amchem* is unavailing.

Stephenson, therefore, remains an attractive doctrine to permit this single term of the settlement release to be the crux upon which a court finds inadequate representation.[142] Indeed, if settlement interests are divergent in the *Hansberry* sense, even if evidenced *post-hoc* by a particular settlement term, fundamental fairness for class members who partially opted-out would seem to mandate a collateral attack.[143] Where ethical rules fail to notice and explain to class members the stakes of a settlement class, the Second Circuit fashioned a powerful remedy.

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139. *Id*. at 367.

140. *In re* Prudential Ins. Co. of Am. Sales Pracs. Litig., 962 F. Supp. 450, 566 (D.N.J. 1997).

141. While it might seem counterintuitive to suggest that partial opt-outs have some continuing right of adequate representation, it would make little sense if they did not. Indeed, the partial opt-out provision is the *only* reason a class member decides against separate litigation based on the theory the settlement *will not inhibit* its future, opted-out claims. If class members were reasonably informed about the *true* nature of the partial opt-out—particularly in the way the aggregate settlement rule suggests—it is quite possible class members would have (1) argued against the overlapping evidence bar or (2) opted-out entirely. Therefore, because the stakes of their partial opt-out claims were inextricably related to their non-opt-out claims, there is some right of adequate representation implicated.

142. The attractiveness of *Stephenson's* front and center approach to fairness presumes that courts will be as robust in scrutinizing a settlement's terms. It also presumes that judicial notions of fairness sync with those of the average class member. Obviously, *Prudential* is the quintessential example of the incongruence between what is and is not fair. However, it is important to consider where *Stephenson* differs from *Prudential*. Pertinently, fairness was at the forefront of *Stephenson*. In *Prudential*, by contrast, fairness did not feature as prominently and likely occurred in the flow of Rule 23. Therefore, it is quite possible that when fairness is only discussed at the death of the settlement class—the fairness hearing—judges are less critical and more reflexive so that the recovery can be apportioned.

143. Of course, Prudential possesses justifiable arguments to the contrary. Particularly, that courts in contract cases *affirmatively reject* bailing parties out of contracts that are bad deals when those parties enter them willfully. Nevertheless, Prudential's argument rises or falls based on the extent—under the contract analogy—that the term and course of dealing was not unconscionable. *See, e.g*., Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 450 (D.C. Cir. 1965) ("In determining reasonableness or fairness [of the contract], the primary concern must be with the terms of the contract considered in light of the circumstances existing when the contract was made."). Even if the contractual argument were unavailing, Prudential holds a countervailing

Even on direct appeal, *Stephenson* may promote efficiency and better defend litigation interests by justifiably criticizing the scheme of Rule 23. Indeed, if a settlement term can create fissures in the interests of a class such that they become misaligned, the settlement should not be an alien force at certification. Moreover, if the courts did consider the settlement at certification, the entire class process would be not only more efficient but, arguably, the class would receive better due process protections with the court's wise and forward-looking disposition at the outset.[144]

D. *STEPHENSON*: A NEVERENDING REVIEW PROBLEM

Even the most full-throated defenders of a *Stephenson* approach must temper themselves, considering its inherent drawbacks. Pertinently, *Stephenson* "will jeopardize other class settlements by allowing *post-hoc* assessments involving new law and new principles."[145] Therefore, in the collateral attack posture, *Stephenson* engenders significant confusion and debate, complicating the efforts of classes to settle because defendants may be exposed to future liability regardless of their good faith.[146] Moreover, even on direct appeal, a settlement approved at the lower court could be upset during the tedious course of litigation within a few short years if new principles push for revision.

Defendants, under *Stephenson*, would have to inquire if there remains any utility to settling. Furthermore, even if there were, *Stephenson* commands that defendants consider all possible ways that future, unknowable developments could harm a proposed settlement class.[147] Therefore, where uncertainty inheres in a class, *Stephenson* creates an *even higher* bar than *Amchem* to certification because courts must also consider *every possible way* a situation may change and render a class inadequately represented. On that score, *Stephenson* disrupts the principles underlying the class action device to the detriment of all parties.

Thus, while cases like *Prudential* might scream unfairness, the alternative likely means *no relief* to any class member. Indeed, if the class were, *post-hoc*, decertified due to an adequate representation problem, then defendants ought not to settle because preclusion—the touchstone of settlement game theory—exists in name only.[148] *Stephenson* lacks a limiting principle. If courts are to include the

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point regarding the fairness to reopen a settlement to which they already compensated class members in reasonable reliance on preclusion.

144. *See* Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 279–80 (7th Cir. 2022) (articulating an understanding that a district judge should act as a fiduciary for the class in reviewing settlements).

145. Maurer, *supra* note 117, at 468.

146. *See* Samuel Issacharoff & Richard Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1690 (2008).

147. *See* Maurer, *supra* note 117, at 479.

148. *See* Wirt, *supra* note 61, at 1299; Fine v. Am. Online, Inc., 743 N.E.2d 416, 423 (Ohio Ct. App. 2000) ("Mere disagreement with the terms of a settlement cannot provide grounds for a collateral attack. If such an argument were upheld, absent class members could always amount a collateral attack against the fairness of a settlement under the guise of challenging the adequacy of representation.").

settlement at certification, then a settlement could cure due process problems and permit certification. However, it is easy to imagine a situation, akin to *Stephenson*, where a settlement leads to certification only for new information to appear years later and upset finality. Thus, there would be no meaningful end to the point where a settlement is relevant and no meaningful finality for defendants to claim against it.

IV. A SURVEY OF *STEPHENSON*-TYPE SETTLEMENT CLASSES

As noted in *Amchem*, "the 'settlement only' class has become a stock device" in aggregate actions, a fact that had generated numerous split approaches to evaluating the proposed classes at the time.[149] In the years since *Amchem* and *Stephenson*, the settlement class is no less a staple.[150] Two principal cases bear discussion because they encapsulate the debate between *Amchem* and *Stephenson*.

A. THE FIFTH CIRCUIT'S DECISION IN *OIL SPILL*

In April 2010, a horrific fire and explosion occurred on the oil rig, *Deepwater Horizon*, resulting in "approximately 168 million gallons" of oil spilling into the Gulf of Mexico.[151] Unsurprisingly, "hundreds of cases with thousands of individual claimants" were filed and subsequently consolidated to facilitate settlement.[152] Within two years, the negotiating parties settled for economic and property damages and sought certification as a Rule 23(b)(3) settlement class action.[153] Of course, as with many mass tort actions, the settlement class device seems "alien" in this context.[154] Again, issues of causation, damages, time horizons, and more abound, which would seem to make surmounting Rule 23 a tall task.

However, *Oil Spill*[155] proceeded quite differently than *Amchem* imagined. Instead, the United States District Court for the Eastern District of Louisiana

149. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 618–19 (1997).

150. A quick search for "settlement class" in Westlaw generates *over 10,000* cases which mention the term. To exacerbate the issue of finding applicable cases, there is a persistent issue with district courts giving short shrift to Rule 23 certification decisions. *See, e.g.*, Weller v. HBSC Fin. Corp., No. 13-cv-00185-REB-MJW, 2015 WL 6123195, at *2 (D. Colo. Oct. 19, 2015); Larsen v. Trader Joe's Co., No. 3:11-cv-05188-WHO, 2014 WL 12641992, at *2 (N.D. Cal. Feb. 6, 2014), *final approval*, No. 11-cv-05188-WHO, 2014 WL 3404531, at *3–5 (N.D. Cal. July 11, 2014); *In re* Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. 05-MD-1720 (JG) (JO), 2012 WL 12929536, at *1 (E.D.N.Y. Nov. 27, 2012), *final approval*, No. 05-MD-1720 (JG) (JO), 2014 WL 12654593, at *2 (E.D.N.Y. Jan. 14, 2014).

151. *Incident News: Deepwater Horizon; Gulf of Mexico*, NAT'L OCEANIC & ATMOS. ADMIN., https://incidentnews.noaa.gov/incident/8220[https://perma.cc/K3YT-HYP2] (last visited Oct. 30, 2022).

152. *In re* Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mex., on Apr. 20, 2010, 910 F. Supp. 2d 891, 900–01 (E.D. La. 2012).

153. *See id.* at 902.

154. *See* Rosenberg, *supra* note 54, at 562.

155. *In re* Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mex., on Apr. 20, 2010, 910 F. Supp. 2d 891 (E.D. La. 2012).

decided to certify the class by explicitly invoking the settlement.[156] For instance, differences in causation were, under the settlement terms, "presumed" and altogether avoided.[157] Notably, the issue of causation was not wholesale extinguished; instead, "[s]ome business claimants must demonstrate that the spill caused their losses" and that the settlement "presumed" causation *only* for those "most likely to prove causation in litigation."[158] While invoking the settlement on this point strains *Amchem*, the method of extinguishing causation for some but not all rings as an intra-class conflict together with a predominance issue.

Even if the causation problem proved too little to predominate, the opinion's adequacy of representation analysis forgets *Amchem*. The district court concluded that no adequate representation issues could inhere because the "class settlement avoids all of the concerns that have prevented approval in cases such as *Amchem*" because the settlement "was structured to assure adequate representation of all interests within the Class."[159] The district court proceeded to enumerate the features of the settlement that assured the adequacy of representation.[160] This approach—certainly at odds with *Amchem*—received a split affirmance by the United States Court of Appeals for the Fifth Circuit.[161]

B. THE THIRD CIRCUIT'S DECISION IN *NFL CONCUSSION*

Similarly sympathetic to *Stephenson's* rationale, the Third Circuit affirmed the certification of a settlement class in another headline-grabbing action: the National Football League's (NFL) concussion litigation.[162] Retired NFL players brought actions against the NFL for allegedly failing to protect them from significant head injuries resulting from concussive hits.[163] These claims generated a significant following, requiring consolidation for settlement negotiations with an ultimate class of "over 20,000 retired players."[164] The class's mass tort claims including "negligence, medical monitoring, fraudulent concealment, fraud," and a smattering of other tortious acts portended near-insurmountable barriers to certification.[165]

Nevertheless, in affirming, the Third Circuit—famous for its role in the case—completely disregarded the supposedly immutable principle pronounced in *Amchem*. Instead, akin to a *Stephenson* rationale, the Third Circuit let a

156. *See id.* at 964.
157. *Id.* at 905–06.
158. *Id.*
159. *Id.* at 917.
160. *See id.* at 917–18.
161. *See In re* Deepwater Horizon, 739 F.3d 790, 821 (5th Cir. 2014). In dissent, Judge Garza challenged—as one might expect—the complete disregard for the causation issues. *See id.* at 827–29 (Garza, J., dissenting).
162. *See In re* Nat'l Football League Players Concuss. Inj. Litig., 821 F.3d 410, 448 (3d Cir. 2016).
163. *See id.* at 421.
164. *See id.* at 420–21.
165. *Id.* at 422.

certification stand because the settlement *eliminated* a significant barrier: causation.[166] The Third Circuit and the district court were particularly concerned about the litigation consequences for the class if causation were left unmitigated, but the settlement's elimination of the barrier ameliorated any trepidation.[167] *Amchem*, of course, emphatically declared that Rule 23(a) and (b)'s requirements demand heightened attention in the settlement context, but the Third Circuit's decision completely disregarded this essential command by allowing a settlement to erase a clear bar to certification.[168]

C. THE LESSON OF THESE DECISIONS

There is little doubt that the *Deepwater Horizon* and NFL cases presented significant public policy reasons for certification. The oil spill resulted in death, destruction of property, natural beauty, climate, and many more short- and long-term injuries.[169] The NFL's case ensured recovery for those with debilitating diagnoses.[170] In each case, defendants benefited from global settlements; the NFL, particularly, obtained a brief respite from the concussion-related controversies that recently have resurfaced and seem destined for future litigation.[171] Certification in these cases is a tempestuous proposition and likely evidence a microcosm of settlement class certifications weighing the *Amchem-Stephenson* debate.

In these cases, *Stephenson* is a proxy for an ideal of judicial leniency and empathy over the strict Rule 23 formalism espoused in *Amchem*. In each case, there is a feature of the settlement eliminating a barrier to certification. Nevertheless, these are pertinent examples of a *Stephenson* approach to settlement class certification, each of which evinced an opportunity for the Supreme Court to act. However, the Court has remained silent,[172] leading some to believe the mass tort settlement class may make a surprising return.[173]

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166. *See In re* Nat'l Football Players' Concuss. Inj. Litig., 307 F.R.D. 351, 395 (E.D. Pa. 2015).

167. *See id.* at 393; *Nat'l Football League*, 821 F.3d at 439–40.

168. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 619–20 (1997).

169. *See In re* Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mex., on Apr. 20, 2010, 910 F. Supp. 2d 891, 900 (E.D. La. 2012).

170. *See Nat'l Football League*, 821 F.3d at 423–24.

171. *See* Marcel Louis-Jacques, *Tua Tagovailoa expected to be interviewed as part of NFL-NFLPA investigation into QB's quick return from injury, sources say*, ESPN (Oct. 2, 2022),https://www.espn.com/nfl/story/_/id/34708808/tua-tagovailoa-expected-interviewed-part-nfl-nflpa-investigation-qb-quick-return-injury-sources-say [https://perma.cc/C6HX-H3SS] (describing a failure of the NFL related to its concussion protocols and expected changes to the protocol).

172. *See* BP Expl. & Prod., Inc. v. Lake Eugenie Land & Dev., Inc., 574 U.S. 1054, 1054 (2014); Gilchrist v. Nat'l Football League, 137 S. Ct. 591, 591 (2016);Armstrong v. Nat'l Football League, 137 S. Ct. 607, 607 (2016).

173. *See* Marcus, *supra* note 85, at 1596–97.

V. CONCLUSION: A NEEDED INTERVENTION BY THE RULES ENABLING ACT

A. A NEEDED INTERVENTION BY THE RULES ENABLING ACT

The Supreme Court's silence on settlement class actions is peculiar, especially amidst a decade of classwide resolution retrenchment.[174] Perhaps the Court's unwillingness to act is grounded in the same concerns underlying *Stephenson*: primarily, a lack of desire to upset settlements that promote the public welfare. Indeed, this understanding would help delineate between the Court's strict litigation class jurisprudence and its lackadaisical settlement class jurisprudence. Regardless of its reasons for inaction, the Court should avoid from this complicated issue in class action due process jurisprudence.

The call for Court action is particularly salient given recent class action decisions citing the Rules Enabling Act, a potential solution to abuses in the settlement class context.[175] The Act provides the Supreme Court "the power to prescribe general rules of practice and procedure" for the courts so long as the rules do not "abridge, enlarge or modify any substantive right."[176] Therefore, the Federal Rules of Civil Procedure are subject to the Act.[177]

While the Act has been discussed and relied upon in recent class action or class arbitration cases, *Amchem* is an early example of the Court considering the Act's reach in settlement classes.[178] Critically, *Amchem* noted that "Rule 23's requirements *must* be interpreted in keeping with … the Rules Enabling Act."[179] Specifically, the Court explained that "[c]ourts are not free to amend" the certification requirements "for a standard never adopted—that if a settlement is 'fair,' then certification is proper."[180]

The Court's language in *Amchem* clarifies that importing the fairness inquiry embodied in Rule 23(e) into the certification analysis violates the Rules Enabling Act, and it is easy to see why the Court reached that conclusion. At the very least,

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174. *See* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 234–38 (2013) (upholding a contractual provision waiving the right for class arbitration because failure to uphold it would violate the Rules Enabling Act); Comcast Corp. v. Behrend, 569 U.S. 27, 34 (2013) (holding a class was improperly certified under Rule 23); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 367 (2011) (holding that class certification improper for failing to meet Rule 23(a)'s commonality requirement and using a statistical model that violated the Rules Enabling Act); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011) (holding that requiring class arbitration be available to claimants is preempted by the Federal Arbitration Act).

175. *See* Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 455–58 (2016) (noting that a violation of the Rules Enabling Act occurs when parties are given different rights in the class context than they could assert in an individual action); *Italian Colors*, 570 U.S. at 234–35 (noting that permitting Rule 23 to overrule private arbitration waivers would violate the Rules Enabling Act); *Dukes*,564 U.S. at 367 (holdingthatremovinga defendant's right to individualized defenses by virtue of a class action violates the Rules Enabling Act).

176. 28 U.S.C. § 2072(a)–(b).

177. *See* Sibbach v. Wilson & Co., Inc., 312 U.S. 1, 7 (1941).

178. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613, 620–22 (1997).

179. *Id*. at 613 (emphasis added).

180. *Id*. at 620, 622.

importing a question of the settlement's fairness into the analysis "modifies" and "enlarges" the substantive right of due process by adding "a superseding direction" to the certification.[181] For both parties to a settlement, therefore, it can be easier than Rule 23(a) and 23(b) contemplated to certify a class and obtain financial and preclusive benefits than if fairness were the operative principle. While *Stephenson* might bring strong doctrinal or policy reasons for a more prominent role for fairness at certification, the Act exists to defend the rights of present parties and absent class members alike. If certification and preclusion are too easy, it can mix up the wrong class members in the action, a clear violation of due process.

Moreover, in the procedural context of *Stephenson*, the importation of fairness into collateral review is no less nefarious. *Post-hoc* review of a settlement as bearing on certification disrupts preclusion by "enlarging" class members' due process rights to include some notion of fairness as superseding the structural protections Rule 23 intended. Far worse, as seen in *Stephenson*, if fairness can reopen defendants' liability, defendants can be deprived of further monetary resources in complete disregard for Rule 23's protections.[182]

There is much to love about *Stephenson* and much to loathe about it. Similarly, for those hoping to open the class action to mass torts or other complex claims, the same is true for *Amchem*. However, the Court ought to continue its streak of relying on the Rules Enabling Act to stop abuses that may tend to prevent positive settlement classes by worrying defendants about the finality of their liability.[183] Although *Amchem* can be a harsh result, due process cannot and should not become a disfavored right by pursuing fairness to the detriment of the class action's continued vitality and utility.

B. RESOLVING *AMCHEM'S* DEFICIENCIES

The dictates of *Amchem* do exacerbate issues of class notice, especially in class settlements. Undoubtedly, even the most well-crafted notice might fall short of being understood by the average class member, as *Prudential* illustrates, without the benefit of mandated legal explanation under the aggregate settlement rule.[184] While mass torts portend certification issues, *Amchem* is not so confined to those actions. For instance, an antitrust action brought under uniform federal law where all individuals were similarly harmed by an overcharge typically results in class settlement.[185] In these instances, even where certification is likely without

181. *Id*. at 621.

182. *See* Issacharoff & Nagareda, *supra* note 146, at 1690 & n.128.

183. *See id*. at 1691.

184. *See* discussion *supra* SECTION III.C.

185. *See* Robin D. Adelstein & Eliot Turner, *US: Settling Class Actions*, GLOBAL COMPETITION REVIEW (Feb. 2, 2021), https://globalcompetitionreview.com/guide/the-settlements-guide/first-edition/article/us-settling-class-actions [https://perma.cc/FD4Q-3H3Z] (discussing how antitrust class actions often result in settlements).

considering the settlement, *Amchem's* disregard for the settlement at certification leaves a gap regarding its fairness to be reflexively dealt with by the court.[186] As *Prudential* illustrates, judicial notions of fairness at the final stage of the settlement process may not align with those of the average class member.[187]

Therefore, while it may make sense to expand the aggregate settlement rule to the class action context, there is some concern that its mandatory procedures inhibit the ability for welfare-maximizing mass settlements outside the class action.[188] Particularly, the vague nature of the aggregate settlement rule portends a serious risk of the abrogation of an entire settlement if a court finds a violation.[189] More troublesome, a perfectly valid settlement could be held up by *one client* insistent on a better deal.[190] Despite the obvious drawback to having a mandatory but vague standard—the denial of relief to even a properly constructed putative class—there has been significant debate over whether the aggregate settlement rule should be stricter or more relaxed.[191]

The concern over the aggregate settlement rule's future and efficacy likely outweighs any perceived benefit to the legal advice provided by the rule. However, it is still hard to ignore the manifest problems with class notice that create significant costs to individuals.[192] One particular result is to legislatively strengthen disclosure requirements under Rule 23. Legislative action in the class context is hardly a foreign concept. Indeed, when Congress began to distrust class action lawyers, Congress enacted the Class Action Fairness Act[193] to remedy perceived abuses.[194] In the asbestos context, Congress passed amendments to the Bankruptcy Code to streamline mass tort claims for financially distressed firms.[195] Even Justice Ginsburg, in her opinion in *Amchem*, admonished Congress to act once more to resolve issues of Rule 23's compatibility with mass tort claims.[196] Unfortunately, Congress ignored that request.[197]

Nevertheless, Congress's history suggests the seeds of action may only need watering. Although informed consent is too strict a procedure, Congress could impose at least some form of legal counseling for members of a putative class.

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186. *See supra* note 142.

187. *See supra* note 142.

188. *See* Katherine Dirks, *Ethical Rules of Conduct in the Settlement of Mass Torts: A Proposal to Revise Rule 1.8(g)*, 83 N.Y.U. L. REV. 501, 501–02 (2008).

189. *See id*. at 509–11.

190. *See id*. at 516.

191. *See id*. at 511–12.

192. *See generally* U.S. Fed. Trade Comm'n, *Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns*, 2, 45–79 (Sept. 2019) (analyzing study data on the efficacy of class notices and finding issues with class settlement notices to consumers).

193. 28 U.S.C. §§ 1332(d), 1453.

194. *See* Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1593, 1596–99 (2008).

195. *See* Dirks, *supra* note 188, at 521–23.

196. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613, 628–29 (1997).

197. *See* Dirks, *supra* note 188, at 507.

Rule 23(c)(2)(B) provides the relevant information to disclose the terms of a settlement,[198] but Congress could create a new fee arrangement applicable to all class action settlements to permit class members to seek non-class counsel legal advice on their options. Certainly, the imposition of fees is not unknown to Congress, which has already imposed a mandatory fee to all those convicted of a federal offense[199] to fund the Crime Victims Fund.[200] Whether the fees are raised in a similar fashion as the Crime Victims Fund, or are siphoned from the generous class counsel fees authorized by the court,[201] a funding provision to assist interested class members understand the implications of opting-out or signing onto a settlement is worthy of review.

Congress should strive to ameliorate the decision in *Amchem* without directly importing the distorting concept of fairness into the certification decision. By vesting individual class members with some authority to adjudge a potential settlement separate from the sterility of the judicial process, Congress can help correct Rule 23's cold shoulder to individual notions of fairness. In this way, Congress could help close the gap between *Amchem* and *Stephenson* while keeping courts focused on their objective role to certify class actions as both cohesive and fair.

198. Fed. R. Civ. P. 23(c)(2)(B)(i)–(vii).

199. 18 U.S.C. § 3013. The special assessment charged under § 3013 resulted by Congress's decision to impose fees to shore up crime victim protections from rising crime in the 1960s and 1970s. *See* Ndjuoh MehChu, *Nickels and Dimes? Rethinking the Imposition of Special Assessment Fees on Indigent Defendants*, 99 N.C. L. REV. 1477, 1493–95 & n.114 (2021). Certainly, Congress has shown an appetite for resolving public problems through the imposition of private fees.

200. *See* U.S. Off. for Victims of Crime, *Crime Victims Fund* (last modified Jan. 19, 2023), https://ovc.ojp.gov/about/crime-victims-fund [https://perma.cc/67JH-4ZYZ].

201. *See generally* Theodore Eisenberg, Geoffrey Miller & Roy Germano, *Attorneys' Fees in Class Actions 2009–2013*, 92 N.Y.U. L. REV. 937 (2008) (analyzing awards of fees in class actions across various case types and courts).