

FILED
SUPREME COURT
STATE OF WASHINGTON
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CLERK

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

CHAN HEALTHCARE GROUP, PS,

Petitioner,

v.

LIBERTY MUTUAL FIRST
INSURANCE and LIBERTY
MUTUAL INSURANCE
COMPANY, a foreign corporation
doing business in Washington,

Respondents.

No. 95416-0

**STATEMENT OF
ADDITIONAL
AUTHORITIES**

Comes now Petitioner Chan Healthcare Group who submits the

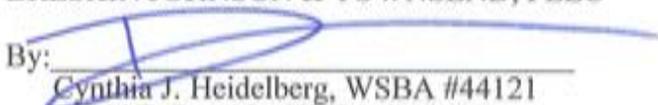
following additional authorities to the Court pursuant to RAP 10.8:

- *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 119 S.Ct. 2295 (1999)(holding that adequacy must be addressed independently of general fairness review of the settlement and that where certification takes place at the same time as settlement, heightened attention is warranted);
- *In Re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223 (2d. Cir. 2016) (holding that certifying court must consider whether differences between class representative and some class members might undermine class representative's incentive to vigorously prosecute their claims, and that conflicts must be addressed by "structural assurances" such as subclasses);
- *Juris v. Inamed Corp.*, 685 F.3d 1294 (11th Cir. 2012)(illustrating the type of express consideration and finding that would support a determination that the trial court considered and decided adequacy of representation, and

discussing the types of structural assurances, other than formal subclasses, that would assure adequate representation).

DATED this 2nd day of November, 2018

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on this date I electronically filed a true and correct copy of the foregoing with the Clerk of the Court and had it served on the following counsel of record:

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Dated: November 2, 2018



Leslie Boston, Paralegal

ATTACHMENT A

Ortiz v. Fibreboard Corp.

Supreme Court of the United States

December 8, 1998, Argued ; June 23, 1999, Decided

No. 97-1704

Reporter

527 U.S. 815 *; 119 S. Ct. 2295 **; 144 L. Ed. 2d 715 ***; 1999 U.S. LEXIS 4373 ****; 67 U.S.L.W. 4632; 99 Cal. Daily Op. Service 4953; 99 Daily Journal DAR 6383; 43 Fed. R. Serv. 3d (Callaghan) 691; 1999 Colo. J. C.A.R. 3596; 12 Fla. L. Weekly Fed. S 491

ESTEBAN ORTIZ, ET AL., PETITIONERS v.
FIBREBOARD CORPORATION, ET AL.

Prior History: [****1] ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Disposition: [134 F.3d 668](#), reversed and remanded.

Syllabus

Respondent Fibreboard Corporation, an asbestos manufacturer, was locked in litigation for decades. Plaintiffs filed a stream of personal injury claims against it, swelling throughout the 1980's and 1990's to thousands of claims for compensatory damages each year. Fibreboard engaged in litigation with its insurers, respondent Continental Casualty Company and respondent Pacific Indemnity Company, over insurance coverage for the personal injury claims. In 1990, a California trial court ruled against Continental and Pacific, and the insurers appealed. At around the same time, Fibreboard approached a group of asbestos plaintiffs' lawyers, offering to discuss a "global settlement" [****2] of Fibreboard's asbestos liability. Negotiations at one point led to the settlement of some 45,000 pending claims, and the parties eventually agreed upon \$ 1.535 billion as the key term of a "Global Settlement Agreement." Of this sum, \$ 1.525 billion would come from Continental and Pacific, which had joined the negotiations, while Fibreboard would contribute \$ 10 million, all but \$ 500,000 of it from other insurance proceeds. At plaintiffs' counsel's insistence, Fibreboard and its insurers then reached a backup settlement of the coverage dispute in the "Trilateral Settlement Agreement," under which the insurers agreed to provide Fibreboard with \$ 2 billion to defend against asbestos claimants and pay the winners, should the Global Settlement Agreement fail to win court

approval. Subsequently, a group of named plaintiffs filed the present action in Federal District Court, seeking certification for settlement purposes of a mandatory class that comprised three groups -- claimants who had not yet sued Fibreboard, those who had dismissed such claims and retained the right to sue in the future, and relatives of class members -- but excluded claimants who had actions pending against Fibreboard [****3] or who had filed and, for negotiated value, dismissed such claims, and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignancy. The District Court allowed petitioners and other objectors to intervene, held a fairness hearing under *Federal Rule of Civil Procedure 23(e)*, ruled that the threshold *Rule 23(a)* numerosity, commonality, typicality, and adequacy of representation requirements were met, and certified the class under *Rule 23(b)(1)(B)*. In response to intervenors' objections that the absence of a "limited fund" precluded *Rule 23(b)(1)(B)* certification, the District Court ruled that both the disputed insurance asset liquidated by the \$ 1.535 billion global settlement, and, alternatively, the sum of the value of Fibreboard plus the value of its insurance coverage, as measured by the insurance funds' settlement value, were relevant "limited funds." The Fifth Circuit affirmed both as to class certification and adequacy of settlement. Agreeing with the District Court's application of *Rule 23(a)*, the Court of Appeals found, *inter alia*, that there were no conflicts of interest sufficiently serious to undermine the adequacy of class counsel's [****4] representation. As to *Rule 23(b)(1)(B)*, the court approved the class certification on a "limited fund" rationale based on the threat to other class members' ability to receive full payment from Fibreboard's limited assets. This Court then decided [Amchem Products, Inc. v. Windsor, 521 U.S. 591, 138 L. Ed. 2d 689, 117 S. Ct. 2231](#), vacated the Fifth Circuit's judgment, and remanded for further consideration in light of that decision. The Fifth Circuit again affirmed the District Court's judgment on remand.

Held:

1. This Court need not resolve two threshold matters before proceeding to the nub of the case. First, petitioners call the class claims nonjusticiable under Article III, saying that this is a feigned action initiated by Fibreboard to control its future asbestos tort liability, with the vast majority of the exposure-only class members being without injury in fact and hence without standing to sue. While an Article III court ordinarily must be sure of its own jurisdiction before getting to the merits, [Steel Co. v. Citizens For Better Environment](#), 523 U.S. 83, 88-89, 140 L. Ed. 2d 210, 118 S. Ct. 1003, a Rule 23 question should be treated first because class certification issues are "logically antecedent" to Article III ****5 concerns, [Amchem, supra, at 612](#), and pertain to statutory standing, which may properly be treated before Article III standing, see [Steel Co., supra, at 92](#). Second, although petitioners are correct that the Fifth Circuit on remand fell short in its attention to *Amchem* in passing on the Rule 23(a) issues, these points are dealt with in the Court's review of the certification on the Fifth Circuit's "limited fund" theory under Rule 23(b)(1)(B). Pp. 11-13.

2. Applicants for contested certification of a mandatory settlement class on a limited fund theory under Rule 23(b)(1)(B) must show that the fund is limited by more than the agreement of the parties, and has been allocated to claimants belonging within the class by a process addressing the conflicting interests of class members. Pp. 13-30.

(a) In drafting Rule 23(b), the Civil Rules Advisory Committee sought to catalogue in functional terms those recurrent life patterns which call for mass litigation through representative parties. Rule 23(b)(1)(B) (read with subdivision (c)(2)) provides for certification of a class whose members have no right to withdraw, when "the prosecution of separate actions . . . would create ****6 a risk" of "adjudications with respect to individual [class] members . . . which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." Among the traditional varieties of representative suits encompassed by Rule 23(b)(1)(B) is the limited fund class action. In such a case, equity required absent parties to be represented, joinder being impractical, where individual claims to be satisfied from the one asset would, as a practical matter, prejudice the rights of absent claimants against a fund inadequate to pay them all. Pp. 13-19.

(b) The cases forming the limited fund class action's

pedigree as understood by Rule 23's drafters have a number of common characteristics, despite the variety of circumstances from which they arose. These characteristics show what the Advisory Committee must have assumed would be at least a sufficient set of conditions to justify binding absent members of a Rule 23(b)(1)(B) class, from which no one has the right to secede. In sum, mandatory class treatment through representative actions on a limited fund theory was ****7 justified with reference to a "fund" with a definitely ascertained limit that was inadequate to pay all claims against it, all of which was distributed to satisfy all those with claims based on a common theory of liability, by an equitable, pro rata distribution. Pp. 19-23.

(c) There are good reasons to treat the foregoing characteristics as presumptively necessary, and not merely sufficient, to satisfy the limited fund rationale for a mandatory class action. At the least, the burden of justification rests on the proponent of any departure from the traditional norm. Although Rule 23(b)(1)(B)'s text is open to a more lenient limited fund concept, the greater the leniency in departing from the historical model, the greater the likelihood of abuse in ways that are apparent when the limited fund criteria are applied to this case. The prudent course, therefore, is to presume that when subdivision (b)(1)(B) was devised to cover limited fund actions, the object was to stay close to the historical model. This limiting construction finds support in the Advisory Committee's expressions of understanding, which clearly did not contemplate that the mandatory class action codified in subdivision ****8 (b)(1)(B) would be used to aggregate unliquidated tort claims on a limited fund rationale. The construction also minimizes potential conflict with the Rules Enabling Act, which requires that rules of procedure "not abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b). See, e.g., [Amchem, supra, at 613](#). Finally, the Court's construction avoids serious constitutional concerns, including the [Seventh Amendment](#) jury trial rights of absent class members, and the due process principle that, with limited exceptions, one is not bound by a judgment *in personam* in litigation in which he is not a party, [Hansberry v. Lee](#), 311 U.S. 32, 40. Pp. 23-30, 85 L. Ed. 22, 61 S. Ct. 115.

3. The record on which the District Court rested its class certification did not support the essential premises of a mandatory limited fund class action. It did not demonstrate that the fund was limited except by the agreement of the parties, and it affirmatively allowed exclusions from the class and allocations of assets at

odds with the concept of limited fund treatment and the *Rule 23(a)* structural protections explained in *Amchem*. Pp. 30-44.

(a) The certification defect going to the most characteristic [****9] feature of a limited fund action was the uncritical adoption by both courts below of figures agreed upon by the parties in defining the fund's limits. In a settlement-only class action such as this, the settling parties must present not only their agreement, but evidence on which the district court may ascertain the fund's limits, with support in findings of fact following a proceeding in which the evidence is subject to challenge. Here, there was no adequate demonstration of the fund's upper limit. The "fund" comprised both Fibreboard's general assets and the insurance provided by the two policies. As to the general assets, the lower courts concluded that Fibreboard had a then-current sale value of \$ 235 million that could be devoted to the limited fund. While that estimate may have been conservative, at least the District Court heard evidence and made an independent finding at some point in the proceedings. The same, however, cannot be said for the value of the disputed insurance. Instead of independently evaluating potential insurance funds, the courts below simply accepted the \$ 2 billion Trilateral Settlement Agreement figure, concluding that where insurance coverage is disputed, [****10] it is appropriate to value the insurance asset at a settlement value. Such value may be good evidence of the maximum available if one can assume that parties of equal knowledge and negotiating skill agreed upon the figure through arms-length bargaining, unhindered by any considerations tugging against the interests of the parties ostensibly represented in the negotiation. No such assumption may be indulged in here, since at least some of the same lawyers representing the class also negotiated the separate settlement of 45,000 pending claims, the full payment of which was contingent on a successful global settlement agreement or the successful resolution of the insurance coverage dispute. Class counsel thus had great incentive to reach any global settlement that they thought might survive a *Rule 23(e)* fairness hearing, rather than the best possible arrangement for the substantially unidentified global settlement class. See *Amchem, supra*, 521 U.S. at 626-627. Pp. 30-36.

(b) The settlement certification also fell short with respect to the inclusiveness of the class and the fairness of distributions to those within it. The class excludes myriad claimants with causes of action, or foreseeable [****11] causes of action, arising from

exposure to Fibreboard asbestos. The number of those outside the class who settled with a reservation of rights may be uncertain, but there is no such uncertainty about the significance of the settlement's exclusion of the 45,000 inventory plaintiffs and the plaintiffs in the unsettled present cases, estimated at more than 53,000. A mandatory limited fund settlement class cannot qualify for certification when in the very negotiations aimed at a class settlement, class counsel agree to exclude what may turn out to be as much as a third of the claimants that negotiators thought might eventually be involved, a substantial number of whom class counsel represent. The settlement certification is likewise deficient as to the fairness of the fund's distribution among class members. First, a class including holders of present and future claims (some of the latter involving no physical injury and claimants not yet born) requires division into homogeneous subclasses under *Rule 23(c)(4)(B)*, with separate representation to eliminate conflicting interests of counsel. See *Amchem, supra*, at 627. No such procedure was employed here. Second, the class included [****12] those exposed to Fibreboard's asbestos products both before and after 1959, the year that saw the expiration of Fibreboard's Continental policy, which provided the bulk of the insurance funds for the settlement. Pre-1959 claimants accordingly had more valuable claims than post-1959 claimants, the consequence being a second instance of disparate interests within the certified class. While at some point there must be an end to reclassification with separate counsel, these two instances of conflict are well within *Amchem's* structural protection requirement. Pp. 36-41.

(c) A third contested feature that departs markedly from the limited fund antecedents is the ultimate provision for a fund smaller than the assets understood by the Fifth Circuit to be available for payment of the mandatory class members' claims. Most notably, Fibreboard was allowed to retain virtually its entire net worth. Given this Court's treatment of the two preceding certification deficiencies, there is no need to decide whether this feature would alone be fatal to the global settlement. To ignore it entirely, however, would be so misleading that the Court simply identifies the issue it raises, without purporting [****13] to resolve it at this time. Fibreboard listed its supposed entire net worth as a component of the total (and allegedly inadequate) assets available for claimants, but subsequently retained all but \$ 500,000 of that equity for itself. It hardly appears that such a regime is the best that can be provided for class members. Whether in a case where a settlement saves transaction costs that would never have gone into a class member's pocket in the absence of settlement, a

credit for some of the savings may be recognized as an incentive to settlement is at least a legitimate question, which the Court leaves for another day. Pp. 42-44.

[134 F.3d 668](#), reversed and remanded.

Counsel: Laurence H. Tribe argued the cause for petitioners.

Elihu Inselbuch argued the cause for respondents.

Judges: SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, THOMAS, and GINSBURG, JJ., joined. REHNQUIST, C. J., filed a concurring opinion, in which SCALIA and KENNEDY, JJ., joined. BREYER, J., filed a dissenting opinion, in which STEVENS, J., joined.

Opinion by: SOUTER

Opinion

[*821] [*2302] [***725] JUSTICE SOUTER delivered the opinion of the Court.

[1A]This case turns on the conditions for certifying a mandatory settlement class on a limited fund theory under *Federal Rule of Civil Procedure 23(b)(1)(B)*. [****14] We hold that applicants for contested certification on this rationale must show that the fund is limited by more than the agreement of the parties, and has been allocated to claimants belonging within the class by a process addressing any conflicting interests of class members.

I

Like *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997), this case is a class action prompted by the elephantine mass of asbestos cases, and our discussion in *Amchem* will suffice to show how this litigation defies customary judicial administration and calls for national legislation.¹

¹ “[This] is a tale of danger known in the 1930s, exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits beginning in the 1970s. On the basis of past and current filing data, and because of a latency period that may last as long as 40 years for some asbestos related diseases, a continuing stream of claims can be expected. The final toll of asbestos related injuries is unknown. Predictions have been made of 200,000 asbestos disease deaths before the year

In 1967, one of the first actions [***2303] for personal asbestos injury was filed in the United States District Court for the Eastern District [*822] of Texas against a group of asbestos manufacturers. App. to Pet. for Cert. 252a. In the 1970's and 1980's, plaintiffs' lawyers throughout the country, particularly in East Texas, honed the litigation of asbestos claims to the point of almost mechanical regularity, improving the forensic identification of diseases caused by asbestos, refining theories of liability, and often settling large inventories of cases. See D. Hensler, W. Felstiner, M. Selvin, & P. Ebener, *Asbestos in the [****15] Courts: The Challenge of Mass Toxic Torts* vii (1985); McGovern, *Resolving Mature Mass Tort Litigation*, [69 B. U. L. Rev. 659, 660-661 \(1989\)](#); see also App. to Pet. for Cert. 253a.

[****16] Respondent Fibreboard Corporation was a defendant in the 1967 action. Although it was primarily a timber company, from the 1920's through 1971 the company manufactured a variety of products containing asbestos, mainly for high-temperature industrial applications. As the tide of asbestos litigation rose, Fibreboard found itself litigating on two fronts. On one, plaintiffs were filing a stream of personal injury claims against it, swelling throughout the 1980's and 1990's to thousands of new claims for compensatory damages each year. *Id.* at 265a; App. 1040a. On the second front, Fibreboard [***726] was battling for funds to pay its tort claimants. From May, 1957, through March, 1959, respondent Continental Casualty Company had provided Fibreboard with a comprehensive general liability policy with limits of \$ 1 million per occurrence, \$ 500,000 per claim, and no aggregate limit. Fibreboard also claimed that respondent Pacific Indemnity Company had insured it from 1956 to 1957 under a similar policy. App. to Pet. for Cert. 267a-268a.

2000 and as many as 265,000 by the year 2015.

“The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.” *Amchem Products, Inc. v. Windsor*, 521 U.S. at 598 (quoting Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation 2-3 (Mar. 1991) (hereinafter Report)). We noted in *Amchem* that the Judicial Conference Ad Hoc Committee on Asbestos Litigation in 1991 had called for “federal legislation creating a national asbestos dispute-resolution scheme.” *Ibid.* (citing Report 3, 27-35 (Mar. 1991)). To date Congress has not responded.

Beginning in 1979, Fibreboard was locked in coverage litigation with Continental and Pacific in a California state trial court, which in 1990 held Continental [****17] and Pacific responsible for indemnification as to any claim by a claimant exposed to Fibreboard asbestos products prior to their policies' respective [**823] expiration dates. *Id.* at 268a-269a. The decree also required the insurers to pay the full cost of defense for each claim covered. *Ibid.* The insurance companies appealed.

With asbestos case filings continuing unabated, and its secure insurance assets almost depleted, Fibreboard in 1988 began a practice of "structured settlement," paying plaintiffs 40 percent of the settlement figure up front with the balance contingent upon a successful resolution of the coverage dispute.²

By 1991, however, the pace of filings forced Fibreboard to start settling cases entirely with the assignments of its rights against Continental, with no initial payment. To reflect the risk that Continental might prevail in the coverage dispute, these assignment agreements generally carried a figure about twice the nominal amount of earlier settlements. Continental challenged Fibreboard's right to make unilateral assignments, [**2304] but in 1992 a California state court ruled for Fibreboard in that dispute.³

[****18]

Meanwhile, in the aftermath of a 1990 Federal Judicial Center conference on the asbestos litigation crisis,

Fibreboard approached a group of leading asbestos plaintiffs' lawyers, offering to discuss a "global settlement" of its asbestos [**824] personal-injury liability. Early negotiations bore relatively little fruit, save for the December 1992 settlement by assignment of a significant [****19] inventory of pending claims. This settlement brought Fibreboard's deferred settlement obligations to more than \$ 1.2 billion, all contingent upon victory over Continental on the scope of coverage and the validity of the settlement assignments.

In February 1993, after Continental had lost on both issues at the trial level, and thus faced the possibility of practically unbounded liability, it too joined the global settlement negotiations. Because Continental conditioned its part in any settlement on a [***727] guarantee of "total peace," ensuring no unknown future liabilities, talks focused on the feasibility of a mandatory class action, one binding all potential plaintiffs and giving none of them any choice to opt out of the certified class. Negotiations continued throughout the spring and summer of 1993, but the difficulty of settling both actually pending and potential future claims simultaneously led to an agreement in early August to segregate and settle an inventory of some 45,000 pending claims, being substantially all those filed by one of the plaintiffs' firms negotiating the global settlement. The settlement amounts per claim were higher than average, with one-half due on closing and [****20] the remainder contingent upon either a global settlement or Fibreboard's success in the coverage litigation. This agreement provided the model for settling inventory claims of other firms.

With the insurance companies' appeal of the consolidated coverage case set to be heard on August 27, the negotiating parties faced a motivating deadline, and about midnight before the argument, in a coffee shop in Tyler, Texas, the negotiators finally agreed upon \$ 1.535 billion as the key term of a "Global Settlement Agreement." \$ 1.525 billion of this sum would come from Continental and Pacific, in the proportion established by the California trial court in the coverage case, [**825] while Fibreboard would contribute \$ 10 million, all but \$ 500,000 of it from other insurance proceeds, App. 84a. The negotiators also agreed to identify unsettled present claims against Fibreboard and set aside an as-then unspecified fund to resolve them, anticipating that the bulk of any excess left in that fund would be transferred to class claimants. *Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505, 517 (ED Tex. 1995). The next day, as a hedge against the possibility that the Global Settlement Agreement might fail, [****21] plaintiffs' counsel

² Because Fibreboard's insurance policy with Continental expired in 1959, before the global settlement the settlement value of claims by victims exposed to Fibreboard's asbestos prior to 1959 was much higher than for victims exposed after 1959, where the only right of recovery was against Fibreboard itself. See *In re Asbestos Litigation*, 90 F.3d 963, 1012-1013 (CA5 1996) (Smith, J., dissenting).

³ *Id.* at 969, and n. 1 (citing *Andrus v. Fibreboard*, No. 614747-3 (Sup. Ct., Alameda Cty. June 1, 1992)). Continental appealed, and, after the Global Settlement Agreement was reached in this case, but before the fairness hearing, see *infra*, at 8, a California appellate court reversed. See 90 F.3d at 969, and n. 1 (citing *Fibreboard Corp. v. Continental Casualty Co.*, No. A059716 (Cal. App., Oct. 19, 1994)). See 90 F.3d at 969 and n. 1. Continental and Fibreboard had each brought actions seeking to establish (or challenge) the validity of Fibreboard's assignment-settlement program, but only *Andrus* produced a definitive ruling as opposed to a settlement. See App. to Pet. for Cert. 288a-290a.

insisted as a condition of that agreement that Fibreboard and its two insurers settle the coverage dispute by what came to be known as the "Trilateral Settlement Agreement." The two insurers agreed to provide Fibreboard with funds eventually set at \$ 2 billion to defend against asbestos claimants and pay the winners, should the Global Settlement Agreement fail to win approval. [Id. at 517, 521](#); see also App. to Pet. for Cert. 492a. ⁴

[**2305] On [****22] September 9, 1993, as agreed, a group of named plaintiffs filed an action in the United States District Court for the Eastern District of Texas, seeking certification for settlement purposes of a mandatory class comprising three groups: all persons with personal injury claims against Fibreboard for asbestos exposure who had not yet brought suit or settled their claims before the previous August 27; those who had dismissed such a claim but retained the right to bring a future action against Fibreboard; and "past, present and future spouses, parents, children, and other relatives" of class members [**826] exposed [***728] to Fibreboard asbestos. ⁵

⁴Two related settlement agreements accompanied the Global and Trilateral Settlement Agreements. The first, negotiated with representatives of Fibreboard's major codefendants, preserved credit rights for codefendant third parties. [In re Asbestos Litigation, 90 F.3d 963, 973 \(CA5 1996\)](#); the second provided that final approval of the Global Settlement Agreement would not constitute a "settlement" under the Longshore and Harbor Workers' Compensation Act, [33 U.S.C. § 933\(g\), 162 F.R.D. at 521-522](#). Neither of these agreements is before the Court.

⁵The final judgment regarding class certification in the District Court defined the class as follows:

"(a) All persons (or their legal representatives) who prior to August 27, 1993 were exposed, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member or any other person), to asbestos or to asbestos-containing products for which Fibreboard may bear legal liability and who have not, before August 27, 1993, (i) filed a lawsuit for any asbestos related personal injury, or damage, or death arising from such exposure in any court against Fibreboard or persons or entities for whose actions or omissions Fibreboard bears legal liability; or (ii) settled a claim for any asbestos-related personal injury, or damage, or death arising from such exposure with Fibreboard or with persons or entities for whose actions or omissions Fibreboard bears legal liability;

"(b) All persons (or their legal representatives) exposed to

The class did not include claimants with actions presently pending against Fibreboard or claimants "who filed and, for cash payment or some other negotiated value, dismissed claims against Fibreboard, and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignancy." [Id. \[**827\] at 534a-535a](#). The complaint pleaded personal injury claims against Fibreboard, and, as justification for class certification, relied on the shared necessity of ensuring insurance funds sufficient for compensation. [Id. at 552a-569a](#). After Continental [****23] and Pacific had obtained leave to intervene as party-defendants, the District Court provisionally granted class certification, enjoined commencement of further separate litigation against Fibreboard by class members, and appointed a guardian ad litem to review the fairness of the settlement to the class members. See [In re Asbestos Litigation, 90 F.3d 963, 972 \(CA5 1996\)](#).

[****24] As finally negotiated, the Global Settlement Agreement provided that in exchange for full releases from class members, Fibreboard, Continental, and Pacific would establish a trust to process and pay class members' asbestos personal injury and death claims. Claimants seeking compensation would be required to try to settle with the trust. If initial settlement attempts failed, claimants would have to proceed to mediation, arbitration, and a mandatory settlement conference.

asbestos or to asbestos-containing products, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member or any other person), who dismissed an action prior to August 27, 1993 without prejudice against Fibreboard, and who retain the right to sue Fibreboard upon development of a nonmalignant disease process or a malignancy; provided, however, that the Settlement Class does not include persons who filed and, for cash payment or some other negotiated value, dismissed claims against Fibreboard, and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignancy; and

"(c) All past, present and future spouses, parents, children and other relatives (or their legal representatives) of the class members described in paragraphs (a) and (b) above, except for any such person who has, before August 27, 1993, (i) filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) or (b) above in any court against Fibreboard (or against entities for whose actions or omissions Fibreboard bears legal liability), or (ii) settled a claim for the asbestos-related personal injury, or damage, or death of a class member described in (a) or (b) above with Fibreboard (or with entities for whose actions or omissions Fibreboard bears legal liability)." App. to Pet. for Cert. 534a-535a.

Only after exhausting that process could claimants go to court against the trust, subject to a limit of \$ 500,000 per claim, with punitive damages and prejudgment interest barred. Claims resolved without litigation would be discharged over three years, while judgments would be paid out over a 5- to 10-year period. The Global Settlement [***729] Agreement also contained spendthrift provisions to conserve the trust, and provided for paying more serious claims first in the event of a shortfall in any given year. [Id. at 973.](#)

After an extensive campaign to give notice of the pending settlement to potential class [**2306] members, the District Court allowed groups of objectors, including petitioners here, to intervene. After an 8-day [****25] fairness hearing, the District Court certified the class and approved the settlement as "fair, adequate, and reasonable," under *Rule 23(e)*. [Ahearn, 162 F.R.D. at 527.](#) Satisfied that the requirements of *Rule [828] 23(a)* were met, [id. at 523-526.](#)⁶ the District Court certified the class under *Rule 23(b)(1)(B)*.⁷

citing the risk that Fibreboard might lose or fare poorly on appeal of the coverage case or lose the assignment-settlement dispute, leaving it without funds to pay all claims. [Id. at 526.](#) The "allowance of individual adjudications by class members," the District Court concluded, "would have destroyed the opportunity to compromise the insurance coverage dispute by creating the settlement fund, and would have exposed the class members to the very risks that the settlement addresses." [Id. at 527.](#) In response to intervenors' objections that the absence of a "limited fund" precluded

certification under *Rule 23(b)(1)(B)*, the District Court ruled that although the subdivision is not so restricted, if it were, this case would qualify. It found both the "disputed insurance asset liquidated by the \$ 1.535 billion Global Settlement," and, alternatively, "the sum of the [****26] value of Fibreboard plus the value of its insurance coverage," as measured by the insurance funds' settlement value, to be relevant "limited funds." App. to Pet. for Cert. 491a-492a.

[****27] On appeal, the Fifth Circuit affirmed both as to class certification and adequacy of settlement. [In re Asbestos Litigation, \[829\] supra.](#)⁸

Agreeing with the District Court's application of *Rule 23(a)*, the Court of Appeals found that there was commonality in class members' shared interest in securing and equitably distributing maximum possible settlement funds, [***730] and that the representative plaintiffs were sufficiently typical both in sharing that interest and in basing their claims on the same legal and remedial theories that absent class members might raise. [90 F.3d at 975-976.](#) The Fifth Circuit also thought that there were no conflicts of interest sufficiently serious to undermine the adequacy of class counsel's representation. [Id. at 976-982.](#)⁹

As to *Rule 23(b)(1)(B)*, the Court approved the class certification on a "limited fund" rationale based on the threat to "the ability of other members of the class to receive full payment for their injuries from Fibreboard's limited assets." *Ibid.*¹⁰

The Court of Appeals cited expert testimony that

⁶ *Rule 23(a)* states four threshold requirements applicable to all class actions: (1) numerosity (a 'class [so large] that joinder of all members is impracticable'); (2) commonality ('questions of law or fact common to the class'); (3) typicality (named parties' claims or defenses 'are typical . . . of the class'); and (4) adequacy of representation (representatives 'will fairly and adequately protect the interests of the class')." [Amchem Products, Inc. v. Windsor, 521 U.S. 591, 613, 138 L. Ed. 2d 689, 117 S. Ct. 2231 \(1997\).](#)

⁷ *Rule 23(b)(1)(B)* provides that "an action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: (1) the prosecution of separate actions by or against individual members of the class would create a risk of . . . (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests."

⁸ Continental and Pacific also filed a class action against a defendant class essentially identical to the plaintiff class in the Global Settlement Agreement as well as a class of third parties with asbestos-related claims against Fibreboard, seeking a declaration that the Trilateral Settlement Agreement was fair and reasonable. The District Court certified the class and approved the Trilateral Settlement Agreement, which the Fifth Circuit consolidated with the review of the case below and affirmed. See [In re Asbestos Litigation, 90 F.3d at 974, 991-993.](#) That decision is now final and is not before this Court.

⁹ As the objectors did not challenge the adequacy of representation of class representatives, the Fifth Circuit did not consider the issue. [Id. at 976, n.10.](#) Likewise, no party raised concerns with *Rule 23(a)*'s numerosity requirement.

¹⁰ Abandoning the District Court's alternative rationale, the Court of Appeals rested entirely on a limited fund theory.

Fibreboard faced enormous potential liabilities and defense costs that would likely equal or exceed the amount of damages paid out, [****28] and concluded that even combining Fibreboard's value of some \$ 235 million with the \$ 2 billion provided in the Trilateral Settlement Agreement, the company would be [**2307] unable to pay all valid claims against it within five to nine years. *Ibid.* Judge Smith dissented, arguing among other things that the [*830] majority had skimmed on serious due process concerns, had glossed over problems of commonality, typicality, and adequacy of representation, and had ignored a number of justiciability issues. See generally *id.* at 993-1026.¹¹

[****29]

Shortly thereafter, this Court decided *Amchem* and proceeded to vacate the Fifth Circuit's judgment and remand for further consideration in light of that decision. 521 U.S. 1114 (1997). On remand, the Fifth Circuit again affirmed, in a brief *per curiam* opinion, distinguishing *Amchem* on the grounds that the instant action proceeded under *Rule 23(b)(1)(B)* rather than (b)(3), and did not allocate awards according to the nature of the claimant's injury. *In re Asbestos Litigation*, 134 F.3d 668, 669-670 (1998). Again citing the findings on certification [****30] under *Rule 23(b)(1)(B)*, the Fifth Circuit affirmed as "incontestable" the District Court's conclusion that the terms of the subdivision had been met. *Id.* at 670. The Court of Appeals acknowledged *Amchem's* admonition that settlement class actions may not proceed unless the requirements of *Rule 23(a)* are met, but noted that the District Court had made extensive findings supporting its *Rule 23(a)* determinations. *Ibid.* Judge Smith again dissented, reiterating his previous concerns, and argued specifically that the District Court erred in certifying the class under *Rule 23(b)(1)(B)* on a "limited fund" theory because the only limited fund in the case was a creature of the settlement itself. 134 F.3d at 671-674.

We granted certiorari, 524 U.S. ____ (1998), and now reverse.

[**731] II

[1B] [2]The nub of this case is the certification of the class under *Rule 23(b)(1)(B)* on a limited fund rationale, but before we reach that issue, there are two threshold

matters. First, [*831] petitioners call the class claims nonjusticiable under Article III, saying that this is a feigned action initiated by Fibreboard to control its future asbestos tort liability, with the "vast majority" of the "exposure-only" class [****31] members being without injury in fact and hence without standing to sue. Brief for Petitioners 44-50. Ordinarily, of course, this or any other Article III court must be sure of its own jurisdiction before getting to the merits. *Steel Co. v. Citizens For Better Environment*, 523 U.S. 83, 88-89, 140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998). But the class certification issues are, as they were in *Amchem*, "logically antecedent" to Article III concerns, 521 U.S. at 612, and themselves pertain to statutory standing, which may properly be treated before Article III standing, see *Steel Co.*, *supra*, at 92. Thus the issue about *Rule 23* certification should be treated first, "mindful that [the Rule's] requirements must be interpreted in keeping with Article III constraints" *Amchem*, *supra*, 521 U.S. at 612-613.

Petitioners also argue that the Fifth Circuit on remand disregarded *Amchem* in passing on the *Rule 23(a)* issues of commonality, typicality, and adequacy of representation. Brief for Petitioners 13-22. We agree that in reinstating its affirmance of the District Court's certification decision, the Fifth Circuit fell short in its attention to *Amchem's* explanation of the governing legal standards. [****32] Two aspects in particular of the District Court's certification should have received more detailed treatment by the Court of Appeals. First, the District Court's enquiry into both commonality and typicality focused almost entirely on the terms of the settlement. See *Ahearn*, 162 F.R.D. at 524.¹²

[**2308] Second, and more significantly, the District Court took no steps at the outset to ensure that the potentially conflicting interests of [*832] easily identifiable categories of claimants be protected by provisional certification of subclasses under *Rule 23(c)(4)*, relying instead on its post-hoc findings at the fairness hearing that these subclasses in fact had been adequately represented. As will be seen, however, these points will reappear when we review the certification on the Court of Appeals's "limited fund"

¹²In *Amchem*, the Court found that class members' shared exposure to asbestos was insufficient to meet the demanding predominance requirements of *Rule 23(b)(3)*. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623-624, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997). We left open the possibility, however, that such commonality might suffice for the purposes of *Rule 23(a)*. *Ibid.*

¹¹The Fifth Circuit denied rehearing en banc, with Judge Smith, joined by five other Circuit Judges, dissenting. *In re Asbestos Litigation*, 101 F.3d 368, 369 (1996).

theory under *Rule 23(b)(1)(B)*. We accordingly turn directly to that.

[****33] III

A

Although representative suits have been recognized in various forms since the earliest days of English law, see generally S. Yeazell, *From Medieval Group Litigation to the Modern Class Action* (1987); see also Marcin, [***732] *Searching for the Origin of the Class Action*, 23 *Cath. U. L. Rev.* 515, 517-524 (1973), class actions as we recognize them today developed as an exception to the formal rigidity of the necessary parties rule in equity, see Hazard, Gedid, & Sowle, *An Historical Analysis of the Binding Effect of Class Suits*, [146 U. Pa. L. Rev.](#) 1849, 1859-1860 (1998) (hereinafter Hazard, Gedid, & Sowle), as well as from the bill of peace, an equitable device for combining multiple suits, see Z. Chafee, *Some Problems of Equity* 161-167, 200-203 (1950). The necessary parties rule in equity mandated that "all persons materially interested, either as plaintiffs or defendants in the subject matter of the bill ought to be made parties to the suit, however numerous they may be." *West v. Randall*, 29 *F. Cas.* 718, 721 (No. 17,424) (CC RI) (1820) (Story, J.). But because that rule would at times unfairly deny recovery to the party before the court, equity developed exceptions, among them [****34] one to cover situations "where the parties are very numerous, and the court perceives, that it will be almost impossible to bring them all before the court; or where the question is of general interest, and a few may sue for the benefit of the whole; or where the parties form a part of a voluntary association [*833] for public or private purposes, and may be fairly supposed to represent the rights and interests of the whole" *Id.* at 722; see J. Story, *Commentaries on Equity Pleadings* § 97 (J. Gould 10th rev. ed. 1892); F. Calvert, *A Treatise upon the Law Respecting Parties to Suits in Equity* 17-29 (1837) (hereinafter Calvert, *Parties to Suits in Equity*). From these roots, modern class action practice emerged in the 1966 revision of *Rule 23*. In drafting *Rule 23(b)*, the Advisory Committee sought to catalogue in "functional" terms "those recurrent life patterns which call for mass litigation through representative parties." Kaplan, *A Prefatory Note*, 10 *B. C. Ind. & Com. L. Rev.* 497 (1969).

Rule 23(b)(1)(B) speaks from "a vantage point within the class, [from which the Advisory Committee] spied out situations where lawsuits conducted with individual members of the class would [****35] have the practical

if not technical effect of concluding the interests of the other members as well, or of impairing the ability of the others to protect their own interests." Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (I), 81 *Harv. L. Rev.* 356, 388 (1967) (hereinafter Kaplan, *Continuing Work*). Thus, the subdivision (read with subdivision (c)(2)) provides for certification of a class whose members have no right to withdraw, when "the prosecution of separate actions . . . would create a risk" of "adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." *Fed. Rule Civ. Proc. 23(b)(1)(B)*.¹³

Classic examples [*834] of such a risk of impairment [***733] may, for example, [***2309] be found in suits brought to reorganize fraternal-benefit societies, see, e.g., *Supreme Tribe of Ben-Hur v. Cauble*, 255 *U.S.* 356, 65 *L. Ed.* 673, 41 *S. Ct.* 338 (1921); actions by shareholders to declare a dividend or otherwise to "fix [their] rights," Kaplan, *Continuing Work* 388; and actions charging [****36] "a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class" of beneficiaries, requiring an accounting or similar procedure "to restore the subject of the trust," *Advisory Committee's Notes on Fed. Rule Civ. Proc. 23*, 28 *U.S.C. App.*, p. 696 (hereinafter *Adv. Comm. Notes*). In each of these categories, the shared character of rights claimed or relief awarded entails that any individual adjudication by a class member disposes of, or substantially affects, the interests of absent class members.

Among the traditional varieties of representative [****37] suit encompassed by *Rule 23(b)(1)(B)* were those involving "the presence of property which called for distribution or management," J. Moore & J. Friedman, 2 *Federal Practice* 2240 (1938) (herein after Moore & Friedman). One recurring type of such suits was the limited fund class action, aggregating "claims . . . made by numerous persons against a fund

¹³ In contrast to class actions brought under subdivision (b)(3), in cases brought under subdivision (b)(1), *Rule 23* does not provide for absent class members to receive notice and to exclude themselves from class membership as a matter of right. See 1 H. Newberg & A. Conte, *Class Actions* § 4.01, p. 4-6 (3d ed. 1992) (hereinafter *Newberg*). It is for this reason that such cases are often referred to as "mandatory" class actions.

insufficient to satisfy all claims." Adv. Comm. Notes 697; cf. Newberg § 4.09, at 4-33 ("Classic" limited fund class actions "include claimants to trust assets, a bank account, insurance proceeds, company assets in a liquidation sale, proceeds of a ship sale in a maritime accident suit, and others").¹⁴

The Advisory Committee cited *Dickinson v. [835] Burnham*, 197 F.2d 973 (CA2), cert. denied, 344 U.S. 875, 97 L. Ed. 678, 73 S. Ct. 169 (1952), as illustrative of this tradition. In *Dickinson*, investors hoping to save a failing company had contributed some \$ 600,000, which had been misused until nothing was left but a pool of secret profits on a fraction of the original investment. In a class action, the District Court took charge of this fund, subjecting it to a constructive trust for division among subscribers who demonstrated [***734] their claims, in amounts proportional [****38] to each class member's percentage of all substantiated claims. 197 F.2d at 978.¹⁵

The Second Circuit approved the class action and the distribution of the entire pool to claimants, noting that "although none of the contributors has been paid in full,

¹⁴ Indeed, Professor Kaplan, reporter to the Advisory Committee's 1966 revision of Rule 23, commented in a letter to another member of the Advisory Committee that the phrase "impair or impede the ability of the other members to protect their interests" is "redolent of claims against a fund." Letter from Benjamin Kaplan to John P. Frank, Feb. 7, 1963, Congressional Information Service Records of the U.S. Judicial Conference, Committee on Rules of Practice and Procedure 1935-1988, No. CI-6312-31, p. 2.

Some fund-related class actions involved claims for the creation or preservation of a specific fund subject to the interests of numerous claimants. See, e.g., *City & County of San Francisco v. Market Street R. Co.*, 95 Cal. App. 2d 648, 213 P.2d 780 (1950). The rationale in such cases for representative plaintiffs suing on behalf of all similarly situated potential parties was that benefits arising from the action necessarily inured to the class as a whole. Another type of fund case involved the adjudication of the rights of all participants in a fund in which the participants had common rights. See, e.g., *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662, 59 L. Ed. 1165, 35 S. Ct. 692 (1915); *Supreme Council of Royal Arcanum v. Green*, 237 U.S. 531, 59 L. Ed. 1089, 35 S. Ct. 724 (1915); *Hartford Life Ins. Co. v. Barber*, 245 U.S. 146, 62 L. Ed. 208, 38 S. Ct. 54 (1917); see also *Smith v. Swormstedt*, 57 U.S. 288, 16 HOW 288, 14 L. Ed. 942 (1854). In such cases, regardless of the size of any individual claimant's stake, the adjudication would determine the operating rules governing the fund for all participants. This category is more

no one . . . now asserts or suggests that they should have full recovery . . . as on an ordinary tort liability for conspiracy and defrauding. The court's power of disposition over the fund was therefore absolute [836] and final." *Id.* at 980.¹⁶

As the [**2310] Advisory Committee recognized in describing *Dickinson*, equity required absent parties to be represented, joinder being impractical, where individual claims to be satisfied from the one asset would, as a practical matter, prejudice the rights of absent claimants against a fund inadequate to pay them all. [****39]

[****40] Equity, of course, recognized the same necessity to bind absent claimants to a limited fund when no formal imposition of a constructive trust was entailed. In *Guffanti v. National Surety Co.*, 196 N.Y. 452, 458, 90 N.E. 174, 176 (1909), for example, the defendant received money to supply steamship tickets and had posted a \$ 15,000 bond as required by state law. He converted to personal use funds collected from more than 150 ticket purchasers, was then adjudged

analogous in modern practice to class actions seeking structural injunctions and is not at issue in this case.

¹⁵ The District Court in *Dickinson*, as was the usual practice in such cases, distributed the limited fund only after notice had been given to all class members, allowing them to come into the suit, prove their claim, and share in the recovery. See 197 F.2d at 978; see also Adv. Comm. Notes 697 (describing limited fund class actions as involving an "action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund").

¹⁶ As *Dickinson* demonstrates, the immediate precursor to the type of limited fund class action invoked in this case was a subset of "hybrid" class actions under the 1938 version of **Rule 23**. Cf. 1 Newberg § 1.09, at 1-25. The original **Rule 23** categorized class actions by "the character of the right sought to be enforced for or against the class," dividing such actions into "(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it; (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought." *Fed. Rule Civ. Proc. 23(a)* (1938 ed., Supp. V). See Moore & Friedman 2240; see also Moore & Cohn, Federal Class Actions, 32 Ill. L. Rev. 307, 317-318 (1937); Moore, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 Geo. L. J. 551, 574 (1937).

bankrupt, and absconded. One of the defrauded ticket purchasers sued the surety in equity on behalf of himself and all others like him. Over the defendant's objection, the New York Court of Appeals sustained the equitable class suit, citing among other considerations the fact that all recovery had to come from a "limited fund out of which the aggregate recoveries must be sought" that was inadequate to pay all claims, and subject to pro rata distribution. [Id. at 458, 90 N.E. at 176](#). See Hazard, Gedid, & Sowle 1915 ("[*Guffanti*] [*837] explained that when a debtor's assets were less than the total of the creditors' claims, a binding class action was not only permitted but was required; otherwise some creditors (the [****41] parties) would be paid and others (the absentees) would not"). See also [Morrison v. Warren 174 Misc. 233, 234, 20 N.Y.S.2d 26, 27 \(Sup. Ct. N. Y. Cty. 1940\)](#) (suit on behalf of more than 400 beneficiaries of an insurance policy following [*735] a fire appropriate where "the amount of the claims . . . greatly exceeds the amount of the insurance"); [National Surety Co. v. Graves, 211 Ala. 533, 534, 101 So. 190 \(1924\)](#) (suit against a surety company by stockholders "for the benefit of themselves and all others similarly situate who will join the suit" where it was alleged that individual suits were being filed on surety bonds that "would result in the exhaustion of the penalties of the bonds, leaving many stockholders without remedy").

[Ross v. Crary, 1 Paige Ch. 416, 417-418 \(N.Y. Ch. 1829\)](#), presents the concept of the limited fund class action in another incarnation. "Divers suits for general legacies," [id. at 417](#), were brought by various legatees against the executor of a decedent's estate. The Ross court stated that where "there is an allegation of a deficiency of the fund, so that an account of the estate is necessary," the court will "direct an account [****42] in one cause only" and "stay the proceedings in the others, leaving all the parties interested in the fund, to come in under the decree." [Id. at 417-418](#). Thus, in equity, legatee and creditor bills against the assets of a decedent's estate had to be brought on behalf of all similarly situated claimants where it was clear from the pleadings that the available portion of the estate could not satisfy the aggregate claims against it.¹⁷

¹⁷In early creditors' bills, for example, equity would order a master to call for all creditors to prove their debts, to take account of the entire estate, and to apply the estate in payment of the debts. See 1 J. Story, Commentaries on Equity Jurisprudence §§ 547, 548 (l. Redfield 8th rev. ed. 1861). This decree, with its equitable benefit and incorporation of all

[*838] [****43] [**2311] B

[3A]The cases forming this pedigree of the limited fund class action as understood by the drafters of *Rule 23* have a number of common characteristics, despite the variety of circumstances from which they arose. The points of resemblance are not necessarily the points of contention resolved in the particular cases, but they show what the Advisory Committee must have assumed would be at least a sufficient set of conditions to justify binding absent members of a class under *Rule 23(b)(1)(B)*, from which no one has the right to secede.

The first and most distinctive characteristic is that the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximums, demonstrate the inadequacy of the fund to pay all the claims. The concept driving this type of suit was insufficiency, which alone justified the limit on an early feast to avoid a later famine. See, e.g., [Guffanti, supra, at 457, 90 N.E. at 176](#) ("The total amount of the claims exceeds the penalty of the bond A just and equitable payment from the bond [***736] would be a distribution *pro rata* upon the amount of the several embezzlements. Unless in a case like this the [****44] amount [*839] of the bond is so distributed among the persons having claims which are secured thereby, it must necessarily result in a scramble for precedence in payment, and the amount of the bond may be paid to the favored, or to those first obtaining knowledge of the embezzlements"); [Graves, supra, at 534, 101 So. at 190](#) ("The primary equity of the bill is the adjustment of

creditors was not, however, available when the executor of the estate admitted assets sufficient to cover its debts, because where assets were not limited, no prejudice to the other creditors would result from the simple payment of the debt to the creditor who brought the bill. See [Woodgate v. Field, 2 Hare 211, 213, 67 Eng. Rep. 88, 89 \(Ch. 1842\)](#) ("The reason for . . . the usual form of decree . . . has no application where assets are admitted, for the executor thereby makes himself liable to the payment of the debt. In such a case, the other creditors cannot be prejudiced by a decree for payment of the Plaintiff's debt; and the object of the special form of the decree in a creditors' suit fails"); see also [Hallett v. Hallett, 2 Paige 15, 21 \(N. Y. 1829\)](#) ("If by the answer of the defendant [in a creditors' or legatees' suit] it appears there will be a deficiency of assets so that all the creditors cannot be paid in full, or that there must be an abatement of the complainant's legacy, the court will make a decree for the general administration of the estate, and a distribution of the same among the several parties entitled thereto, agreeable to equity").

claims and the equitable apportionment of a fund provided by law, which is insufficient to pay claimants in full"). The equity of the limitation is its necessity.

Second, the whole of the inadequate fund was to be devoted to the overwhelming claims. See, e.g., [Dickinson](#), 197 F.2d at 979-980 (rejecting a challenge by holder of funds to the court's disposition of the entire fund); see also [United States v. Butterworth-Judson Corp.](#), 269 U.S. 504, 513, 70 L. Ed. 380, 46 S. Ct. 179 (1926) ("Here, the fund being less than the debts, the creditors are entitled to have all of it distributed among them according to their rights and priorities"). It went without saying that the defendant or estate or constructive trustee with the inadequate assets had no opportunity to benefit himself or claimants of lower priority by holding back on [****45] the amount distributed to the class. The limited fund cases thus ensured that the class as a whole was given the best deal; they did not give a defendant a better deal than *seriatim* litigation would have produced.

Third, the claimants identified by a common theory of recovery were treated equitably among themselves. The cases assume that the class will comprise everyone who might state a claim on a single or repeated set of facts, invoking a common theory of recovery, to be satisfied from the limited fund as the source of payment. Each of the people represented in *Ross*, for example, had comparable entitlement as a legatee under the testator's will. Those subject to representation in *Dickinson* had a common source of claims in the solicitation of funds by parties whose subsequent defalcation left them without their investment, while in *Guffanti* the individuals represented had each entrusted [840] money for ticket purchases. In these cases the hope of recovery was limited, respectively, by estate assets, the residuum of profits, and the amount of the bond. Once the represented classes were so identified, there was no question of omitting anyone whose claim shared the common [****46] theory of liability and would contribute to the calculated shortfall of recovery. See [Railroad Co. v. Orr](#), 85 U.S. 471, 18 Wall. 471, 474, 21 L. Ed. 810 (1873) (reciting the "well settled" general rule "that when it appears on the face of the bill that there will be a deficiency in the fund, and that there are other creditors or legatees who are entitled [**2312] to a ratable distribution with the complainants, and who have a common interest with them, such creditors or legatees should be made parties to the bill, or the suit should be brought by the complainants in behalf of themselves and all others standing in a similar situation"). The plaintiff appeared on behalf of all

similarly situated parties, see *Calvert*, Parties to Suits in Equity 24 ("It is not sufficient that the plaintiff appear on behalf of numerous parties; the rule seems to be, that he must appear on behalf of all who are interested"); thus, the creditors' bill was brought on behalf of all creditors, cf. *Leigh v. Thomas*, 2 Ves. Sen. 312, 313, [***737] 28 Eng. Rep. 201 (Ch. 1751) ("No doubt but a bill may be by a few creditors in behalf of themselves and the rest . . . but there is no instance of a bill by three or four to have an account of the [****47] estate, without saying they bring it in behalf of themselves and the rest of the creditors"), the constructive trust was asserted on behalf of all victims of the fraud, and the surety suit was brought on behalf of all entitled to a share of the bond.¹⁸

Once all similar claims [841] were brought directly or by representation before the court, these antecedents of the mandatory class action presented straightforward models of equitable treatment, with the simple equity of a pro rata distribution providing the required fairness, see 1 Pomeroy Equity Jurisprudence § 407, p. 764 (4th ed. 1918) ("If the fund is not sufficient to discharge all claims upon it in full . . . equity will incline to regard all the demands as standing upon an equal footing, and will decree a *pro rata* distribution or payment").¹⁹

¹⁸ Professor Chafee explained, in discussing bills of peace, that where a case presents a limited fund, "it is impossible to make a fair distribution of the fund or limited liability to all members of the multitude except in a single proceeding where the claim of each can be adjudicated with due reference to the claims of the rest. The fund or limited liability is like a mince pie, which can not be satisfactorily divided until the carver counts the number of persons at the table." Bills of Peace with Multiple Parties, 45 Harv. L. Rev. 1297, 1311 (1932).

¹⁹ As noted above, traditional limited fund class actions typically provided notice to all claimants and the opportunity for those claimants to establish their claims before the actual distribution took place. See, e.g., [Dickinson v. Burnham](#), 197 F.2d 973, 978 (CA2 1952); [Terry v. President and Directors of the Bank of Cape Fear](#), 20 F. 777, 782 (CC WDNC 1884); cf. [Johnson v. Waters](#), 111 U.S. 640, 674, 28 L. Ed. 547, 4 S. Ct. 619 (1884) (in a creditors' bill, "it is the usual and correct course to open a reference in the master's office and to give other creditors, having valid claims against the fund, an opportunity to come in and have the benefit of the decree"). **Rule 23**, however, specifies no notice requirement for subdivision (b)(1)(B) actions beyond that required by subdivision (e) for settlement purposes. Plaintiffs in this case made an attempt to notify all presently identifiable class members in connection with the fairness hearing, though the adequacy of the effort is disputed. Since satisfaction or not of

[****48]

[****49] In sum, mandatory class treatment through representative actions on a limited fund theory was justified with reference to a "fund" with a definitely ascertained limit, all of which would be distributed to satisfy all those with liquidated claims based on a common theory of liability, by an equitable, pro rata distribution.

C

[1C]The Advisory Committee, and presumably the Congress in approving subdivision (b)(1)(B), must have assumed that an action with these characteristics would satisfy the limited [*842] fund rationale cognizable under that subdivision. The question remains how far the same characteristics are necessary for limited fund treatment. While we cannot settle all the details of a subdivision (b)(1)(B) limited fund here (and so cannot decide the ultimate question whether settlements of multitudes of related tort actions are amenable to mandatory class treatment), there are good reasons to treat these characteristics as presumptively necessary, and not merely sufficient, to satisfy the limited fund rationale for a mandatory action. At the least, the burden of justification rests on the proponent of any departure from the traditional norm.

It is true, of course, that the text of [****50] *Rule 23(b)(1)(B)* is on its face open to [***738] a more lenient limited fund concept, just as it covers more historical antecedents than the limited [**2313] fund. But the greater the leniency in departing from the historical limited fund model, the greater the likelihood of abuse in ways that will be apparent when we apply the limited fund criteria to the case before us. The prudent course, therefore, is to presume that when subdivision (b)(1)(B) was devised to cover limited fund actions, the object was to stay close to the historical model. As will be seen, this limiting construction finds support in the Advisory Committee's expressions of understanding, minimizes potential conflict with the Rules Enabling Act, and avoids serious constitutional concerns raised by the mandatory class resolution of individual legal claims, especially where a case seeks to resolve future liability in a settlement-only action.

To begin with, the Advisory Committee looked cautiously at the potential for creativity under *Rule*

23(b)(1)(B), at least in comparison with *Rule 23(b)(3)*. Although the committee crafted all three subdivision of the Rule in general, practical terms, without the formalism that had bedeviled the original [****51] *Rule 23*, see Kaplan, *Continuing Work* 380-386, the Committee was consciously retrospective with intent to codify pre-*Rule* categories under *Rule 23(b)(1)*, not forward-looking as it was in anticipating innovations under *Rule 23(b)(3)*. Compare [*843] Civil Rules Advisory Committee Meeting, Oct. 31-Nov. 2, 1963, Congressional Information Service Records of the U.S. Judicial Conference, Committee on Rules of Practice and Procedure 1935-1988, CI 7104-53, p. 11 (hereinafter Civil Rules Meeting) (comments of Reporter Prof. Benjamin Kaplan) (*Rule 23(b)(3)* represents "the growing point of the law"); *id. at 16* (comments of Committee Member Prof. Albert M. Sacks) (*Rule 23(b)(3)* is "an evolving area"). Thus, the Committee intended subdivision (b)(1) to capture the "standard" class actions recognized in pre-*Rule* practice, Kaplan, *Continuing Work* 394.

Consistent with its backward look under subdivision (b)(1), as commentators have pointed out, it is clear that the Advisory Committee did not contemplate that the mandatory class action codified in subdivision (b)(1)(B) would be used to aggregate unliquidated tort claims on a limited fund rationale. See Monaghan, *Antisuit Injunctions and Preclusion* [****52] *Against Absent Nonresident Class Members*, [98 Colum. L. Rev. 1148, 1164 \(1998\)](#) ("The 'framers' of *Rule 23* did not envision the expansive interpretations of the rule that have emerged No draftsmen contemplated that, in mass torts, (b)(1)(B) 'limited fund' classes would emerge as the functional equivalent to bankruptcy by embracing 'funds' created by the litigation itself"); see also Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, [80 Cornell L. Rev. 837, 840 \(1995\)](#) ("The original concept of the limited fund class does not readily fit the situation where a large volume of claims might eventually result in judgments that in the aggregate could exceed the assets available to satisfy them"); Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, [80 Cornell L. Rev. 858, 877 \(1995\)](#). None of the examples cited in the Advisory Committee Notes or by Professor Kaplan in explaining *Rule 23(b)(1)(B)* remotely approach what was then described as a "mass accident" case. While the Advisory Committee focused much attention [***739] on the amenability of *Rule 23(b)(3)* to such cases, [*844] the Committee's debates are silent about resolving tort claims under a mandatory limited fund [****53] rationale

a notice requirement would not effect the disposition of this case, we express no opinion on the need for notice or the sufficiency of the effort to give it in this case.

under *Rule 23(b)(1)(B)*.²⁰

It is simply implausible that the Advisory Committee, so concerned about the potential difficulties posed by dealing [**2314] with mass tort cases under *Rule 23(b)(3)*, with its provisions for notice and the right to opt out, see *Rule 23(c)(2)*, would have uncritically assumed that mandatory versions of such class actions, lacking such protections, could be certified under *Rule 23(b)(1)(B)*.²¹

We do not, it is true, decide the ultimate question whether *Rule 23(b)(1)(B)* may ever be used to aggregate individual tort claims, cf. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121, 128 L. Ed. 2d 33, 114 S. Ct. 1359 (1994) [*845] (*per curiam*). But we do recognize that the Committee would have thought such an application of the Rule surprising, and take this as a good reason to limit any surprise by presuming that the

²⁰To the extent that members of the Advisory Committee explicitly considered cases resembling the current mass tort limited fund class action, they did so in the context of the debate about bringing "mass accident" class actions under *Rule 23(b)(3)*. There was much concern on the Advisory Committee about the degree to which subdivision (b)(3), which the Committee was drafting to replace the old spurious class action category, would be applied to "mass accident" cases. Compare, e.g., Civil Rules Meeting 9, 14, with, e.g., *id.* at 13, 44-45. See also *id.* at 51. As a compromise, the Advisory Committee Notes state that a "'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways." Adv. Comm. Notes 697. See also Kaplan, *Continuing Work* 393.

²¹The Advisory Committee noted, moreover, that "where the class-action character of the lawsuit is based solely on the existence of a 'limited fund,' the judgment, while extending to all claims of class members against the fund, has ordinarily left unaffected the personal claims of nonappearing members against the debtor." Adv. Comm. Notes 698. Cf. Bone, *Personal and Impersonal Litigative Forms: Reconciling the History of Adjudicative Representation*, 70 *B. U. L. Rev.* 213, 282 (1990) (historically suits involving individual claims in the absence of a common fund did not automatically bind class members, instead providing a mechanism for notice and the opportunity to join the suit). This recognition underscores doubt that the Advisory Committee would have intended liberality in allowing such a circumscribed tradition to be transmogrified by operation of *Rule 23(b)(1)(B)* into a mechanism for resolving the claims of individuals not only against the fund, but also against an individual tortfeasor.

Rule's historical antecedents identify requirements. [****54]

The Rules Enabling Act underscores the need for caution. As we said in *Amchem*, no reading of the [****55] Rule can ignore the Act's mandate that "rules of procedure 'shall not abridge, enlarge or modify any substantive right.'" *Amchem*, 521 U.S. at 613 (quoting 28 U.S.C. § 2072(b)); cf. *Guaranty Trust Co. v. York*, 326 U.S. 99, 105, 89 L. Ed. 2079, 65 S. Ct. 1464 (1945) ("In giving federal courts 'cognizance' of equity suits in cases of diversity jurisdiction, Congress never gave, nor did the federal courts ever claim, the power to deny substantive rights created by State law or to create substantive rights denied by State law"). Petitioners argue that the Act has been violated here, asserting that the Global Settlement Agreement's priorities of claims and compromise of full recovery abrogated the state law that must govern this diversity action under 28 U.S.C. § 1652. See Brief for Petitioners 31-36. Although we need not grapple with the difficult choice-of-law and substantive state-law questions raised by petitioners' assertion, we [***740] do need to recognize the tension between the limited fund class action's pro rata distribution in equity and the rights of individual tort victims at law. Even if we assume that some such tension is acceptable under the Rules Enabling Act, it is best kept within tolerable limits [****56] by keeping limited fund practice under *Rule 23(b)(1)(B)* close to the practice preceding its adoption.

Finally, if we needed further counsel against adventurous application of *Rule 23(b)(1)(B)*, the Rules Enabling Act and the general doctrine of constitutional avoidance would jointly sound a warning of the serious constitutional concerns that come with any attempt to aggregate individual tort claims on a limited fund rationale. First, the certification of a mandatory class followed by settlement of its action for money [*846] damages obviously implicates the *Seventh Amendment* jury trial rights of absent class members.²²

We noted in *Ross v. Bernhard*, 396 U.S. 531, 24 L. Ed. 2d 729, 90 S. Ct. 733 (1970), that since the merger of law and equity in 1938, it has become settled among the lower courts that "class action plaintiffs may obtain a jury trial on any legal issues they present." *Id.* at 541. By its nature, however, a mandatory settlement-only class

²²The *Seventh Amendment* provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved"

action with legal issues and future claimants compromises their [Seventh Amendment](#) rights without their consent.

[****57] Second, and no less important, mandatory class actions aggregating damages claims implicate the due process "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in [**2315] which he is not designated as a party or to which he has not been made a party by service of process." [Hansberry v. Lee](#), 311 U.S. 32, 40, 85 L. Ed. 22, 61 S. Ct. 115 (1940), it being "our 'deep-rooted historic tradition that everyone should have his own day in court,'" [Martin v. Wilks](#), 490 U.S. 755, 762, 104 L. Ed. 2d 835, 109 S. Ct. 2180 (1989) (quoting 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4449, p. 417 (1981)); see [Richards v. Jefferson County](#), 517 U.S. 793, 798-799, 135 L. Ed. 2d 76, 116 S. Ct. 1761 (1996). Although "we have recognized an exception to the general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party," or "where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate," [Martin](#), *supra*, at 762, n. 2 (citations omitted), the burden of justification rests on the exception. [****58]

The inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damages claims gathered in a mandatory class. Unlike [Rule 23\(b\)\(3\)](#) class members, objectors to the collectivism of a mandatory [**847] subdivision (b)(1)(B) action have no inherent right to abstain. The legal rights of absent class members (which in a class like this one would include claimants who by definition may be unidentifiable when the class is certified) are resolved regardless either of their consent, or, in a class with objectors, their express wish to the [***741] contrary. 23

²³ It is no answer in this case that the settlement agreement provided for a limited, back-end "opt out" in the form of a right on the part of class members eventually to take their case to court if dissatisfied with the amount provided by the trust. The "opt out" in this case requires claimants to exhaust a variety of alternative dispute mechanisms, to bring suit against the trust, and not against Fibreboard, and it limits damages to \$ 500,000, to be paid out in installments over 5 to 10 years, see *supra*, at 8, despite multimillion-dollar jury verdicts sometimes reached in asbestos suits, [In re Asbestos Litigation](#), 90 F.3d 963, 1006, n. 30 (CA5 1996) (Smith, J., dissenting). Indeed,

And in settlement-only class actions the procedural protections built into the Rule to protect the rights of absent class members during litigation are never invoked in an adversarial setting, see [Amchem](#), *supra*, at 620.

[****59] [4] In related circumstances, we raised the flag on this issue of due process more than a decade ago in [Phillips Petroleum Co. v. Shutts](#), 472 U.S. 797, 86 L. Ed. 2d 628, 105 S. Ct. 2965 (1985). *Shutts* was a state class action for small sums of interest on royalty payments suspended on the authority of a federal regulation. *Id.* at 800. After certification of the class, the named plaintiffs notified each member by first-class mail of the right to opt out of the lawsuit. Out of a class of 33,000, some 3,400 exercised that right, and another 1,500 were excluded because their notices could not be delivered. *Id.* at 801. After losing at trial, the defendant, Phillips Petroleum, argued that the state court had no jurisdiction over claims of out-of-state plaintiffs without their affirmative consent. We said no and held that out-of-state plaintiffs could not invoke the same due process limits on personal jurisdiction that out-of-state defendants had under [International Shoe Co. v. Washington](#), 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154 [**848] (1945), and its progeny. 472 U.S. at 806-808. But we also saw that before an absent class member's right of action was extinguishable due process required that the member "receive notice plus [****60] an opportunity to be heard and participate in the litigation," and we said that "at a minimum . . . an absent plaintiff [must] be provided with an opportunity to remove himself from the class." *Id.* at 812. ²⁴

[**2316] IV

[3B] The record on which the District Court rested its certification of the class for the purpose of the global settlement did not support the essential premises of

on approximately a dozen occasions. Fibreboard had settled for more than \$ 500,000. See App. to Pet. for Cert. 373a.

²⁴ We also reiterated the constitutional requirement articulated in [Hansberry v. Lee](#), 311 U.S. 32, 85 L. Ed. 22, 61 S. Ct. 115 (1940), that "the named plaintiff at all times adequately represent the interests of the absent class members." [Phillips Petroleum Co. v. Shutts](#), 472 U.S. at 812 (citing [Hansberry](#), *supra*, 311 U.S. at 42-43, 45). In *Shutts*, as an important caveat to our holding, we made clear that we were only examining the procedural protections attendant on binding out-of-state class members whose claims were "wholly or predominately for money judgments." 472 U.S. at 811, n. 3.

mandatory limited fund actions. It failed to demonstrate that [****61] the fund was limited except by the agreement of the parties, and it showed exclusions from the class and allocations of assets at odds with the concept of limited fund treatment and the structural protections of *Rule 23(a)* explained in *Amchem*.

[***742] A

[3C] [5]The defect of certification going to the most characteristic feature of a limited fund action was the uncritical adoption by both the District Court and the Court of Appeals of figures²⁵

agreed upon by the parties in defining the limits of the fund and demonstrating its inadequacy.²⁶

When a district [**849] court, as here, certifies for class action settlement only, the moment of certification requires "heightened attention," *Amchem*, 521 U.S. at 620, to the justifications for binding the class members. This is so because certification of a mandatory settlement class, however provisional technically, effectively concludes the proceeding save for the final fairness hearing. And, as we held in *Amchem*, a fairness hearing under *Rule 23(e)* is no substitute for rigorous adherence to those provisions of the Rule "designed to protect absentees," *ibid.* among them subdivision (b)(1)(B).²⁷

²⁵ The plural reflects the fact that the insurers agreed to provide \$ 1.525 billion under the Global Settlement Agreement and \$ 2 billion under the Trilateral Settlement Agreement.

²⁶ The federal courts have differed somewhat in articulating the standard to evaluate whether, in fact, a fund is limited, in cases involving mass torts. Compare, e.g., *In re Northern Dist. of California, Dalkon Shield IUD Products Liability Litigation*, 693 F.2d 847, 852 (CA9 1982), cert. denied sub nom. *A. H. Robins Co., Inc. v. Abed et al.*, 459 U.S. 1171, 74 L. Ed. 2d 1015, 103 S. Ct. 817 (1983) (class proponents must demonstrate that allowing the adjudication of individual claims will inescapably compromise the claims of absent class members), with, e.g., *In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718, 726 (EDNY 1983), aff'd 818 F.2d 145 (CA2 1987), cert. denied sub nom. *Fratlicelli et al. v. Dow Chemical Co. et al.*, 484 U.S. 1004, 108 S. Ct. 695, 98 L. Ed. 2d 648 (1988) (requiring only a "substantial probability - that is less than a preponderance but more than a mere possibility - that if damages are awarded, the claims of earlier litigants would exhaust the defendants' assets"). Cf. *In re Bendectin Products Liability Litigation*, 749 F.2d 300, 306 (CA6 1984). Because under either formulation, the class certification in this case cannot stand, it would be premature to decide the appropriate standard at this time.

Thus, in an action such as this the settling [****62] parties must present not only their agreement, but evidence on which the district court may ascertain the limit and the insufficiency of the fund, with support in findings of fact following a proceeding in which the evidence is subject to challenge, see *In re Bendectin Products Liability Litigation*, 749 F.2d 300, 306 (CA6 1984) ("The district court, as a matter of law, must have a fact-finding inquiry on this question and allow the opponents of class certification to present evidence that a limited fund [**850] does not exist"); see also *In re Temple*, 851 F.2d 1269, 1272 (CA11 1988) ("Without a finding as to the net worth of the defendant, it is difficult to see how the fact of a limited fund could have been established given that all of [the defendant's] assets are potentially available to suitors"); *In re Dennis Greenman Securities Litigation*, 829 F.2d 1539, 1546 (CA11 1987) (discussing factual findings necessary for certification of a limited fund class action). [****63]

[****64] [3D]We have already alluded to the difficulties facing limited fund treatment of huge numbers of actions for unliquidated damages arising from mass torts, the first such hurdle being a computation of the total claims. It is simply not a matter of adding up the liquidated amounts, as in the [***743] models of limited fund actions. Although we might assume *arguendo* that prior judicial experience with asbestos claims would allow a court to make a sufficiently reliable determination of the probable total, the District Court here apparently thought otherwise, concluding that [**2317] "there is no way to predict Fibreboard's future asbestos liability with any certainty." 162 F.R.D. at 528. Nothing turns on this conclusion, however, since there was no adequate demonstration of the second element [****65] required for limited fund treatment, the upper limit of the fund itself, without which no showing of insufficiency is possible.

The "fund" in this case comprised both the general assets of Fibreboard and the insurance assets provided by the two policies, see 90 F.3d at 982 (describing fund as Fibreboard's entire equity and \$ 2 billion in insurance assets under the Trilateral Settlement Agreement). As to Fibreboard's assets exclusive of the contested insurance, the District Court and the Fifth Circuit

²⁷ See Issacharoff, *Class Action Conflicts*, 30 U. C. D. L. Rev. 805, 822 (1997) ("In the context of a mandatory settlement class, the individual class member is presented with what purports to be a binding *fait accompli*, with the only recourse a likely futile objection at the fairness hearing required by *Rule 23(e)*").

concluded that Fibreboard had a then-current sale value of \$ 235 million that could be devoted to the limited fund. While that estimate may have been conservative,²⁸

at least the District Court heard evidence [*851] and made an independent finding at some point in the proceedings. The same, however, cannot be said for the value of the disputed insurance.

[****66] The insurance assets would obviously be "limited" in the traditional sense if the total of demonstrable claims would render the insurers insolvent, or if the policies provided aggregate limits falling short of that total; calculation might be difficult, but the way to demonstrate the limit would be clear. Neither possibility is presented in this case, however. Instead, any limit of the insurance asset here had to be a product of potentially unlimited policy coverage discounted by the risk that Fibreboard would ultimately lose the coverage dispute litigation. This sense of limit as a value discounted by risk is of course a step removed from the historical model, but even on the assumption that it would suffice for limited fund treatment, there was no adequate finding of fact to support its application here. Instead of undertaking an independent evaluation of potential insurance funds, the District Court (and, later, the Court of Appeals), simply accepted the \$ 2 billion Trilateral Settlement Agreement figure as representing the maximum amount the insurance companies could be required to pay tort victims, concluding that "where insurance coverage is disputed, it is appropriate to value [****67] the insurance asset at a settlement value." See App. to Pet. for Cert. 492a.²⁹

²⁸ The District Court based the \$ 235 million figure on evidence provided by an investment banker regarding what a "financially prudent buyer" would pay to acquire Fibreboard free of its personal injury asbestos liabilities, less transaction costs. App. to Pet. for Cert. 377a, 492a. In 1997, however, Fibreboard was acquired for about \$ 515 million, plus \$ 85 million of assumed debt. See *In re Asbestos Litigation*, 134 F.3d 668, 674 (CA5 1998) (Smith, J., dissenting); see also Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 *Colum. L. Rev.* 1343, 1402 (1995) (noting the surge in Fibreboard's stock price following the settlement below).

²⁹ In describing possible limited funds in this case, the District Court discounted the \$ 2 billion Trilateral Settlement Agreement figure by the amount necessary to resolve present claims included neither in the inventory settlements nor the global class claims and other items, yielding a figure equal to

[*852] [****68] Settlement value is not always acceptable, however. One may take a [***744] settlement amount as good evidence of the maximum available if one can assume that parties of equal knowledge and negotiating skill agreed upon the figure through arms-length bargaining, unhindered by any considerations tugging against the interests of the parties ostensibly represented in the negotiation. But no such assumption may be indulged in this case, or probably in any class action settlement with the potential for gigantic fees.³⁰

In this case, certainly, any assumption [**2318] that plaintiffs' counsel could be of a mind to do their simple best in bargaining for the benefit of the settlement class is patently at odds with the fact that at least some of the same lawyers representing plaintiffs and the class had also negotiated the separate settlement of 45,000 pending claims, *90 F.3d at 969-970, 971*, the full payment of which was contingent on a successful global settlement agreement or the successful resolution of the insurance coverage dispute (either by litigation or by agreement, as eventually occurred in the Trilateral Settlement Agreement), *id. at 971, n. 3*; App. 119a-120a. Class counsel thus had great [****69] incentive to reach any agreement in the global settlement negotiations that they thought might survive a *Rule 23(e)* fairness hearing, rather than the best possible arrangement for the substantially unidentified global settlement class. Cf. Cramton, *Individualized Justice*, Mass [*853] *Torts*, and "Settlement Class Actions": An Introduction, *80 Cornell L. Rev.* 811, 832 (1995) ("Side settlements suggest that class counsel has been laboring under an impermissible conflict of interest and

the \$ 1.535 billion available under the Global Settlement Agreement. App. to Pet. for Cert. 492a. The Court of Appeals, by contrast, assumed that the full \$ 2 billion represented by the Trilateral Settlement Agreement would be available to class claims. *In re Asbestos Litigation*, *90 F.3d 963, 982 (CA5 1996)*. The Court of Appeals provided no explanation for using the higher figure in light of the District Court's conclusion that only \$ 1.535 billion of the \$ 2 billion Trilateral Settlement Agreement figure would actually be available to the class. Either way, the figure represented only the amount the insurance companies agreed to pay, and not an independent evaluation of the limits of their payment obligations.

³⁰ In a strictly rational world, plaintiffs' counsel would always press for the limit of what the defense would pay. But with an already enormous fee within counsel's grasp, zeal for the client may relax sooner than it would in a case brought on behalf of one claimant.

that it may have preferred the interests of current clients to those of the future claimants in the settlement class"). The resulting incentive to favor the known plaintiffs in the earlier settlement was, indeed, an egregious example of the conflict noted in *Amchem* resulting from divergent interests of the presently injured and future claimants. See [521 U.S. at 626-627](#) (discussing adequacy of named representatives under *Rule 23(a)(4)*).

[****70] We do not, of course, know exactly what an independent valuation of the limit of the insurance assets would have shown. It might have revealed that even on the assumption that Fibreboard's coverage claim was sound, there would be insufficient assets to pay claims, considered with reference to their probable timing; if Fibreboard's own assets would not have been enough to pay the insurance shortfall plus any claims in excess of policy limits, the projected insolvency of the insurers and Fibreboard would have indicated a truly limited fund. (Nothing in the record, however, suggests that this would have been a supportable finding.) Or an independent valuation might have revealed assets of insufficient value to pay all projected claims if the assets were discounted by the prospects that the insurers would win the coverage cases. Or the Court's independent [***745] valuation might have shown, discount or no discount, the probability of enough assets to pay all projected claims, precluding certification of any mandatory class on a limited fund rationale. Throughout this litigation the courts have accepted the assumption that the third possibility was out of the question, and they may have been right. [****71] But objecting and unidentified class members alike are entitled to have the issue settled by specific evidentiary findings independent of the agreement of defendants and conflicted class counsel.

[*854] B

The explanation of need for independent determination of the fund has necessarily anticipated our application of the requirement of equity among members of the class. There are two issues, the inclusiveness of the class and the fairness of distributions to those within it. On each, this certification for settlement fell short.

The definition of the class excludes myriad claimants with causes of action, or foreseeable causes of action, arising from exposure to Fibreboard asbestos. While the class includes those with present claims never filed, present claims withdrawn without prejudice, and future claimants, it fails to include those who had previously

settled with Fibreboard while retaining the right to sue again "upon development of an asbestos related malignancy," plaintiffs with claims pending against Fibreboard at the time of the initial announcement of the Global Settlement Agreement, and the plaintiffs in the "inventory" claims settled as a supposedly necessary step in reaching [****72] the global settlement, see [90 F.3d at 971](#). The number of those outside the class who settled with a reservation of rights may be uncertain, but there is no such uncertainty about the significance of the settlement's exclusion of the 45,000 inventory plaintiffs and the plaintiffs in the unsettled present cases, estimated by the Guardian Ad Litem at more than 53,000 as of August 27, 1993, see App. in No. 95-40635 (CA5), 6 Record, [**2319] Tab 55, p. 72 (Report of the Guardian Ad Litem). It is a fair question how far a natural class may be depleted by prior dispositions of claims and still qualify as a mandatory limited fund class, but there can be no question that such a mandatory settlement class will not qualify when in the very negotiations aimed at a class settlement, class counsel agree to exclude what could turn out to be as much as a third of the claimants that negotiators thought might eventually be involved, a substantial number of whom class counsel represent, see App. to Pet. for Cert. [*855] 321a (noting that the parties negotiating the global settlement agreed to use a negotiating benchmark of 186,000 future claims against Fibreboard).

Might such class exclusions be forgiven if it were [****73] shown that the class members with present claims and the outsiders ended up with comparable benefits? The question is academic here. On the record before us, we cannot speculate on how the unsettled claims would fare if the Global Settlement were approved, or under the Trilateral Settlement. As for the settled inventory claims, their plaintiffs appeared to have obtained better terms than the class members. They received an immediate payment of 50 percent of a settlement higher than the historical average, and would get the remainder if the global settlement were sustained (or the coverage litigation resolved, as it [****746] turned out to be by the Trilateral Settlement Agreement); the class members, by contrast, would be assured of a 3-year payout for claims settled, whereas the unsettled faced a prospect of mediation followed by arbitration as prior conditions of instituting suit, which would even then be subject to a recovery limit, a slower payout and the limitations of the trust's spendthrift protection. See *supra*, at 8. Finally, as discussed below, even ostensible parity between settling nonclass plaintiffs and class members would be insufficient to

overcome the failure to provide [****74] the structural protection of independent representation as for subclasses with conflicting interests.

On the second element of equity within the class, the fairness of the distribution of the fund among class members, the settlement certification is likewise deficient. Fair treatment in the older cases was characteristically assured by straightforward pro rata distribution of the limited fund. See *supra*, at 22. While equity in such a simple sense is unattainable in a settlement covering present claims not specifically proven and claims not even due to arise, if at all, until some future time, at the least such a settlement must [*856] seek equity by providing for procedures to resolve the difficult issues of treating such differently situated claimants with fairness as among themselves.

First, it is obvious after *Amchem* that a class divided between holders of present and future claims (some of the latter involving no physical injury and to claimants not yet born) requires division into homogeneous subclasses under *Rule 23(c)(4)(B)*, with separate representation to eliminate conflicting interests of counsel. See *Amchem*, 521 U.S. at 627 (class settlements must provide "structural [****75] assurance of fair and adequate representation for the diverse groups and individuals affected"); cf. 5 J. Moore, T. Chovrat, D. Feinberg, R. Marmer, & J. Solovy, *Moore's Federal Practice § 23.25[5][e]*, p. 23-149 (3d ed. 1998) (an attorney who represents another class against the same defendant may not serve as class counsel).³¹

As we said in [**2320] *Amchem*, "for the currently

³¹ This adequacy of representation concern parallels the enquiry required at the threshold under *Rule 23(a)(4)*, but as we indicated in *Amchem*, the same concerns that drive the threshold findings under *Rule 23(a)* may also influence the propriety of the certification decision under the subdivisions of *Rule 23(b)*. See *Amchem*, 521 U.S. at 623, n.18.

In *Amchem*, we concentrated on the adequacy of named plaintiffs, but we recognized that the adequacy of representation enquiry is also concerned with the "competency and conflicts of class counsel." *Id.* at 626, n.20 (citing *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157, n.13, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982)); see also 5 *Moore's Federal Practice § 23.25[3][a]* (adequacy of representation concerns named plaintiff and class counsel). In this case, of course, the named representatives were not even "named [until] after the agreement in principle was reached." App. to Pet. for Cert. 483a; and they then relied on class counsel in subsequent settlement negotiations, *ibid.*

injured, the critical goal is generous immediate payments," but "that goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future." *Amchem*, *supra*, at 626. No such procedure was employed here, and the conflict was as contrary to the equitable obligation entailed by the limited fund [*857] rationale as it was to the requirements of structural protection applicable to all class actions under *Rule 23(a)(4)*.

[****76] [***747] Second, the class included those exposed to Fibreboard's asbestos products both before and after 1959. The date is significant, for that year saw the expiration of Fibreboard's insurance policy with Continental, the one which provided the bulk of the insurance funds for the settlement. Pre-1959 claimants accordingly had more valuable claims than post-1959 claimants, see 90 *F.3d* at 1012-1013 (Smith, J., dissenting), the consequence being a second instance of disparate interests within the certified class. While at some point there must be an end to reclassification with separate counsel, these two instances of conflict are well within the requirement of structural protection recognized in *Amchem*.

It is no answer to say, as the Fifth Circuit said on remand, that these conflicts may be ignored because the settlement makes no disparate allocation of resources as between the conflicting classes. See 134 *F.3d* at 669-670. The settlement decides that the claims of the immediately injured deserve no provisions more favorable than the more speculative claims of those projected to have future injuries, and that liability subject to indemnification is no different from liability with no [****77] indemnification. The very decision to treat them all the same is itself an allocation decision with results almost certainly different from the results that those with immediate injuries or claims of indemnified liability would have chosen.

Nor does it answer the settlement's failures to provide structural protections in the service of equity to argue that the certified class members' common interest in securing contested insurance funds for the payment of claims was so weighty as to diminish the deficiencies beneath recognition here. See Brief for Respondent Class Representatives Ahearn, et al. 31 (discussing this issue in the context of the *Rule 23(a)(4)* adequacy of representation requirement); *id.* [*858] at 35-36 (citing, e.g., *In re "Agent Orange" Product Liability Litigation*, 996 *F.2d* 1425, 1435-1436 (CA2 1993); *In re "Agent Orange" Product Liability Litigation*, 800 *F.2d* 14, 18-19 (CA2 1986)). This argument is simply a variation of the

position put forward by the proponents of the settlement in *Amchem*, who tried to discount the comparable failure in that case to provide separate representatives for subclasses with conflicting interests, see Brief for Petitioners [****78] in *Amchem Products, Inc. v. Windsor*, O. T. 1996, No. 96-270, p. 48 (arguing that "achieving a global settlement" was "an overriding concern that all plaintiffs [held] in common"); see also *id.* at 42 (arguing that the requirement of *Rule 23(b)(3)* that there be predominance of common questions of law or fact had been met by shared interest in "the fairness of the settlement"). The current position is just as unavailing as its predecessor in *Amchem*. There we gave the argument no weight, see 521 U.S. at 625-628, observing that "the benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration," but the determination whether "proposed classes are sufficiently cohesive to warrant adjudication" must focus on "questions that preexist any [***748] settlement," *id.* at 622-623.³²

Here, just as in the earlier case, the proponents of the settlement are trying to rewrite *Rule 23*; each ignores the fact that *Rule 23* requires protections under subdivisions (a) and (b) against inequity and potential inequity at the pre-certification stage, quite independently of the required determination at [****79] postcertification fairness review under subdivision (e) that any settlement is fair in an overriding sense. A fairness hearing under subdivision (e) can no more swallow the preceding [**2321] protective requirements [*859] of *Rule 23* in a subdivision (b)(1)(B) action than in one under subdivision (b)(3).³³

³² We made this observation in the context of *Rule 23(b)(3)*'s predominance enquiry, see *Amchem*, 521 U.S. at 622-623, and noted that no "'limited fund' capable of supporting class treatment under *Rule 23(b)(1)(B)*" was involved, *id.* at 623, n.19.

³³ As a variation of the argument that class members' common interest in securing the insurance settlement overrode any internal conflicts, respondents put forth an alternative rationale for sustaining the certification in this case under *Rule 23(b)(1)(B)*. They assert that "failure by the class to file and maintain a class action to resolve the coverage disputes on a unitary basis -- allowing class members instead to prosecute their claims separately -- would have put class members to the 'significant risks' that Fibreboard would lose its claimed insurance as a result of the coverage disputes," and that "any separate action by any class member could have itself resulted in an adjudication that the insurers owed no coverage

[****80] C

A third contested feature of this settlement certification that departs markedly from the limited fund antecedents is the ultimate provision for a fund smaller than the assets understood by the Court of Appeals to be available for payment of the mandatory class members' claims; most notably, Fibreboard was allowed to retain virtually its entire net worth. Given our treatment of the two preceding deficiencies of the certification, there is of course no need to decide whether this feature of the agreement would alone be fatal to the Global Settlement Agreement. To ignore it entirely, however, would be so misleading that we have decided simply to identify the issue it raises, without purporting to resolve it at this time.

[3E] [6A]Fibreboard listed its supposed entire net worth as a component of the total (and allegedly inadequate) assets available for claimants, but subsequently retained all but \$ 500,000 [*860] of that equity for itself.³⁴

to Fibreboard" Brief for Respondents Continental et al. 25 (quoting *Rule 23(b)(1)(B)*). Whatever its merits, this rationale for certification is foreclosed by the class conflicts, rehearsed above, that tainted the negotiation of the global settlement, and that at this point cannot be undone. Thus, whether a mandatory class could now be certified without the excluded inventory plaintiffs (whose settlements would appear to be final), or with properly represented subclasses, is an issue we need not address.

³⁴ [6B]

We need not decide here how close to insolvency a limited fund defendant must be brought as a condition of class certification. While there is no inherent conflict between a limited fund class action under *Rule 23(b)(1)(B)* and the Bankruptcy Code, cf., e.g., *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (CA2 1992), it is worth noting that if limited fund certification is allowed in a situation where a company provides only a *de minimis* contribution to the ultimate settlement fund, the incentives such a resolution would provide to companies facing tort liability to engineer settlements similar to the one negotiated in this case would, in all likelihood, significantly undermine the protections for creditors built into the Bankruptcy Code. We note further that Congress in the Bankruptcy Reform Act of 1994, Pub. L. 103-394 § 111(a), amended the Bankruptcy Code to enable a debtor in a Chapter 11 reorganization in certain circumstances to establish a trust toward which the debtor may channel future asbestos-related liability, see 11 U.S.C. §§ 524(g), (h).

On the face of it, the arrangement seems irreconcilable with the justification of necessity in denying any opportunity for withdrawal of [***749] class members whose jury trial rights will be compromised, whose damages will be capped, and whose payments will be delayed. [****81] With Fibreboard retaining nearly all its net worth, it hardly appears that such a regime is the best that can be provided for class members. Given the nature of a limited fund and the need to apply its criteria at the certification stage, it is not enough for a District Court to say that it "need not ensure that a defendant designate a particular source of its assets to satisfy the class' claims; [but only that] the amount recovered by the class [be] fair." [162 F.R.D. at 527](#).

[****82] The District Court in this case seems to have had a further point in mind, however. One great advantage of class action treatment of mass tort cases is the opportunity to save the enormous transaction costs of piecemeal litigation, an advantage to which the settlement's proponents have referred in this case.³⁵

Although the District Court made no [**2322] specific [**861] finding about the transaction cost saving likely from this class settlement, estimating the amount in the "hundreds of millions," [id. at 529](#), it did conclude that the amount would exceed Fibreboard's net worth as the Court valued it, *ibid.* (Fibreboard's net worth of \$ 235 million "is considerably less than the likely savings in defense costs under the Global Settlement"). If a settlement thus saves transaction costs that would

³⁵Some courts certifying limited fund class actions have focused on the advantages such suits have in reducing transaction costs when compared to piecemeal litigation. See, e.g., *In re Drexel Burnham Lambert Group, Inc.*, [supra](#), at 292 (certifying mandatory class in part because "some members of the putative class might attempt to maintain costly individual actions in the hope and, perhaps, the belief that their claims are more meritorious than the claims of other class members," and thus warranting mandatory class certification "to prevent claimants with such motivations from unfairly diminishing the eventual recovery of other class members"). Although the transaction costs Fibreboard faced prior to settlement were at times significant, see [Ahearn](#), [162 F.R.D. at 509](#); see also App. to Pet. for Cert. 282a (Fibreboard's annual asbestos litigation defense costs ran, at times, as high as twice the total face value of settlements reached), given the exigencies of Fibreboard's contingent insurance asset, this case does not present an instance in which limited fund certification can be justified on the ground that such settlement necessarily provided funds equal to, or greater than, what might have been recovered through individual litigation factoring out transaction costs.

never have gone into a class member's pocket in the absence of settlement, may a credit for some of the savings be recognized in a mandatory class action as an incentive to settlement? It is at least a legitimate question, which we leave for another day.

[****83] V

[7]Our decision rests on a different basis from the ground of JUSTICE BREYER's dissent, just as there was a difference in approach between majority and dissenters in *Amchem*. The nub of our position is that we are bound to follow *Rule 23* as we understood it upon its adoption, and that we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act. Although, as the dissent notes, *post*, at 18, the revised text adopted in 1966 was understood (somewhat cautiously) to authorize the courts to provide for class treatment of mass tort litigation, it was also [**862] the Court's understanding that the Rule's growing edge for that purpose would be the opt-out class authorized by subdivision (b)(3), not the mandatory class [***750] under subdivision (b)(1)(B), see [supra](#), at 24-25. While we have not ruled out the possibility under the present Rule of a mandatory class to deal with mass tort litigation on a limited fund rationale, we are not free to dispense with the safeguards that have protected mandatory class members under that theory traditionally.

[3F]Apart from its effect on the requirements of subdivision (a) as explained and held binding in *Amchem*, [****84] the dissent would move the standards for mandatory actions in the direction of opt-out class requirements by according weight to this "unusual limited fund[s] . . . witching hour," *post*, at 13, in exercising discretion over class certification. It is on this belief (that we should sustain the allowances made by the District Court in consideration of the exigencies of this settlement proceeding) that the dissent addresses each of the criteria for limited fund treatment (demonstrably insufficient fund, intraclass equity, and dedication of the entire fund, see *post*, at 9-19).

As to the calculation of the fund, the dissent believes an independent valuation by the District Court may be dispensed with here in favor of the figure agreed upon by the settling parties. The dissent discounts the conflicts on the part of class counsel who negotiated the Global Settlement Agreement by arguing that the "relevant" settlement negotiation, and hence the relevant benchmark for judging the actual value of the insurance amount, was the negotiation between

Fibreboard and the insurers that produced the Trilateral Settlement Agreement. See *post*, at 12. This argument, however, minimizes [****85] two facts: (1) that Fibreboard and the insurers made this separate, backup agreement only at the insistence of class counsel as a condition for reaching the Global Settlement Agreement; (2) even more important, that "the Insurers were . . . adamant that they would not agree [*863] to pay any more in the context of a backup agreement than in a global agreement," a principle "Fibreboard acceded to" on the day the Global Settlement Agreement was announced "as the price of permitting an agreement to be reached with respect to a global settlement," *Ahearn, 162 F.R.D. at 516*. Under these circumstances the reliability of the Trilateral Settlement Agreement's figure is inadequate as an independent benchmark that might excuse the [**2323] want of any independent judicial determination that the Global Settlement Agreement's fund was the maximum possible. In any event, the dissent says, it is not crucial whether a \$ 30 claim has to settle for \$ 15 or \$ 20. But it is crucial. Conflict-free counsel, as required by *Rule 23(a)* and *Amchem*, might have negotiated a \$ 20 figure, and a limited fund rationale for mandatory class treatment of a settlement-only action requires assurance that claimants are receiving [****86] the maximum fund, not a potentially significant fraction less.

With respect to the requirement of intraclass equity, the dissent argues that conflicts both within this certified class and between the class as certified and those excluded from it may be mitigated because separate counsel were simply not to be had in the short time that a settlement agreement was possible before the argument (or likely decision) in the coverage case. But this is to say that [***751] when the clock is about to strike midnight, a court considering class certification may lower the structural requirements of *Rule 23(a)* as declared in *Amchem*, and the parallel equity requirements necessary to justify mandatory class treatment on a limited fund theory.

Finally, the dissent would excuse Fibreboard's retention of virtually all its net worth, and the loss to members of the certified class of some 13 percent of the fund putatively available to them, on the ground that the settlement made more money available than any other effort would likely have done. But even if we could be certain that this evaluation were true, this is to reargue *Amchem*: the settlement's fairness [*864] under *Rule 23(e)* does not dispense with the [****87] requirements of *Rule 23(a)* and (b).

[1D]We believe that if an allowance for exigency can make a substantial difference in the level of *Rule 23* scrutiny, the economic temptations at work on counsel in class actions will guarantee enough exigencies to take the law back before *Amchem* and unsettle the line between mandatory class actions under subdivision (b)(1)(B) and opt-out actions under subdivision (b)(3).

VI

[1E] [3G]In sum, the applicability of *Rule 23(b)(1)(B)* to a fund and plan purporting to liquidate actual and potential tort claims is subject to question, and its purported application in this case was in any event improper. The Advisory Committee did not envision mandatory class actions in cases like this one, and both the Rules Enabling Act and the policy of avoiding serious constitutional issues counsel against leniency in recognizing mandatory limited fund actions in circumstances markedly different from the traditional paradigm. Assuming *arguendo* that a mandatory, limited fund rationale could under some circumstances be applied to a settlement class of tort claimants, it would be essential that the fund be shown to be limited independently of the agreement of the parties to [****88] the action, and equally essential under *Rule 23(a)* and (b)(1)(B) that the class include all those with claims unsatisfied at the time of the settlement negotiations, with intraclass conflicts addressed by recognizing independently represented subclasses. In this case, the limit of the fund was determined by treating the settlement agreement as dispositive, an error magnified by the representation of class members by counsel also representing excluded plaintiffs, whose settlements would be funded fully upon settlement of the class action on any terms that could survive final fairness review. Those separate settlements, together with other exclusions from the claimant class, precluded adequate structural protection by subclass treatment, which was not even [*865] afforded to the conflicting elements within the class as certified.

The judgment of the Court of Appeals, accordingly, is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Concur by: REHNQUIST

Concur

[**752] CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA and JUSTICE KENNEDY join, concurring.

JUSTICE BREYER's dissenting opinion highlights in graphic detail the massive impact of asbestos-related [****89] claims on the federal courts. *Post*, at 1-3. Were I devising [**2324] a system for handling these claims on a clean slate, I would agree entirely with that dissent, which in turn approves the near-heroic efforts of the District Court in this case to make the best of a bad situation. Under the present regime, transactional costs will surely consume more and more of a relatively static amount of money to pay these claims.

But we are not free to devise an ideal system for adjudicating these claims. Unless and until the Federal Rules of Civil Procedure are revised, the Court's opinion correctly states the existing law, and I join it. But the "elephantine mass of asbestos cases," *ante*, at 1, cries out for a legislative solution.

Dissent by: BREYER

Dissent

JUSTICE BREYER, with whom JUSTICE STEVENS joins, dissenting.

This case involves a settlement of an estimated 186,000 potential future asbestos claims against a single company, Fibreboard, for approximately \$ 1.535 billion. The District Court, in approving the settlement, made 446 factual findings, on the basis of which it concluded that the settlement was equitable, that the potential claimants had been well represented, and that the distinctions [****90] drawn among different categories of claimants were reasonable. [162 F.R.D. 505 \(1995\)](#); App. to Pet. for [*866] Cert. 248a-468a. The Court of Appeals, dividing 2 to 1, held that the settlement was lawful. [134 F.3d 668 \(CA5 1998\)](#). I would not set aside the Court of Appeals' judgment as the majority does. Accordingly, I dissent.

I

A

Four special background circumstances underlie this settlement and help to explain the reasonableness and consequent lawfulness of the relevant District Court

determinations. First, as the majority points out, the settlement comprises part of an "elephantine mass of asbestos cases," which "defies customary judicial administration." *Ante*, at 1. An estimated 13 to 21 million workers have been exposed to asbestos. See Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 6-7 (Mar. 1991) (hereinafter Judicial Conference Report). Eight years ago the Judicial Conference spoke of the mass of related cases having "reached critical dimensions," threatening "a disaster of major proportions." *Id.* at 2. In the Eastern District of Texas, for example, one out of every three civil cases filed in 1990 was an asbestos case. See *id.* at 8. In the [****91] past decade nearly 80,000 new federal asbestos cases have been filed; more than 10,000 new federal asbestos cases were filed last year. See U.S. District Courts Civil Cases Commenced by Nature of Suit, Administrative Office of the Courts Statistics (Table C2-A) (Dec. 31, 1994-1998) (hereinafter AO Statistics).

The Judicial Conference found that asbestos cases on average take almost [***753] twice as long as other lawsuits to resolve. See Judicial Conference Report 10-11. Judge Parker, the experienced trial judge who approved this settlement, noted in one 3,000-member asbestos class action over which he presided that 448 of the original class members had died while the litigation was pending. [Cimino v. Raymark Industries, Inc., 751 F. Supp. 649, 651 \(ED Tex. 1990\)](#). And yet, Judge Parker [*867] went on to state, if the district court could close "thirty cases a month, it would [still] take six and one-half years to try these cases and [due to new filings] there would be pending over 5,000 untouched cases" at the end of that time. [Id. at 652](#). His subsequent efforts to accelerate final decision or settlement through the use of sample cases produced a highly complex trial (133 trial [****92] days, more than 500 witnesses, half a million pages of documents) that eventually closed only about 160 cases because efforts to extrapolate from the sample proved fruitless. See [Cimino v. Raymark Industries, Inc., 151 F.3d 297, 336 \(CA5 1998\)](#). The consequence is not only delay but also attorney's fees and other "transaction costs" that are unusually high, to the point where, of each dollar that asbestos defendants pay, those costs consume an estimated 61 cents, with only 39 cents going to victims. See Judicial Conference Report 13.

[**2325] Second, an individual asbestos case is a tort case, of a kind that courts, not legislatures, ordinarily will resolve. It is the number of these cases, not their nature, that creates the special judicial problem. The judiciary cannot treat the problem as entirely one of legislative

failure, as if it were caused, say, by a poorly drafted statute. Thus, when "calls for national legislation" go unanswered, *ante*, at 1, judges can and should search aggressively for ways, within the framework of existing law, to avoid delay and expense so great as to bring about a massive denial of justice.

Third, in that search the district courts may take advantage [****93] of experience that appellate courts do not have. Judge Parker, for example, has written of "a disparity of appreciation for the magnitude of the problem," growing out of the difference between the trial courts' "daily involvement with asbestos litigation" and the appellate courts' "limited" exposure to such litigation in infrequent appeals. [Cimino, 751 F. Supp. at 651](#).

Fourth, the alternative to class-action settlement is not a fair opportunity for each potential plaintiff to have his or her [*868] own day in court. Unusually high litigation costs, unusually long delays, and limitations upon the total amount of resources available for payment, together mean that most potential plaintiffs may not have a realistic alternative. And *Federal Rule of Civil Procedure 23* was designed to address situations in which the historical model of individual actions would not, for practical reasons, work. See generally Advisory Committee's Notes on *Fed. Rule Civ. Proc. 23*, 28 U.S.C. App., p. 696 (discussing, in relation to *Rule 23(b)(1)(B)*, instances in which individual judgments, "while not technically concluding the other members, might do so as a practical matter").

For these reasons, I cannot easily [****94] find a legal answer to the problems this case raises by referring, as does the majority, to "our 'deep-rooted historic tradition that everyone [***754] should have his own day in court.'" *Ante*, at 28 (citation omitted). Instead, in these circumstances, I believe our Court should allow a district court full authority to exercise every bit of discretionary power that the law provides. See generally [Califano v. Yamasaki, 442 U.S. 682, 703, 61 L. Ed. 2d 176, 99 S. Ct. 2545 \(1979\)](#) ("Most issues arising under *Rule 23* . . . [are] committed in the first instance to the discretion of the district court"); [Reiter v. Sonotone Corp., 442 U.S. 330, 345, 60 L. Ed. 2d 931, 99 S. Ct. 2326 \(1979\)](#) (district courts have "broad power and discretion . . . with respect to matters involving the certification" of class actions). And, in doing so, the Court should prove extremely reluctant to overturn a fact-specific or circumstance-specific exercise of that discretion, where a court of appeals has found it lawful. Cf. [Universal Camera Corp. v. NLRB, 340 U.S. 474, 490-491, 95 L. Ed. 456, 71 S. Ct. 456 \(1951\)](#) (Supreme Court will rarely

overturn appellate court review of agency fact-finding). This cautionary principle of review leads me to an ultimate conclusion different from that of [****95] the majority.

B

The case before us involves a class of individuals (and their families) exposed to asbestos manufactured by Fibreboard [*869] who, for the most part, had not yet sued or settled with Fibreboard as of August 1993. The negotiating parties estimated that Fibreboard faced approximately 186,000 of these future claims. See App. to Pet. for Cert. 321a; cf. AO Statistics, Table C2-A (total number of *all* civil cases filed in federal district courts in 1998 was 252,994). Although the District Court was unable to give a precise figure, see App. to Pet. for Cert. 356a-357a, there is no doubt that a realistic assessment of the value of these claims far exceeds Fibreboard's total net worth.

But, as of 1993, one potentially short-lived additional asset promised potential claimants a greater recovery. That asset consisted of two insurance policies, one issued by Continental Casualty, the other by Pacific Indemnity. If the policies were valid (*i.e.*, if they covered most of the relevant claims), they were worth several billion dollars; but if they were invalid, this asset was worth nothing. At that time, a separate case brought by Fibreboard against the insurance companies in California [****96] state court seemed likely to [**2326] resolve the value of the policies in the near future. That separate litigation had a settlement value for the insurance companies. At the time the parties were negotiating, prior to the California court's decision, the insurance policies were worth, as the majority puts it, the value of "unlimited policy coverage" (*i.e.*, perhaps the insurance companies' entire net worth) "discounted by the risk that Fibreboard would ultimately lose the coverage dispute litigation." *Ante*, at 33.

The insurance companies offered to settle with both Fibreboard and those persons with claims against Fibreboard (who might have tried to sue the insurance companies directly). The settlement negotiations came to a head in August 1993, just as a California state appeals court was poised to decide the validity of the insurance policies. This fact meant speed was important, for the California court could well decide that the policies were worth nothing. It also meant that it was important to certify a non opt-out class of Fibreboard [***755] plaintiffs. [*870] If the class that entered into the settlement were an opt-out class, then members of

that class could wait to see what the California [****97] court did. If the California court found the policies valid (hence worth many billions of dollars), they would opt out of the class and sue for everything they could get; if the California court found the policies invalid (and worth nothing), they would stick with the settlement. The insurance companies would gain little from that kind of settlement, and they would not agree to it. See *In re Asbestos Litigation*, 90 F.3d 963, 970 (CA5 1996).

After eight days of hearings, the District Court found that the insurance policies plus Fibreboard's net worth amounted to a "limited fund," valued at \$ 1.77 billion (the amount the insurance companies were willing to contribute to the settlement plus Fibreboard's value). See App. to Pet. for Cert. 492a. The court entered detailed factual findings. See generally 162 F.R.D. at 518-519. It certified a "non opt-out" class. And the court approved the parties' Global Settlement Agreement. The Global Settlement Agreement allows those exposed to asbestos (and their families) to assert their Fibreboard claims against a fund that it creates. It does not limit recoveries for particular types of claims, but allows for individual determinations of damages [****98] based on all historically relevant individual factors and circumstances. See 90 F.3d at 976. It contains spendthrift provisions designed to limit the total payouts for any particular year, and a requirement that the claimants with the most serious injuries be paid first in any year in which there is a shortfall. It also permits an individual who wishes to retain his right to bring an ordinary action in court to opt out of the arrangement (albeit after mediation and nonbinding arbitration), but sets a ceiling of \$ 500,000 upon the recovery obtained by any person who does so. See generally 162 F.R.D. at 518-519.

The question here is whether the court's certification of the class under *Rule 23(b)(1)(B)* violates the law. The majority seems to limit its holding (though not its discussion) [*871] to that question, and so I limit the focus of my dissent to the *Rule 23(b)(1)(B)* issues as well.

II

The District Court certified a class consisting primarily of individuals (and their families) who had been exposed to Fibreboard's asbestos but who had not yet made claims. See *ante*, at 6-7, and n. 5. It did so under the authority of *Federal Rule of Civil Procedure 23(b)(1)(B)*, which, by analogy [****99] to pre-Rules "limited fund" cases, permits certification of a non opt-out class where

"the prosecution of separate actions by or against individual members of the class would create a risk of . . . adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests."

The majority thinks this class could not be certified under *Rule 23(b)(1)(B)*. I, on the contrary, think it could.

The case falls within the Rule's language as long as there was a significant "risk" that the total assets available to satisfy the claims of the [***756] class members would fall well below [**2327] the likely total value of those claims, for in such circumstances the money would go to those claimants who brought their actions first, thereby "substantially impairing" the "ability" of later claimants "to protect their interests." And the District Court found there was indeed such a "risk." 162 F.R.D. at 526.

Conceptually speaking, that "risk" was no different from the risk inherent in a classic pre-Rules "limited fund" case. Suppose [****100] a broker agrees to invest the funds of 10 individuals who each give the broker \$ 100. The broker misuses the money, and the customers sue. (1) Suppose their claims total \$ 1,000, but the broker's total assets amount to \$ 100. [*872] (2) Suppose the same broker has no assets left, but he does have an insurance policy worth \$ 100. (3) Suppose the broker has both \$ 100 in assets and a \$ 100 insurance policy.

The first two cases are classic limited fund cases. See *ante*, at 16-17 (citing, e.g., *Dickinson v. Burnham*, 197 F.2d 973 (CA2 1952), cert. denied, 344 U.S. 875, 97 L. Ed. 678, 73 S. Ct. 169 (1952), an investors' suit for the return of misused funds); *ante*, at 18 (citing, e.g., *Morrison v. Warren*, 174 Misc. 233, 234, 20 N.Y.S.2d 26, 27 (Sup. Ct. 1940), a suit to distribute insurance proceeds to third party beneficiaries). The third case simply combines the first two, and that third case is the case before us.

Of course the value of the insurance policies in our case is not as precise as the \$ 100 in my example, nor was it certain at the time of settlement. But that uncertainty makes no difference. It was certain that the insurance policies' value was limited. And that limitation was [****101] created by the likelihood of an independent judicial determination of the meaning of words in the policy, in respect to which the merits or value of the underlying tort claims against Fibreboard

were beside the point.

Nor does it matter that the value of the insurance policies in our case might have fluctuated over time. Long before the Federal Rules of Civil Procedure, courts permitted actions by one group of insurance policy holders to bind all policy holders, even where the group proceeded against an insurance-company-administered fund that fluctuated over time. See *Hartford Life Ins. Co. v. IBS*, 237 U.S. 662, 672, 59 L. Ed. 1165, 35 S. Ct. 692 (1915) (life insurance fund which, like the fund before us, was administered through court-ordered rules that bound all policy holders).

Neither does it matter that the insurance policies *might* be worth much more money *if* the California court decided the coverage dispute in Fibreboard's favor. A trust worth, say, \$ 1 million (faced with \$ 2 million in claims) is a limited fund, despite the possibility that a company whose stock it [*873] holds *might* strike oil and send the value of the trust skyrocketing. Limitation is a matter of present value, which takes [****102] appropriate account of such future possibilities.

I need not pursue the conceptual matter further, however, for the majority apparently concedes the conceptual point that a fund's limit may equal its "value discounted by risk." *Ante*, at 33. But the majority sets forth three additional conditions, which it says are "sufficient . . . to justify binding absent members of a class under *Rule 23(b)(1)(B)*, from which no one [***757] has the right to secede." *Ante*, at 20. Those three conditions are:

Condition One: That "the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximum, demonstrate the inadequacy of the fund to pay all the claims." *Ibid.*; Part IV-A, *ante*.

Condition Two: That "the claimants identified by a common theory of recovery were treated equitably among themselves." *Ante*, at 21; Part IV-B, *ante*.

Condition Three: That "the whole of the inadequate fund was to be devoted to the overwhelming claims." *Ante*, at 20; Part IV-C, *ante*.

I shall discuss each condition in turn.

A

In my view, the first condition is substantially satisfied. No one doubts that [****103] the "totals of the

aggregated" claims well exceed the value of the assets in the "fund available [**2328] for satisfying them," at least if the fund totaled about what the District Court said it did, namely, \$ 1.77 billion at most. The District Court said that the limited fund equaled in value "the sum of the value of Fibreboard plus the value of its insurance coverage," or \$ 235 million plus \$ 1.535 billion. App. to Pet. for Cert. 492a. The Court of Appeals upheld [*874] the finding. *90 F.3d at 982*. And the finding is adequately supported.

The District Court found that the insurance policies were not worth substantially more than \$ 1.535 billion in part because there was a "significant risk" that the insurance policies would soon turn out to be worth nothing at all. *162 F.R.D. at 526*. The court wrote that "Fibreboard might lose" its coverage, *i.e.*, that it might lose "on one or more issues in the [California] Coverage Case, or that Fibreboard might lose its insurance coverage as a result of its assignment settlement program." *Ibid.*

Two California insurance law experts, a Yale professor and a former state court of appeals judge, testified that there was a good chance that [****104] Fibreboard would lose all or a significant part of its insurance coverage once the California appellate courts decided the matter. *90 F.3d at 974*. And that conclusion is not surprising. The Continental policy (for which Fibreboard had paid \$ 10,000 per year) carried limits of \$ 500,000 "per-person" and \$ 1 million "per-occurrence," had been in effect only between May 1957 and March 1959, and arguably denied Fibreboard the right to settle tort cases as it had been doing. See App. to Pet. for Cert. 267a. The Pacific policy was said (no one could find a copy) to carry a \$ 500,000 per-claim limit, and had been in effect only for one year, from 1956-57. See *ibid.* To win significantly in respect to either of the two policies, Fibreboard had to show that the policies fully covered a person exposed to asbestos long before the policy year (say, in 1948) even if the disease did not appear until much later (say, in 2002). It also had to explain away the \$ 1 million per occurrence limit in the Continental policy, despite policy language defining "one occurrence" as "all . . . exposure to substantially the same general conditions existing at or emanating from each premises location." Brief [****105] for Respondents Continental Casualty et al. 5. And Fibreboard had to show that its tort-suit [***758] settlement practice was consistent with the policy.

[*875] The settlement value of previous cases also indicated that the insurance policies were of limited

value. Fibreboard's "no-cash" settlements (which required a settling plaintiff to obtain recovery from the insurance companies) were twice as high on average as were its comparable 40% cash settlements. App. to Pet. for Cert. 231a. That difference, suggesting a 50% discount for 40% cash, in turn suggests that settling parties estimated the odds of recovering on the insurance policies as worse than 2 to 1 against.

The District Court arrived at the present value of the policies (\$ 1.535 billion) by looking to a different settlement, the settlement arrived at in the insurance coverage case itself as a result of bargaining between Fibreboard and the insurance companies. See *id.* at 492a. That settlement, embodied in the Trilateral Agreement, created a backup fund by taking from the insurance companies \$ 1.535 billion (plus other money used to satisfy claims not here at issue) and simply setting it aside to use for the payment of claims brought [****106] against Fibreboard in the ordinary course by members of this class (in the event that the federal courts ultimately failed to approve the Global Settlement Agreement).

The Fifth Circuit approved this method of determining the value of the insurance policies. See *90 F.3d at 982* (discussing value of Trilateral Agreement plus value of Fibreboard). And the majority itself sees nothing wrong with that method in principle. The majority concedes that one

"may take a settlement amount as good evidence of the maximum available if one can assume that parties of equal knowledge and negotiating skill agreed upon the figure through arms-length bargaining, unhindered by any considerations tugging against the interests of the parties ostensibly represented in the negotiation." *Ante*, at 34.

The majority rejects the District Court's valuation for a different reason. It says that the settlement negotiation [876] that led to the [2329] valuation was not necessarily a fair one. The majority says it cannot make the necessary "arms-length bargaining" assumption because "class counsel" had a "great incentive to reach any agreement" in light of the fact that "some of the same lawyers . . . had also negotiated [****107] the separate settlement of 45,000" pending cases, which was partially contingent upon a global settlement or other favorable resolution of the insurance dispute. *Id.* at 34-35 (emphasis added).

The District Court and Court of Appeals, however, did

accept the relevant "arms-length" assumption, with good reason. The *relevant* bargaining (*i.e.*, the bargaining that led to the Trilateral Agreement that set the policies' value) was not between the *plaintiffs' class counsel* and the insurance companies; it was between *Fibreboard* and the insurance companies. And there is no reason to believe that *that* bargaining, engaged in to settle the California coverage dispute, was not "arms-length." That bargaining did not lead to a settlement that would release Fibreboard from potential tort liability. Rather, it led to a potential backup settlement that did not release Fibreboard from anything. It created a fund of insurance money, which, once exhausted, [***759] would have left Fibreboard totally exposed to tort claims. Consequently, Fibreboard had every incentive to squeeze as much money as possible out of the insurance companies, thereby creating as large a fund as possible in order [****108] to diminish the likelihood that it would eventually have to rely upon its own net worth to satisfy future asbestos plaintiffs.

Nor are petitioners correct when they argue that the insurance companies' participation in setting the value of the insurance policies created a fund that is limited "only in the sense that . . . every settlement is limited." Brief for Petitioners 28. As the District Court found, the fund was limited by the value of the insurance policies (along with Fibreboard's own limited net worth), and that limitation arose out of the independent likelihood that the California courts [877] would find the policies valueless. App. to Pet. for Cert. 492a. That is why the District Court said that certification in this case does not determine whether

"mandatory class certification is appropriate in the typical case where a class action is settled with a defendant's own funds, or with insurance funds that are not the subject of genuine and vigorous dispute." *162 F.R.D. at 527.*

The court added that, in the ordinary case: "If the settlement failed, . . . the defendant would retain the settlement funds (or the insurance coverage), and there might not be the 'impairment' to class [****109] members' 'ability to protect their interests' required for mandatory class certification." *Ibid.* In this case, however, if settlement failed, coverage "may well disappear . . . with the result that Class members could not then secure their due through litigation." *Ibid.*

I recognize that one could reasonably argue about whether the total value of the insurance policies (plus the value of Fibreboard) is \$ 1.535 billion, \$ 1.77 billion,

\$ 2.2 billion, or some other roughly similar number. But that kind of argument, in this case, is like arguing about whether a trust fund, facing \$ 30,000 in claims, is worth \$ 15,000 or \$ 20,000 (e.g., do we count Aunt Agatha's share as part of the fund?), or whether a ship, subject to claims that, by any count, exceed its value, is worth a little more or a little less (e.g., does the coal in the hold count as fuel, which is part of the ship's value, or as cargo, which is not?). A perfect valuation, requiring lengthy study by independent experts, is not feasible in the context of such an unusual limited fund, one that comes accompanied with its own witching hour. Within weeks after the parties' settlement agreement, the insurance [****110] policies might well have disappeared, leaving most potential plaintiffs with little more than empty claims. The ship was about to sink, the trust fund to evaporate; time was important. Under these circumstances, I would accept the valuation [*878] findings made by the District Court and affirmed by the Court of Appeals as legally sufficient. See *supra*, at 4.

B

I similarly believe that the second condition is satisfied. The "claimants . . . were treated equitably among themselves." *Ante*, [**2330] at 21. The District Court found equitable treatment, and the Court of Appeals affirmed. But a majority of this Court now finds significant inequities arising out of class counsel's "egregious" conflict of interest, the settlement's substantive terms, [***760] and the District Court's failure to create subclasses. See *ante*, at 35-39. But nothing I can find in the Court's opinion, nor in the objectors' briefs, convinces me that the District Court's findings on these matters were clearly erroneous, or that the Court of Appeals went seriously astray in affirming them.

The District Court made 76 separate findings of fact, for example, in respect to potential conflicts of interest. App. to Pet. for Cert. [****111] 392a-430a. Of course, class counsel consisted of individual attorneys who represented other asbestos claimants, including many other Fibreboard claimants outside the certified class. Since Fibreboard had been settling cases contingent upon resolution of the insurance dispute for several years, any attorney who had been involved in previous litigation against Fibreboard was likely to suffer from a similar "conflict." So whom should the District Court have appointed to negotiate a settlement that had to be reached soon, if ever? Should it have appointed attorneys unfamiliar with Fibreboard and the history of its asbestos litigation? Where was the District Court to

find those competent, knowledgeable, conflict-free attorneys? The District Court said they did not exist. Finding of Fact P372 says there is "no credible evidence of the existence of other 'conflict-free' counsel who were qualified to negotiate" a settlement within the necessary time. *Id.* at 428a. Finding of Fact P317 adds that the District Court viewed it as [*879] "crucial . . . to appoint asbestos attorneys who were experienced, knowledgeable, skilled and credible in view of the extremely short window of opportunity to negotiate [****112] a global settlement, and the very high risk to future claimants presented by the Coverage Case appeal." *Id.* at 401a. Where is the clear error?

The majority emphasizes the fact that, by settling the claims of a class that consisted, for the most part, of persons who had not yet asserted claims against Fibreboard, counsel assured the availability of funds to pay other clients who had already asserted those claims. *Ante*, at 35. The decision to split the latter "inventory" claims from the former "class" claims, however, reflected the suggestion, not of class counsel, but of a judge, Circuit Judge Patrick Higginbotham, who had become involved in efforts to produce a timely settlement. Judge Higginbotham thought that negotiations had broken down because the combined class was "too complex." App. to Pet. for Cert. 316a-317a; see also *id.* at 397a. He thought "inventory" claim settlements could be used as benchmarks to determine future class claim values, *id.* at 316a-317a, and that is just what happened. Although the majority is concerned that "inventory" plaintiffs "appeared to have obtained better terms than the class members," *ante*, at 38, Finding of Fact P329 says [****113] that class counsel

"used the higher-than-average [inventory plaintiff settlement values] . . . to achieve a global settlement for future claimants at similarly high values, effectively arguing they could not possibly accept less for a class of future claimants than they had just negotiated for their present clients." App. to Pet. for Cert. 407a.

In addition, more than 150 findings of fact, made after an 8-day hearing, support the District Court's finding that overall the settlement is "fair, adequate, and reasonable." See *id.* [***761] at 500a-501a. And, of course, Finding of Fact P318 says that appointing other attorneys -- i.e., those who had no inventory [*880] clients -- would have "jeopardized any effort at serious negotiations" and "resulted in a less favorable settlement" for the class, or perhaps no settlement followed by no insurance policy either. *Id.* at 402a.

The Fifth Circuit found that "the record amply supports" these District Court findings. [90 F.3d at 978](#). Does the majority mean to set them aside? If not, does it mean to set forth a rigid principle of law, such as the principle that asbestos lawyers with clients outside a class, who will potentially benefit from [****114] a class settlement, can never represent a class in settlement negotiations? And does that principle apply no matter how unusual the circumstances, or no matter how necessary that representation might be? [**2331] Why should there be such a rule of law? If there is not an absolute rule, however, I do not see how this Court can hold that the case before us is not that unusual situation.

Consider next the claim that "equity" required more subclasses. *Ante*, at 38-40. To determine the "right" number of subclasses, a district court must weigh the advantages and disadvantages of bringing more lawyers into the case. The majority concedes as much when it says "at some point there must be an end to reclassification with separate counsel." *Ante*, at 39. The District Court said that if there had "been as many separate attorneys" as the objectors wanted, "there is a significant possibility that a global settlement would not have been reached before the Coverage Case was resolved by the California Court of Appeal." App. to Pet. for Cert. 428a. Finding of Fact P346 lists the shared common interests among subclasses that argue for single representation, including "avoiding the potentially disastrous [****115] results of a loss . . . in the Coverage Case," "maximizing the total settlement contribution," "reducing transactions costs and delays," "minimizing . . . attorney's fees," and "adopting equitable claims payment "procedures." *Id.* at 415a. Surely the District Court was within its discretion to conclude that "the point" to which the majority alludes was reached in this case.

[*881] I need not go into further detail here. Findings of Fact PP347-354 explain why the alleged conflict between pre- and post-1959 claimants is not significant. [Id.](#) at 415a-418a (noting that "the decision as to how to divide the settlement among class members" did not take place until after the Trilateral Agreement was agreed to, at which point money was available equally to both pre- and post-1959 claimants). Findings of Fact PP355-363 explain why the alleged conflict between claimants with, and those without, current illnesses is not significant. [Id.](#) at 419a-422a (explaining why "the interest of the two subgroups at issue here coincide to a far greater extent than they diverge"). The Fifth Circuit found that the District Court "did not abuse its discretion in finding that the class was adequately

represented [****116] and that subclasses were not required." [90 F.3d at 982](#). This Court should not overturn these highly circumstance-specific judgments.

C

The majority's third condition raises a more difficult question. It says that the "whole of the inadequate [***762] fund" must be "devoted to the overwhelming claims." *Ante*, at 20 (emphasis added). Fibreboard's own assets, in theory, were available to pay tort claims, yet they were not included in the global settlement fund. Is that fact fatal?

I find the answer to this question in the majority's own explanation. It says that the third condition helps to guarantee that those who held the

"inadequate assets had no opportunity to benefit [themselves] or claimants of lower priority by holding back on the amount distributed to the class. The limited fund cases thus ensured that the class as a whole was given the best deal; they did not give a defendant a better deal than *seriatim* litigation would have produced." *Ante*, at 20-21.

[*882] That explanation suggests to me that *Rule 23(b)(1)(B)* permits a slight relaxation of this absolute requirement, where its basic purpose is met, *i.e.*, where there is no doubt that "the class as a whole was given [****117] the best deal," and where there is good reason for allowing the third condition's *substantial*, rather than its *literal*, satisfaction.

Rule 23 itself does not require modern courts to trace every contour of ancient case law with literal exactness. Benjamin Kaplan, reporter to the Advisory Committee on Civil Rules that drafted the 1966 revisions, upon whom the majority properly relies for explanation, see, *e.g.*, *ante*, at 14, 15, 24, wrote of *Rule 23*:

"The reform of *Rule 23* was intended to shake the law of class actions free of abstract categories . . . and to rebuild the law on functional lines responsive to those recurrent life patterns which call for mass litigation through representative parties. . . . And whereas the old *Rule* had paid virtually no attention to the practical administration of class actions, the revised *Rule* dwelt long on this matter -- not, to be [**2332] sure, by prescribing detailed procedures, but by confirming the courts' broad powers and inviting judicial initiative." A Prefatory Note, 10 B. C. Ind. & Com. L. Rev. 497 (1969).

The majority itself recognizes the possibility of providing incentives to enter into settlements that reduce costs by granting [****118] a "credit" for cost savings by relaxing the whole-of-the-assets requirement, at least where most of the savings would go to the claimants. *Ante*, at 44.

There is no doubt in this case that the settlement made far more money available to satisfy asbestos claims than was likely to occur in its absence. And the District Court found that administering the fund would involve transaction costs of only 15%. App. to Pet. for Cert. 362a. A comparison of that 15% figure with the 61% transaction costs figure applicable to asbestos cases in general suggests hundreds of millions [**883] of dollars in savings -- an amount greater than Fibreboard's net worth. And, of course, not only is it better for the injured plaintiffs, it is far better for Fibreboard, its employees, its creditors, and the communities where it is located for Fibreboard to remain a working enterprise, rather than slowly forcing it into bankruptcy while most of its money is spent on asbestos lawyers and expert witnesses. [***763] I would consequently find substantial compliance with the majority's third condition.

Because I believe that all three of the majority's conditions are satisfied, and because I see no fatal conceptual difficulty, [****119] I would uphold the determination, made by the District Court and affirmed by the Court of Appeals, that the insurance policies (along with Fibreboard's net value) amount to a classic limited fund, within the scope of *Rule 23(b)(1)(B)*.

III

Petitioners raise additional issues, which the majority does not reach. I believe that respondents would likely prevail were the Court to reach those issues. That is why I dissent. But, as the Court does not reach those issues, I need not decide the questions definitively.

In some instances, my belief that respondents would likely prevail reflects my reluctance to second-guess a court of appeals that has affirmed a district court's fact- and circumstance-specific findings. See *supra*, at 4; cf. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 629-630, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997) (BREYER, J., concurring in part and dissenting in part). That reluctance applies to those of petitioners' further claims that, in effect, attack the District Court's conclusions related to: (1) the finding under *Rule 23(a)(2)* that there are "questions of law and fact common to the class," see App. to Pet. for Cert. 480a; see generally *Amchem, supra*, at 634-636 (BREYER, J.,

[****120] concurring in part and dissenting in part); (2) the finding under *Rule 23(a)(3)* that claims of the representative parties are "typical" of the claims of the class, see App. [**884] to Pet. for Cert. 480a-481a; (3) the adequacy of "notice" to class members pursuant to *Rule 23(e)* and the Due Process Clause, see *id.* at 511a; see generally *Amchem, supra*, at 640-641 (BREYER, J., concurring in part and dissenting in part); and (4) the standing-related requirement that each class member have a good-faith basis under state law for claiming damages for some form of injury-in-fact (even if only for fear of cancer or medical monitoring), see App. to Pet. for Cert. 252a; cf., e.g., *Coover v. Painless Parker, Dentist*, 105 Cal. App. 110, 286 P. 1048 (1930).

In other instances, my belief reflects my conclusion that class certification here rests upon the presence of what is close to a *traditional* limited fund. And I doubt that petitioners' additional arguments that certification violates, for example, the Rules Enabling Act, the Bankruptcy Act, the *Seventh Amendment*, and the Due Process Clause, are aimed at or would prevail against a traditional limited fund (e.g., "trust [****121] assets, a bank account, insurance proceeds, company assets in a liquidation sale, proceeds of a ship sale in a maritime accident suit," *ante*, at 15-16 (internal quotation marks and citations omitted)). Cf. *In re Asbestos Litigation*, 90 F.3d at 986 (noting that *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 86 L. Ed. 2d 628, 105 S. Ct. 2965 (1985), involved a class certified [**2333] under the equivalent of *Rule 23(b)(3)*, not a limited fund case under *Rule 23(b)(1)(B)*). Regardless, I need not decide these latter issues definitively now, and I leave them for another day. With that caveat, I respectfully dissent.

References

Go to Supreme Court Brief(s)

[32B Am Jur 2d, Federal Courts 1807-1816, 1831-1833, 1863, 1957-1960; 59 Am Jur 2d, Parties 78, 80, 82-85](#)

USCS Court Rules, *Federal Rules of Civil Procedure, Rule 23*

L Ed Digest, Class Actions 4, 16

L Ed Index, Asbestos; Class Actions or Proceedings

Annotation References:

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527 U.S. 815, *884; 119 S. Ct. 2295, **2333; 144 L. Ed. 2d 715, ***763; 1999 U.S. LEXIS 4373, ****121

Appealability of order allowing [****122] action to proceed as class action under *Rule 23 of Federal Rules of Civil Procedure*. [32 ALR Fed 674](#).

Right to class member, in class action under *Rule 23 of Federal Rules of Civil Procedure*, to appeal from order approving settlement with class. [30 ALR Fed 846](#).

Class actions in state mass tort suits. [53 ALR4th 1220](#).

ATTACHMENT B

[In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.](#)

United States Court of Appeals for the Second Circuit

September 28, 2015, Argued; June 30, 2016, Decided

Docket Nos. 12-4671-cv(L); 12-4708(CON); 12-4765(CON); 13-4719(CON); 13-4750(CON); 13-4751(CON); 13-4752(CON); 14-32(CON); 14-117(CON); 14-119(CON); 14-133(CON); 14-157(CON); 14-159(CON); 14-192(CON); 14-197(CON); 14-219(CON); 14-241(CON); 14-250(CON); 14-266(CON); 14-303(CON); 14-331(CON); 14-349(CON); 14-404(CON); 14-422(CON); 14-443(CON); 14-480(CON); 14-497(CON); 14-530(CON); 14-567(CON); 14-584(CON); 14-606(CON); 14-663(CON); 14-837(CON)

Reporter

827 F.3d 223 *; 2016 U.S. App. LEXIS 12047 **; 2016-2 Trade Cas. (CCH) P79,680

IN RE PAYMENT CARD INTERCHANGE FEE AND
MERCHANT DISCOUNT ANTITRUST LITIGATION

Subsequent History: US Supreme Court certiorari denied by *Photos Etc. Corp. v. Home Depot U.S.A., Inc.*, 137 S. Ct. 1374, 197 L. Ed. 2d 568, 2017 U.S. LEXIS 2042 (U.S., Mar. 27, 2017)

On remand at, Motion granted by, in part, Motion denied by, in part [In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 2017 U.S. Dist. LEXIS 160045 \(E.D.N.Y., Sept. 27, 2017\)](#)

Later proceeding at [In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 2018 U.S. Dist. LEXIS 34113 \(E.D.N.Y., Feb. 26, 2018\)](#)

Prior History: This antitrust class action was brought on behalf of approximately 12 million merchants against Visa and MasterCard, which are the two largest credit card issuing networks in the United States, as well as against various issuing and acquiring banks, alleging a conspiracy in violation of Section 1 of the Sherman Act. After nearly ten years of litigation, the parties agreed to a settlement that released all claims in exchange for disparate relief to each of two classes: up to \$7.25 billion would go to an opt-out class, and a non-opt-out class would get injunctive relief. The district court certified these two settlement-only classes, and approved the settlement as fair and reasonable. On this appeal, numerous objectors and opt-out plaintiffs argue that this class action was improperly certified and that the settlement was unreasonable and inadequate. We conclude that the class plaintiffs were inadequately represented in violation of Rule 23(a)(4) and the *Due Process Clause* [**1]. Accordingly, we vacate the district court's certification of this class action and reverse the approval of the settlement.

[In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 986 F. Supp. 2d 207, 2013 U.S. Dist. LEXIS 179340 \(E.D.N.Y., Dec. 13, 2013\)](#)

Disposition: Vacated, reversed, and remanded.

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Judges: Before: WINTER, JACOBS, and LEVAL, Circuit Judges. Judge Leval concurs in a separate opinion.

Opinion by: DENNIS JACOBS

Opinion

[*227] DENNIS JACOBS, Circuit Judge:

This antitrust class action was brought on behalf of approximately 12 million merchants against Visa U.S.A. Inc. ("Visa") and MasterCard International Incorporated ("MasterCard"), which are the two largest credit card issuing networks in the United States, as well as against various issuing and acquiring banks (collectively with Visa and MasterCard, the "defendants"), alleging a conspiracy in violation of *Section 1* of the Sherman Act. After nearly ten years of litigation, the parties agreed to a settlement that released all claims in exchange for disparate **[**6]** relief for each of two classes: up to \$7.25 billion would go to an opt-out class, and a non-opt-out class would get injunctive relief. The district court certified these two settlement-only classes, and approved the settlement as fair and reasonable. On this appeal, numerous objectors and opt-out plaintiffs argue that this class action was improperly certified and that the settlement was unreasonable and inadequate. We conclude that the class plaintiffs were inadequately represented in violation of *Rule 23(a)(4)* and the *Due Process Clause*. Accordingly, we vacate the district court's certification of this class action and reverse the approval of the settlement.

BACKGROUND

Detailed information about how the credit card industry operates is set out in **[*228]** the district court opinion

approving the settlement in this case, *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig. ("Payment Card I")*, 986 F. Supp. 2d 207, 214-15 (E.D.N.Y. 2013), and in our previous opinions dealing with past antitrust lawsuits against Visa and MasterCard, *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 101-02 (2d Cir. 2005); *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 234-37 (2d Cir. 2003); *In re Visa Check/MasterMoney Antitrust Litig. ("Visa Check")*, 280 F.3d 124, 129-31 (2d Cir. 2001). This section of the opinion lays out only the facts and procedural history needed to explain our analysis and result.

In general terms, a Visa or MasterCard **[**7]** credit card transaction is processed as follows: the customer presents a credit card to pay for goods or services to the merchant; the merchant relays the transaction information to the acquiring bank; the acquiring bank processes the information and relays it to the network (here, Visa or MasterCard); the network relays the information to the issuing bank; if the issuing bank approves the transaction, that approval is relayed to the acquiring bank, which then relays it to the merchant. If the transaction is approved, the merchant receives the purchase price minus two fees: the "interchange fee" that the issuing bank charged the acquiring bank and the "merchant discount fee" that the acquiring bank charged the merchant.

In a given transaction, the interchange fee that the acquiring bank pays (and is in turn paid by the merchant) varies depending on the credit card network and the type of credit card. Thus, the American Express credit-card network generally charges a higher interchange fee than the Visa or MasterCard networks. And Visa and MasterCard have different product levels within their credit card portfolios, such as cards that give consumers generous rewards, and typically charge **[**8]** a higher interchange fee than cards that offer few rewards or none. The difference in interchange fee between American Express and Visa or MasterCard is one at the brand level, while the difference between, e.g., a rewards card from Visa and a no-rewards card from Visa is one at the product level.

Plaintiffs are all merchants who accept Visa- and MasterCard-branded credit cards and are therefore bound by the issuers' network rules. Plaintiffs challenge as anti-competitive several of the following network rules (which are effectively identical as between Visa and MasterCard). The "default interchange" fee applies to every transaction on the network (unless the

merchant and issuing bank have entered into a separate agreement). The "honor-all-cards" rule requires merchants to accept all Visa or MasterCard credit cards if they accept any of them, regardless of the differences in interchange fees. Multiple rules prohibit merchants from influencing customers to use one type of payment over another, such as cash rather than credit, or a credit card with a lower interchange fee. These "anti-steering" rules include the "no-surcharge" and "no-discount" rules, which prohibit merchants from charging **[**9]** different prices at the point of sale depending on the means of payment.

Plaintiffs allege that these Visa and MasterCard network rules, working in tandem, allow the issuing banks to impose an artificially inflated interchange fee that merchants have little choice but to accept. The argument is that the honor-all-cards rule forces merchants to accept all Visa and MasterCard credit cards (few merchants can afford to accept none of them); the anti-steering rules prohibit them from nudging consumers toward cheaper forms of payment; the issuing banks are thus free to set interchange fees at a supra- **[**229]** competitive rate; and that rate is effectively locked in via the default interchange fee because the issuing banks have little incentive to deviate from it unless a given merchant is huge enough to have substantial bargaining power.

The first consolidated complaint in this action was filed in 2006. Developments since then have altered the credit card industry in important ways. Both Visa and MasterCard conducted initial public offerings that converted each from a consortium of competitor banks into an independent, publicly traded company. The "Durbin Amendment" to the Dodd-Frank Wall Street Reform and Consumer **[**10]** Protection Act of 2010 limited the interchange fee that issuing banks could charge for debit card purchases, and allowed merchants to discount debit card purchases relative to credit card purchases. Finally, pursuant to a consent decree with the Department of Justice in 2011, Visa and MasterCard agreed to permit merchants to discount transactions to steer consumers away from credit cards use. None of these developments affected the honor-all-cards or no-surcharging rules, or the existence of a default interchange fee.

Notwithstanding these pro-merchant industry developments, the plaintiffs pressed on. Discovery included more than 400 depositions, 17 expert reports, 32 days of expert deposition testimony, and the production of over 80 million pages of documents. The

parties fully briefed a motion for class certification, a motion to dismiss supplemental complaints, and cross-motions for summary judgment. Beginning in 2008, the parties participated in concurrent settlement negotiations assisted by well-respected mediators. At the end of 2011, the district judge and the magistrate judge participated in the parties' discussions with the mediators. In October 2012, after several more marathon **[**11]** negotiations with the mediators (including one more with the district court and magistrate judges), the parties executed the Settlement Agreement. The district court granted preliminary approval of the proposed settlement on November 27, 2012, and final approval on December 13, 2013. [Payment Card I, 986 F. Supp. 2d at 213, 217.](#)

The Settlement Agreement divides the plaintiffs into two classes: one - the Rule 23(b)(3) class - covers merchants that accepted Visa and/or MasterCard from January 1, 2004 to November 28, 2012; the other - the Rule 23(b)(2) class - covers merchants that accepted (or will accept) Visa and/or MasterCard from November 28, 2012 onwards forever. The former class would be eligible to receive up to \$7.25 billion in monetary relief; the latter would get injunctive relief in the form of changes to Visa's and MasterCard's network rules. Because of the difference between *Rule 23(b)(3)* and *Rule 23(b)(2)*, members of the first class (which receives money damages in the settlement) could opt out, but members of the second, forward-looking class (which receives only injunctive relief) could not.

The most consequential relief afforded the (b)(2) class was the ability to surcharge Visa- and MasterCard-branded credit cards at both the brand and product levels. That is, a **[**12]** merchant could increase the price of a good at the point of sale if a consumer presents (for example) a Visa card instead of cash, or a Visa rewards card instead of a Visa card that yields no rewards. The incremental value and utility of this relief is limited, however, because many states, including New York, California, and Texas, prohibit surcharging as a matter of state law. See, e.g., [Expressions Hair Design v. Schneiderman, 808 F.3d 118, 127 \(2d Cir. 2015\)](#) (upholding the New York ban on credit-card surcharges); [Rowell \[*230\] v. Pettijohn, 816 F.3d 73, 80 \(5th Cir. 2016\)](#) (upholding the Texas ban on credit-card surcharges). But see [Dana's R.R. Supply v. Attorney Gen., Florida, 807 F.3d 1235, 1249 \(11th Cir. 2015\)](#) (striking down Florida ban on credit-card surcharges). Moreover, under the most-favored-nation clause included in the Settlement Agreement, merchants that accept American Express cannot avail

themselves of the surcharging relief because American Express effectively prohibits surcharging, and the Settlement Agreement permits surcharging for Visa or MasterCard only if the merchant also surcharges for use of cards issued by competitors such as American Express.

Visa and MasterCard also agreed to modify their network rules to reflect that they will: negotiate interchange fees with groups of merchants in good faith, lock-in the benefits of the Durbin Amendment and Department of Justice consent decree, and permit a merchant that **[**13]** operates multiple businesses under different names or banners to accept Visa or MasterCard at fewer than all of its businesses.

The Settlement Agreement provides that all of the injunctive relief will terminate on July 20, 2021.

In return, the plaintiffs are bound by a release that waives any claims they would have against the defendants for: all of the conduct challenged in the operative complaint, all other policies and practices (concerning credit card transactions) that were in place as of November 27, 2012, and any substantially similar practices they adopt in the future. While the injunctive relief for the (b)(2) class will expire on July 20, 2021, this release has no end date. It operates in perpetuity, provided only that Visa and MasterCard keep in place the several rules that were modified by the injunctive relief provided to the (b)(2) class (including, *inter alia*, permitting merchants to surcharge), or impose rules that are substantially similar to the modified rules. That is, after July 20, 2021, for as long as Visa and MasterCard elect to leave in place their network rules as modified by the Settlement Agreement or adopt rules substantially similar thereto, the defendants **[**14]** continue to enjoy the benefit of the release as to all claims the plaintiffs potentially had against the defendants for any of the network rules existing as of November 27, 2012.

If, after July 20, 2021, the Visa or MasterCard networks rules are changed such that they are no longer substantially similar to their form as modified by the Settlement Agreement, then merchants are freed from the release as to claims arising out of that new network rule - but only as to such claims. For example, if Visa or MasterCard revert to their pre-Settlement Agreement rules by forbidding merchants from surcharging, then the release will not bar future merchants included in the (b)(2) class from bringing antitrust claims arising out of the prohibition on surcharging; but the rest of release would remain in effect, so that a suit by the future

plaintiff could not challenge any of the unchanged network rules, such as the honor-all-cards rule or imposition of default interchange fees. In sum, regardless what Visa or MasterCard do with their network rules after July 20, 2021, no merchant will ever be permitted to bring claims arising out of the network rules that are *unaffected* by this Settlement Agreement, **[**15]** including most importantly, the honor-all-cards rule or existence of default interchange fees.

Appellants, including those that opted out from the (b)(3) class and objected to the (b)(2) class, argue that the (b)(2) class was improperly certified and that the settlement was inadequate and unreasonable.

[*231] DISCUSSION

Certification of a class is reviewed for abuse of discretion, *i.e.*, whether the decision (i) rests on a legal error or clearly erroneous factual finding, or (ii) falls outside the range of permissible decisions. *In re Literary Works in Elec. Databases Copyright Litig. ("Literary Works")*, 654 F.3d 242, 249 (2d Cir. 2011). The district court's factual findings are reviewed for clear error; its conclusions of law are reviewed *de novo*. *Charron v. Wiener*, 731 F.3d 241, 247 (2d Cir. 2013).

Class actions are an exception to the rule that only the named parties conduct and are bound by litigation. See *Hansberry v. Lee*, 311 U.S. 32, 40-41, 61 S. Ct. 115, 85 L. Ed. 22 (1940). "In order to justify a departure from that rule, a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Wal-Mart v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541, 2550, 180 L. Ed. 2d 374 (2011) (internal quotation marks and citations omitted). That principle is secured by *Rule 23(a)(4)* and the *Due Process Clause*. *Rule 23(a)(4)*, which requires that "the representative parties . . . fairly and adequately protect the interests **[**16]** of the class," "serves to uncover conflicts of interest between named parties and the class they seek to represent," as well as the "competency and conflicts of class counsel." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625, 626 n.20, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997). "[T]he *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, 812, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985). Class actions and settlements that do not comply with *Rule 23(a)(4)* and the *Due Process Clause*

cannot be sustained.

We conclude that class members of the (b)(2) class were inadequately represented in violation of both *Rule 23(a)(4)* and the *Due Process Clause*. Procedural deficiencies produced substantive shortcomings in this class action and the settlement. As a result, this class action was improperly certified and the settlement was unreasonable and inadequate.

I

Under *Rule 23(a)(4)*, "[a]dequacy is twofold: the proposed class representative must have an interest in vigorously pursuing the claims of the class, and must have no interests antagonistic to the interests of other class members." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006); see also *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 170 (2d Cir. 2001) ("Two factors generally inform whether class representatives satisfy the *Rule 23(a)(4)* requirement: '(1) absence of conflict and (2) assurance of vigorous prosecution.'") To assure vigorous prosecution, courts consider whether the class representative has adequate incentive to pursue **[**17]** the class's claim, and whether some difference between the class representative and some class members might undermine that incentive. *Id.* at 171. To avoid antagonistic interests, any "fundamental" conflict that goes "to the very heart of the litigation," *Charron*, 731 F.3d at 249-50 (internal citations omitted), must be addressed with a "structural assurance of fair and adequate representation for the diverse groups and individuals" among the plaintiffs. *Amchem*, 521 U.S. at 627. One common structural protection is division of the class into "homogenous subclasses under *Rule 23(c)(4)(B)*, with separate representation to eliminate conflicting interests of counsel." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999).

[*232] "Adequacy must be determined independently of the general fairness review of the settlement; the fact that the settlement may have overall benefits for all class members is not the 'focus' in 'the determination whether proposed classes are sufficiently cohesive to warrant adjudication.'" *Denney*, 443 F.3d at 268 (quoting *Ortiz*, 527 U.S. at 858). The focus of the *Rule 23(a)* inquiry remains on "inequity and potential inequity at the precertification stage." *Ortiz*, 527 U.S. at 858. So when (as here) the district court certifies the class at the same time it approves a settlement, the requirements of *Rule*

23(a) "demand undiluted, even heightened, attention." [Amchem](#), 521 U.S. at 620.

A

The Supreme Court wrote the **[**18]** ground rules for adequate representation in the settlement-only class context in [Amchem](#) and [Ortiz](#), two asbestos cases. Our recent decision in [Literary Works](#) contributed a gloss on the subject.

The single-class proposed settlement in [Amchem](#) potentially encompassed millions of plaintiffs who had been exposed to asbestos, without distinction between those who had already manifested asbestos-related injuries and sought "generous immediate payments," and those who had not manifested injury and sought "an ample, inflation-protected fund for the future." [Amchem](#), 521 U.S. at 626. A single class representative could not adequately represent both interests. The two subgroups had "competing interests in the distribution of a settlement whose terms reflected 'essential allocation decisions designed to confine compensation and to limit defendants' liability.'" [Literary Works](#), 654 F.3d at 250 (quoting [Amchem](#), 521 U.S. at 627). The antagonistic interests were so pronounced, on an issue so crucial, that the settlement required a "structural assurance of fair and adequate representation for the diverse groups and individuals." [Amchem](#), 521 U.S. at 627.

Two years later, the Supreme Court again considered a settlement-only class action that joined present and future claimants in a single class, and emphasized: **[**19]** "it is obvious after [Amchem](#) that a class divided between holders of present and future claims ... requires division into homogenous subclasses under *Rule 23(c)(4)(B)*, with separate representation to eliminate conflicting interests of counsel." [Ortiz](#), 527 U.S. at 856. A second fatal deficiency in the [Ortiz](#) settlement was that all present claimants were treated equally, notwithstanding that some had claims that were more valuable. "It is no answer to say ... that these conflicts may be ignored because the settlement makes no disparate allocation of resources as between the conflicting classes" for the "very decision to treat them all the same is itself an allocation decision with results almost certainly different from the results that [the disparate claimants] would have chosen." [Id.](#) at 857. These fault lines between present and future plaintiffs, and among plaintiffs with differently valued claims, were so fundamental that they required "structural protection" in the form of subclasses with separate counsel. [Id.](#)

[Literary Works](#) contained the same "ingredients of conflict identified in [Amchem](#) and [Ortiz](#)." [Literary Works](#), 654 F.3d at 251. The settlement divided class claims into three categories, capped defendants' overall liability at \$18 million, and used a formula **[**20]** for splitting this amount. The settlement was less generous to the third category, and required the holders of those claims to exclusively bear the risk of over-subscription, i.e., their recovery alone **[**233]** would be reduced to bring the total payout down to \$18 million. The class representatives of the single class included individuals with claims in each category; nevertheless, we held that (at a minimum) class members with claims only in the third category required separate representation because their interests were antagonistic to the others on a matter of critical importance — how the money would be distributed. [Id.](#) at 254.

Since some named representatives held claims across all three categories, the class did not encompass mutually exclusive groups as in [Amchem](#); still, each impermissibly "served generally as representative for the whole, not for a separate constituency." [Id.](#) at 251 (quoting [Amchem](#), 521 U.S. at 627). Class representatives with claims in all three categories naturally would want to maximize their overall recovery regardless of allotment across categories, whereas class members with claims only in the third category would want to maximize the compensation for that category in particular. A great risk thus arose **[**21]** that class representatives would sell out the third category of claims for terms that would tilt toward the others. As it transpired, the resulting settlement awarded the third category less, and taxed that lesser recovery with all the risk that claim would exceed the liability cap.

We did not conclude that the third category's "inferior recovery [w]as determinative evidence of inadequate representation." [Id.](#) at 253. The claims in third category were objectively the weakest. "The problem, of course, [wa]s that we ha[d] no basis for assessing whether the discount applied to Category C's recovery appropriately reflect[ed] that weakness." [Id.](#) We could not know the right value of the category C claims "without independent counsel pressing its most compelling case." [Id.](#) While the settlement "was the product of an intense, protected, adversarial mediation, involving multiple parties," including "highly respected and capable" mediators and associational plaintiffs, these features of the negotiation could not "compensate for the absence of independent representation" because there could be no assurance that anyone "advanced the strongest arguments in favor" of the disfavored claims.

Id. at 252-53. The eventual settlement proved that "[o]nly the [**22] creation of subclasses, and the advocacy of an attorney representing each subclass, can ensure that the interests of that particular subgroup are in fact adequately represented." *Id.* at 252. Divided loyalties are rarely divided down the middle.

B

Like the settlement-only classes in *Amchem, Ortiz*, and *Literary Works*, the unitary representation of these plaintiffs was inadequate. Class representatives had interests antagonistic to those of some of the class members they were representing. The fault lines were glaring as to matters of fundamental importance. Such conflicts and absence of incentive required a sufficient "structural assurance of fair and adequate representation," *Amchem*, 521 U.S. at 627, but none was provided.

The conflict is clear between merchants of the (b)(3) class, which are pursuing solely monetary relief, and merchants in the (b)(2) class, defined as those seeking only injunctive relief. The former would want to maximize cash compensation for past harm, and the latter would want to maximize restraints on network rules to prevent harm in the future. *Amchem* tells us that such divergent interests require separate counsel when it impacts the "essential allocation decisions" of plaintiffs' compensation [**23] [*234] and defendants' liability. *Amchem*, 521 U.S. at 627. The Settlement Agreement does manifest tension on an "essential allocation decision": merchants in the (b)(3) class would share in up to \$7.25 billion of damages, while merchants in the (b)(2) class would enjoy the benefit of some temporary changes to the defendants' network rules. The same counsel represented both the (b)(3) and the (b)(2) classes. The class counsel and class representatives who negotiated and entered into the Settlement Agreement were in the position to trade diminution of (b)(2) relief for increase of (b)(3) relief. However, "it is obvious after *Amchem* that a class divided between holders of present and future claims ... requires division into homogenous subclasses ... with separate representation." *Ortiz*, 527 U.S. at 856.

Moreover, many members of the (b)(3) class have little to no interest in the efficacy of the injunctive relief because they no longer operate, or no longer accept Visa or MasterCard, or have declining credit card sales. By the same token, many members of the (b)(2) class have little to no interest in the size of the damages

award because they did not operate or accept Visa or MasterCard before November 28, 2012, or have growing credit card [**24] sales. Unitary representation of separate classes that claim distinct, competing, and conflicting relief create unacceptable incentives for counsel to trade benefits to one class for benefits to the other in order somehow to reach a settlement.

Class counsel stood to gain enormously if they got the deal done. The (up to) \$7.25 billion in relief for the (b)(3) class was the "largest-ever cash settlement in an antitrust class action." *Payment Card I*, 986 F. Supp. 2d at 229. For their services, the district court granted class counsel \$544.8 million in fees. *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig. ("Payment Card II")*, 991 F. Supp. 2d 437, 440 (E.D.N.Y. 2014). The district court calculated these fees based on a graduated percentage cut of the (b)(3) class's recovery; thus counsel got more money for each additional dollar they secured for the (b)(3) class. But the district court's calculation of fees explicitly did not rely on any benefit that would accrue to the (b)(2) class, *id.* at 442 n.4, and class counsel did not even ask to be compensated based on the size or significance of the injunctive relief. *Id.* The resulting dynamic is the same as in *Ortiz*. As the Supreme Court recognized in that case: when "the potential for gigantic fees" is within [**25] counsel's grasp for representation of one group of plaintiffs, but only if counsel resolves another group of plaintiffs' claims, a court cannot assume class counsel adequately represented the latter group's interests. *Ortiz*, 527 U.S. at 852. We expressly do not impugn the motives or acts of class counsel. Nonetheless, class counsel was charged with an inequitable task.

The trouble with unitary representation here is exacerbated because the members of the worse-off (b)(2) class could not opt out. The (b)(2) merchants are stuck with this deal and this representation. We do not decide whether providing these class members with opt out rights would be a sufficient "structural assurance of fair and adequate representation," *Amchem*, 521 U.S. at 627, to overcome the lack of separate class counsel and representative. Cf. *Visa Check*, 280 F.3d at 147. It is enough to say that this feature of the Settlement Agreement compounded the problem.

One aspect of the Settlement Agreement that emphatically cannot remedy the inadequate representation is the assistance of judges and mediators in the [**235] bargaining process. True, "a court-appointed mediator's involvement in pre-

certification settlement negotiations helps to ensure that the proceedings were free of collusion and undue **[**26]** pressure." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001). But even "an intense, protected, adversarial mediation, involving multiple parties," including "highly respected and capable" mediators and associational plaintiffs, does not "compensate for the absence of independent representation." *Literary Works*, 654 F.3d at 252-53. The mission of mediators is to bring together the parties and interests that come to them. It is not their role to advance the strongest arguments in favor of each subset of class members entitled to separate representation, or to voice the interests of a group for which no one else is speaking.

Nor is the problem cured by the partial overlap of merchants who get cash as members of the (b)(3) class and become members of the (b)(2) class as they continue to accept Visa or MasterCard. The force of *Amchem* and *Ortiz* does not depend on the mutually exclusivity of the classes; it was enough that the classes did not perfectly overlap. We held as much in *Literary Works*, reasoning that named plaintiffs with claims in multiple subgroups cannot adequately represent the interests of any one subgroup because their incentive is to maximize their own total recovery, rather than the recovery for any single subgroup. *Amchem* observed that "where differences **[**27]** among members of a class are such that subclasses must be established, we know of no authority that permits a court to approve a settlement ... on the basis of consents by members of a unitary class, some of whom happen to be members of the distinct subgroups." *Amchem*, 521 U.S. at 627 (quoting *In re Joint E. and S. Dist. Asbestos Litig.*, 982 F.2d 721, 742-43 (2d Cir. 1992), modified on reh'g, 993 F.2d 7 (2d Cir. 1993)).

Moreover, whatever overlap presently exists is partial and shrinking with time. As of the September 12, 2013 fairness hearing, class counsel reported that the class was composed of about 12 million merchants. That figure of course does not include merchants that have come into being since then, or those that will come into being in the future, all of whom will be members of only the (b)(2) class. The membership of the (b)(3) class, on the other hand, is fixed and finite. Over time, the initial overlap will be reduced, and the gap between the interests of the (b)(3) and (b)(2) classes will continue to widen.

None of this is to say that (b)(3) and (b)(2) classes cannot be combined in a single case, or that (b)(3) and (b)(2) classes necessarily and always require separate

representation. Problems arise when the (b)(2) and (b)(3) classes do not have independent counsel, seek distinct relief, have non-overlapping **[**28]** membership, and (importantly) are certified as settlement-only. The requirements of *Rule 23(a)* are applied with added solicitude in the settlement-only class context because "the certification of a mandatory settlement class 'effectively concludes the proceeding save for the final fairness hearing,' and there is thus a heightened risk of conflating the fairness requirements of *Rule 23(e)* with the independent requirement of 'rigorous adherence to those provisions of the Rule designed to protect absentees,' such as *Rules 23(a)* and (b)." *Charron*, 731 F.3d at 250 (quoting *Ortiz*, 527 U.S. at 849). As in *Amchem*, *Ortiz*, and *Literary Works*, settlements that are approved simultaneously with class certification are especially vulnerable to conflicts of interest because the imperatives of the settlement process, which come to bear on the defendants, the class counsel, and even **[**236]** the mediators and the court itself, can influence the definition of the classes and the allocation of relief. For this reason, we scrutinize such settlements more closely.

Of course we have blessed multi-class settlements that were the product of unitary representation, but those were entered into *after* class certification. For example, we approved a settlement negotiated by unitary counsel in *Charron* **[**29]**; but before doing so, we "note[d] that unlike the situation in *Amchem*, *Ortiz*, and *Literary Works*, the settlement here was not being approved at the same time that the class was being certified." *Charron*, 731 F.3d at 250. Accordingly, we were more skeptical of allegations that subclass conflicts required separate representation. *Id.* True, *Charron* observed "[a]ll class settlements value some claims more highly than others, based on their perceived merits, and strike compromises based on probabilistic assessments," *id.*, but that observation has less force in the settlement-only context. *Charron* also spoke of counsel trading one *claim* for another (which may be permissible); in the settlement-only class action, we are concerned that counsel will trade the interests of one *class* for another (which is not).

We have reason to think that that occurred here. Structural defects in this class action created a fundamental conflict between the (b)(3) and (b)(2) classes and sapped class counsel of the incentive to zealously represent the latter. Apparently, the only unified interests served by herding these competing claims into one class are the interests served by settlement: (i) the interest of class counsel in fees, and

(ii) the **[**30]** interest of defendants in a bundled group of all possible claimants who can be precluded by a single payment. This latter interest highlights the next problem with the Settlement Agreement.

II

This opinion already concludes that class plaintiffs were inadequately represented. Accordingly, the settlement and release that resulted from this representation are nullities. See *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 260 (2d Cir. 2001), aff'd in part by an equally divided court and vacated in part, 539 U.S. 111, 123 S. Ct. 2161, 156 L. Ed. 2d 106 (2003) ("Res judicata generally applies to bind absent class members except where to do so would violate due process" and "[d]ue process requires adequate representation at all times throughout the litigation."). This outcome is confirmed by the substance of the deal that was struck. Like the Supreme Court in *Amchem*, we "examine a settlement's substance for evidence of prejudice to the interests of a subset of plaintiffs" when "assessing the adequacy of representation." *Literary Works*, 654 F.3d at 252. Here, the bargain that was struck between relief and release on behalf of absent class members is so unreasonable that it evidences inadequate representation.

"It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment **[**31]** where they are *in fact adequately represented* by parties who are present" consistent with "the requirements of due process and full faith and credit." *Hansberry*, 311 U.S. at 42-43 (emphasis added); see also *Stephenson*, 273 F.3d at 261 ("Part of the due process inquiry (and part of the Rule 23(a) class certification requirements) involves assessing adequacy of representation and intra-class conflicts."). Similarly, "[p]laintiffs in a class action may release claims that were or could have been pled in exchange for settlement relief"; but this authority "is limited by the 'identical factual predicate' and 'adequacy of representation' **[**237]** doctrines." *Wal-Mart Stores*, 396 F.3d at 106. "[W]here class plaintiffs have not adequately represented the interests of class members," any "[c]laims arising from a shared set of facts will not be precluded." *Id.* at 108.

A

As discussed above, *Literary Works* concluded that inadequate representation was demonstrated by the

relief afforded to a subset of the class. Similarly, the release in *Stephenson* was itself proof of inadequate representation, whereas the release in *Wal-Mart Stores* did not impugn the class's representation. Considered together, these cases illustrate when the tradeoff between relief and release as applied to a class member can violate due process.

Literary Works held that **[**32]** class members with claims in one of the categories were inadequately represented not only because they did not receive separate representation, but also because they solely bore the risk that the total amount claimed would exceed a preset liability cap. We observed that this feature of the settlement could not be justified by the relative weakness of those claims because that fact was already accounted for. *Literary Works*, 654 F.3d at 253. We could discern no reason for subjecting the single category of claims to the whole risk of over-subscription; nor could the settlement's proponents. *Id.* at 254. When "one category [of class members are] targeted for [worse treatment] without credible justification" it "strongly suggests a lack of adequate representation for those class members who hold only claims in this category." *Id.*

In *Stephenson*, we considered a collateral attack on a class action that had established a settlement fund for individuals injured by exposure to Agent Orange. The underlying litigation provided compensation only for those who discovered their injury *before* 1994, yet released all future claims. Two individuals who fell within the class definition of individuals injured by Agent Orange, but who learned of **[**33]** their injury *after* 1994, challenged the release as applied to them. Analogizing the case to *Amchem* and *Ortiz*, we concluded that the two individuals were inadequately represented in the prior litigation because the settlement purported to resolve all future claims but "the settlement fund was permitted to terminate in 1994" and "[n]o provision was made for post-1994 claimants." *Stephenson*, 273 F.3d at 260-61. The two challengers could not have been adequately represented if their class representative negotiated a settlement and release that extinguished their claims without affording them any recovery. The result violated due process; the plaintiffs could not be bound by the settlement release. *Id.* at 261.

A similar challenge was raised to the settlement release in *Wal-Mart Stores*, which foreclosed all claims arising from the same factual predicate as that alleged in the complaint. Objectors argued that they were

inadequately represented because class representatives did not pursue certain claims as vigorously as others. We rejected this basis for objection because "adequate representation of a particular claim is determined by the alignment of interests of class members, not proof of vigorous pursuit of that claim." Wal-Mart Stores, 396 F.3d at 113. Stephenson [**34] was "not directly on point" because in the Agent Orange settlement (as in the Amchem and Ortiz settlements) "future claims had not been considered separately from claims involving current injury" despite these two groups having clearly divergent interests. *Id.* at 110. The objectors in Wal-Mart Stores did not allege divergent interests; they had disagreements about which claims were most valuable and what relief [**238] was adequate. Moreover, the settlement in Wal-Mart Stores covered only a past, finite period and did not preclude future suits over conduct post-dating the settlement. *Id.* No future claimants or claims were covered by the Wal-Mart Stores settlement or release. Finally, every claimant from the objecting groups benefitted from the settlement. *Id.* at 112.

B

Merchants in the (b)(2) class that accept American Express or operate in states that prohibit surcharging gain no appreciable benefit from the settlement, and merchants that begin business after July 20, 2021 gain no benefit at all. In exchange, class counsel forced these merchants to release virtually any claims they would ever have against the defendants. Those class members that effectively cannot surcharge and those that begin operation after [**35] July 20, 2021 were thus denied due process.

No one disputes that the most valuable relief the Settlement Agreement secures for the (b)(2) class is the ability to surcharge at the point of sale. To the extent that the injunctive relief has any meaningful value, it comes from surcharging, not from the buying-group provision, or the all-outlets provision, or the locking-in of the Durbin Amendment and DOJ consent decree. For this reason, it is imperative that the (b)(2) class in fact benefit from the right to surcharge. But that relief is less valuable for any merchant that operates in New York, California, or Texas (among other states that ban surcharging), or accepts American Express (whose network rules prohibit surcharging and include a most-favored nation clause). Merchants in New York and merchants that accept American Express can get no advantage from the principal relief their counsel

bargained for them.

It may be argued that the claims of the (b)(2) class are weak and can command no benefit in settlement. However, that argument would seem to be foreclosed because other members of the same class with the same claims — those that do not take American Express and operate in states that permit surcharging [**36] — derive a potentially substantial benefit. There is no basis for this unequal intra-class treatment: the more valuable the right to surcharge (a point the parties vigorously dispute), the more unfair the treatment of merchants that cannot avail themselves of surcharging.

This is not a case of some plaintiffs forgoing settlement relief. A significant proportion of merchants in the (b)(2) class are either legally or commercially unable to obtain incremental benefit from the primary relief negotiated for them by their counsel, and class counsel knew at the time the Settlement Agreement was entered into that this relief was virtually worthless to vast numbers of class members. Alternative forms of relief might have conferred a real and palpable benefit, such as remedies that affected the default interchange fee or honor-all-cards rule. This is not a matter of certain merchants (*e.g.*, those based in New York and those that accept American Express) arguing that class counsel did not bargain for their preferred form of relief, did not press certain claims more forcefully, or did not seek certain changes to the network rule books more zealously. This is a matter of class counsel trading the [**37] claims of many merchants for relief they cannot use: they actually received nothing.

Another fault line within the (b)(2) class runs between merchants that will have accepted Visa or MasterCard before July 20, 2021, and those that will come into being thereafter. The former are at least guaranteed some form of relief, while the [**239] latter are at the mercy of the defendants to receive relief because the Settlement Agreement explicitly states that the defendants' obligation to provide any injunctive relief terminates on July 20, 2021. Like the servicemen with latent injury in Stephenson, the post-July 20, 2021 merchants are future claimants who had their claims settled for nothing. There is no evidence to suggest that merchants operating after July 20, 2021 would have weaker claims than those operating before July 20, 2021; yet, the Settlement Agreement consigns the former to an unambiguously inferior position. As in Literary Works, we conclude that such arbitrary harsher treatment of class members is indicative of inadequate

representation.

Merchants that cannot surcharge, and those that open their doors after July 20, 2021, are also bound to an exceptionally broad release. The Settlement **[**38]** Agreement releases virtually any claim that (b)(2) class members would have had against the defendants for any of the defendants' thousands of network rules. And unlike the relief, which expires on July 20, 2021, the release operates indefinitely. Therefore, after July 20, 2021, the (b)(2) class remains bound to the release but is guaranteed nothing. This release permanently immunizes the defendants from any claims that any plaintiff may have now, or will have in the future, that arise out of, *e.g.*, the honor-all-cards and default interchange rules. Even if the defendants revert back to all their pre-Settlement Agreement practices, the release continues to preclude any claim based on any rule that was not altered by the Settlement Agreement. The defendants never have to worry about future antitrust litigation based on their honor-all-cards rules and their default interchange rules.

That is because the *only* claims that merchants post-July 20, 2021 *may* have are ones relating to those network rules that are explicitly changed by the injunctive relief in the Settlement Agreement. Those claims will become actionable only if the defendants elect to revert to their pre-Settlement Agreement **[**39]** rules. Of course, it remains to be seen how much the mandated rules will cost the defendants or benefit the merchants, but either way, the defendants win. If the defendants see that permitting surcharging had little effect on their business, they can decide to maintain the rules changes provided for in the injunctive relief so that only merchants that do not accept American Express and do not operate in states like New York, California, and Texas will be able to avail themselves of that limited relief. On the other hand, if the defendants observe that surcharging took a significant toll on their business, they can revert to prohibiting surcharging and expose themselves to lawsuits that are limited to challenging the surcharging ban. In all events, merchants that cannot surcharge receive valueless relief while releasing a host of claims of unknown value.

This bargain is particularly unreasonable for merchants that begin accepting Visa or MasterCard after July 20, 2021. They will be deemed to have released all of their claims pertaining to a whole book of rules, including (perhaps most importantly) the honor-all-cards and default interchange rules, and in return have the *chance* that the **[**40]** defendants will permit surcharging. In

substance and effect, merchants operating after July 20, 2021 give up claims of potential value and receive nothing that they would not otherwise have gotten. Since there was no independent representation vigorously asserting these merchants' interests, we have no way to ascertain the value of the claims forgone. See [Literary Works](#), *654 F.3d at 253*.

[*240] In sum, this release has much in common with the releases in [Stephenson](#), [Amchem](#), and [Ortiz](#). Like those, this release applies to future claims and claimants, and disadvantaged class members are bound to it. The Settlement Agreement waives any claim any (b)(2) merchant would have against any defendant arising out of any of the current network rules, or those imposed in the future that are substantially similar thereto. The (b)(2) class had no notice and no opportunity to opt out of this deal. (At least the authors in [Literary Works](#) could opt out from their inadequate representation.) This Settlement Agreement is also distinguishable from releases that have passed muster. For example, the settlement release in [Wal-Mart Stores](#) (another merchant class action against Visa and MasterCard) did not bind future claimants and did not preclude **[**41]** new suits for similar conduct in the future. [Wal-Mart Stores](#), *396 F.3d at 110, 113*. And our approval of the [Charron](#) settlement release explicitly distinguished it from those in [Amchem](#), [Ortiz](#), and [Literary Works](#) on the ground that it did not extinguish claims other than those that were the subject of relief in the settlement. [Charron](#), *731 F.3d at 252*.

Merchants that cannot surcharge (by reason of state law or rules of American Express) and those that begin operating after July 20, 2021 suffer an unreasonable tradeoff between relief and release that demonstrates their representation did not comply with due process. We of course acknowledge that "[b]road class action settlements are common, since defendants and their cohorts would otherwise face nearly limitless liability from related lawsuits in jurisdictions throughout the country." [Wal-Mart Stores](#), *396 F.3d at 106*. And it is true that "[p]arties often reach broad settlement agreements encompassing claims not presented in the complaint in order to achieve comprehensive settlement of class actions, particularly when a defendant's ability to limit his future liability is an important factor in his willingness to settle." [Literary Works](#), *654 F.3d at 247-48*. But the benefits of litigation peace do not outweigh class members' due process right to adequate representation.

CONCLUSION [**42]

For the foregoing reasons, we vacate the district court's certification of the class, reverse approval of the settlement, and remand for further proceedings not inconsistent with this opinion.

Concur by: LEVAL

Concur

LEVAL, Circuit Judge, concurring:

I concur in Judge Jacobs's thoughtful opinion. I write separately, however, to note another, perhaps deeper, problem with the settlement. Under its terms, one class of Plaintiffs accepts substantial payments from the Defendants, in return for which they compel Plaintiffs in another class, who receive no part of the Defendants' payments, to give up forever their potentially valid claims, without ever having an opportunity to reject the settlement by opting out of the class. Opinions of the Supreme Court directly hold that this arrangement violates the due process rights of those compelled to surrender their claims for money damages.

Representatives brought this class action on behalf of approximately 12 million merchants against Visa and MasterCard, alleging that a number of the Defendants' practices violate the antitrust laws, and seeking both damages for past injury and an injunction barring future violations. Eventually, the Defendants reached a proposed settlement [**43] with the Representatives. The settlement provides that the Defendants would pay approximately \$7.25 billion to compensate merchants for damages suffered up to November 28, 2012 (when [**241] the district court granted preliminary approval of the settlement). The settlement also entails a commitment by the Defendants, enforced by injunction, to abandon some (not all) of their challenged practices for nine years—until July 20, 2021. The Defendants would be free after that date to resume the practices they temporarily abandoned and would also be free from the outset to continue forever the challenged practices they did not agree to abandon. In return for what the Defendants gave up, a class consisting of all merchants that would ever in the future accept Visa and MasterCard is compelled to release forever the Defendants from any and all claims for past or future conduct (other than the conduct enjoined) that relate in any way to any of Defendants' practices that are alleged or could have been alleged in the suit. While I do not

speculate on the merits of the Plaintiffs' claims, the fact that the Defendants were willing to pay \$7.25 billion, apparently the largest antitrust cash settlement in [**44] history, suggests that the claims were not entirely devoid of merit.

What is particularly troublesome is that the broad release of the Defendants binds not only members of the Plaintiff class who receive compensation as part of the deal, but also binds in perpetuity, without opportunity to reject the settlement, all merchants who in the future will accept Visa and MasterCard, including those not yet in existence, who will never receive any part of the money. This is not a settlement; it is a confiscation. No merchants operating from November 28, 2012, until the end of time will ever be allowed to sue the Defendants, either for damages or for an injunction, complaining of any conduct (other than that enjoined) that could have been alleged in the present suit. The future merchants are barred by the court's adoption of the terms of the settlement from suing for relief from allegedly illegal conduct, although they have no ability to elect not to be bound by it. One class of Plaintiffs receives money as compensation for the Defendants' arguable past violations, and in return gives up the future rights of others. The Supreme Court has addressed such circumstances and ruled that an adjudication [**45] coming to this result is impermissible.

In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985), the Supreme Court reasoned that a claim for money damages—a “chose in action”—is “a constitutionally recognized property interest possessed by each of the plaintiffs” whose claims are represented in a class action. *Id.* at 807. In order for a court “to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. . . . [D]ue process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class” *Id.* at 811-12. That opportunity was lacking here.

Following *Shutts*, the Court unanimously held in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541, 2557, 180 L. Ed. 2d 374 (2011), that claims for monetary relief cannot be certified under *Rule 23(b)(2)*, as here, because of the possibility that “individual class members' compensatory-damages claims would be precluded by litigation they had no power to hold themselves apart from.” *Id.* at 2559 (emphasis added). *Dukes* did not involve a settlement agreement, but that does not make its precedent any less applicable to this

case. If a class may not even be certified because of the risk that adjudication of its rights might violate the due process rights of its members by forcibly depriving them of **[**46]** claims, then necessarily an adjudication of a class's rights that in **[*242]** fact forcibly deprives the members of their claims is also unacceptable. Because the terms of this settlement preclude all future merchants that will accept the Defendants' cards (the (b)(2) class) from bringing claims without their having had an opportunity to opt out (or even object), the Supreme Court's rulings in *Shutts* and *Dukes* make clear that a court cannot accept it.

The practical effects of this settlement underscore why this is so. Although no court will ever have ruled that the Defendants' practices are lawful, no person or entity will ever have the legal right to sue to challenge those practices, and no person or entity, past, present, or future has had or will have the opportunity to refuse to be a part of the class so bound. For this reason, as well as those noted in Judge Jacobs's opinion, we must reject the settlement.

ATTACHMENT C

[Juris v. Inamed Corp.](#)

United States Court of Appeals for the Eleventh Circuit

July 6, 2012, Decided; July 6, 2012, Filed

No. 10-12665

Reporter

685 F.3d 1294 *; 2012 U.S. App. LEXIS 13841 **; 23 Fla. L. Weekly Fed. C 1251; 2012 WL 2681445

ZUZANNA JURIS, Plaintiff-Appellant, versus INAMED CORPORATION, MCGHAN MEDICAL CORP., et al., Defendants-Appellees.

Subsequent History: US Supreme Court certiorari denied by [Juris v. Inamed Corp., 2013 U.S. LEXIS 841 \(U.S., Jan. 14, 2013\)](#)

Prior History: **[**1]** Appeal from the United States District Court for the Northern District of Alabama. D. C. Docket No. 2:97-cv-11441-RDP.

[United States v. Baxter Int'l, Inc., 345 F.3d 866, 2003 U.S. App. LEXIS 19067 \(11th Cir. Ala., 2003\)](#)

Disposition: AFFIRMED.

Counsel: For ZUZANNA JURIS, Plaintiff - Appellant: Joe R. Whatley, Jr., William Tucker Brown, Whatley Drake & Kallas, LLC, BIRMINGHAM, AL; Cynthia C. Lebow, Lebow Law Offices, SANTA MONICA, CA.

For INAMED CORPORATION, Defendant - Appellee: Augusta S. Dowd, J. Mark White, Katherine R. Brown, White Arnold & Dowd, PC, BIRMINGHAM, AL; Ellen L. Darling, Richard A. Derevan, Brendan Mathieu Ford, Todd E. Lundell, Snell & Wilmer, LLP, COSTA MESA, CA; Defendant's Liaison Counsel, Dinsmore & Shohl, LLP, CINCINNATI, OH; Charles C. Lifland, O'Melveny & Myers, LLP, LOS ANGELES, CA.

For MCGHAN MEDICAL CORP., CUI CORPORATION, DONALD MCGHAN, Defendants - Appellees: Charles C. Lifland, O'Melveny & Myers, LLP, LOS ANGELES, CA.

For SANDY ALTRICHTER: Leslie Joan Bryan, Ralph I. Knowles, Jr., Doffermyre Shields Canfield & Knowles, LLC, ATLANTA, GA; Elizabeth Joan Cabraser, Lieff Cabraser Heimann & Bernstein, LLP, SAN FRANCISCO, CA; Fredric L. Ellis, Ellis & Rapacki, LLP, BOSTON, MA; Edgar C. Gentle, III, Gentle Turner & Sexton, HOOVER, AL; Ernest H. Hornsby, Farmer Price Hornsby & Weatherford, **[**2]** LLP, DOTHAN, AL;

Dianna Pendleton-Dominguez, SAINT MARY'S, OH; Joe R. Whatley, Jr., Whatley Drake & Kallas, LLC, BIRMINGHAM, AL.

For JANELL CRUMLEY BLACK, DARLENE DAVIS, LOIS HAZMILTON, ROSE MARIE HODGES, GLORIA JONES: Leslie Joan Bryan, Ralph I. Knowles, Jr., Doffermyre Shields Canfield & Knowles, LLC, ATLANTA, GA; Elizabeth Joan Cabraser, Lieff Cabraser Heimann & Bernstein, LLP, SAN FRANCISCO, CA; Ernest H. Hornsby, Farmer Price Hornsby & Weatherford, LLP, DOTHAN, AL; Dianna Pendleton-Dominguez, SAINT MARY'S, OH.

Judges: Before TJOFLAT, CARNES and ANDERSON, Circuit Judges.

Opinion by: ANDERSON

Opinion

[*1301] ANDERSON, Circuit Judge:

In 1999, the United States District Court for the Northern District of Alabama approved a mandatory, limited fund class settlement, which resolved tens of thousands of claims arising out of injuries allegedly caused by defective silicone breast implants manufactured by Inamed Corporation ("Inamed"). Several years later, in 2006, Zuzanna Juris filed an individual action in California state court against Inamed and Allergan, Inc. ("Allergan"), Inamed's successor, alleging injuries caused by her Inamed implants. The defendants contended that Juris's lawsuit was barred because the 1999 class settlement **[**3]** resolved her claims; Juris posited that she could avoid the settlement's res judicata effect on due process grounds. The district court held that the class settlement precluded Juris from prosecuting the California case. This is Juris's appeal.

For the reasons explained below, we affirm.

I. BACKGROUND¹

Well after the creation of silicone breast implants, women implanted with them began claiming that leaking gel was causing them various diseases. In 1992, the Food and Drug Administration ("FDA") first banned the use of silicone gel implants, and a flood of litigation followed. The FDA relaxed the ban later that year to permit the use of such implants for specified medical procedures. The number of lawsuits only increased further. As a result, the Judicial Panel on Multidistrict Litigation consolidated more than 21,000 cases against various breast implant manufacturers for pretrial proceedings and transferred them to District **[**4]** Judge Sam Pointer in the Northern District of Alabama.²

See *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 793 F. Supp. 1098 (J.P.M.L. 1992); *In re Silicone Breast Implants Prods. Liab. Litig.*, MDL 926, 2:92-cv-10000 (N.D. Ala.). The transfer included all pending federal lawsuits against Inamed regarding allegedly defective implants.

[*1302] A. Inamed's Pre-Settlement Financial Condition

In 1991, women with Inamed breast implants began filing individual suits against Inamed and its subsidiaries. The litigation ballooned. At one point, more than 15,000 lawsuits were pending against Inamed across the country. Breast implant litigation forced the company to divert substantial capital to funding defense efforts. In 1994, in an attempt to stem the tide, Inamed and the plaintiffs' settlement committee negotiated a global settlement agreement, which would have required Inamed to pay \$1 million per year for twenty-five years. Anticipating approval **[**5]** of that proposal, Inamed booked the \$25 million annuity as a contingent liability in the amount of \$9.2 million (the present value of twenty-five annual payments of \$1 million). Inamed

sought to certify a limited fund settlement class pursuant to *Federal Rule of Civil Procedure 23(b)(1)(B)* in an effort to secure a mandatory, global resolution of all present and future claims. The plaintiffs' settlement committee retained Ernst & Young to review Inamed's finances and determine whether limited fund treatment was appropriate. Ernst & Young issued a report confirming Inamed's claims that its liabilities, both operational and litigation-related, dwarfed its assets. Counsel for the plaintiffs did not dispute this. However, they questioned whether the \$9.2 million present value contribution was prudent considering Inamed's potential future earnings. Disagreement yielded further negotiations, and the possibility of a global settlement languished.

Responding to its growing financial troubles, in 1996, Inamed approached a high risk investment group and raised \$35 million through the private placement of senior secured convertible notes. The notes were senior to all claims, including operational **[**6]** liabilities and tort claims, and were secured by interests in substantially all of Inamed's assets. Pursuant to the terms of the offering, Inamed deposited \$15 million in escrow for the sole purpose of financing a non-opt-out class settlement if approved before January 23, 1997. That temporal condition was not met. Inamed returned the \$15 million to the noteholders in exchange for warrants to purchase Inamed common stock in the event a mandatory class settlement was later approved. Inamed quickly exhausted the balance, \$20 million, which provided necessary cash to stay in business and cover expenditures related to inventory, payments to vendors, and other operational items.

In January of 1997, Inamed secured an additional \$6.2 million through another private debt placement. All proceeds were immediately applied towards day-to-day operational expenses and payments against past-due income tax liabilities. Around this time, Inamed defaulted on its repayment obligations under the senior secured notes and its stock price dropped. The company continued to explore options for raising working capital. However, between the senior secured noteholders exercising their veto authority over Inamed's **[**7]** ability to raise capital through equity offerings and, more generally, the unavailability of commercially reasonable lending opportunities given the company's dire financial predicament, Inamed's only option was to borrow approximately \$10 million from an entity associated with its former chairman.

Throughout the 1990s, each audit letter prepared by

¹The district court should be commended for the comprehensive narrative in which it set forth this case's complex procedural and factual history. Throughout Part I.A through E, we borrow in large part from the findings of fact in the district court's memorandum opinion.

²Troubled by allegations of forum shopping, litigation strategies, and underlying motives, the multidistrict panel rejected the forum preferences of both sides and independently assigned the case to Judge Pointer in light of his experience and reputation.

Inamed's independent auditing firm, Coopers & Lybrand, included a qualified opinion expressing "substantial doubt about the Company's ability to continue as a going concern." For fiscal years 1995, 1996, and 1997, Inamed reported pre-tax operating losses of \$8.6 million, \$6.0 million, and \$6.6 million, respectively. [*1303] By the end of 1997, the company's consolidated book value—subtracting liabilities from assets—was negative \$10.9 million. Setting aside the \$9.2 million contingent liability booked in 1994 in anticipation of the proposed global settlement, Inamed's book value was still negative \$1.7 million. And, significantly, other than the \$9.2 million contingent liability, Inamed's balance sheet did not account for any other litigation expenses, including possible settlements, attorneys' fees, and potential judgments. Those litigation expenses, [**8] however, were staggering. For example, it cost Inamed's attorneys approximately \$150,000 to take a single case to the brink of trial, and an additional \$150,000 to defend through trial. In 1997 alone, Inamed settled sixteen breast implant cases. The settlement values ranged from \$2,500 to \$50,000, averaging out to \$18,500 per case.³

During this time, neither Inamed nor its subsidiaries had products liability insurance coverage.

In light of Inamed's rapidly deteriorating financial condition, in the latter part of 1997, the company and plaintiffs' counsel revisited settlement negotiations. By this time, investors were unwilling to finance any settlement that would not extinguish substantially all of the breast implant litigation. They considered elimination of the enormous costs and risks associated with the implant litigation an essential precondition to the economic turnaround that would be necessary to repay any investment. Coupling this pressure with the senior secured noteholders' authority over Inamed's financial decisions, Inamed's ability [**9] to afford any settlement was dependent on the senior creditors' willingness to finance it.

The parties considered the possibility of Inamed pursuing bankruptcy. Chapter 7 liquidation, as opposed to Chapter 11 reorganization, was the only viable solution to Inamed's financial stresses. If Inamed had elected to pursue Chapter 7 bankruptcy at the end of 1997, the company's saleable assets, discounted by the impairment likely to result from a forced liquidation, would have totaled between \$11.4 million and \$20.4

million. From this sum, the senior secured noteholders would have been entitled to \$19 million, leaving unsecured creditors—trade creditors, subordinated noteholders and tort claimants—with somewhere between \$0 and \$1.4 million. At best, the tort claimants would have been left to compete for \$1.4 million against trade creditors, with rights to payment valued at \$12.5 million, and subordinated noteholders, with rights to payment valued at \$10 million.

Plaintiffs' counsel, including Ernest Hornsby, an attorney designated to represent the interests of Inamed breast implant recipients with potential, future injury claims, negotiated with Inamed and its senior secured noteholders.⁴

The [**10] senior secured noteholders—the only lenders open to advancing Inamed funds for settlement—conditioned financing on the settlement being mandatory and not exceeding \$31.5 million. These senior creditors had no obligation to contribute funds. If plaintiffs' counsel demanded either opt-out rights or settlement funds beyond \$31.5 million, Inamed, steered by its senior creditors, was prepared to pursue liquidation. [*1304] Thus, the proposed class settlement created a substantial recovery fund that otherwise would not exist. Plaintiffs' counsel ultimately accepted the comparative benefit of the \$31.5 million limited fund, obtained by Inamed from the senior secured noteholders, as the only available resolution. They concluded that all Inamed implant claimants, whether their injuries had manifested or not, had a common interest in securing a certain source of recovery for their claims; none would be well served by the alternatives of default, insolvency, or bankruptcy.

B. Notice of the Proposed Settlement Class

The parties presented Judge Pointer with the proposed settlement, which called for class certification of a \$31.5 million mandatory, limited fund class and imposed on Inamed certain disclosure obligations with respect to ongoing breast implant studies. On June 2, 1998, Judge Pointer provisionally certified and approved the mandatory, limited fund class under *Rule 23(b)(1)(B)*. He expressly conditioned permanent certification and

³In addition, an individual case that went to trial against Inamed could produce—and in the past had produced—a multimillion dollar jury verdict.

⁴Hornsby was brought in to address the possibility that implant recipients with manifested injuries and those without manifested injuries had divergent or conflicting interests. In order to ensure that all viewpoints were represented, [**11] Hornsby directly participated in negotiations on behalf of the implant recipients with only potential, future claims.

final approval "upon an evidentiary showing, to this Court's satisfaction, that a 'limited fund' or other circumstances exist satisfying the criteria for mandatory class certification under *Rule 23*, and that the proposed settlement is in the best interests of the class and should be approved under *Rule 23(e)*." District Court order, Docket No. 10 at 3. Subsequently, on October 7, 1998, Judge Pointer entered Order 47. Among other things, that order directed that notice be given to all individuals potentially affected by the class settlement. In furnishing the notice plan, Judge Pointer attempted to approximate **[**12]** the level and quality of notice required by *Rule 23(b)(3)*, even though the class was provisionally certified under *Rule 23(b)(1)(B)*.⁵

Judge Pointer first directed notice to be sent to approximately 250,000 women registered with the MDL 926 claims office, estimating that 80,000 were potential class members.⁶

He also directed notice to 28,000 attorneys known to represent plaintiffs with breast implant-related claims against Inamed. However, because not all Inamed breast implant recipients were registered with the claims office or represented by counsel, Judge Pointer ordered that notice of the proposed settlement be published in various periodicals. Judge Pointer approved the text of the proposed notice, and class counsel retained Hilsoft Notifications to design the layout and select the appropriate publications. Notices of the proposed settlement appeared in the October 28, 1998, edition of *USA Today* and the October 30, **[**13]** 1998, edition of *People Magazine*. Together, these publications reached

⁵"For any class certified under *Rule 23(b)(3)*, the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Fed. R. Civ. P. 23(c)(2)(B)*.

⁶In 1994, in connection with the "Original Global Settlement," an extensive notice campaign invited all women with breast implants to register with the MDL 926 claims office. That particular settlement sought to resolve claims against Inamed and various other manufacturers; as such, the 1994 notice campaign resulted in several hundred thousand women registering with the claims office, only a fraction of whom had Inamed breast implants. Although the 1994 settlement ultimately fell apart, the pool of information collected remained on file with the claims office. In 1999, Judge Pointer directed that notice of the proposed Inamed class settlement be mailed to all individuals **[**14]** registered with the MDL 926 claims office, except for those who clearly would not qualify as class members or have any interest in participating.

an estimated 26,641,000 females. In addition, Judge Pointer approved another notice that was placed in the December 7, 1998, edition of *Modern Healthcare Magazine*, a publication with a **[**1305]** total readership of 76,482. The magazine posted the same notice on its website from November 23, 1998, through December 7, 1998. Finally, Judge Pointer had notice of the proposed settlement placed on the court-supervised website from October of 1998 through January of 1999.

Each of the above-described notices contained the following details: The district court had preliminarily certified and approved a \$31.5 million mandatory class settlement against Inamed; if approved, the class settlement would extinguish all claims, filed or otherwise, against Inamed in connection with implants received prior to June 1, 1993; certification and settlement objections had to be postmarked by December 11, 1998; a copy of the proposed settlement could be obtained for free; and a hearing on the propriety of final class certification and settlement approval would be held on January 11, 1999, at the federal courthouse in Birmingham, Alabama.

C. Certification of the Inamed Settlement Class

On January 11, 1999, Judge Pointer held a hearing for the purpose of considering class certification and approval of the settlement. The class's negotiation committee agreed with Judge Pointer that, to the extent there was a conflict between current injury and future injury claimants, it was relevant only to the distribution plan. There were no conflicts **[**15]** with respect to the initial decision as to whether to certify a limited fund class. More specifically, Judge Pointer explained that it would be premature to consider potential conflicts or proper distribution methods before he could be certain that there was, in fact, a settlement fund with money to distribute. He believed it was in the best interest of all members of the proposed class to secure the largest fund possible, as soon as possible, and to bring that fund under the control of the court.

Various concerns were presented at the hearing through oral and written objections. Among the objections presented were the following: (1) the settlement fund was insufficient; (2) future claimants should be entitled to opt out and reserve their legal rights; (3) the settlement lacked a predetermined distribution plan; (4) mandatory class members should nevertheless be given a right to opt out under *Phillips Petroleum Co. v. Shutts*, [472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. 2d 628 \(1985\)](#); (5) notice was inadequate as to future injury claimants; (6) the settlement would violate the Rules Enabling Act;

(7) the settlement would improperly side step bankruptcy; (8) Inamed was not a limited fund in light of the slight **[**16]** economic turnaround the company experienced after provisional approval of the mandatory class settlement; (9) the district court should delay consideration of the proposed class settlement in light of the Supreme Court's pending decision in [Ortiz v. Fibreboard Corp.](#), 527 U.S. 815, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999); and (10) the district court did not have jurisdiction to enjoin parallel state court proceedings.

After carefully considering these objections, on February 1, 1999, Judge Pointer entered Order 47A, certifying the non-opt-out settlement class. Judge Pointer concluded that the proposed class satisfied the threshold requirements for certification found in *Rule 23(a)*.⁷

In doing so, he **[*1306]** found as follows: There were tens of thousands of individuals in the Inamed settlement class, making joinder impracticable; questions of fact and law common to the class existed, including whether Inamed's breast implant products were defective and unreasonably dangerous, and whether the company's conduct, level of knowledge, or duty would give rise to liability; the class members had a common interest in determining whether a limited fund existed, avoiding that fund's diminishment through bankruptcy, and **[**17]** establishing equitable procedures for its distribution; and the claims of the class representatives were typical of the class in that they asserted the same types of factual and legal liability theories generally asserted by the class members. With respect to *Rule 23(a)(4)*, Judge Pointer noted that the "Representative Plaintiffs, who reflect the full spectrum of breast implant claimants ranging from claimants with no manifested injuries to claimants with serious illnesses . . . will fairly and adequately protect the interests of the Inamed Settlement Class." District Court order, Docket No. 59 at 3.

The class was certified pursuant to *Rule 23(b)(1)(B)*, which authorizes certification when "prosecuting

⁷ *Rule 23(a)* provides that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." *Fed. R. Civ. P. 23(a)*.

[18]** separate actions by or against individual class members would create a risk of . . . adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests."⁸

Based on evidentiary submissions,⁹

Judge Pointer found that Inamed's probable liability to the class members from the implant litigation greatly exceeded Inamed's limited financial resources; that the settlement fund made available by certification was substantially greater than the amount, if any, that would be available in the absence of certification; and that Inamed constituted a "limited fund" against which claims are properly subject to certification under *Rule 23(b)(1)(B)*. Thus, Judge Pointer found that mandatory certification was warranted because "continued prosecution of separate actions by individual members of the Inamed Settlement Class would create a risk of adjudications with respect to individual Inamed Settlement Class members that would as a practical matter be dispositive of the interests of the other Inamed Class **[**19]** Settlement members not parties to the adjudications or substantially impair or impede their ability to protect their interest." District Court order, Docket No. 59 at 3.

Judge Pointer certified the class even though Inamed had experienced a slight financial rebound following

⁸ "In contrast to class actions brought under *subdivision (b)(3)*, in cases brought under *subdivision (b)(1)*, *Rule 23* does not provide for absent class members to receive notice and to exclude themselves from class membership as a matter of right. It is for this reason that such cases are often referred to as 'mandatory' class actions." [Ortiz v. Fibreboard Corp.](#), 527 U.S. 815, 834 n.13, 119 S. Ct. 2295, 2309, 144 L. Ed. 2d 715 (1999) (citation omitted).

⁹ The parties submitted evidence regarding Inamed's financial condition, inability to fully satisfy class members' claims, and imminent Chapter 7 liquidation. This evidence included a declaration from Alan Jacobs, a partner at Ernst & Young who served as a financial advisor to the settlement class counsel since 1994; a declaration from Richard Babbit, Inamed's President and CEO, which attached recent SEC filings and explained their significance; and a declaration from L. Richard Rawls, Inamed's national coordinating trial counsel. In addition, at the January 11, 1999, hearing, Judge Pointer **[**20]** heard testimony from Jacobs, who was examined by counsel representing future injury claimants as well as counsel representing objecting class members.

announcement of the proposed settlement. Inamed's stock price had risen, suggesting an increased [*1307] aggregate market value, and class objectors argued that Inamed was therefore not a limited fund. Inamed responded that market capitalization was not an appropriate valuation method. First, it was circular to say that Inamed was not a limited fund because the announcement of a mandatory class settlement caused its stock to rise. The stock value reflected a market expectation that the settlement would be completed and the company would achieve total relief from the expense and uncertainty surrounding the breast implant litigation. Second, the increase in Inamed's stock price in no way measured the company's ability to pay, especially if the flood of pending breast implant cases was not resolved with the proposed settlement. Inamed reiterated that it was the settlement's preliminary approval that had, in large part, made possible the restructuring [*21] efforts that further contributed to the company's improved financial condition. After careful consideration of the arguments of the parties and the underlying evidence, Judge Pointer overruled the objection grounded in the recent improvements in Inamed's operation performance and stock price. He later found that the \$31.5 million settlement fund was substantially greater than the amount that would be available in the absence of certification, that the settlement fund was the maximum fund that feasibly could be expected, and that Inamed's probable liability to the class members greatly exceed the \$31.5 million fund (which in turn greatly exceeded the value of the entirety of all other resources available to pay claims to the class members).

Judge Pointer additionally evaluated the settlement for fairness pursuant to *Rule 23(e)*¹⁰

¹⁰At the time Judge Pointer considered the propriety of the settlement proposal, *Rule 23(e)* provided that "[a] class action shall not be dismissed or compromised without the approval [*23] of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." *Fed. R. Civ. P. 23(e)* (1998). In 2003, however, *Rule 23(e)* was expanded. The rule now requires that, before the claims of a "certified class may be settled, voluntarily dismissed, or compromised," the court must approve the proposed settlement, subject to the following procedures and considerations: "(1) The Court must direct notice in a reasonable manner to all class members who would be bound by the proposal. (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate. (3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal. (4) If the

and determined it was non-collusive, negotiated in good faith, fair, adequate, and reasonable. Importantly, he found:

The evidence shows, inter alia, that—absent the new capital contributed to the company conditioned upon approval of this settlement—Inamed has negative net worth, net liquidation value of essentially zero, and no resources to pay claims. The company [*22] has had to borrow heavily in order to stay afloat. The settlement is to be funded by additional borrowing available only in the context of this settlement, and the amount Inamed was able to raise for that purpose was constrained both by restrictions associated with its existing debt and the willingness of its lenders to assume the risk that the company's post-settlement operations would repay their investment. The record establishes that Inamed [*1308] would be unable to raise such additional funds in the absence of this settlement, that the alternative of continued litigation of individual claims would drive Inamed to bankruptcy, and that the funds available to class members from this settlement are substantially greater than the funds, if any, that would remain for class members after an Inamed bankruptcy. Considering the record evidence of Inamed's financial condition, the court finds a substantial risk that an Inamed bankruptcy would leave all class members with nothing.

District Court order, Docket No. 59 at 4.

The class included "all persons and entities, wherever located, who have or may in the future have any unsatisfied claim (whether filed or unfiled, pending or reduced to judgment, existing or contingent, and specifically including claims for alleged injuries and damages not yet known or manifest) . . . related to, or involving Inamed Breast Implants that were implanted in an operation that occurred before June 1, 1993." *Id.* at 1-2. In addition, Order 47A expansively defined "settled claims" as follows:

[A]ny and all Breast Implant Related claims . . .

class action was previously certified under *Rule 23(b)(3)*, the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so. (5) Any class member may object to the proposal if it requires court approval under this *subdivision (e)*; [*24] the objection may be withdrawn only with the court's approval." *Fed. R. Civ. P. 23(e)*. All of these requirements were satisfied here, Judge Pointer having presciently foreseen what the rule currently provides.

whether known or unknown, asserted or unasserted, regardless of legal theory, that are or may be asserted now or in the future by any and/or all Settlement Class Members against any or all of Inamed "Settled Claims" include, without limitation: (1) any and all claims of personal injury and/or bodily injury, damage, death, emotional or mental harm; (2) any and all claims for alleged economic or other injury or loss or for statutory **[**25]** damages under any state statute; (3) any and all claims for medical monitoring and claims for injunctive or declaratory relief based on, arising out of, or relating to Breast Implants; (4) any and all claims for loss of support, services, consortium, companionship, and/or society by spouses, parents, children, other relatives or "significant others" of persons implanted with Breast Implants; (5) any and all claims for conspiracy or concert of action; (6) any and all wrongful death or survival actions; and (7) any and all claims for punitive or exemplary damages based on or arising out of or related to Breast Implants.

Id. at 2. The settlement "conclusively compromised, settled and released" all "settled claims" of each member of the class. *Id.* at 5. Correspondingly, Order 47A permanently enjoined all members of the class "from instituting, asserting or prosecuting against Inamed . . . in any pending or future action in any federal or state court, any Settled Claim that the member had, has, or may have in the future." *Id.*

Judge Pointer made explicit that there was no just reason for delay and that Order 47A constituted a final judgment with respect to all settled claims. All questions **[**26]** regarding distribution of the settlement fund would be subject to subsequent orders enforcing the court's judgment, based on Judge Pointer's belief that these considerations were irrelevant to the question of whether the overall fund available was adequate. Accordingly, Order 47A states that, "[w]ithout deferring or delaying the finality of this order and judgment, this court retains exclusive and continuing jurisdiction to (1) implement, interpret, and enforce the Settlement Agreement, (2) administer, allocate, and distribute the settlement fund, and (3) rule on any applications for cost and expenses incurred in implementing this order and the Settlement Agreement." *Id.* No appeal was taken from Order 47A.

D. Distribution of the Settlement Fund

Order 47A merely certified the limited fund class and approved the settlement insofar as it required Inamed to

infuse the **[*1309]** settlement fund with \$31.5 million. Having tabled a decision regarding a plan for allocation of the settlement recovery, Judge Pointer revisited the issue. Class counsel—including Hornsby, the attorney designated to represent solely future injury class members—presented a proposed plan of fund distribution, which called for **[**27]** a pro rata division of the \$31.5 million among all claimants, without reference to extent of injury.

In May of 1999, the court preliminarily approved the proposed distribution plan and ordered notice of it sent to approximately 350,000 implant recipients on file, of whom 45,000 were likely Inamed settlement class members. The notice requested comments and objections to the proposal. The court received sixty-two objections to the proposal. Many of the objections concentrated on the perceived inequity of the plan's failure to differentiate between claimants without injuries and claimants with current injuries. Following a July 6, 1999, hearing, Judge Pointer overruled these objections, citing the unique financial constraints affecting the settlement terms. He explained that the fund was so severely limited in relation to the number of claimants, that a distribution plan differentiating between claimants with varying degrees of injuries would have "substantially increased administrative costs," "not greatly increase[d] the amount of distribution to those determined to be eligible for enhanced benefits," and "decrease[d] even more the meager distribution to other claimants." District Court **[**28]** order, Docket No. 70 at 5.

In sum, Judge Pointer agreed with class counsel that pro rata division remained "the only workable solution under the facts of this case," and he approved the proposed distribution plan. *Id.* On July 7, 1999, he entered Order 47B, pursuant to which the settlement fund was promptly distributed by equal pro rata division, without reference to the extent of injuries or expenses, to eligible class members who returned satisfactory claim forms prior to October 1, 1999. Each claimant ultimately received approximately \$725. Class counsel received no fees out of the Inamed settlement fund.¹¹

Order 47B was not appealed.

E. Events Following the Inamed Class Settlement

For fiscal year 1998, Inamed's net sales increased by

¹¹Class counsel were ultimately paid out of a separate, common benefit account funded years earlier by a coalition of breast implant manufacturers.

twenty-four percent. It reported a net income in 1998, compared to a substantial net loss in 1997. However, Inamed's book value in 1998 was still negative \$15,625,000, and it remained a debt-ridden company. By 1999, Inamed began reporting a much improved operating income, openly attributing its profitability [**29] to settling the breast implant litigation and an aggressive cost-reduction program. On September 1, 1999, Inamed purchased Collagen Aesthetics, Inc., for approximately \$159 million, the funding for which was provided by substantial borrowing. Nevertheless, even after undergoing a public offering to raise proceeds to pay the debt incurred in the purchase, Inamed's financial viability remained precarious.

Around 2002, Plaintiff Zuzanna Juris began experiencing "chronic fatigue, severe chest wall and breast pain, capsular contraction, joint and muscle pain, muscle weakness, significant weight loss, severe headaches, skin rashes, memory loss, and loss of mental acuity." In May of 2005, a surgeon removed her implants. Upon removal, the surgeon discovered that the implants, which Juris received in 1991,¹²

[*1310] had deflated and leaked silicone and gel into her chest cavity and lymph nodes. She was, according to her physician, suffering from "silicone-related immune dysfunction, atypical neurological disease and infection."

On March 23, 2006, Allergan purchased substantially all of Inamed's outstanding common stock, as well as its wholly-owned subsidiary, McGhan Medical Corporation ("McGhan"). Shortly thereafter, on May 16, 2006, Juris filed suit against Allergan, Inamed, and McGhan (hereinafter, collectively, "Allergan") in the Superior Court of California for the County of Los Angeles. She alleged that Inamed/McGhan breast implants caused her injuries and asserted claims for strict liability, negligence, breach of express warranty, breach of implied warranty, deceit/negligent misrepresentation, and intentional infliction of emotional distress. Allergan filed a demurrer to Juris's complaint, arguing that the "doctrine of *res judicata* . . . gives conclusive effect to the [Inamed] settlement and bars [Juris] from re-litigating her claims in this case." Juris responded that applying *res judicata* as a bar to her claims would deprive her of due process.

¹² Juris first received breast implants in 1989. In 1991, however, as a result of capsular contraction, a surgeon removed that set, and Juris received her second set of breast [**30] implants.

F. Procedural History

On September 20, 2006, Allergan filed a motion in the district court for the Northern District of Alabama—the Inamed class action court—requesting that Juris and her attorney show cause why they should not be held in contempt for [**31] violating Order 47A's anti-suit injunction. Allergan contended that Juris was a member of the Inamed settlement class and her claims were "settled claims" as defined in Order 47A. As a result, the company argued, the settlement's injunction prohibited Juris's lawsuit. In her opposition to Allergan's contempt motion, Juris argued that she had a right to collaterally attack the class judgment and that the Anti-Injunction Act denied the district court power to enjoin the California state court action. Subsequently, on October 19, 2006, counsel for both parties jointly requested that the California court stay the proceedings before it, pending a decision from the district court. Their joint motion stated that they "agree that [Juris's] legal and constitutional challenge to Order No. 47A should be brought before the Alabama district court, and that the Los Angeles Superior Court should not rule on this issue."

On October 3, 2008, District Judge U.W. Clemon traveled to California, where he heard evidence and oral argument from the parties on Allergan's show cause motion.¹³

The parties filed post-hearing briefs addressing various issues. In November of 2009, Juris filed a motion in the California [**32] state court seeking a hearing and requesting that the stay be lifted, and she notified the district court of her intention to proceed with the California litigation. The district court promptly informed the parties that a second hearing would be held with respect to Allergan's motion for an order to show cause. On December 14, 2009, Judge Proctor heard oral argument from counsel representing Juris, Allergan, and the Inamed settlement class. The parties again submitted post-hearing briefs. Thus, in all, the issues before the district court were explored at two hearings and through three rounds of briefing.

Juris advanced four arguments: (1) she may raise a collateral attack against the [*1311] Inamed class

¹³ Notably, by this point, Judge Pointer, now deceased, was no longer presiding over the Inamed class action. The case was reassigned a number of times, and the district court order at issue in this appeal was authored by District Judge R. David Proctor.

settlement in the forum of her choice; (2) in light of *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999), the district court erroneously certified the Inamed class under *Rule 23(b)(1)(B)*; (3) even if correctly certified, the district **[**33]** court lacked personal jurisdiction over her and application of res judicata to her claims would violate her due process rights; and (4) the anti-suit injunction contained in Order 47A is unenforceable because it violates the Anti-Injunction Act. Judge Proctor considered each argument in turn.

Judge Proctor noted that, although Juris had initially argued that the California court was the only proper court to entertain her collateral challenge to the Inamed class settlement, she subsequently abandoned that position and agreed to resolve the collateral challenge in the district court in Alabama. However, in an abundance of caution, Judge Proctor nevertheless addressed the merits of the issue of the appropriate forum. Concluding that "Juris' arguments have evolved from defensive, forum-specific contentions to offensive, relief-oriented requests," Judge Proctor construed Juris's filings as a motion for relief from judgment pursuant to *Federal Rule of Civil Procedure 60(b)*. District Court order, Docket No. 303 at 33-34. He held that the class action court properly could consider Juris's collateral challenge.

In addition, with respect to Juris's contention that *Rule 23(b)(1)(B)* certification **[**34]** was improper under the requirements outlined in *Ortiz*, Judge Proctor held that Juris's substantive attack on Orders 47A and 47B, which were not appealed, were foreclosed by res judicata. In the alternative, he held that "even if Juris were able to contest Judge Pointer's conclusions of law . . . the Inamed Class Settlement was properly certified as a limited fund." *Id.* at 45.

Judge Proctor specifically rejected Juris's contention that post-settlement financial disclosures, which placed Inamed's economic status in a more positive light than the evidence presented at class certification, provided a basis for setting aside the judgment. He emphasized the fact that the reports at issue reflected Inamed's financial position *after* announcement and final approval of the settlement. He additionally observed that provisional certification of the class had an "incalculable impact" on Inamed's financial status by enjoining all litigation by the then-putative class. Most importantly, Judge Proctor found that Juris was ignoring one essential point: "If Inamed had not resolved the breast implant cases on a global scale, then the company was destined for liquidation at the direction of its senior **[**35]** secured

creditors—a fact which Juris has never disputed." *Id.* at 62. Thus, Judge Proctor concluded that Juris's argument was circular; it simply made no sense to say that certification of the Inamed settlement was flawed because Inamed rebounded, when it was the settlement itself that prompted the rebound.

Judge Proctor undertook an independent analysis of Inamed's financial condition at the time of the certification, examining the evidence on which Judge Pointer had relied. Judge Proctor's analysis confirmed Judge Pointer's previous findings. Judge Proctor found that the \$31.5 million settlement fund was "the maximum value available for settling the pending tort claims." *Id.* at 52, 65. Judge Proctor also confirmed the earlier findings by Judge Pointer that the \$31.5 million was substantially greater than the then-value of the entirety of Inamed's net assets, and that the magnitude of the claims of the class members greatly exceeded that amount.¹⁴

[*1312] Judge Proctor then held that Juris's due process and personal jurisdiction arguments could not enable her to escape the Inamed class settlement. As more fully developed below, Judge Proctor concluded that opt-out rights are not required in the case of a *Rule 23(b)(1)(B)* limited fund. Juris was adequately represented, and the class notice ordered by Judge Pointer was adequate. Finally, Judge Proctor held that Order 47A's anti-suit injunction did not violate the Anti-Injunction Act because the injunction was necessary **[**37]** in aid of the court's jurisdiction and to protect or effectuate its judgments.

Accordingly, the district court granted in part and denied in part Allergan's motion for an order to show cause.

¹⁴ Aside from Juris's flawed and conclusory assertions about the subsequent improvement in Inamed's financial condition, and aside from her conclusory assertion that Judge Pointer blindly accepted the settling parties valuations (an assertion **[**36]** squarely belied by the record), Juris fails to mount any challenge to the foregoing crucial findings of fact by both Judges Pointer and Proctor. For example, despite full opportunity in these collateral proceedings, Juris has failed to offer any expert witness, or any other evidence at all, to challenge the undisputed facts that, in the absence of certification, Inamed was destined for a Chapter 7 bankruptcy in which the tort claimants would receive virtually nothing, that the \$31.5 million settlement fund was substantially greater than the class could feasibly expect in the absence of certification, and that the settlement fund was therefore the maximum feasibly expected.

Although the court declined to hold Juris or her counsel in contempt for violating Order 47A's anti-suit injunction, it held that she was bound by Judge Pointer's injunction, prohibiting her from proceeding with the California litigation. Correspondingly, the district court denied Juris's request to be excluded from the Inamed class settlement, which the court construed as a [Federal Rule of Civil Procedure 60\(b\)](#) motion.

II. DISCUSSION

On appeal Juris argues: (A) that she can collaterally challenge the res judicata effect of the Inamed class settlement; (B) that the California court—not the Northern District of Alabama—is the appropriate forum for the collateral attack; and (C) that she was denied fundamental due process during the Inamed class proceedings in that (1) she did not receive adequate notice, (2) she was not adequately represented, and (3) she was denied the right to opt out. In addition, Juris seeks to escape the preclusive effect of the class settlement by arguing that Judge Pointer **[**38]** erred in certifying the class under *Rule 23(b)(1)(B)* (which we address in Part II.D). Finally, she urges us to conclude that the Anti-Injunction Act prohibited the district court from enjoining her state court suit (which we address in Part II.E)

A. Availability of Collateral Attacks

Class action judgments will typically bind all members of the class. [Kemp v. Birmingham News Co.](#), 608 F.2d 1049, 1054 (5th Cir. 1979).¹⁵

Thus, "[g]enerally, principles of res judicata, or claim preclusion, apply to judgments in class actions as in other cases." [Twigg v. Sears, Roebuck & Co.](#), 153 F.3d 1222, 1226 (11th Cir. 1998). There is an exception to this rule, however, which is grounded in due process. [Kemp](#), 608 F.2d at 1054. This Court has explained:

Before the bar of claim preclusion may be applied to the claim of an absent class member, it must be demonstrated that invocation of the bar is consistent with due process, see, e.g., [Johnson v. General Motors Corp.](#), 598 F.2d 432, 435, 437 (5th Cir. 1979), and an absent class member may collaterally attack the prior judgment on the ground that to apply claim preclusion would deny him due

[*1313] process, see, e.g., [Silber v. Mabon](#), 957 F.2d 697, 699-700 (9th Cir. 1992); **[**39]** [Gonzales v. Cassidy](#), 474 F.2d 67, 74-75 (5th Cir. 1973), see generally Note, [Collateral Attack on the Binding \[*1314\] Effect of Class Action Judgments](#), 87 HARV. L. REV. 589 (1974).

[Twigg](#), 153 F.3d at 1226; see also 3 William B. Rubenstein et al., [Newberg on Class Actions](#) § 8:30 (4th ed. 2011) ("A right of collateral attack, through which the essential fairness of a judgment is questioned during subsequent litigation, remains a potential limitation on the binding effect of determinations in representative actions.").

The propriety of collateral attacks "is amply supported by precedent." [Stephenson v. Dow Chem. Co.](#), 273 F.3d 249, 258 (2d Cir. 2001), *aff'd in part by an equally divided court and vacated in part*, 539 U.S. 111, 123 S. Ct. 2161, 156 L. Ed. 2d 106 (2003); see [Hansberry v. Lee](#), 311 U.S. 32, 42, 61 S. Ct. 115, 118, 85 L. Ed. 22 (1940) ("[T]here has been a failure of due process only in those cases where it cannot be said that the procedure adopted [in the representative action], fairly insures the protection of the interests of absent parties who are **[**40]** to be bound by it."). Absent class members can collaterally challenge the res judicata effect of a prior class judgment either because they were not adequately represented, see, e.g., [Gonzales v. Cassidy](#), 474 F.2d 67, 72 (5th Cir. 1973); [Stephenson](#), 273 F.3d at 261; [Van Gemert v. Boeing Co.](#), 590 F.2d 433, 440 n.15 (2d Cir. 1978), or because there was not adequate notice, see, e.g., [Twigg](#), 153 F.3d at 1229; [Johnson v. Gen. Motors Corp.](#), 598 F.2d 432, 434 (5th Cir. 1979); [King v. S. Cent. Bell Tel.](#), 790 F.2d 524, 530 (6th Cir. 1986); [Pate v. United States](#), 328 F. Supp. 2d 62, 73-74 (D.D.C. 2004). In addition, absent class members have successfully attacked a class action court's ability to bind them by arguing that they were denied the ability to opt out or exclude themselves from the class. See, e.g., [Brown v. Ticor Title Ins. Co.](#), 982 F.2d 386, 392 (9th Cir. 1992), *cert. dismissed*, 511 U.S. 117, 114 S. Ct. 1359, 128 L. Ed. 2d 33 (1994).

The traditional collateral attack involves a class member commencing a separate suit on a similar subject matter as a prior class settlement, the defendant's assertion that the prior class settlement has preclusive effect and bars the new suit, and the class member's **[**41]** contention that giving res judicata effect to the prior settlement would violate her rights to due process. At the same time, "[a] related, collateral method for attacking judgment finality after expiration of the appeals

¹⁵Fifth Circuit opinions issued prior to October 1, 1981, are binding precedent on this court. [Bonner v. City of Prichard](#), 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

period is available under federal [Rule 60\(b\)](#)." 3 William B. Rubenstein et al., [Newberg on Class Actions](#) § 8:30 (4th ed. 2011). Courts treat [Rule 60\(b\)\(4\)](#) motions, pursuant to which a litigant can seek relief from a final judgment on the grounds that "the judgment is void," as a vehicle for absent class members to advance the same due process challenges that can be raised in a traditional collateral attack. See [In re Diet Drugs Prods. Liab. Litig.](#), [431 F.3d 141, 145 \(3d Cir. 2005\)](#) ("This [due process] challenge can take the form of an appeal of the class certification itself, a collateral attack on an already-certified class, or a [Rule 60\(b\)](#) motion."); [Arthur Andersen & Co. v. Ohio \(In re Four Seasons Sec. Laws Litig.\)](#), [502 F.2d 834, 842-44 \(10th Cir. 1974\)](#) (analyzing due process challenge to binding effect of prior class settlement in the context of a [Rule 60\(b\)\(4\)](#) motion); [Battle v. Liberty Nat'l Life Ins. Co.](#), [770 F. Supp. 1499, 1522-23 \(N.D. Ala. 1991\)](#) (same), [aff'd](#), [\[**42\] 974 F.2d 1279 \(11th Cir. 1992\)](#). "Since the claim in both instances is that the judgment is void and since the requirements for a valid judgment are not altered by the setting in which validity is tested, this treatment seems logical." Note, [Collateral Attack on the Binding Effect of Class Action Judgments](#), 87 Harv. L. Rev. 589, 598 n.55 (1974). The primary difference is that a [Rule 60\(b\)](#) motion must be brought in the class action court, and a traditional collateral attack is typically litigated in a second, reviewing court.¹⁶

¹⁶ The parties have briefed an apparent split of authority with respect to the proper scope of collateral review. Some courts hold that collateral review is limited, and absent class members are not permitted to relitigate—in a collateral attack—due process arguments that were raised by class objectors and rejected by the certification court. See, e.g., [Epstein v. MCA, Inc.](#), [179 F.3d 641, 648 \(9th Cir. 1999\)](#) ("Simply put, the absent class members' due process right to adequate representation is protected not by collateral review, but by the certifying court initially, and thereafter by appeal within the state system and by direct review in the United States Supreme [**43] Court."); [Diet Drugs](#), [431 F.3d at 146](#) ("Once a court has decided that the due process protections did occur for a particular class member or group of class members, the issue may not be relitigated."). On the other hand, other authorities favor a more probing, broader, merits-based collateral review. See, e.g., [Epstein](#), [179 F.3d at 652](#) (Thomas, J., dissenting) (stating that the court had a "responsibility to examine the merits of the [absent class members'] due process arguments fully and fairly"); [Hege v. Aegon USA, LLC](#), [780 F. Supp. 2d 416, 429 \(D.S.C. 2011\)](#) ("Having thus established that it is proper for this Court to inquire whether [absent class members] were afforded due process in [a prior class action], this Court next considers whether the notice and representation [the absent plaintiffs]

B. Appropriate Forum for Juris's Due Process Challenge

As a preliminary matter, we must ensure that the district court was the proper forum to resolve Juris's due process challenge. Early on, in response to Allergan's [\[**45\]](#) contempt motion, Juris posited that she had the right to select the court where she would pursue her attack on the binding effect of the Inamed class settlement. She complained that she should not be forced to travel across the country to Alabama to litigate her constitutional challenge in the class action court. Instead, Juris maintained, she should be allowed to launch a traditional collateral attack in the California state court.

Juris relies principally on the Third Circuit's decision [In re Real Estate Title & Settlement Services Antitrust Litigation](#), [869 F.2d 760 \(3d Cir. 1989\)](#). In that case, following settlement of a multidistrict class action in the Eastern District of Pennsylvania, absent class members filed an Arizona state court action collaterally attacking the class settlement. [Id. at 762](#). The Pennsylvania district court enjoined the Arizona litigation, holding that if the plaintiffs wished to challenge the due process safeguards they received in the class proceeding, [\[**1315\]](#) they could only do so in the Eastern District of Pennsylvania. [Id.](#) On appeal, the Third Circuit observed:

In this case, the [plaintiffs] were haled across the

received in [the prior action] were constitutionally sufficient."); Patrick Woolley, [The Availability of Collateral Attack for Inadequate Representation in Class Suits](#), [79 Tex. L. Rev.](#) [383, 445 \(2000\)](#) (criticizing the narrow approach to collateral review and concluding that "the Constitution forbids denying an absent class member the right to collaterally attack the class judgment"). Allergan [\[**44\]](#) argues we should conduct a limited collateral review, urging us to affirm without reaching the merits of Juris's due process arguments because Judge Pointer considered and rejected similar arguments at class certification.

Notably, the former Fifth Circuit's binding decision in [Gonzales](#) may have already decided this issue, as it apparently prescribes a broad, merits-based collateral review. See [474 F.2d at 72](#) (noting that the second, reviewing court must engage in a collateral review of the class action court's initial determination that the class representatives would be adequate). Regardless, to the extent it presents an open question, we need not decide the proper scope of collateral review available to Juris in this case. As will be demonstrated below, even assuming arguendo it was proper for Judge Proctor to revisit the underlying merits of each of Juris's arguments, we would affirm his holding that Juris has failed to demonstrate a violation of her due process rights.

country . . . merely because of the fortuity that **[**46]** plaintiffs in Pennsylvania had similar claims and the Judicial Panel on Multi-District Litigation elected to consolidate all the MDL 633 cases there. Thus we must look carefully at the protections that the [plaintiffs] were given in the class action proceeding, to assess whether it would violate due process to force them to litigate their adequacy as part of an injunction action in Pennsylvania district court.

Id. at 768. The court characterized the issue as "whether an absent class member can be *enjoined* from relitigation if the member does not have minimum contacts with the forum." *Id. at 769.* On this point, the court held that "if the member has not been given the opportunity to opt out in a class action involving both important injunctive relief and damage claims, the member must either have minimum contacts with the forum or consent to jurisdiction in order to be enjoined by the district court that entertained the class action." *Id.* Because the plaintiffs were not given an opportunity to opt out of the class settlement, did not have minimum contacts with Pennsylvania, and had not consented to jurisdiction in the Pennsylvania district court, the Third Circuit vacated the injunction; **[**47]** and the plaintiffs were allowed to proceed with their collateral attack in Arizona. *Id.*

Juris complains that she was similarly "haled across the country" to defend Allergan's contempt motion, even though she did not have the opportunity to opt out of the Inamed class settlement, she did not have minimum contacts with Alabama, and she did not consent to the jurisdiction of the Alabama district court. That is, she ended up litigating in Alabama by nothing more than the "fortuity" that, years earlier, thousands of lawsuits related to silicone breast implants were consolidated by the Judicial Panel on Multidistrict Litigation and transferred to the Northern District of Alabama. Juris contends that the California state court action should have been allowed to proceed to decide whether she was afforded due process in the Inamed class settlement. We cannot agree.

First, *Real Estate* did not involve a limited fund class action. The prior settlement in that case involved a "hybrid class," which sought substantial damages, but primarily injunctive relief, certified pursuant to *Rule 23(b)(1)(A)* and *Rule 23(b)(2)*. *Id. at 764, 768.* The Third Circuit limited its holding to the facts before it, stating **[**48]** that it was not "address[ing] the due process requirements in a class action certified under *23(b)(1)(B)*

in which there is only a limited common fund from which the plaintiffs can obtain relief."¹⁷

Id. at 768 n.8. Thus, even if *Real Estate* were binding authority in this Circuit, that decision would not control our analysis because the case at bar involves a limited fund.

Second, and more importantly, we hold that Juris consented to jurisdiction in the court below.¹⁸

Juris and Allergan filed a consent motion to stay the California case, which stated that they "agree that **[**1316]** [Juris's] legal and constitutional challenge to Order No. 47A should be brought before the Alabama district court, and that the Los Angeles Superior Court should not rule on this issue." The joint motion similarly provided: "To the extent Plaintiff intends to pursue **[**49]** a constitutional challenge to Order 47A, Plaintiff and Defendants agree that the Northern District of Alabama is the proper court to interpret and review said order, and to determine its effect on Plaintiff's claims herein." In support, Juris's counsel filed a sworn declaration explaining that "[c]ounsel for the Plaintiff and counsel for the Defendants, including their respective local Alabama counsel, have jointly agreed to seek to resolve the legal and constitutional issues related to Plaintiff's commencement of the above-entitled action before the federal court in Alabama."¹⁹

¹⁷ The Third Circuit's express qualification suggests that the due process considerations in a limited fund class actions might yield a different outcome. At least one district court in that circuit has distinguished *Real Estate* on this basis. See *Fanning v. Acromed Corp. (In re Orthopedic Bone Screw Prods. Liab. Litig.)*, 176 F.R.D. 158, 180-81 (E.D. Pa. 1997).

¹⁸ Significantly, whether Juris consented to having the district court—i.e., Judge Proctor's court—rule on her due process challenges is an inquiry separate from whether the district court—i.e., Judge Pointer's court—had jurisdiction to adjudicate Juris's claims as part of the Inamed class action over a decade earlier. We address the latter issue below.

¹⁹ Although Juris initially pressed her forum choice argument, she abandoned it in the district court. In a post-hearing reply brief, Juris's counsel acknowledged that she consented to having the district court decide her due process challenge, stating that, "[d]espite **[**50]** Plaintiff's continuing belief that the California court could properly address the issue of whether Plaintiff's claims were barred by *res judicata*, out of deference for [District] Judge Clemon Plaintiff Juris and her counsel nonetheless agreed that this Court could rule on the issue in the first instance." Juris's subsequent briefs altogether

Given her express consent, we have no difficulty concluding that the Alabama district court was the proper forum to resolve Juris's constitutional challenge to the res judicata effect of the Inamed class settlement. Juris cannot now be heard to complain that she was "hailed across the country" to a forum for which she did not have minimum contacts or consent to jurisdiction. **[**51]** We do not reach the issue left open by the Third Circuit in *Real Estate*—whether, in the absence of her express consent to jurisdiction, it would have run afoul of the *due process clause* to require Juris to litigate her collateral attack on the limited fund settlement in the certifying court.²⁰

C. Juris's Due Process Arguments

1. Adequate Notice

Juris argues that the Inamed settlement should not be given res judicata effect because she did not receive adequate notice of the class proceedings. She does not challenge the class judgment on the theory that the content of the notices was constitutionally inadequate. See *Twigg v. Sears*, **[*1317]** *Roebuck & Co.*, 153 F.3d 1222, 1227 (11th Cir. 1998) (concluding that prior class judgment could not bar absent class member's claims

dropped the argument that her collateral attack should proceed in the California court. Thus, Judge Proctor held that Juris "appears to have abandoned" her earlier choice of the California forum and "has now apparently consented to this court's jurisdiction." District Court order, Docket No. 303 at 35. We agree both that she abandoned the issue in the district court and, in any event, that she had expressly consented to the jurisdiction of that court to rule on her collateral challenge.

²⁰We therefore need not decide whether Judge Proctor properly construed our decision in *Battle v. Liberty National Life Insurance Co.*, 877 F.2d 877 (11th Cir. 1998), to be in conflict with the Third Circuit's decision in *Real Estate*. We also note that the unique procedural posture of this case closely parallels that in *Adams v. Southern Farm Bureau Life Insurance Co.*, 493 F.3d 1276 (11th Cir. 2007). There, the defendant filed a "Motion to Enforce Final Judgment" in the Middle District of Georgia, arguing that a 1999 class settlement approved by that court barred two Mississippi state court actions that were filed in 2005. *Id.* at 1278. The motion to enforce sought in part to enjoin the Mississippi litigation. *Id.* In opposition, the state court plaintiffs contended that they did not receive adequate notice in the prior class action, and therefore, permitting the class settlement to have res judicata **[**52]** effect would be inconsistent with due process. *Id.* at 1285. The class action court resolved the collateral challenge, holding there were no due process violations, although neither the district court nor the Eleventh Circuit addressed the issue of the appropriate forum. *Id.* at 1289.

because, "even if Twigg had received the notices, their language was insufficient to notify him that claims like his were being litigated in the action"). Rather, her due process argument takes aim at the method of distributing class notice approved by Judge Pointer. Juris specifically urges us to find that the class notice was constitutionally deficient because she did not receive actual, individual notice.²¹

The notice provisions of *Rule 23*, which are meant to protect the due process rights of absent class members, set forth "different notice requirements to different kinds of cases and even to different phases of the same case." *Battle v. Liberty Nat'l Life Ins. Co.*, 770 F. Supp. 1499, 1515 (N.D. Ala. 1991), *aff'd*, 974 F.2d 1279 (11th Cir. 1992). The rule itself does not require notice in *Rule 23(b)(1)* and *(b)(2)* class actions. See *Fed. R. Civ. P. 23(c)(2)(A)-(B)*. Instead, in these "mandatory" **[**55]** class actions, *Rule 23* allows courts to exercise

²¹In the district court, relying **[**53]** on *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997), Juris contended that "meaningful notice for 'future' claimants, such as Juris was, in fact, impossible." In *Amchem*, although it did not decide the issue, the Supreme Court questioned whether constitutionally sufficient class notice could ever be given to exposure-only asbestos tort claimants. *Id.* at 628, 117 S. Ct. at 2252. The Court emphasized that many exposure-only individuals "may not even know of their exposure, or realize the extent of the harm they may incur." *Id.* Judge Pointer rejected this argument when raised by class objectors in 1998, and Judge Proctor did the same. According to Judge Proctor, unlike exposure-only asbestos tort claimants, who may not know of their exposure until they contract asbestos-related illnesses, all breast implant recipients—whether they have manifested injuries or not—know that they have had implants and are capable of being notified. Judge Proctor was additionally persuaded that the *Amchem* court's concern that "those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out," *id.*, is inapplicable **[**54]** in a non-opt-out class action.

We need not in this case decide whether Judge Proctor's reasoning, and his distinction of *Amchem*, was sound, because Juris has not fairly raised the issue on appeal. Notwithstanding her briefs in the court below and the fact that she discussed this potential notice issue during oral argument, Juris did not sufficiently develop this argument in her appellate briefs and has therefore abandoned it. See *McFarlin v. Conseco Servs. LLC*, 381 F.3d 1251, 1263 (11th Cir. 2004) ("A party is not allowed to raise at oral argument a new issue for review."); *Marek v. Singletary*, 62 F.3d 1295, 1298 n.2 (11th Cir. 1995) ("Issues not clearly raised in the briefs are considered abandoned.").

their discretion to provide appropriate notice "to protect class members and fairly conduct the action." *Fed. R. Civ. P. 23(c)(2)(A), (d)(1)(B)*; see also 3 William B. Rubenstein et al., *Newberg on Class Actions* § 8:5 (4th ed. 2011) ("[T]he court may make appropriate orders requiring notice to some or all of the members regarding the pendency of the class, proposed judgment or settlement, soliciting input on the adequacy of class representation, opportunity to intervene or present claims or defenses, and the like."). "Regardless of the category under which a class suit may be or potentially may be certified, however, *Rule 23(e)* requires that absent class members be informed when the lawsuit is in the process of being voluntarily dismissed or compromised." *Id.* § 8:17; see *Fed. R. Civ. P. 23(e)(1)*.

Under certain circumstances, however, even when not provided for by *Rule 23*, due process may require that class members receive notice of the pendency of the proceeding. See, e.g., *Johnson v. Gen. Motors Corp.*, 598 F.2d 432, 437 (5th Cir. 1979) (holding that due process required notice, "[a]lthough under the [*1318] text of *Rule 23* and the cases interpreting [*56] it notice is not required in all representative suits"). Although other courts have held that adequate representation alone is a sufficient test for assessing due process in the context of a limited fund class action, see, e.g., *Flanagan v. Ahearn (In re Asbestos)*, 90 F.3d 963, 986-87 (5th Cir. 1996), rev'd on other grounds sub nom. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999), we have held that due process will additionally require at least some notice to potential absent members prior to class certification under *Rule 23(b)(1)(B)*. See *In re Temple*, 851 F.2d 1269, 1272 (11th Cir. 1988).

In *Temple*, an asbestos manufacturer moved to consolidate all present and future asbestos-related injury actions against it and to certify a mandatory class action. *Id.* at 1270. The company asserted that certification was warranted under *Rule 23(b)(1)(B)* because its assets constituted a limited fund in the sense that they were insufficient to satisfy all claims. *Id.* at 1271. Without notifying any putative class members or conducting an adversarial proceeding on the existence of a limited fund, the district court accepted the defendant's assertions. *Id.* The district court found that the [*57] company's insurance and other funds would not be able to cover its potential tort liability, and it observed that the costs of defending numerous small actions were rapidly depleting the company's resources. *Id.* On appeal, we held that the certification was due to be reversed because, *inter alia*, "[t]he [district] court's

failure to notify petitioners of the certification hearing violated due process." *Id.* at 1272. We reasoned that, "[u]nlike class members in cases certified under 23(b)(3) who may opt out of the action and have no need for prior notice of efforts to obtain class certification, members of a mandatory class need to be provided with notice to contest the facts underlying a certification they may strenuously oppose." *Id.* The lack of notice produced a non-adversarial proceeding that "almost certainly led to the premature and speculative finding that a limited fund existed." *Id.* Therefore, we held, the district court's order "clearly violate[d] the individual constitutional rights of the petitioners." *Id.*

The due process violation in *Temple* arose because the district court certified a mandatory, limited fund class action without any notice to absent class members. The decision [*58] does not stand for the proposition that the Constitution requires that each individual class member receive actual notice. Instead, our concern was with the total absence of notice, which led to the "non-adversarial nature of the [class certification] proceedings." *Id.* at 1272. We therefore agree with the district court that *Temple* is not controlling in this case. Where the notice afforded reaches a critical mass of putative class members, such that the facts underlying certification are contested and approached in a sufficiently adversarial manner, the due process pitfall identified in *Temple* can be avoided.

The careful analysis of the notice mandated by due process in *Battle*, 770 F. Supp. 1499, is also persuasive here.²²

In that case, years after a class settlement, absent members sought to circumvent the prior judgment on the theory that it violated their due process rights to actual, personal notice. *Battle*, 770 F. Supp. at 1508, 1510. Although the court stopped short of holding that no notice at all would have passed constitutional muster, it concluded that individual notice to certain class members as well as certain "media" notice "was enough to subsequently bind this 23(b)(2)-type [*1319] [*59] plaintiff class . . . consistent with due process." *Id.* at 1519-20. The court reasoned:

Because such notice was appropriately designed not to afford absent members the chance to exclude themselves from the class, but rather to

²² In our opinion affirming the trial court's decision in *Battle*, we stated only that we were "not presented with any reversible error on the part of the district judge." 974 F.2d at 1279.

inform them of the pendency of the action and permit them to challenge the representation by the named plaintiffs and class counsel or to otherwise intervene, the fact that paid-up policyholders did not receive notice did not frustrate this purpose. Because such policyholders shared the same interests as those who did receive notice, the latter could adequately speak for them vis-a-vis the named plaintiffs and class counsel.

Id. at 1520 (citation omitted). As such, *Battle* holds that when a mandatory class is composed of plaintiffs with singular interests, and where the representatives and objectors reflect the interests of those who did not receive notice, failure to individually notify each class member will not equate to a constitutional violation.²³

To the extent that *Temple* and *Battle* require notice to ensure that the class certification and the underlying facts supporting it are sufficiently scrutinized and to ensure that the varied interests of non-participating class members are represented, notice in the present case was sufficient to satisfy due process. Judge Pointer directed individual notices to be mailed to 250,000 women who had registered with the claims office and 28,000 attorneys representing Inamed breast implant recipients. He also ordered that notice [*61] of the proposed settlement and the certification-fairness hearing be published in *People Magazine*, *USA Today*, and *Modern Healthcare Magazine*, as well as on *Modern Healthcare Magazine's* website and the district court's website. At the certification-fairness hearing, potential class members—including those with no manifested injury—objected, arguing among other things that the settlement fund was too small, that the named class representatives did not adequately reflect the putative class members' varying degrees of injuries, that future claimants should be allowed to opt-out of the class, that the settlement would improperly sidestep the bankruptcy system, and that Inamed did not constitute a

limited fund in light of the company's economic rebound. The hearing was far different from "[t]he district court's ex parte proceeding" in *Temple*, which "denied petitioners their right to contest [the asbestos company's] assertions." *851 F.2d at 1272*. The proceedings before Judge Pointer were sufficiently adversarial.

Even with the benefit of hindsight, Juris cannot point to a single objection that she would have raised that was not actually advanced by putative class members before Judge Pointer. [*62] Accordingly, the ordered notice amply satisfied the requirements of *Temple* and *Battle* that absent class members be sufficiently informed of the pendency of the action.²⁴

[*1320] We likewise find that the notice with respect to the proposed plan for distribution of the Inamed settlement fund satisfied due process. See *Battle*, 770 F. Supp. at 1520 (explaining that, apart from notice of the pendency of the action, a court must analyze whether class members received constitutionally sufficient notice of and the right to object to the settlement). Per Judge Pointer's orders, notices requesting objections and comments on the proposed fund distribution plan were mailed to 350,000 implant recipients registered with the claims office. The court received sixty-two objections to the proposal, and Judge Pointer held a hearing to consider the propriety of pro

²⁴ Class counsel have suggested that extensive paid notice associated with the failed Original Global Settlement, which resulted in 500,000 women registering with the MDL 926 claims office, as well as the informal notice stemming from the enormous volume of news stories about breast implant litigation, further increased exposure to the Inamed class settlement. Because we find that the formal notice campaign approved by Judge Pointer was sufficient, we need not address the precise constitutional significance of this "other" notice. See *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 169 (2d Cir. 1987) (taking judicial notice of the widespread publicity that litigation received and concluding that "the omissions noted were of little consequence in light of the actual notice and widespread publicity"); *Battle*, 770 F. Supp. at 1520 (finding individual notice to some class members and "certain 'media' notice in the Birmingham area" was enough to bind absent class members); 7AA Charles Alan Wright et al., *Federal Practice & Procedure* § 1786 (3d ed. 2005) (noting that courts have suggested that *Rule 23* "does not require publication to be accomplished through formal newspaper advertisements," and citing cases in which "widespread notoriety given to the case" and "attention given the action by the news media" were held to provide adequate notice).

²³ This notion is consistent [*60] with the understanding of the drafters of the 1966 amendments to *Rule 23*. The drafters explained that, "[i]n the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum." *Fed. R. Civ. P. 23*, supplementary note of advisory committee on 1966 Amendment; see also 7AA Charles Alan Wright et al., *Federal Practice & Procedure* § 1786 (3d ed. 2005) ("In representative actions brought under [*Rule 23(b)(1)* and (*b)(2)*], the class generally will be more cohesive. . . . This means there is less reason to be concerned about each member of the class having an opportunity to be present.").

rata distribution of the fund. For example, Judge Pointer addressed concerns that the plan was inequitable because it failed to differentiate between claimants with current injuries and those **[**64]** without injuries; he also overruled objections that certain claimants could not identify the manufacturer of their breast implants and thus could not provide the necessary information to be eligible to claim from the Inamed settlement fund. Judge Pointer was not required to provide each absent class member individual notice of the proposed settlement allocation plan, and the notice here satisfied "the broad reasonableness standards imposed by due process." *Fowler v. Birmingham News Co.*, 608 F.2d 1055, 1059 (5th Cir. 1979); see also *Franks v. Kroger Co.*, 649 F.2d 1216, 1222-23 (6th Cir. 1981), *aff'd on reh'g*, 670 F.2d 671 (1982). Importantly, under the circumstances, "the interests of those class members . . . who did receive notice of the settlement were essentially identical to the interests of [those] who were not alerted to the settlement . . . and the former raised just the sort of objections that the latter would have raised." *Battle*, 770 F. Supp. at 1521.

Juris's conclusory assertion that the Inamed class settlement cannot be given preclusive effect because "[t]here is no dispute that she did not receive actual notice" rests on a faulty premise. As demonstrated by our discussion **[**65]** of *Temple* and *Battle*, where due process calls for absent members of a mandatory class to receive notice, it does not *automatically* require that the notice match that in a 23(b)(3) class action. That is, something less than "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort," may suffice. *Fed. R. Civ. P. 23(c)(2)(B)*; see also 3 William B. Rubenstein et al., *Newberg on Class Actions* § 8:13 (4th ed. 2011) ("As a rule, class certification notice, even if held to be required in a *Rule 23(b)(1)* . . . class suit by . . . due process, will invariably mean significant cost savings by means of published or other general notice, compared to the corresponding but stricter requirements of individual *Rule 23(c)(2)* **[**1321]** notice to members of classes certified only under *Rule 23(b)(3)*"); *Johnson v. Gen. Motors Corp.*, 598 F.2d 432, 438 (5th Cir. 1979) (holding that individual monetary claims in a 23(b)(2) class cannot be barred where absent class members received no notice, but stating that "[i]t **[**66]** will not always be necessary for the notice in such cases to be equivalent to that required in (b)(3) actions").

However, even assuming this heightened standard applied, Juris would be unable to demonstrate that the

notice in the class proceeding was constitutionally deficient. Courts have consistently recognized that, even in *Rule 23(b)(3)* class actions, due process does not require that class members actually receive notice. See *Silber v. Mabon*, 18 F.3d 1449, 1453-54 (9th Cir. 1994) (explaining that even in an opt-out class action, class notice standard is "best practicable," as opposed to "actually received"); *Adams v. S. Farm Bureau Life Ins. Co.*, 417 F. Supp. 2d 1373, 1380 n.6 (M.D. Ga. 2006) ("The analysis for purposes of due process is on the notice plan itself, and actual receipt of notice by each individual class member is not required."), *aff'd*, 493 F.3d 1276 (11th Cir. 2007); *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 164 F.R.D. 362, 368 (S.D.N.Y. 1996). ("It is widely accepted that for the due process standard to be met it is not necessary that every class member receive actual notice . . ."). *aff'd*, 107 F.3d 3 (2d Cir. 1996); *Trist v. First Fed. Sav. & Loan Ass'n of Chester*, 89 F.R.D. 1, 2 (E.D. Pa. 1980) **[**67]** ("*Mullane* [v. *Ctr. Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 656, 94 L. Ed. 865 (1950).] has never been interpreted to require the sort of actual notice demanded by the defendants . . ."); see also 4 William B. Rubenstein et al., *Newberg on Class Actions* § 11:53 (4th ed. 2011) ("Thus, due process does not require actual notice, but rather a good faith effort to provide actual notice. Courts have consistently recognized that due process does not require that every class member receive actual notice so long as the court reasonably selected a means likely to apprise interested parties."); 7AA Charles Alan Wright et al., *Federal Practice & Procedure* § 1789.1 (3d ed. 2005) ("[A]s long as the notice scheme that is adopted meets [the constitutional standards], courts generally have ruled that an absent class member will be bound by any judgment that is entered, even though the absentee never actually received notice."). Where certain class members' names and addresses cannot be determined with reasonable efforts, notice by publication is generally considered adequate. See *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 168-69 (2d Cir. 1987) (finding that, with respect to a 23(b)(3) **[**68]** class, unidentified absent class members that could not be located through reasonable efforts did not need to be provided with individual, mailed notice in order to be bound); *Gordon v. Hunt*, 117 F.R.D. 58, 63 (S.D.N.Y. 1987) ("This combination of mailed notice to all class members who can be identified by reasonable effort and published notice to all others is the long-accepted norm in large class actions."). Juris cites no case law to the contrary.

Judge Pointer constructed a notice campaign which he

intended to approximate the level of notice that would have been provided to a *Rule 23(b)(3)* class. Juris has done nothing to call into question the fact that the dissemination of notice was—as Judge Pointer intended, and Judge Proctor later found—the best practicable under the circumstances. We hold that the notice campaign in the Inamed class action was sufficient in a constitutional sense, and we cannot conclude that there was a deficiency in notice that prevents *res judicata* from attaching to the class settlement.

[*1322] 2. Adequate Representation

Juris additionally seeks to circumvent the binding effect of the Inamed class settlement on the basis that she was not adequately represented. She [*69] claims she was inadequately represented for several reasons; we address her arguments in turn.

"Due process of law would be violated for the judgment in a class suit to be *res judicata* to the absent members of a class unless the court applying *res judicata* can conclude that the class was adequately represented in the first suit." *Gonzales v. Cassidy*, 474 F.2d 67, 74 (5th Cir. 1973).

To answer the question whether the class representative adequately represented the class so that the judgment in the class suit will bind the absent members of the class requires a two-pronged inquiry: (1) Did the trial court in the first suit correctly determine, initially, that the representative would adequately represent the class? and (2) Does it appear, after the termination of the suit, that the class representative adequately protected the interest of the class? The first question involves us in a collateral review of the [class action] court's determination to permit the suit to proceed as a class action with [the named plaintiffs] as the representative[s], while the second involves a review of the entire suit—an inquiry which is not required to be made by the trial court but which is appropriate [*70] in a collateral attack on the judgment such as we have here.

Id. at 72.

Juris argues that Judge Pointer erred by failing to create discrete subclasses for those breast implant recipients with current injuries and those with only potential, future injuries. She relies primarily on *Amchem Products, Inc.*

v. Windsor, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997). In *Amchem*, the Supreme Court analyzed, on direct appeal, the certification of a settlement-only class action involving persons exposed to asbestos products. The "sprawling class" included not only presently injured individuals, but also those who had only been exposed to asbestos with no present manifestation of injury. *Id.* at 602-03, 117 S. Ct. at 2239-40. The Court reversed class certification, noting, among other defects, that *Rule 23(a)(4)*'s requirement that the named representatives "will fairly and adequately protect the interests of the class" had not been satisfied. *Id.* at 625, 117 S. Ct. at 2250. Importantly, the Court reasoned:

[N]amed parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single [*71] class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future.

Id. at 626, 117 S. Ct. at 2251.

Quoting from a Second Circuit decision, the Court shed light on its precise concern: "The class members may well have thought that the Settlement serves the aggregate interests of the entire class. But the adversity among subgroups requires that members of each subgroup cannot be bound by a settlement except by consents given by those who understand that their role is to represent solely members of their respective subgroups." *Id.* at 627, 117 S. Ct. at 2251 (quoting *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 742-43 (2d Cir. 1992), modified on reh'g, 993 F.2d 7 (2d Cir. 1993)). The crux of the problem in *Amchem* was that there was "no assurance . . . either in the terms of the settlement or in the structure of the negotiations—that the named plaintiffs operated under a proper understanding of their representational responsibilities." [*1323] *Id.*; see *id.* ("The settling parties, in sum, achieved a global compromise [*72] with no structural assurance of fair and adequate representation for the diverse groups and individuals affected.").

Two years later, in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999), the Court again discussed the potentially conflicting interests within a class of current and future injury asbestos claimants certified for global settlement

purposes. *Id.* at 856, 119 S. Ct. at 2319. According to the Court, under the law of *Amchem*, "a class divided between holders of present and future claims (some of the latter involving no physical injury and attributable to claimants not yet born) requires homogenous subclasses under Rule 23(c)[], with separate representation to eliminate conflicting interests of counsel." *Id.* *Ortiz* involved Rule 23(b)(1)(B) certification requirements, as opposed to Rule 23(a)(4), but the Court found that the intra-class conflict was "as contrary to the equitable obligation entailed by the limited fund rationale as it was to the requirements of structural protection applicable to all class actions under Rule 23(a)(4)." *Id.* at 856, 119 S. Ct. at 2320; see *id.* at 856 n.31, 119 S. Ct. at 2319 n.31 (noting that the Rule 23(b) "adequacy of representation [**73] concern parallels the enquiry required at the threshold under Rule 23(a)(4)").

The cases describe a requirement that there be structural assurances of adequate representation that protect against the conflicting goals of present and future injury class members. These protections must ensure that class representatives understand that their role is representing solely members of their respective constituency, not the whole class. Although we need not rule definitively, *Amchem* and *Ortiz* appear to hold that Rule 23(a)(4) calls for some type of adequate structural protection, which would include, but may not necessarily require, formally designated subclasses.²⁵

²⁵ We are not the first court to suggest that *Amchem* and *Ortiz* impose a requirement of adequate structural assurances, [**74] as opposed to a per se requirement of formally designated subclasses. For example, in [**1325] *In re Literary Works in Electric Databases Copyright Litigation*, 654 F.3d 242 (2d Cir. 2011), after noting that an *Amchem* conflict was present, the Second Circuit considered whether certain protections, including the fact that the settlement was the product of "intense, protracted, adversarial mediation, involving multiple parties and complex issues," were sufficient to satisfy Rule 23(a)(4). *Id.* at 252. Although the court ultimately concluded that these protections did not provide sufficient assurance of adequate representation, its analysis of the issue is revealing. See *id.* at 251-55; see also *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 261 n.9 (2d Cir. 2001) (describing the problem in *Amchem* and *Ortiz* as a "lack of procedural safeguards like subclasses"), *aff'd in part by an equally divided court and vacated in part*, 539 U.S. 111, 123 S. Ct. 2161, 156 L. Ed. 2d 106 (2003). Commentators have also suggested (or at least implied) that the certification of subclasses is just one example of structural protection capable of ensuring adequate representation in the face of intra-class conflicts. See, e.g., 1 William B. Rubenstein [**75] et al.,

Of course, both *Amchem* [**1324] and *Ortiz* involved review on direct appeal of the Rule 23 pre-certification requirements, as opposed to the collateral challenge context of our case in which Juris must show that her due process rights were violated. In the context of this case, we are unwilling to hold that the *due process* concept of adequate representation is so rigid and inflexible as to demand formal subclasses in the case at bar.

Judge Pointer and [**76] class counsel put in place procedures to protect against antagonistic alignment within the class and avoid the fatal flaw in *Amchem*. Judge Pointer appointed six named breast implant recipients as class representatives, among them, a representative with no manifested injury, one with minor to moderate injuries, and one who was totally disabled. He appointed five attorneys with extensive breast implant trial experience as class counsel. Most significantly, and anticipating an *Amchem* problem, separate counsel, Ernest Hornsby, was specifically brought in for the sole purpose of representing those plaintiffs with only potential, future injuries. Thus, even prior to provisional certification of the class, the interests of those claimants with unmanifested injuries were represented and given a separate seat at the negotiation table through qualified and independent counsel.²⁶

Newberg on Class Actions § 3:61 (5th ed. 2011) (noting that "subclasses or other managerial mechanisms can be employed to resolve the potential conflict"); 2 John F.X. Peloso et al., *Business and Commercial Litigation in Federal Courts* § 19:106 (3d ed. 2011) ("The Supreme Court suggested that some of the problems noted in the proposed class could have been resolved by procedural devices, such as the use of subclasses, each with independent representatives and counsel."); 1 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 4:45 (8th ed. 2011) ("Thus, *Amchem* suggested that the adequate representation requirement may be satisfied notwithstanding differences among subclasses within a class if there is some form of 'structural assurance of fair and adequate representation"); Note, Kevin R. Bernier, *The Inadequacy of the Broad Collateral Attack: Stephenson v. Dow Chemical Company and its Effect on Class Action Settlements*, 84 B.U. L. Rev. 1023, 1042 (2004) ("Therefore, *Ortiz* and *Amchem* do not stand for a per se rule against settlements that do not include subclasses, but rather require a demand for strong procedural protection at the certifying level.").

²⁶ Judge Pointer found that there were no conflicts among the class representatives or class counsel at certification. He believed that all class members had a common, overriding interest in identifying and preserving a limited fund that

Hornsby continued his representation of exposure-only plaintiffs throughout the case, including when, at the certification stage, Judge Pointer considered approving the settlement and the settlement fund, and, more significantly, later, when he considered various proposals for allocating the fund. This combination of [**77] named plaintiffs representing the full spectrum of breast implant claimants and separate counsel to represent the present injury and future injury claimants addressed the potential and actual divergent interests within the Inamed class.

In contrast with *Amchem* and *Ortiz*, the structure of the negotiations in the case at bar ensured that class representatives operated with a proper understanding of their representative responsibilities. The negotiation process did not resemble that in *Amchem* and *Ortiz* where there were no structural assurances whatsoever and where nobody "exclusively advanced the particular interests of either subgroup." *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 250 (2d Cir. 2011). [**79] Because of this, we are confident that the class settlement, as well as the plan for distribution, was achieved only by the consent of those who understood that their role was to advocate on behalf of their respective subgroups.²⁷

provided the maximum possible recovery for all; divergent interests would occur, if at all, during the later stages of the case in which the court would take up the issue of how to distribute the settlement fund. We agree that the interests of the Inamed class members were in complete alignment at certification. The present circumstances are therefore unlike those in *Amchem*, where the proposed class settlement, which was negotiated by lawyers who had no attorney-client relationship with future claimants, made essential allocation decisions as to how the recovery was to be allocated among various types of plaintiffs. 521 U.S. at 610, 117 S. Ct. at 2243. Here, the goal of the currently injured did not "tug against" the [**78] goal of the exposure-only plaintiffs until the court considered, post-certification, the proper method of distribution. See *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 680 (7th Cir. 2009) ("At this stage in the litigation the existence of such conflicts is hypothetical. If and when they become real, the district court can certify subclasses with separate representation of each."); 1 William B. Rubenstein et al., *Newberg on Class Actions* § 3:58 (5th ed. 2011) (explaining that potential conflicts over distribution will not bar an initial finding of adequacy at class certification, and that the court can resolve conflicts over distribution through the use of subclasses at a later stage). Adequate structural protections were in place well before that time.

²⁷ We emphasize that class counsel's behavior is directly intertwined with that of the named plaintiffs. See, e.g., *Pelt v.*

We therefore conclude that the structural protections put in place were sufficient to meet the demands of due process.

Our holding that formal subclasses were not constitutionally required is reinforced by Judge Proctor's unchallenged findings. According to Judge Proctor, "the class's court-appointed representatives and counsel served as the functional equivalents of formally subclassed groups, which ensured that the class representatives, as well as their counsel, participated directly in negotiations and litigation." District Court order, Docket No. 303 at 93. He additionally found that formal sub-classing would have been "superfluous" because Judge Pointer received objections that mirrored the concerns that subdivided "currents" and "futures" subclasses likely would have produced respectively. *Id.* at 95. On appeal, Juris does not contest Judge Proctor's findings, and she has not articulated how formal subclasses would have provided increased assurance of adequate representation.

Juris does argue that "Hornsby did not, and could not, vigorously and tenaciously protect the plaintiff's interests" because "Hornsby [**81] represented all kinds of plaintiffs in the Inamed litigation—those who had no current injuries, some who had current injuries, and some who were going to develop a condition or disease in the future." Juris's initial appellate brief makes this conclusory assertion, without even labeling it a conflict of interest, and provides no follow-up argument on the issue.²⁸

Utah, 539 F.3d 1271, 1288 (10th Cir. 2008) ("Realistically, for purposes of determining adequate representation, the performance of class counsel is intertwined with that of the class representative."); *Culver v. City of Milwaukee*, 277 F.3d 908, 913 (7th Cir. 2002) ("For purposes of determining whether the class representative is an adequate representative of the members of the class, the performance of the class lawyer is inseparable from that of the class representative. . . . Realistically, functionally, practically, [the class lawyer] is the class representative, not [the class representative]."); *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 832 n.9 (3d Cir. 1973) ("Experience teaches that it is counsel for the [**80] class representative and not the named parties, who direct and manage these actions. Every experienced federal judge knows that and any statements to the contrary is [sic] sheer sophistry.").

²⁸ In her reply brief, Juris again makes mention of "Hornsby's representation of class members with both present illnesses and future claims." Although that brief labels Hornsby's alleged dual representation a conflict of interest for the first time, Juris again failed to provide any follow-up discussion or elaborate

Even more problematic, Juris has raised this claim for the first time on appeal.

"A federal appellate court will not, as a general rule, consider an issue that is raised for the first time on appeal." *In re Pan Am. World Airways, Inc.*, 905 F.2d 1457, 1461-62 (11th Cir. 1990). "The corollary of this rule is that, if a party hopes to preserve a claim, argument, theory, or defense on appeal, she must first clearly present it to the district court, that is, in such a way as to afford the district court [**82] an opportunity to recognize and rule on it." *Id.* at 1462. In her appellate briefs, Juris cites to a portion of the hearing before Judge Proctor in which Hornsby made a stray remark that, at the beginning, he represented some breast implant plaintiffs with current injuries and some with no [**1326] manifested injuries.²⁹

Juris's counsel did not respond, at that point or any other point during the hearing, by arguing that Hornsby had a conflict of interest which deprived Juris of adequate representation.³⁰

Most importantly, Juris discussed adequate representation in five briefs in the court below, and she never once suggested that Hornsby suffered from a conflict of interest.

Having foregone an opportunity to explore Hornsby's representation before Judge Proctor (at which time the matter could have been investigated and clarified), and having raised the conflict-of-interest claim in such a vague and tangential manner on appeal, Juris has waived it. Having doubly waived the conflict of interest issue, and especially having deprived Allergan of the opportunity to adduce evidence to clarify the situation, Juris is deemed to have abandoned the issue. *See id.* at 1461-62; *Marek v. Singletary*, 62 F.3d 1295, 1298 n.2 (11th Cir. 1995).

Even setting aside Juris's abandonment of this issue, we would hold that the record amply supported Judge

on her assertion.

²⁹ Hornsby stated as follows: "Well, as I said, when I came in, I came in with a real bias against [the limited fund settlement]. I represented people that were going to be adversely affected by it just like Miss Juris, some who had no current injuries, some who had current injuries, and some who were going to develop a condition or disease in the future"

³⁰ In fact, at that same hearing, "Juris's counsel conceded . . . that there is absolutely nothing in the record to suggest that Hornsby, acting as Class Counsel on [**83] behalf of future claimants, suffered from a conflict of interest." District Court order, Docket No. 303 at 96.

Proctor's finding that counsel in this case served as the functional equivalents of formal subclasses, such that the situation falls far short of a due process violation. The record reveals that the parties agreed, and Judge Pointer was aware, that Hornsby represented solely future claimants with no current manifestations of injury. An affidavit submitted by class counsel in support of provisional certification of the Inamed [**84] settlement class provides as follows:

One concern that we raised and explored, as discussions and negotiations proceeded, was whether breast implant recipients with manifest injuries, and those who have not yet suffered injuries from their implants, had a common interest in a mandatory fund settlement as opposed to the inevitable alternative of Inamed insolvency. To assure that all interests and perspectives were represented, Ernest Hornsby, a plaintiffs' attorney with extensive Breast Implants trial experience, who represents Inamed implant recipients with potential future claims, was added as class counsel in this action, and participated in the final round of discussions and negotiations that led up to the instant settlement.

Subsequently, when adopting the proposed distribution plan, Judge Pointer stated: "Class counsel—some of whom represent clients with existing medical problems and others of who represent clients without presently documented problems—have, with the Court, struggled . . . and reluctantly come to the conclusion that pro rata division remains the better—and indeed only workable—solution under the facts of this case." District Court order, Docket No. 70 at 5. This [**85] establishes not only that Hornsby was brought in and designated to represent exposure-only class members, but also that this procedural safeguard was put in place for the express purpose of addressing the divergent interests that could arise between present and future injury claimants. For this reason, even if Hornsby had previously represented some clients with current injuries, he, by agreeing [**1327] to be the designated representative for the named plaintiff with merely future, potential claims, implicitly ceded the representation of any other clients to class counsel representing currently injured plaintiffs. We conclude that Juris has failed to show that her due process rights were violated.

Juris next urges us to find that she was not in fact adequately represented because Hornsby did not prosecute an appeal of Order 47A, the order certifying the settlement-only class and approving the settlement

as fair, based on [Ortiz v. Fibreboard Corp.](#), 527 U.S. 815, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999). The Supreme Court's decision in [Ortiz](#), which was still pending when Judge Pointer entered Order 47A, ultimately narrowed the grounds upon which certification of a limited fund class settlement could be supported. **[**86]** In support of her failure-to-appeal argument, Juris cites [Gonzales v. Cassidy](#), 474 F.2d 67 (5th Cir. 1973).

In [Gonzales](#), the plaintiffs collaterally attacked a class action judgment on the grounds that they had not been adequately represented. [Id.](#) at 72. In the prior proceeding, a three-judge district court declared a Texas statute unconstitutional. [Id.](#) at 71. However, that court limited the scope of relief by holding that its order only applied retroactively to the named plaintiff himself; with respect to all other class members, the court's order granted only prospective relief. [Id.](#) "Having obtained relief for himself, [the class representative] did not appeal the court's denial of retroactive relief to the other members of his class." [Id.](#) The district court rejected the argument that this constituted inadequate representation. [Id.](#) 72.

On appeal, the former Fifth Circuit found that the named plaintiff's representation was adequate up through the time that the three-judge court entered its final order. [Id.](#) at 75. The Court then characterized the "narrow question" before it as "whether [the class representative's] failure to appeal this order, which denied retroactive relief to all members **[**87]** of the class except [himself], constitutes inadequate representation so that they are not bound by the judgment." [Id.](#) Concluding that the failure to appeal rendered the representation inadequate, the court explained:

The problem is that he was representing 150,000 persons, who, although having had their licenses and registration receipts suspended without due process, were denied any relief by the three-judge court's prospective only application of its decision. So long as an appeal from this decision could not be characterized as patently meritless or frivolous, [the named plaintiff] should have prosecuted an appeal. . . . [His] failure to prosecute an appeal deprived the members of his class, whose rights were not vindicated by the three-judge court's decision, of full participation in [the judicial] process.

[Id.](#) at 76.

[Gonzales](#) is easily distinguished from the case at bar.

That case does not hold that a class representative's failure to appeal, in the abstract, will render representation inadequate. Critically, the absent plaintiffs in [Gonzales](#) had been "denied any relief" by the unappealed judgment's prospective application, and the fact that the representative had secured a better **[**88]** deal for himself than the remainder of the class prompted him not to pursue an appeal. See [Brown v. Ticor Title Ins. Co.](#), 982 F.2d 386, 390 (9th Cir. 1992) ("In [Gonzales](#), the class members collaterally attacked the settlement, demonstrating that the class representative secured a better monetary deal for himself than the rest of the class, and it was because of this that he failed to pursue an appeal on behalf of the class. In the **[*1328]** MDL 633 litigation, the settlement was similar for each class member.") (citation omitted); [Kemp v. Birmingham News Co.](#), 608 F.2d 1049, 1054 (5th Cir. 1979) ("Because Kemp received the same relief as all other members of the class, [Gonzales](#) is inapplicable."); see also [Frank v. United Airlines, Inc.](#), 216 F.3d 845, 852 (9th Cir. 2000) ("Consequently, when the class representatives chose not to appeal the adverse ruling on the facial validity of the weight policy, they abandoned any representation of the interests of those present and potential future class members in order to protect present class members seeking back pay and reinstatement."). Here, it cannot be said that the rights of absent class members such as Juris "were not vindicated" by Order 47A. **[**89]** Nor is there anything to suggest that Hornsby's failure to take an appeal was motivated by the fact that Order 47A benefitted certain representatives to the detriment of other class members. In electing not to appeal, Hornsby did not abandon the interests of the segment of the class he represented—i.e., the exposure-only claimants.³¹

Additional factors establish that Hornsby's decision not to appeal did not constitute inadequate representation. First, even if filed the same day the Supreme Court

³¹ Juris does not contend that her due process rights were violated by Hornsby's failure to appeal Order 47B, which approved the allocation plan for the Inamed settlement fund. Nevertheless, we emphasize that the representatives received the same pro rata share of the settlement recovery that absent class members like Juris received. The distribution plan also did not distinguish between presently injured claimants and those with only future, potential injuries. The decision not to appeal therefore did not advance the interests of some class members by subordinating the interests of others. Indeed, an appeal of Order 47B may have actually been contrary to the interests of exposure-only plaintiffs.

[**90] decided Ortiz, any appeal of the limited fund class certification would have been untimely. Judge Pointer entered Order 47A on February 1, 1999, and the Ortiz decision was released on June 23, 1999, approximately five months later. More significantly, there was a compelling tactical reason for Hornsby *not* to pursue an appeal of Order 47A. Inamed's senior creditors had conditioned financing of the settlement on certification of a mandatory class, and the undisputed evidence established that if class representatives or objectors successfully appealed, those lenders would have withdrawn financing and forced Inamed into a Chapter 7 liquidation. Hornsby later explained, "I didn't file a notice of appeal obviously because I just didn't see where—it would have made the only arrangement that could have gotten claimants anything collapse because it would have delayed it, the investors would have pulled out and gone on, and I just didn't see the benefit." Opting not to take an appeal was not antagonistic to Juris's interests. Instead, it was a strategic decision that protected exposure-only claimants by ensuring that a limited fund even existed for the class's benefit.

Under these circumstances, [**91] Hornsby's decision not to prosecute an appeal of Order 47A based on the then-pending Ortiz does not call into question the extent to which he "vigorously and tenaciously protected the interests of the class." Gonzales, 474 F.2d at 75. That decision, therefore, did not render Hornsby's representation constitutionally inadequate.

In conclusion, Juris has not presented facts demonstrating a due process violation stemming from the lack of adequate representation.³²

³² Juris's remaining arguments do not warrant extended discussion. Her assertion that Hornsby made no objections at the fairness does not, without more, establish inadequate representation. Juris does not specify any particular objection that Hornsby should have presented. And significantly, each of the points now raised by Juris in this collateral posture were raised by objecting class members before Judge Pointer.

We likewise reject Juris's argument that representation was inadequate because nobody filed a Rule 60 motion to set aside the limited fund certification based on Inamed's 1998 10-K, which she contends undermined [**92] Inamed's pleas of poverty. Judge Pointer overruled an objection on similar grounds, and Judge Proctor made a reasonable finding of fact that Inamed's post-settlement economic rebound was due to the prospect that the company would be relieved from its overwhelming debt burden and its otherwise undisputed path towards insolvency. On appeal, Juris does not even attempt to challenge Judge Proctor's factual finding. We agree with

Her inadequate [**1329] representation claims cannot free her from the Inamed class settlement's preclusive effect.

3. Opt-out Rights and Personal Jurisdiction

Juris further argues that applying the Inamed settlement to bar her claims would violate due process because she did not have an opportunity to opt out or exclude herself. Juris asserts that because she was a California resident with no contacts with Alabama, the class action court—Judge Pointer's court—never had personal jurisdiction over her. Therefore, she urges us to conclude that, pursuant to Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985), she had a constitutional right to opt out.

In Shutts, the Supreme Court described [**93] the procedural requirements for asserting personal jurisdiction over absent, nonresident class members in a Kansas class action that asserted claims for money damages.³³

The petitioner argued that "Kansas should not be able to exert jurisdiction over the plaintiff's claims unless the plaintiffs have sufficient minimum contacts with Kansas." Id. at 808, 105 S. Ct. at 2972. The petitioner contended that the Kansas "opt out" procedure was not enough; instead, it posited, an "opt in" procedure—which would require plaintiffs without minimum contacts with the forum state to affirmatively consent to inclusion in the class—was necessary to satisfy due process. Id. at 811, 105 S. Ct. at 2974. The Court disagreed. Id. Noting that fewer burdens are placed on absent class-action plaintiffs than on absent defendants in non-class suits, the Court concluded that "the *Due Process Clause* need not and does not afford the former as much protection from state-court jurisdiction as it does the latter." Id.

The Court held that "a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support

Judge Proctor that "a failure to pursue an otherwise insubstantial question of fact or law does not amount to inadequate representation." District Court order, Docket No. 303 at 90.

³³ The class action at issue there was certified under the Kansas equivalent of **Federal Rule of Civil Procedure 23(b)(3)**. That is, the state procedural rule required that class members receive notice of [**94] the action by first-class mail and an opportunity to opt out and remove themselves from the litigation. Shutts, 472 U.S. at 810-11, 105 S. Ct. at 2974.

personal jurisdiction over a defendant." *Id.* It proceeded to explain that a forum state could bind absent plaintiffs "concerning a claim for money damages or similar relief at law," so long as certain procedural protections are provided. *Id. at 811-12, 105 S. Ct. at 2974*. Namely, under the circumstances of that case, absent plaintiffs needed to receive notice and an opportunity to be heard, an opportunity to remove themselves from the class by returning an opt out, and adequate representation. *Id. at 812, 105 S. Ct. at 2974*. Because these minimal due [*1330] process protections were afforded, *Shutts* concludes that the Kansas court properly asserted jurisdiction over the absent class members. *Id. at 814, 105 S. Ct. at 2976*. However, the Court emphasized: "Our holding today is limited to those class actions which seek to bind known plaintiffs [*95] concerning claims wholly or predominately for money judgments." *Id. at 811 n.3, 105 S. Ct. at 2974 n.3*. The *Shutts* court "intimate[d] no view concerning other types of class actions, such as those seeking equitable relief." *Id.*

Significantly, the question now before us—whether *Shutts* requires that an absent class member be afforded an opportunity to exclude herself from a limited fund class settlement—presents a question of first impression in this Circuit.³⁴

Shutts is a case about personal jurisdiction—i.e., the forum state's adjudicatory power over nonresident, non-consenting absent class members who did not otherwise have minimum contacts. Opt-out rights were of critical importance in *Shutts* for the reason that they allowed for an inference of consent, which was sufficient to support the class action court's jurisdiction over the class members who otherwise had no connection with Kansas.³⁵

³⁴ In *In re Temple*, 851 F.2d 1269 (11th Cir. 1988), on appeal of a decision certifying a *Rule 23(b)(1)(B)* class, we stated that, based on a "literal reading of *Shutts*," absent class members "may . . . have the right to opt out of even a mandatory class action where the predominant issue is money damages." *Id.* 1272-73 n.5. However, because we vacated the certification order on other grounds, we did not need to decide the issue. *Id.*

³⁵ Our understanding as to the import of *Shutts* finds support in the works of commentators interpreting that case. See, e.g., 4 William B. Rubenstein et al., *Newberg on Class Actions* § 13:33 (4th ed. 2011) ("[Under *Shutts*,] absent class members without minimum contacts with the forum had to consent to personal jurisdiction. This could be achieved with notice and

With respect to these nonresident, non-consenting absent plaintiffs, the opt-out rights functioned as a substitute for the traditional personal jurisdiction analysis (minimum contacts) applicable to defendants. Therefore, courts have concluded, "the *Shutts* holding as to what due process requires [*96] where a court lacks personal jurisdiction over some class members does not apply where the court has an independent basis for jurisdiction." *In re Joint E. & So. Dist. Asbestos Litig.*, 78 F.3d 764, 778 (2d Cir. 1996); see, e.g., *White v. Nat'l Football League*, 41 F.3d 402, 407-08 (8th Cir. 1994) (finding that *Shutts* opt-out protection was inapplicable in a *Rule 23(b)(1)* class action where "each of the objectors either had minimum contacts with the forum or submitted himself to the jurisdiction of the district court"); *Grimes v. Vitalink Commc'n Corp.*, 17 F.3d 1553, 1558 (3d Cir. 1994) ("Although the class members in the present case were not provided with an opportunity to opt out, the state court had the [*1331] requisite power to bind absent class members as long as they had minimum contacts with the forum and they were not otherwise denied due process."); *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 292 (2d Cir. 1992) (holding that *Shutts* did not require opt-out rights in a *Rule 23(b)(1)(B)* class action because the plaintiffs had already submitted to the district court's jurisdiction by filing bankruptcy claims against the defendant); see also Arthur R. Miller et al., *Jurisdiction [*97] and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 *Yale L. J.* 1, 52 (1986) (explaining that whether a mandatory class can be brought after *Shutts* may depend on "whether there are sufficient contacts between the claimants (or the object

opt-out provisions."); Arthur R. Miller et al., *Jurisdiction and Choice of Law in Multistate Class [*98] Actions After Phillips Petroleum Co. v. Shutts*, 96 *Yale L. J.* 1, 52 (1986) ("The right to opt out is essential to the Supreme Court's inference of consent, and that reasoning, in turn, is essential to the Court's validation of jurisdiction over members who have no affiliation with a distant forum."); Note, Stephen T. Cottreau, *The Due Process Right to Opt Out of Class Actions*, 73 *N.Y.U. L. Rev.* 480, 490 (1998) ("Where a state wishes to bind nonresidents lacking minimum contacts with the forum, due process requires the granting of opt out rights to establish consent of the class members to the court's adjudicatory jurisdiction."). We also note that in *Adams v. Robertson*, 520 U.S. 83, 117 S. Ct. 1028, 137 L. Ed. 2d 203 (1997), in dismissing a writ of certiorari as improvidently granted, the Court characterized the petitioner's contention in *Shutts* as arguing that "the state court lacked personal jurisdiction over out-of-state class members, not the different and broader question of whether . . . due process requires that all class members have the right to opt out." *Id. at 88-89, 117 S. Ct. at 1030*.

of the action) and the forum").

In a limited fund class action, the presence within the jurisdiction of a res or fund that is the subject **[**99]** of the litigation resolves the personal jurisdiction objection of absent claimants. See *Flanagan v. Ahearn (In re Asbestos)*, 90 F.3d 963, 987 (5th Cir. 1996) ("The court can appropriately adjudicate all claims against the fund because of its jurisdiction over the fund . . .");³⁶

Fanning v. Acromed Corp. (In re Orthopedic Bone Screw Prods. Liab. Litig.), 176 F.R.D. 158, 180 (E.D. Pa. 1997) (same); 6 William B. Rubenstein, et al., *Newberg on Class Actions* § 20:14 (4th ed. 2011) ("Certain types of equitable actions involving allocations of limited funds . . . historically have been deemed constitutional yet have never provided for opt-out rights."); Note, Stephen T. Cottreau, *The Due Process Right to Opt Out of Class Actions*, 73 N.Y.U. L. Rev. 480, 505 (1998) ("Many actions that demand a unitary adjudication will not require opt out rights because the forum will have minimum contacts with the class or the property at stake.") (emphasis added); *Miller et al. supra*, at 52 ("For example, a case concerning a limited fund located in a particular state can be brought as a mandatory action, because the nexus between the fund, the claimants, and the action supports the exercise of jurisdiction **[**100]** over claimants even against their will."); Barbara A Winters, *Jurisdiction over Unnamed Plaintiffs in Multistate Class Actions*, 73 Cal. L. Rev. 181, 197 (1985) ("There could still be jurisdiction over such non residents if, for example, rights to a res within the state were at issue in the litigation."). The class

action court's adjudicatory power over the claimants in such a case is akin to *in rem* or *quasi in rem* jurisdiction. See *Ahearn*, 90 F.3d at 987 ("This view of a limited-fund class action as similar to an action *in rem* makes particular sense because . . . the court in such an action has before it for disposition all the assets in which class members could claim an interest."); *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 734-35 (2d Cir. 1992) (holding that *in rem* and *quasi in rem* jurisdiction **[**1332]** was available over absent class members because trial courts were "fully entitled to exercise jurisdiction over the beneficiaries of a [limited fund] trust created in New York, pursuant to the authority of the Southern District bankruptcy court"), modified on reh'g, 993 F.2d 7 (2d Cir. 1993); *Grimes*, 17 F.3d at 1567-68 (Hutchinson, J., dissenting) ("Many cases which state or **[**101]** seem to imply that personal jurisdiction can be exercised over absent members of a plaintiff 'class' without minimum contacts are 'common fund' cases in which the court entertaining the action had jurisdiction over nonresident members. Jurisdiction there is present because the plaintiffs have a property interest in the fund or alternatively because the court had *in rem* or *quasi in rem* jurisdiction over the fund.");³⁷

We hold that the \$31.5 million limited fund recovery,

³⁶The Supreme Court granted certiorari and ultimately reversed the Fifth Circuit's *Ahearn* decision in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999). However, the Court, which had the case on direct review of certification, resolved the appeal on the narrow grounds that the certification of the limited fund class was improper under the substantive requirements of Rule 23. *Id.* at 821, 119 S. Ct. at 2302. Thus, the decision was grounded in a construction of Rule 23(b)(1)(B) **[**102]** instead of due process. See *id.* at 830, 119 S. Ct. at 2307 ("The nub of this case is the certification of the class under Rule 23(b)(1)(B) on a limited fund rationale . . ."). The Court did not reach the issue of whether and under what circumstances limited fund class members have a constitutional right to opt out. Therefore, the Fifth Circuit's concept that limited fund class members do not have a right to opt out under *Shutts* "was not disturbed by the Supreme Court [because] the case was reversed on other grounds." 4 William B. Rubenstein et al., *Newberg on Class Actions* § 13:34 (4th ed. 2011).

³⁷"Like an interpleader action, the *raison d'être* of a limited fund or impairment class action is the prejudice and impairment of rights that would result to some claimants if others are permitted to seek individual adjudications." 6 William B. Rubenstein et al., *Newberg on Class Actions* § 20:14 (4th ed. 2011). That is, a unitary adjudication of a limited fund is necessary for the very reason that permitting a class member to opt out of such a limited fund "would defeat its essential purpose." *Id.*; see also *Ortiz*, 527 U.S. at 838, 119 S. Ct. at 2311 ("The concept driving [limited fund actions] **[**103]** was insufficiency, which alone justified the limit on early feast to avoid a later famine."); *Ahearn*, 90 F.3d at 986 ("Unitary adjudication of a limited fund is crucial because allowing plaintiffs to sue individually would make the litigation an unseemly race to the courtroom door with monetary prizes for a few winners and worthless judgments for the rest.") (quotations and citation omitted); Zechariah Chafee, Jr., *Bills of Peace with Multiple Parties*, 45 Harv. L. Rev. 1297, 1311 (1932) (explaining that in a limited fund case "it is impossible to make a fair distribution of the fund or limited liability to all members of the multitude except in a single proceeding where the claim of each can be adjudicated with due deference to the claims of the rest"). Because a court cannot separately resolve individual claims to a limited fund without prejudicing the rights of absent claimants, equity demands that all claimants to a limited fund be represented before the court and bound by the court's disposition of the fund. See *Ortiz*, 527 at 835-36, 119 S. Ct. at 2309-10.

which was deposited into a court-supervised settlement account in Birmingham, Alabama, prior to class certification, provided Judge Pointer's court with jurisdiction over the fund and all claimants to that fund, wherever located.³⁸

[**1333] The opt-out requirement in *Shutts* addressed the class action court's jurisdiction over absent class members without minimum contacts with the forum. Because established law³⁹

holds that [**106] a court with jurisdiction over a res or fund also has jurisdiction over all claims against that fund, Juris's personal jurisdiction objection is resolved, and the need for opt-out rights is removed.⁴⁰

certified under *Rule 23(b)(1)* in which there is only a limited common fund from which the plaintiffs can obtain relief." [869 F.2d at 768 n.8.](#)

Juris's reliance on *In re Teletronics Pacing Systems, Inc.*, [221 F.3d 870 \(6th Cir. 2000\)](#), is also unavailing. In that case, the Sixth Circuit reversed a *Rule 23(b)(1)(B)* certification because the limited fund settlement at issue suffered from some of the same deficiencies as that in *Ortiz*. Most notably, there was no limited fund because the district court excluded the value of two potentially [**105] liable parent companies in calculating the "fund available" for satisfying the claims. *Id.* at 878. Although the named defendant alone did not have assets sufficient to cover the expected tort liability, the settlement released the parent companies who would have been "able to bear the expense of litigation and pay damages if found liable." *Id.* In the case at bar, there were no insurance assets and there were no parent companies. Inamed's assets constituted the entirety of the fund available to satisfy the claims, and the fund at issue was limited independently of any agreement by the parties. Finally, Juris's citations to *Jefferson v. Ingersoll International Inc.*, [195 F.3d 894 \(7th Cir. 1999\)](#), and *Molski v. Gleich*, [318 F.3d 937 \(9th Cir. 2003\)](#), are likewise unpersuasive. Those cases arose in the context of direct appeals of class certification, and each involved a *Rule 23(b)(2)* class action, not a limited fund action certified pursuant to *23(b)(1)(B)*. *Jefferson*, [195 F.3d at 897](#); *Molski*, [318 F.3d at 943](#).

³⁹The court's jurisdiction in a limited fund action is well-established as is indicated in the foregoing authorities, and is akin to that described in common fund cases. In the common fund cases, it was established historically that, so long as the interests of all claimants are represented before the court, a unitary decision with respect to common interests in the fund will bind all claimants to that fund. See, e.g., *Mullane v. Ctr. Hanover Bank & Trust Co.*, [339 U.S. 306, 313, 70 S. Ct. 652, 656, 94 L. Ed. 865 \(1950\)](#) ("It is sufficient to observe that . . . the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accord full opportunity to appear and be heard."); *Hartford Life Ins. Co. v. Ibs.*, [237 U.S. 662, 670-71, 35 S. Ct. 692, 695, 59 L. Ed. 1165 \(1915\)](#) [**107] ("The fund was single It would have been destructive of their mutual rights in the plan of mutual insurance to use the mortuary fund in one way for claims of members residing in one state, and to use it another way as to claims of members residing in a different state."); *Smith v. Swormstedt*, [57 U.S. 288, 303, 14 L. Ed. 942 \(1853\)](#) ("For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable

³⁸The cases cited in Juris's brief are easily distinguished and not persuasive with respect to our analysis. For example, she [**104] relies heavily on *In re Real Estate Title & Settlement Services Antitrust Litigation*, [869 F.2d 760 \(3d Cir. 1989\)](#), and *Brown v. Ticor Title Insurance Co.*, [982 F.2d 386 \(9th Cir. 1992\)](#). Both cases analyzed the due process rights of absent members in the same class action, which was certified under *Rule 23(b)(1)(A)* and *(b)(2)*, not *(b)(1)(B)*. *Real Estate*, [869 F.2d at 763](#); *Brown*, [982 F.2d at 392](#). Significantly, the courts' due process discussion—more specifically, their treatment of the opt-out issue—was not in the context of a limited fund. In fact, the *Real Estate* court expressly stated that its holding did not "address the due process requirements in a class action

rights and liabilities of all being before the court by representation, and especially where the subject matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained.”).

⁴⁰In resolving Juris’s particular opt-out challenge, we note two additional issues which today’s opinion does not address. First, Allergan argues that the *Shutts* holding with respect to opt-out rights is simply inapplicable in a limited fund case. In essence, Allergan urges us to adopt the broader reasoning of the Fifth Circuit in *Ahearn*, 90 F.3d at 986, which holds **[**108]** that “[t]he limitation of *Shutts* to claims that are predominantly for money damages forecloses application of its holding to 23(b)(1)(B) actions which have always been equitable and often involve unknown plaintiffs.” Juris responds that *Shutts* applies with equal force to the Inamed class settlement because, although it was certified under *Rule* 23(b)(1)(B), it purportedly bound class members with respect to their individual claims for money damages. See *id.* at 1004-06 (Smith, J., dissenting) (arguing that not all classes certified under *Rule* 23(b)(1)(B) seek equitable relief and that a limited fund settlement that resolves mass torts would not be equitable). As discussed, the inference of consent to jurisdiction from the opt-out procedure as understood in *Shutts* is not needed in the instance case, where Judge Pointer’s court had jurisdiction over all Inamed claimants by virtue of the limited fund’s presence in the forum state. We therefore need not decide more broadly whether *Shutts* is simply not applicable at all in a limited fund class action because such an action is equitable in nature. In similar circumstances, the Third Circuit did not address this broader issue. See *Grimes*, 17 F.3d at 1560 n.7.

Second, **[**109]** commentators have suggested that all class members may have a due process right to opt out that is grounded in the right to individual control of litigation. Under this view of the opt-out right, absent members may have a due process right to exclude themselves from the class even in situations, such as the instant case, where the court’s adjudicatory jurisdiction over them is not subject to question. See *Miller et al., supra*, at 54 (“Another way to analyze *Shutts* is a decision protecting the right to opt out for its own sake. In this view, the right to opt out not only is a check against distant forum abuse, but it also protects the claimant’s right to control her litigation.”); *Cottreau, supra*, at 510 (arguing that “due process requires opt out rights in some class actions where no jurisdictional concerns exists”). Juris briefly mentioned this alternative opt-out argument before Judge Proctor, although even there her suggestion was sufficiently vague and unaccompanied by any reasoning or authority that it is doubtful the argument was preserved. In any event, her position on appeal can only be understood as arguing that Judge Pointer’s “court lacked personal jurisdiction over out-of-state **[**110]** class members, not the different and broader question of whether, [even] if a state has jurisdiction over the plaintiffs, due process requires that all class members have

[1334]** D. Propriety of Class Certification

Juris dedicates other portions of her briefs to arguing that Judge Pointer erred in certifying the Inamed settlement class. She claims that the class did not conform to the *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999), requirements for certification under *Rule* 23(b)(1)(B), and also that the settlement was not an appropriate substitute for bankruptcy. We hold that these arguments are—at this stage—barred by res judicata.

In *Ortiz*, the Supreme Court reversed class certification in a *Rule* 23(b)(1)(B) limited fund class action that purported to settle actual and potential asbestos-related tort claims. After describing traditional limited funds, the Court identified three **[**111]** “common characteristics” consistent with the “historical limited fund model.” *Id.* at 838, 119 S. Ct. at 2311. “The first and most distinctive characteristic,” *Ortiz* explains, “is that the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitively at their maximums, demonstrate the inadequacy of the fund to pay all the claims.” *Id.* The second historical characteristic is that “the whole of the inadequate fund was to be devoted to the overwhelming claims.” *Id.* at 839, 119 S. Ct. at 2311. The third characteristic is that “the claimants identified by a common theory of recovery were treated equitably among themselves.” *Id.* According to the Court, these characteristics should be treated as “presumptively necessary, and not merely sufficient,” to justify certification of a *Rule* 23(b)(1)(B) limited fund class. *Id.* at 842, 119 S. Ct. at 2312. Because the settlement at issue in *Ortiz* failed to satisfy these presumptively necessary characteristics, the Court concluded that certification was improper. *Id.* at 864, 119 S. Ct. at 2323. *Ortiz* ultimately leaves open the question of whether—even if the three essential premises are supported—a mandatory, **[**112]** limited fund class settlement can ever be used to resolve tort claims. *Id.* at 844, 119 S. Ct. at 2314.

Judge Proctor concluded that Juris’s argument that the Inamed settlement class was erroneously certified under *Rule* 23(b)(1)(B) amounted to an improper basis for seeking relief under *Rule* 60. He expressly held that

the right to opt out of the class and settlement agreement.” *Adams*, 520 U.S. at 88-89, 117 S. Ct. at 1030. Because the alternative opt-out argument has not been fairly raised on appeal, we deem it abandoned and decline to entertain it. See *Marek v. Singletary*, 62 F.3d 1295, 1298 n.2 (11th Cir. 1995).

Juris's attack on the certification order was "foreclosed as a matter of law," because "a collateral attack, such as one launched through [Rule 60\(b\)](#) proceedings, is not a vehicle for subsequently correcting past errors of law, which undoubtedly includes a conclusion as to certification under [Rule 23\(b\)](#)." District Court order, Docket No. 303 at 45. Stated otherwise, Juris's Rule 23 contentions were not cognizable due process arguments available to an absent plaintiff collaterally attacking a prior class judgment. Judge Proctor then proceeded to explain: "*But even if Juris were able to contest Judge Pointer's conclusions of law, the [*1335] court finds in the alternative that the Inamed class settlement was properly certified as a limited fund.*" *Id.* (emphasis added). Thus, in what was a true alternative holding, the district court found that the [Ortiz](#) requirements for application [*113] of the limited fund rationale under [Rule 23\(b\)\(1\)\(B\)](#) had been satisfied.

On appeal, Juris argues that Judge Proctor's alternative conclusion—that the Inamed settlement possesses the presumptively necessary characteristics of a limited fund—is off the mark. She asserts that, if anything, Judge Pointer should have certified the class under [Rule 23\(b\)\(3\)](#), as opposed to [23\(b\)\(1\)\(B\)](#). Significantly, however, Juris has not challenged, or even acknowledged, Judge Proctor's holding that this line of argument is foreclosed as a matter of law by the doctrine of res judicata. Allergan claims that Juris has therefore waived any argument on this issue, and we agree. In the absence of any argument to the contrary, we will not disturb the district court's holding that Juris's position with respect to the propriety of Judge Pointer's final, unappealed class certification presented an improper basis for collateral attack.⁴¹

Thus, our primary holding in this Part II.D is that, by failing to challenge Judge Proctor's res judicata holding on appeal, Juris has abandoned any challenge to the propriety of the [Rule 23\(b\)\(1\)\(B\)](#) certification by Judge Pointer. See [Sepulveda v. U.S. Attorney Gen.](#), 401 F.3d 1226, 1228 n.2 (11th Cir. 2005) ("When an appellant

⁴¹ Allergan's response brief clearly argues, under a separate heading styled in bold type face, that Juris failed to challenge the district court's holding that her class certification argument was not a proper collateral attack. Nevertheless, Juris's reply brief fails to address the [*114] res judicata issue. Instead, Juris continues to dispute only Judge Proctor's alternative conclusion, contending that "the Inamed class settlement did not qualify for certification under [Rule 23\(b\)\(1\)\(B\)](#) as required by [Ortiz](#)," and that "certification of the Inamed settlement class was defective under the standards pronounced by [Ortiz](#)."

fails to offer argument on an issue, that issue is abandoned."). However, even in the absence of Juris's waiver, we would affirm Judge Proctor's res judicata conclusion. There is considerable support for the proposition that a collateral attack is not a vehicle for an absent class member to retrospectively challenge the propriety of class certification under the Federal Rules of Civil Procedure. Put otherwise, an absent class member cannot escape the res judicata effect of a prior judgment by demonstrating—without more—that certification [*115] was in error or that the class should have been certified under a different subsection of [Rule 23](#).

"[C]ertain fundamental defects—lack of subject matter jurisdiction, personal jurisdiction, or due process—in a prior litigation will render the judgment void and without legal effect" Note, [Collateral Attack on the Binding Effect of Class Action Judgment](#), 87 Harv. L. Rev. 589, 593-94 (1974). However, "the res judicata consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." [Federated Dep't Stores, Inc. v. Moitie](#), 452 U.S. 394, 398, 101 S. Ct. 2424, 2428, 69 L. Ed. 2d 103 (1981). Therefore, an absent class member will not typically be able to collaterally attack a prior judgment by arguing that there was an error in the certification.⁴²

[*1336] It should be emphasized that [Ortiz](#) arose on direct appeal of certification, not a collateral attack; and as discussed above—and as Juris concedes—the Court expressly decided the case on a construction of [Rule 23\(b\)\(1\)\(B\)](#), rather than due process. Juris asserts that Judge Pointer erred in certifying the Inamed settlement class because it did not satisfy the rules-based requirements for limited fund treatment later announced

⁴² The Supreme Court's decision dismissing a writ of certiorari as improvidently granted in [Ticor Title Insurance Co. v. Brown](#), 511 U.S. 117, 114 S. Ct. 1359, 128 L. Ed. 2d 33 (1994), is illustrative. Therein, the Court stated: "Before the Ninth Circuit, respondents did not (and indeed could not) [collaterally] challenge whether the class in the [*116] MDL No. 633 litigation was properly certified under [Rules 23\(b\)\(1\)\(A\)](#) and [\(b\)\(2\)](#)." *Id.* at 120, 114 S. Ct. at 1361. According to the Court, res judicata prevented that non-constitutional issue from being relitigated on collateral attack; "[i]t was conclusively determined in the MDL No. 633 litigation that respondents' class fit within [Rule 23\(b\)\(1\)\(A\)](#) and [\(b\)\(2\)](#)," and "even though that determination may have been wrong, it is conclusive upon these parties." *Id.* at 121, 114 S. Ct. at 1361-62.

in Ortiz. She has not attempted to articulate how that alleged Rule 23 error amounts to a jurisdictional defect or a violation of due process, making it an appropriate subject for attempting to avoid res judicata in a collateral attack.⁴³

Moreover, although Juris asserts that certification **[**117]** of the class was in error because the settlement was an inappropriate substitute for bankruptcy, she provides no explanation as to how that potential error would rise to the level of a constitutional or jurisdictional deficiency.⁴⁴

Accordingly, even in the absence of Juris's waiver of any challenge to Judge Proctor's res judicata holding, we would affirm the district court's holding that Juris is barred from bringing her rules-based challenges to Judge Pointer's certification.⁴⁵

[*1338] E. Anti-Injunction Act

⁴³Admittedly, Ortiz states that "serious constitutional concerns" provide "further counsel against adventurous application of **Rule 23(b)(1)(B)**." 527 U.S. at 845, 119 S. Ct. at 2314. However, the constitutional concerns expressed in Ortiz related to risks entailed in adventurous departures from the traditional characteristics of the limited fund cases. By contrast, in this collateral attack on a final judgment, Juris must demonstrate an actual violation of her due process rights. To be sure, we do not rule out the possibility that—in addition to adequacy of notice, adequacy of representation, and the right to opt out—the extent to which there was a "truly limited fund" could ever be the subject of a collateral **[**118]** attack. However, even assuming that some other case might involve departures from a "truly limited fund" sufficiently significant as to rise to the level of a due process violation, Juris has wholly failed to identify any such deficiency in this case.

⁴⁴Juris cites to In re Joint Eastern & Southern District Asbestos Litigation, 982 F.2d 721 (2d Cir. 1992), modified on reh'g, 993 F.2d 7 (2d Cir. 1993). That case discusses the possibility that the use of a limited fund class action in situations where there is a likelihood that an aggregate of tort claims would render a defendant insolvent may "constitute[] an impermissible circumvention of bankruptcy law protections." Id. at 738. Significantly, the court's analysis was in the context of a direct appeal from certification, and not collateral review, and the discussion therein is grounded in terms of comparing the procedural protections available under the statutory bankruptcy scheme with those provided by the class action procedures of Rule 23. See id. at 736 ("To lessen the risk that these pressures will lead to unfair compromises, bankruptcy

Finally, **[**126]** Juris argues that the Anti-Injunction Act barred the district court from enjoining her California state court action. The Anti-Injunction Act prohibits a federal court from enjoining state court proceedings "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. We hold that the district court's injunction in this case was permissible because it was necessary "in aid of its jurisdiction" and "to protect or effectuate its

law provides numerous safeguards not contained in class action procedures."). The court framed **[**119]** the issue as whether a **Rule 23(b)(1)(B)** class should have been certified given the court's rules-based and policy-based concerns. There is nothing in the court's decision (or Juris's appellate briefs) to suggest that circumventing the bankruptcy scheme would entail the sacrifice of absent class members' constitutional rights.

In any event, although the Joint Eastern court vacated

judgments.ⁿ⁴⁶

certification on other grounds, it actually concluded that “the need to insist on bankruptcy law protections” was not so great as to prevent certification of a limited fund settlement class under the circumstances. [Id. at 739–40](#). We also note that, in [Ortiz](#), the Supreme Court expressly stated that “there is no inherent conflict between a limited fund class action under **Rule 23(b)(1)(B)** and the Bankruptcy Code.” [527 U.S. at 860 n.34, 119 S. Ct. at 2321 n.34](#).

⁴⁵Although the propriety vel non of Judge Pointer’s **Rule 23(b)(1)(B)** certification is an issue which is not before us—both because of Juris’s failure to challenge Judge Proctor’s res judicata holding and because of the merits of the operation of res judicata—we make brief comments to illustrate how far short of any due process violation are the relevant facts. **[**120]** Judge Pointer’s **Rule 23(b)(1)(B)** certification was far different from that in [Ortiz](#). To the extent the instant circumstances depart at all from the historical limited fund model, it is not nearly as significant a departure as Juris suggests.

[Ortiz](#) first requires that there be a demonstration that the fund, “set definitively at [its] maximum,” is inadequate “to pay all the claims.” [527 U.S. at 838, 119 S. Ct. at 2311](#). Unlike the facts of [Ortiz](#), Judge Pointer undertook a careful analysis of both the magnitude of the claims and the value and adequacy of the entirety of the resources to pay those claims. Because there was no insurance coverage, the only resources available to pay claims were Inamed’s own assets. In contrast with [Ortiz](#), external factors here—not the mere agreement of the parties—imposed the limit on the size of the fund. The fund was limited by the net value of the entirety of the assets of Inamed. As summarized in Part I.A and Part I.C, [supra](#), Judge Pointer’s careful findings of fact established that the \$31.5 million settlement fund was substantially greater than the value of the entirety of the net assets of Inamed which could have been available to pay claims in the **[**121]** absence of certification, and that the magnitude of the claims of the class members far exceeded that value. Moreover, notwithstanding the absence of a serious challenge to these crucial facts, Judge Proctor carefully reviewed the evidence and Judge Pointer’s findings. Judge Proctor similarly found that the \$31.5 million fund was the maximum amount that could have been available for the claimants, and that the claims of the class far exceeded any possible recovery. On appeal, Juris fails to challenge these crucial fact findings by Judge Pointer and Judge Proctor, and she has never denied that the value of the outstanding tort claims vastly exceeded the assets available to meet the claims.

The second defect identified in [Ortiz](#) was the fact that the limited fund settlement failed to ensure “equity among the members of the class.” [527 U.S. at 854, 119 S. Ct. at 2318](#). There are two issues here, “the inclusiveness of the class and the fairness of distributions to those within it.” [Id.](#) In [Ortiz](#), the settlement was improper in part because class counsel had

agreed to “exclude what could turn out to be as much as a third of the claimants that . . . might eventually be involved.” [Id. at 854, 119 S. Ct. at 2319](#). **[**122]** There has been no suggestion that any such exclusions occurred with respect to the instant settlement class. The [Ortiz](#) limited fund class was also improper because the lack of structural protections—i.e., “independent representation as for subclasses with conflicting interests”—ran contrary to the equitable obligation within the limited fund rationale. [Id. at 855–57, 119 S. Ct. at 2319–20](#). Here, as discussed in Part II.C.2, [supra](#), the proceedings before Judge Pointer were protected by the functional equivalent of subclasses, and these “procedures . . . resolve[d] the difficult issues of treating . . . differently situated claimants with fairness as among themselves.” [Ortiz, 527 U.S. at 856, 119 S. Ct. at 2319](#). Juris can hardly make any challenge to the equity among the class members, particularly in light of the fact that she was a mere future claimant at the time, and future claimants shared with the currently injured on a pro rata basis.

The final feature of the settlement in [Ortiz](#) that departed from the historical model was “the ultimate provision for a fund smaller than the assets understood . . . to be available.” [Id. at 859, 119 S. Ct. at 2321](#). The Court stopped short of deciding **[**123]** whether this fact would alone be fatal, but it observed that the defendant contributed only \$500,000 of its own assets, retaining nearly all of its net worth, with an estimated value of around \$235 million. [Id. at 859–61, 119 S. Ct. at 2321–22](#). The bulk of the settlement recovery was provided for by the company’s insurers. [Id.](#) Importantly, [Ortiz](#) leaves open how close to insolvency a limited fund defendant would need to be brought as a condition of certification, [id. at 860 n.34, 119 S. Ct. at 2321 n.34](#), and also the extent to which saved transaction costs and expenses “that would never have gone into a class member’s pocket in the absence of settlement” may be credited to the defendant as an incentive to settle, [id. at 860–61, 119 S. Ct. 2321–22](#). Here, it is significant that Judge Proctor found that, beyond the \$31.5 million loaned by Inamed’s senior noteholders, the company had almost no other assets to contribute to the settlement, and the entirety of the settlement fund was earmarked exclusively for the class. Additionally, Judge Pointer found and Judge Proctor confirmed that Inamed had a negative net worth, net liquidation value of essentially zero, and no resources to pay claims. **[**124]** As noted above in note 14, [supra](#), and in stark contrast with [Ortiz](#), it is undisputed that the recovery fund ultimately provided for the class was greater than the assets understood to be available.

Thus, although the issue is not before us, the instant certification would seem to fall within the dicta of [Ortiz](#): “[i]f Fibreboard’s own assets would not have been enough to pay the insurance shortfall plus any claims in excess of the policy limits, the projected insolvency of the insurers and Fibreboard would have indicated a truly limited fund.” [527 U.S. at 853, 119 S. Ct. at 2318](#). We note also that the record here reflects that the settlement was reached by arms-length dealings.

Moreover, the instant case may be unique in that there can be no concern about conflicts of interest on the part of class counsel by virtue of the potential gigantic fees emphasized by the Ortiz court. *Id.* at 852 n.30, 119 S.Ct. at 2317 n.30. Judge Proctor found that, "unlike Ortiz, class counsel in this case received their fees from a separate account, funded years earlier, by a coalition of breast implant manufacturers." District Court order, Docket No. 303 at 54. There is also no issue here regarding a defendant-favorable **[**125]** forum selection; the forum was carefully selected by the Judicial Panel on Multidistrict Litigation.

However, even assuming arguendo that a court on direct review would, after Ortiz, be reluctant to approve certification of a limited fund class on these facts, that could provide no comfort to Juris. In the collateral challenge posture of this case, Juris must demonstrate more than the failure to satisfy the requirements of **Rule 23(b)(1)(B)**. She must demonstrate that her own due process rights were violated. In the preceding sections of this opinion, we have addressed each argument asserted by Juris to support a due process violation, and concluded that each argument is without merit. In addition, the particular facts of this case suggest the very opposite of a due process violation; they indicate fundamental fairness. It is apparent that there was adequate notice, that class objectors had ample opportunity to make—and did make—all the arguments Juris now raises, that future claimants like Juris received adequate representation, and finally, it is apparent that the class did in fact receive a greater recovery than was possible with any other available option.

⁴⁶ It is not clear that the Anti-Injunction Act is even applicable under the present circumstances. The district court entered Order 47A in 1999, permanently enjoining the Inamed settlement class members from "instituting, asserting or prosecuting . . . in any pending or future action in any federal or state court, any Settled Claim that the member had, has, or may have in the future," and Juris subsequently commenced the California suit in 2006. District Court order, Docket No. 59 at 5; see *Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2, 85 S. Ct. 1116, 1119 n.2, 14 L. Ed. 2d 22 (1965) ("This statute and its predecessors do not preclude injunctions against the institution **[**127]** of state court proceedings, but only bars stays of suits already instituted."); *Martingale LLC v. City of Louisville*, 361 F.3d 297, 303 (6th Cir. 2004) (agreeing that "the Anti-Injunction Act does not prevent a court from enjoining the parties from commencing state court proceedings, as opposed to enjoining the parties from proceeding with already-filed state actions."). As noted above in the penultimate sentence of Part I.F. *supra*, Judge Proctor in 2010 did not himself issue an injunction against the California suit. Rather, he held that Judge Pointer's 1999 injunction was binding on Juris, thus barring her subsequent 2006 California suit. However, because we reject Juris's Anti-Injunction Act argument on other grounds, we need not decide whether the Act is even applicable in this situation.

1. In Aid of Jurisdiction

The "necessary in aid of" jurisdiction exception to the ban on federal **[**1339]** injunctions exists "to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Atl. Coast Line R.R. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 295, 90 S. Ct. 1739, 1747, 26 L. Ed. 2d 234 (1970). **[**128]** As a general matter, however, "[c]oncurrent *in personam* jurisdiction does not satisfy the 'necessary in aid of jurisdiction' exception to the Anti-Injunction Act." 17A *Moore's Federal Practice* § 121.07 (3d ed. 2010). As such, this Court has explained that:

Ordinarily, a federal court may issue an injunction 'in aid of its jurisdiction' in only two circumstances: (1) the district court has exclusive jurisdiction over the action because it had been removed from state court; or, (2) the state court entertains an *in rem* action involving a res over which the district court has been exercising jurisdiction in an *in rem* action.

In re Ford Motor Co., 471 F.3d 1233, 1250-51 (11th Cir. 2006).

Importantly, federal courts have recognized a narrow exception to this general rule, allowing the "in aid of its jurisdiction" exception to be used "to enjoin parallel state class action proceedings that might jeopardize a complex federal settlement and state *in personam* proceedings that threaten to make complex multidistrict litigation unmanageable." 17A *Moore's Federal Practice* § 121.07 (3d ed. 2010). For example, in *Battle v. Liberty National Life Insurance Co.*, 877 F.2d 877 (11th Cir. 1989), we held that **[**129]** a district court that had issued a final judgment in a complex and lengthy class action, and expressly retained jurisdiction over the settlement, properly enjoined a subsequent state court suit involving substantially similar claims. We stated that "it ma[de] sense to consider th[e] case, involving years of litigation and mountains of paperwork, as similar to a res to be administered," and that the "lengthy, complicated litigation [wa]s the 'virtual equivalent of a res.'" *Id.* at 882 (quotations and citation omitted). We reasoned that "[a]ny state court judgment would destroy the settlement worked out over seven years, nullify this court's work in refining its Final Judgment over the last ten years, add substantial confusion in the minds of a large segment of the state's population, and subject the parties to added expense and conflicting orders." *Id.* (quotations and citation omitted); see also *Wesch v.*

[Folsom](#), 6 F.3d 1465, 1470-71 (11th Cir. 1993) (affirming injunction and finding that "virtual equivalent of a res to be administered" existed where the district court had "invested a great deal of time and other resources in the arduous task of reapportioning Alabama's congressional [*130] districts").

The lengthy, complicated litigation at issue in this case was likewise the "virtual equivalent of a res." The district court has spent countless hours managing the highly complex multidistrict breast implant litigation, and it was only after years of extended settlement negotiations that the parties were able to resolve the claims of over 40,000 Inamed breast implant recipients. Moreover, the district court, like that in [Battle](#), retained exclusive jurisdiction to review, interpret, and enforce the Inamed class settlement. The district court has continually exercised that jurisdiction in interpreting the Inamed settlement agreement and supervising the escrow agent charged with administering the settlement fund. Admittedly, [Battle](#) and [Wesch](#) offer little guidance as to how the parallel federal and state proceedings were sufficiently similar to an *in rem* proceeding so as to warrant an injunction." [Burr & Forman v. Blair](#), 470 F.3d 1019, 1032-33 (11th Cir. 2006). However, we agree with Judge Proctor that this "paradigmatically [*1340] complex" litigation "presumptively satisfies this standard."⁴⁷

District Court order, Docket No. 303 at 109.

2. To Protect or Effectuate Judgments

The "to protect or effectuate" judgments exception to the Anti-Injunction Act, referred to as the "relitigation exception," is "appropriate where the state law claims would be precluded by the doctrine of *res judicata*." [Burr & Forman](#), 470 F.3d at 1029-30 (citation omitted). "In a sense, the relitigation exception empowers a federal court to be the final arbiter of the *res judicata* effects of its own judgments because it allows a litigant to seek an injunction from the federal court rather than arguing the *res judicata* defense in the state court." *Id.* at 1030 n.30; see also [Wesch](#), 6 F.3d at 1471 ("[The relitigation exception] is essentially a *res judicata* concept designed

⁴⁷ Notably, Judge Proctor found that "the [Battle](#) [*131] fiction (that a complex class action is sufficiently comparable to a res) is arguably unnecessary here." District Court order, Docket No. 303 at 108 n.53. As discussed above, the district court continues to supervise the equitable division of a limited fund, which is "not analogous to a *res*—it is a *res*." *Id.* Thus, the instant case is very different from the situation addressed by Judge Tjoflat's opinion in [Burr & Forman](#).

to prevent issues that have already been tried in federal court [*132] from being relitigated in state court.").

Without elaboration or citation to authority, Juris makes a conclusory assertion that the relitigation exception cannot apply because the Inamed class action did not result in a decision on the merits.⁴⁸

The record belies that assertion. For purposes of determining *res judicata*, an order approving a settlement agreement provides a final determination on the merits. See [Martin v. Pahiakos](#), 490 F.3d 1272, 1277 (11th Cir. 2007); [Norfolk S. Corp. v. Chevron, U.S.A., Inc.](#), 371 F.3d 1285, 1288 (11th Cir. 2004); [Citibank, N.A. v. Data Lease Fin. Corp.](#), 904 F.2d 1498, 1501-02 (11th Cir. 1990). Judge Pointer's Order 47A was styled "Order and Final Judgment"; further, after stating that "every Settled Claim of each member of the Inamed Settlement Class is conclusively compromised, settled and released," Order 47A dismissed those claims with prejudice. District Court order, Docket No. 59 at 1, 4-5. Accordingly, the Inamed class settlement resulted in a decision on the merits, and we hold the district court's injunction was necessary "to protect or effectuate its judgments."

III. CONCLUSION

We emphasize the collateral posture of this case. Judge Pointer's order certifying the Inamed settlement class as a limited fund class under *Rule 23(b)(1)(B)* is not before us on direct appeal. The issue is not whether we would on direct appeal vacate certification under the strict *Rule 23* guidelines later announced in [Ortiz](#) or whether *Rule 23(b)(1)(B)* should be used to settle aggregated [*134] tort claims in a post-[Ortiz](#) [*1341] world. Instead, Juris can avoid the *res judicata* effect of the Inamed class settlement only by demonstrating a

⁴⁸ Juris also argues that this exception is inapplicable because the class judgment [*133] in Order 47A did not satisfy the demands of due process. Juris is correct that an injunction contained in a class judgment may be collaterally attacked on due process grounds. See [Stephenson v. Dow Chem. Co.](#), 273 F.3d 249, 257 (2d Cir. 2001) ("The injunction was part and parcel of the judgment that plaintiffs contend failed to afford them adequate representation. If plaintiffs' inadequate representation allegations prevail, as we so conclude, the judgment, which includes the injunction on which defendants rely, is not binding as to these plaintiffs."), *aff'd in part by an equally divided court and vacated in part*, 539 U.S. 111, 123 S. Ct. 2161, 156 L. Ed. 2d 106 (2003). However, because we have already resolved Juris's due process and personal jurisdiction challenges, we need not address them again here.

violation of her due process rights. This she has not done.

Upon review, we conclude that the 1999 Inamed class settlement precludes Juris from bringing her action against Allergan. Accordingly, we affirm.

AFFIRMED.

BRESKIN JOHNSON & TOWNSEND PLLC

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