

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -X
3 DOW CHEMICAL COMPANY, ET AL. , :
4 Petitioners :
5 v. : No. 02-271
6 DANIEL RAYMOND STEPHENSON, :
7 ET AL. :
8 - - - - -X
9 Washington, D. C.
10 Wednesday, February 26, 2003
11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 11:05 a.m.
14 APPEARANCES:
15 SETH P. WAXMAN, ESQ. , Washington, D. C. ; on behalf of the
16 Petitioners.
17 GERSON H. SMOGER, ESQ. , Oakland, California; on behalf of
18 the Respondents.
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1 P R O C E E D I N G S

2 (11:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 02-271, the Dow Chemical Company v. Daniel
5 Raymond Stephenson.

6 Mr. Waxman.

7 ORAL ARGUMENT OF SETH P. WAXMAN

8 ON BEHALF OF THE PETITIONERS

9 MR. WAXMAN: Mr. Chief Justice, and may it
10 please the Court:

11 We rely on four propositions in this case.
12 First, there is a long final judgment in the Agent Orange
13 litigation that binds a class which by its terms includes
14 respondents.

15 Second, all of the judges in the direct
16 proceedings, the trial judges and the appellate judges,
17 concluded that all veterans should be included in the
18 class and settlement, because all of the veterans, whether
19 they were symptomatic or not, face the overwhelming
20 prospect of legal defeat on issues common to the entire
21 class, first and foremost, the Government contractor
22 defense.

23 Third, adequacy of representation was expressly
24 considered several times, both generally and with specific
25 respect to asymptomatic veterans, by both the district

1 court and the court of appeals, and fourth, there is
2 simply no question that Judge Weinstein, whose scholarship
3 on class actions the 1966 Rule 23 Advisory Committee
4 repeatedly cited, and who literally wrote the book on mass
5 tort litigation, conscientiously applied the procedures of
6 Rule 23, including, in particular, the obligation that he
7 certify and thereafter ensure adequacy of representation.

8 Now, the respondents may certainly challenge the
9 res judicata effect of the judgment against them, and the
10 question presented for this Court is the permissible scope
11 and standard of that review. In our view, due process
12 does not require and finality principles do not permit de
13 novo relitigation from scratch of the adequacy
14 determination made in this case.

15 QUESTION: What about notice, notice to these
16 respondents? It's sort of hard to find, looking back at
17 the settlement agreement and the orders that were entered,
18 that the people in respondent's category were thought to
19 be covered.

20 MR. WAXMAN: Well, Justice O'Connor, notice in
21 this case -- I think as the case comes to this Court, the
22 Court certainly cannot decide this case on the principle
23 that the notice was constitutionally inadequate. In the
24 first place, both the trial court and the court of appeals
25 three times found the notice adequate under Rule 23 and

1 under the Due Process Clause. The Second Circuit below
2 suggested that this Court's decision in *Amchem* might have
3 made the notice defective, but notice issues were not
4 presented by the respondents in this case as an
5 alternative grounds for affirmance in their brief in
6 opposition, and what is more, their factual record in this
7 case is completely inadequate to conclude that the notice
8 was unsatisfactory with respect to the content.

9 I completely understand the argument that
10 they're making with respect to how the words, injured by
11 exposure, would have been read at the time, but one cannot
12 answer that question either in a vacuum, without looking
13 at the external circumstances, or in hindsight. One has
14 to determine whether, in 1984, an asymptomatic veteran, a
15 healthy veteran, would, whether all of them, many of them,
16 most of them, some of them, or some significant number
17 would have understood that that includes me because
18 exposure itself has been said to be injurious.

19 Now, at footnote 12 --

20 QUESTION: Mr. Waxman, I'd like to stop you
21 right there, exposure itself has been said to be
22 injurious. This Court in *Metro North* said, exposure only
23 people have no claim, and it did so purporting to use
24 traditional common law in interpreting the FELA, so
25 according to this Court's decision in *Metro North*, isn't

1 it clear that these people had no ripe claim to state, and
2 how could they be adequately represented when their claim
3 had not yet accrued?

4 As I understand the law of both Louisiana and
5 New Jersey, where these cases come from, the claim doesn't
6 accrue until the exposure has manifested itself in an
7 injury, in an illness.

8 MR. WAXMAN: Justice Ginsburg, before I answer
9 that, let me just give one more answer to Justice
10 O'Connor, and I'll directly address your question.

11 The only other point I wanted to make -- I'm
12 afraid I'll forget it -- is that in footnote 12 of our
13 reply brief we point out that at the time, that is, at the
14 time of certification and before settlement, publications
15 ranging from The New York Times to Penthouse Magazine,
16 which we put at the end of our footnote, and newspapers,
17 local newspapers in the states that these two respondents
18 reside in, understood that the class included all veterans
19 in Vietnam who were -- were or may have been exposed, and
20 that's the factual issue that, without which you can't
21 resolve the notice issue in this case adverse to us.

22 Now, Justice Ginsburg --

23 QUESTION: I'd like to ask you later how that
24 comports with, what is it, Eisen and Jacquelin. I mean,
25 you could have, if you really thought this was the class,

1 given mail notice to all the veterans, all the people who
2 had served in Vietnam, and newspaper service is very nice,
3 but it's rarely seen by anyone, but anyway, let's get back
4 to --

5 MR. WAXMAN: Well --

6 QUESTION: -- that this Court has said, under
7 the common law, people who were merely exposed, who do not
8 have a current injury, don't have any claim. They may
9 never have a claim, but they certainly have no ripe claim
10 at this stage.

11 MR. WAXMAN: Well, first of all, Justice
12 Ginsburg, as you pointed out, the Metro North case, a)
13 long post dated the final judgment in this case, and --

14 QUESTION: But it purported to apply traditional
15 common law.

16 MR. WAXMAN: No, I do understand that, and it
17 was looking to traditional common law in order to make a
18 ruling with respect to the FELA.

19 Now, at the time, in 19 -- I mean, our
20 submission essentially is, here the adequacy determination
21 and the Article III claims sort of mesh together, but
22 our -- our submission here is that injury in fact, which
23 is what is necessary in order to include them in the
24 class, is not dependent on the existence of a mature cause
25 of action. They clearly alleged that they were injured in

1 fact because, as New York State and other states
2 recognized at the time, there was a mature tort for
3 exposure, injury by exposure, and many, many states
4 recognized that and applied that rule at the time, and in
5 any event, whether or not they had a mature cause of
6 action, they plainly had a present right at the time and a
7 cognizable interest in the establishment of a -- of a fund
8 that would be available to compensate them. That's the
9 word this Court --

10 QUESTION: But were they plainly included within
11 the class, so that the class representatives would have
12 known that they were supposed to represent these people,
13 and as I understand it -- maybe you could go to -- go to
14 this point. Your -- your friend on the other side has
15 said, the first time that in writing we saw anything that
16 made it plain, even though it was buried in language
17 somewhere, that the injured class included the exposures
18 only was in the notice of settlement, and so my question
19 is, is that correct, and number 2, aside from that point,
20 why would, why should we understand that the parties
21 involved, including the representative plaintiffs,
22 understood that injured included exposures only, so that
23 they knew they were supposed to be representing them?

24 MR. WAXMAN: Well, there -- I believe there are
25 at least two separate questions --

1 QUESTION: There are.

2 MR. WAXMAN: -- and I'll deal with the
3 respondents in this case first. They allege that they
4 never saw any notice saying anything at any time, which
5 makes -- and of course we know from Dusenbery, and before
6 that Mullane, that actual notice isn't required, so the
7 wording of the no -- these are peculiarly inappropriate
8 parties to be complaining about the wording of one of the
9 many notices that went out in this case. There were at
10 least three, and perhaps four notices that went out, and
11 the notice that they are putting their attention on is the
12 notice certifying --

13 QUESTION: Well, are you saying that even though
14 the notice was improper, since they didn't see any notice
15 at all, they can't complain about it? .

16 MR. WAXMAN: Not at all. We think that there
17 clearly are -- since actual notice isn't required, we
18 don't think that they lack standing to, on behalf of the
19 2.4 million people who were in the class --

20 QUESTION: Mr. --

21 MR. WAXMAN: -- to say that we have -- Mullane
22 requires that the content of the notice be adequate as
23 well as the --

24 QUESTION: Actual notice isn't required when you
25 don't know the people. It is required, best notice

1 practicable, in Mullane, when you knew the names, they
2 were identified beneficiaries -- Justice Jackson says
3 those people have got to get mail notice. It's only when
4 you don't know the error hasn't -- who the person is, that
5 the other is adequate. Here, there were records, who
6 served in Vietnam from '61 to '72, so you did know.

7 MR. WAXMAN: Justice Ginsburg, this point, and
8 indeed most, if not all of the points that the respondents
9 are making in this collateral litigation, were made by my
10 clients in the direct proceedings before Judge Weinstein
11 and in the mandamus petition that went up to the Second
12 Circuit from his class certification decision.

13 We argued that there should be individual notice
14 to all veterans. The Government represented, the
15 plaintiffs claimed, and both the trial court and the
16 Second Circuit expressly found --

17 QUESTION: Mr. -- Mr. Waxman, that's --

18 MR. WAXMAN: -- that there was not such a list.

19 QUESTION: Mr. Waxman, that's well and good that
20 your clients, the defendants in this case did that, but
21 here we have a class of people, potential plaintiffs. Who
22 represented them? Was there anyone in this case, other
23 than the judge, who has a global settlement, is there
24 any -- were any of the named representatives asym --

25 MR. WAXMAN: Asymptomatic?

1 QUESTION: Yes, were any of them?

2 MR. WAXMAN: The named representatives were not
3 asymptomatic, and by design. Judge Weinstein wanted to
4 put in front of the jury the strongest, most sympathetic
5 cases for causation, and there -- at the time of
6 settlement in this case, the symptomatic representatives
7 were completely representative of the views of all
8 veterans, because they had the following overwhelming
9 objectives: defeat the Government contractor defense
10 which, as it turns out, was applied both by the district
11 court and by the court of appeals to grant judgment
12 against the people who actually opted out and pursued
13 their claims.

14 Secondly, to establish a defense to the
15 company's defense that the Government had misused it, that
16 the Government had prevented them from putting warnings
17 on, and to prove general causation, that is, to establish
18 proof by a preponderance --

19 QUESTION: But when we get past that, Mr.
20 Waxman, adequacy of representation has to exist at all
21 stages of the litigation, and we're getting to the point
22 where there isn't going to be any trial. There's going to
23 be a settlement fund, and I suppose if I were representing
24 someone who was not going to be diseased until 1998, I
25 never would have consented to a settlement fund that will

1 run dry in 1994.

2 MR. WAXMAN: Justice Ginsburg, the distinction
3 here, even at the distribution phase -- and remember, the
4 parties, the plaintiffs' representatives and the
5 plaintiffs' lawyers, recognizing the extreme weakness of
6 their legal claims, however great the pathos was, and
7 genuine anguish that they suffered, that their legal
8 claims were so weak they were willing to settle this case
9 and, on the assumption that Judge Weinstein and the
10 Special Master would allocate the formula, and the -- I
11 would say the proof in the pudding is that the named
12 representatives included six veterans. I believe only two
13 of them were ever given cash benefits in this case, as
14 opposed to the general benefits that the class received
15 from the \$70 million class --

16 QUESTION: But they were symptomatic, all of
17 the --

18 MR. WAXMAN: They were all --

19 QUESTION: Okay.

20 MR. WAXMAN: -- they were all symptomatic, and
21 our submission here is that, as Judge Weinstein found and
22 the Second Circuit found, in response to precisely these
23 arguments, the pervasive, overwhelming, common weakness
24 that all of the plaintiffs had with respect to the legal
25 issues made the representation of asymptomatic veterans

1 representative. This is --

2 QUESTION: Okay, that's get -- all right, let's
3 assume for the sake of argument that gets you to the point
4 of -- of the settlement, 200, whatever it was, 200 million
5 is fine. Then we get to the point that you referred to a
6 moment ago, in which they'd leave it to the judge to
7 decide how the 200 million is going to be split up, and
8 who's in effect going to be sub -- able to claim benefits
9 out of what.

10 At that point, I suppose it's fair to say that
11 the symptomatic class representatives are going to be in
12 favor of a division of that fund which gives most of the
13 money to the presently symptomatic veterans. There was no
14 one at that point, that I can see, who was standing up for
15 the as yet asymptomatics and saying, wait a minute, you're
16 not setting aside enough money and leaving the money
17 available for a long enough period of time for us, so that
18 if you're right up to the point of settlement, why haven't
19 you got the problem once that point is reached?

20 MR. WAXMAN: Justice Souter, I -- I do at some
21 point want to argue to the Court why we think that de novo
22 relitigation of adequacy is not appropriate on collateral
23 review, but even if it were, I believe I have a
24 satisfactory answer to your question.

25 First of all, the way that the distribution, the

1 allocation proceedings occurred, with hearings, multiple
2 hearings, multiple submissions not only by the class
3 representatives whose proposal was uniquely rejected by
4 Judge Weinstein, but by individual veterans, veterans
5 groups, actuaries, scientists --

6 QUESTION: Individual veterans were heard, but
7 they weren't representatives, and the court wasn't a
8 representative.

9 MR. WAXMAN: That, to be sure. To be sure, but
10 they were -- the class -- first of all, and Shutts itself
11 stands for the proposition, Phillips Petroleum v. Shutts
12 stands for the proposition that the court and the parties
13 adverse to the class may supply the arguments and the
14 necessary sharpness in an adversary system to assure that
15 in the main the procedures followed were sufficiently
16 fundamentally fair, but here I think it's very important
17 not to character -- not to understand that in 1984 this
18 looked like the type of futures versus presents that
19 existed in Amchem and existed in Ortiz.

20 First --

21 QUESTION: Okay, why didn't it? Why --

22 MR. WAXMAN: Okay, for several reasons. First
23 of all, the -- this -- in those cases you had a situation
24 in which people who presently suffered from asbestosis and
25 mesothelioma and the other -- the other tragic

1 manifestations of asbestos exposure had valuable,
2 demonstrably valuable -- there was a matrix to figure out
3 how much they were entitled to, and the rest of the class,
4 which, unlike here, included -- in the asbestos context
5 included -- the entire civilized world who may or may not
6 have been exposed to asbestos, had claims worth nothing.

7 In this case the district court and the Second
8 Circuit found repeatedly that what united these people
9 was, none of them had a legal claim that was worth
10 anything under the way the law existed at the time, and we
11 think exists now.

12 Secondly, the distinction between futures and
13 presents was one of many, many, many different ways that
14 you could distinguish among the class. The more salient
15 one, we think, was between people who would recover
16 anything under the settlement and people who would recover
17 nothing under the settlement.

18 For example --

19 QUESTION: No, but I'm posing the question, as
20 at the point -- at the point at which the settlement
21 proceeds are being divided, as between those who will get
22 something and those who will get nothing, and so I'm
23 saying, why was there no distinction between them, for our
24 purposes, at that point?

25 MR. WAXMAN: I think that there -- there --

1 Judge Weinstein recognized, and several people who
2 appeared before him and provided testimony, written and
3 oral testimony in the fairness hearings, in the
4 distribution hearings, in the motion for reconsideration,
5 and written objections, and a motion to certify a class,
6 made him very aware that, and he himself was aware from
7 reading the literature, that the latency period for many
8 diseases is as long as 40 years, and there would be claims
9 that would come up long into the future that some people
10 would attribute to exposure to Agent Orange, and what he
11 did was, he said, I will --

12 QUESTION: Then why -- why was none of the money
13 held over for such late-blooming claims?

14 MR. WAXMAN: Well, what Judge Weinstein found,
15 and what -- the Second Circuit on appeal insisted that the
16 settlement fund be entirely disposed of within the period.
17 What Judge Weinstein found was, we have to make provision
18 for all veterans who were exposed. I'm going to do it in
19 two ways, given the size of the class and the
20 indeterminacy of the law. Number 1, I'm going to set
21 aside a certain pot of this money to provide cash
22 benefits. It will be insufficient. It will be
23 insufficient as a matter of insurance, although more than
24 sufficient as a matter of proximate causation, since
25 nobody can demonstrate that.

1 I'm then going to take what turned out to be \$70
2 million and use it for the benefit of the class as a
3 whole, for educational programs, for counseling programs,
4 for health programs, for the very kinds of programs that
5 produced the enactment of the Agent Orange legislation
6 that now provides, on a monthly basis, more money than
7 almost any veteran got, period, and also funded the
8 medical studies and scientific studies, or prompted
9 enactment of legislation that funded the studies that now
10 allow them to claim that there are -- that there is
11 greater evidence of an association.

12 QUESTION: Mr. --

13 MR. WAXMAN: As to the other -- as to the --
14 pardon me.

15 QUESTION: Mr. Waxman, your time is drawing to a
16 close, and you've said a couple of times you think that
17 the standard on collateral review should be much different
18 than on direct review of a class action settlement. Could
19 you explain why that is, and what standard it would be?

20 MR. WAXMAN: Yes, I could. May I say one
21 sentence in response to Justice O'Connor --

22 QUESTION: Sure.

23 MR. WAXMAN: -- and I will.

24 With respect to the 75 percent of the fund that
25 went for compensation, Judge Weinstein understood and did

1 reserve a very substantial portion of that for people who
2 manifested in the future, and the respondents in the case
3 were just like the respondents in Ivy/Hartman, which is,
4 they were asymptomatic. They didn't know whether they
5 were going to become ill and, if so, when, and what
6 Judge -- and many -- thousands of claims were paid of
7 people who manifested disease in the future, and what
8 Judge Weinstein said is, look, at some point, the time
9 passage is so great that it simply becomes almost
10 impossible, as a matter of causation, to be able -- we all
11 get sick, and unfortunately we all die, and many of us get
12 diseases, and as time passes, he ruled, it becomes less
13 and less likely you could ever prove causation, and that's
14 why he drew the line that he did.

15 Mr. Chief Justice, our proposition with respect
16 to the standard of review is threefold. First of all, it
17 should not be de novo redetermination of adequacy.
18 Second, because there was no showing of collusion or
19 fraud, which are recognized exceptions to the res judicata
20 effect of a judgment, and because the courts
21 conscientiously applied procedures that Congress adopted
22 specifically in response to Hansberry in order to provide
23 procedures that in the main will provide fundamental
24 fairness in all but the most extraordinary cases, that
25 should be the end of the inquiry. That is the question on

1 collateral review.

2 And third, even if that is not true, and even if
3 a court should take note of the substantive claim of
4 inadequacy of representation, the prior determination
5 should be subject to a highly deferential standard that is
6 appropriate for a collateral attack on a 20-year-old
7 judgment in which pervasive --

8 QUESTION: Why? Why?

9 MR. WAXMAN: -- finality and reliance
10 interests --

11 QUESTION: I mean, suppose I agree with you on that
12 notice has nothing to do with this case. The Second, the
13 Circuit, Second Circuit has a footnote where they say,
14 we're not deciding, all right, so we have to assume notice
15 is adequate.

16 But suppose I don't agree with you on the last
17 point. Suppose I can't figure out a reason why it should
18 be subject to some special standard of deference. After
19 all, this person is claiming, I had nothing to do with
20 this case. I was not properly represented. If I don't
21 agree with you about that -- a) why should I agree with
22 you that? b) If I don't agree with you about that,
23 still the Second Circuit said, we're looking into the
24 merits of this, and we think they were not adequately
25 represented.

1 MR. WAXMAN: Well, the --

2 QUESTION: Now, to know whether they're right or

3 wrong about that, I guess I have to read 500,000 pages of

4 this settlement hearing and find out everything about this

5 case in order to decide whether they're right or wrong --

6 MR. WAXMAN: Well --

7 QUESTION: -- about their ultimate judgement.

8 How do I do that?

9 MR. WAXMAN: Justice Breyer, first of all the

10 Second Circuit did not do that. Notably it didn't do it.

11 It didn't do it in a case in which there are 60 reported

12 decisions, something like 13,000 docket entries in the

13 district court alone. What it said is, we're going to

14 retroactively apply Amchem. We're going to conclude that

15 Amchem was a due process decision, even though it

16 explicitly disavowed that, and --

17 QUESTION: There's one thing --

18 QUESTION: It has to be -- I think the answer to

19 my question has to be, is just tell the Second Circuit,

20 wait, Amchem's a different thing, go back and do it over.

21 MR. WAXMAN: Our submission that you --

22 QUESTION: Is that what you're saying we should

23 do?

24 MR. WAXMAN: Certainly not.

25 QUESTION: Well, I mean, if we -- if I reject

1 a), if I reject --

2 MR. WAXMAN: Certainly not.

3 QUESTION: Right.

4 MR. WAXMAN: I'm just pointing out that Amchem
5 didn't redetermine adequacy as a factual matter. It
6 concluded that as a matter of law --

7 QUESTION: And it didn't do anything new. Mr.
8 Waxman, you put it in your brief, repeated it today. You
9 said, retroactively apply Amchem. As far as I know that
10 decision, like Ortiz, were not doing anything new. They
11 were applying the law that existed then that the Court
12 thought was the law before, so Amchem was not a change in
13 the law. This was not a new rule. This was the Court's
14 attempt to interpret what the rule meant when the rule
15 first came on the books, and what it meant over time.

16 MR. WAXMAN: Justice Ginsburg, with respect, we
17 cited in our brief district court decisions in the 1980's
18 that were --

19 QUESTION: Two district court decisions.

20 MR. WAXMAN: And --

21 QUESTION: Not a single court of appeals
22 decision.

23 MR. WAXMAN: Both the Second Circuit in this
24 case and the Ninth Circuit in the Epstein case on which we
25 rely characterized Amchem as heralding a new era, or being

1 a watershed decision, and our submission only is that for
2 purposes of the new rules, doctrine that this Court
3 announced, for example, in *Teague v. Lane* and following
4 cases, the burden is on the party that seeks to invoke the
5 benefit of a later-decided case to prove that a
6 conscientious court prior to the announcement of the rule
7 would have been, quote, compelled to conclude that futures
8 could not be included in the class.

9 Now, as to the standard of review, this Court's
10 decision -- this Court even in *Teague* itself, which was a
11 criminal case, the Court said, to be sure, in civil cases
12 finality concerns are far, far more important, and in
13 cases like *Brecht* and *Herrera*, this Court has emphasized
14 over and over again, even when a defendant's life is at
15 stake, that on collateral review, in a subsequent review
16 of a final judgment, the showing has to be, quote,
17 necessarily far higher to obtain relief than on direct
18 review.

19 This Court's decisions in the -- in jurisdiction
20 cases, subject matter and personal jurisdiction cases,
21 where we're talking about the fundament of the power of
22 the original court to decide the case prove that, if
23 there -- in *Stohl v. Gotlieb*, this Court pointed out that
24 with respect to the first proceeding, even without any
25 express discussion of it, we have to assume, and we will

1 conclusively presume that the original court had subject
2 matter jurisdiction unless it would have been a, quote,
3 manifest abuse of authority to have done so, and with
4 respect to personal jurisdiction, Durfee v. Duke and Iowa
5 v. Baldwin and those other cases all stand for the
6 proposition that if the prior court, quote, has decided
7 the question of jurisdiction over the parties as a
8 contested issue there will be no reinquiry into personal
9 jurisdiction.

10 We're not even advocating that rule in our
11 second test. We're just saying, it should be deferential.

12 QUESTION: These were all parties who were
13 there. Every case that you mentioned, Durfee, these
14 people weren't there, so -- and in habeas, all the
15 criminal cases, of course the defendant was there. These
16 are two people who say, we weren't there, and we didn't
17 have a chance to litigate it.

18 MR. WAXMAN: Justice Ginsburg, this is a
19 representative suit. There is a judgment that says, at
20 this point, with respect, there is a judgment that said,
21 these parties were there.

22 Now, the analogy I think that would be
23 appropriate here would be with reference to the -- the
24 default judgment cases, where you can say, you can't have
25 a default judgment on jurisdiction because no one appeared

1 to contest it. That can't happen in a representative
2 suit. As we pointed out in our blue brief, the judge
3 cannot grant a default judgment in a class action. He has
4 to --

5 QUESTION: If the representation is adequate.

6 MR. WAXMAN: He has to make the determination
7 that the representation was adequate, and it was made
8 repeatedly and affirmed repeatedly in this case.

9 May I reserve the balance of my time?

10 QUESTION: Very well, Mr. Waxman.

11 Mr. Smoger, we'll hear from you.

12 ORAL ARGUMENT OF GERSON H. SMOGER

13 ON BEHALF OF THE RESPONDENT

14 MR. SMOGER: Mr. Chief Justice, and may it
15 please the Court:

16 Mr. Isaacson in New Jersey and Mr. Stephenson in
17 Louisiana had no injuries in 1984. They had no claim that
18 they could have brought in 1984. They bring the claim for
19 their devastating cancers in 1998 and 1999, when they can
20 under their state law. They -- the -- they then get moved
21 to dismiss, because others have somehow settled their
22 cases without them ever being aware of it, for no
23 compensation, and told --

24 QUESTION: Counsel may I ask you just kind of a
25 preliminary question about the Isaacson case? I think the

1 Second Circuit may have justified Federal jurisdiction
2 over that case under the All Writs Act, and I think this
3 Court recently in something called Syngenta said that
4 wouldn't fly. What are we going to do about Isaacson,
5 remand it?

6 MR. SMOGER: Mr. Isaacson's here, so I wanted to
7 say that, but I think we do a remand.

8 QUESTION: I think you have to.

9 MR. SMOGER: Yes.

10 QUESTION: In light of that case.

11 MR. SMOGER: In light of Syngenta, yes.

12 QUESTION: It was a state court matter.

13 MR. SMOGER: In fact, it is exactly what we
14 argued at the time --

15 QUESTION: Yes.

16 MR. SMOGER: -- when it was being removed.

17 QUESTION: Yes. Thank you.

18 MR. SMOGER: So I will just address Mr.
19 Stephenson in that case.

20 QUESTION: Yes, okay.

21 MR. SMOGER: Now, Mr. Stephenson is not here to
22 contest whether the overall settlement is fair or not.
23 That's not the issue. The issue here is whether he was
24 properly before the Court, and if he was not properly
25 before the Court, he cannot be included in any judgment.

1 That's -- that's what the Second Circuit held, and the
2 question then becomes, what's -- it becomes the question
3 of jurisdiction. Is he -- in order to bind somebody to a
4 judgment, they have to have notice and an opportunity to
5 be heard.

6 In the class action setting, we've come to an
7 accommodation. We say that you don't have to personally
8 be there, but if you have notice, an opportunity to be
9 heard, a right to opt out, and adequate representation,
10 according to this Court in Shutts, then we will say that
11 you are deemed to have been there.

12 In this case, Mr. Stephenson had none of those,
13 and let me tell you why. To begin with, we're talking
14 about the question of representation and the adequacy of
15 representation. At the time this class was certified,
16 there were no representatives selected, not a
17 representative reviewed for anyone. The representatives
18 were chosen by the plaintiffs after the court was
19 certified, after the notice was decided on, and when the
20 notice was going out, so there was nobody there to
21 represent anyone at the time. The class representatives
22 were never specifically approved by the court. They were
23 chosen by the plaintiff's counsel for the purposes of
24 trial. All the class representatives --

25 QUESTION: Mr. Smoger, supposing this is back in

1 1984, when the judgment is about to be entered, and the
2 Dow says in effect, you know, we think you really have a
3 lousy claim on the merits, but we're willing to pay \$200
4 million if we -- we know that this will be the last of it.

5 Now, your clients became ill in 19, what, 98?

6 MR. SMOGER: 1996 and 1998.

7 QUESTION: 1996 and 1998. How could the
8 defendant in this case, or how could the court in this
9 case have affected a settlement that would bind everybody?
10 I mean, how about people who perhaps get sick in 2018?

11 MR. SMOGER: Well, let's say, if the goal is the
12 ability to have unexposed people, people that have
13 absolutely no disease, to somehow take care of them, even
14 in Amchem and Ortiz there were certain back-end opt-out
15 rights that were insufficient. There were no back-end
16 opt-out rights here, so one of the things the Court would
17 have to do is to give some kind of back-end opt-out
18 rights. It would have to have some kind of mechanism to
19 take care of information that came as a result of science.

20 It's an interesting phenomenon that most cancers
21 don't occur until more than 20 years, of these kinds,
22 afterwards. In actuality, with people exposed over 12
23 years, the present claimants probably didn't have anything
24 related to Agent Orange, because it would be somewhat
25 later, in the 20 to 30 years, that they would actually get

1 injured, and that has to be taken care of if you want to
2 look at futures.

3 There also has to be some kind of insurance,
4 some kind of protective mechanism to look at the value of
5 what you're getting so that the value for futures in
6 comparative dollars is equivalent. There are a lot of
7 things --

8 QUESTION: Now, it sounds to me when you say all
9 those things that you're really saying, can't settle a
10 class action.

11 QUESTION: Yes.

12 QUESTION: At least not a mass tort action.

13 MR. SMOGER: You can settle --

14 QUESTION: Because the person who wants to
15 settle, you know, it's always open to any one of million
16 people in the action to come in later and say, now he
17 defines himself as a class in a way that wasn't
18 represented before, not too hard to do, and he says, you
19 should have had a lawyer for that group, and there's just
20 nothing anybody can do about it.

21 Now, that, if that's so, you can't settle a mass
22 tort class action, so --

23 MR. SMOGER: I --

24 QUESTION: So I'm putting it pretty strongly,
25 but I want to get your response to that, because that's

1 the kind of thing that's bothering me a lot.

2 MR. SMOGER: Well, there's multiple questions
3 here. One is, the advisory committee in 1966 basically
4 said it was inappropriate for mass torts. Now, if you're
5 trying to make --

6 QUESTION: In other words, you say, that's okay.
7 That's not such -- I'm worried about it. You say, don't
8 worry. The advisory committee says you shouldn't settle
9 mass torts. They all should go to trial and, fine -- I'm
10 a little hesitant about that, considering asbestos is
11 eating up about \$200 billion without people really getting
12 compensated, but I mean, I'd say that that's a possible
13 answer, and you know more about it than I do, I should
14 think.

15 MR. SMOGER: I would think that if there is a
16 question on how you can do it, at least you have to have
17 the fundamentals of having somebody represent those
18 individuals, and it's a person so that a lawyer can
19 advocate. If you have an individual that doesn't have an
20 injury, at least you have an advocate for that individual,
21 and he's similarly situated, and asking for the same
22 relief as those people that were -- that he wants the
23 relief.

24 QUESTION: Well, would it -- would it have been
25 sufficient to say, have one class representative be --

1 represent all those who were then asymptomatic that might
2 later get it, or would you have to break that down?

3 MR. SMOGER: Somebody, if that person has
4 separate counsel advocating for them, then that's the
5 first thing they could do and look at it. I mean, is
6 it -- there is a certain difficulty --

7 QUESTION: And in this case, as you just heard --

8

9 MR. SMOGER: Yes.

10 QUESTION: -- and as you know, there are two
11 special things about it. One, this is not asbestos, and
12 the reason it's not asbestos is because asbestos involves
13 future claimants whom I think most people would say have
14 been hurt by the asbestos, and here, there are future
15 claimants, at least one side says, have not been hurt by
16 Agent Orange. They are dying naturally, like 22 percent
17 of us will, of cancer, and they're understandably upset,
18 but it wasn't Agent Orange that did it.

19 Now, that's what Judge Weinstein thought, and
20 that's why, I take it, he felt that here, unlike asbestos,
21 you don't need that lawyer, that special class.

22 Now, all I know is, that's -- this is the third
23 time that question has been raised and litigated. The
24 first two times it was decided against you. Are we
25 supposed to sit here, knowing virtually nothing about it,

1 and decide whether in this particular case that was right
2 or wrong? How do we handle this case?

3 And that's why they're saying, well, what you
4 should do is give some weight to the fact that this was
5 already decided against you twice, although with different
6 clients.

7 I'm looking for an answer. I'm not --

8 MR. SMOGER: Well --

9 QUESTION: I'm not trying to put an --

10 MR. SMOGER: I --

QUESTION: -objectionable question. I'm trying to
find the answer to how we deal with this.

11 MR. SMOGER: I understand. You've given me a
12 number of questions, but first of all, the first question
13 was never decided against Mr. Stephenson. Mr. Stephenson
14 never had an opportunity to say that he didn't get notice,
15 or proper notice, and it's clearly that he wouldn't have
16 said injured, and we've talked about before, the actual
17 notice that went out said it's limited to people who have
18 injuries, and then described it as injury, disease, death
19 or disability. There was no way that Mr. Isaac -- that
20 Mr. Stephenson would ever have thought he was in the class
21 that had the right to opt out.

22 It's also true in this matter that the opt-out
23 period ended before the settlement took place, so there
24 was never an opportunity of these people, of the uninjured
25 to opt out of the class and have the rights that we give

1 them to have separate litigation.

2 As to the matter of the science, we can -- we
3 can speak to the, you know, speak to the science itself.
4 It has changed tremendously. I understand that Your Honor
5 has written -- has written on this in a footnote --

6 QUESTION: - - as of 1984, and what you're saying
7 is, it's changed. Now, is that change relevant?

8 MR. SMOGER: I think the change is absolutely
9 relevant, because the possibility of the --

10 QUESTION: I don't want to get you off the main
11 point. I was very interested in your basic answer, so
12 continue.

13 MR. SMOGER: The change in the science has been
14 dramatic, and I'll just say very briefly that in 1984
15 these were not considered human carcinogens. Now they're
16 recognized as human carcinogens by the international
17 agency, the research on cancer by the EPA, and it's -- the
18 National Academy of Sciences, so our scientific
19 understanding is utterly changed because of the time it
20 takes to do those kinds of scientific types of proper
21 studies. That's what has to be taken into account when
22 you initially go about having a settlement and thinking
23 about futures, and that's why you have to think about all
24 the rights. If they had a separate advocate, those rights
25 would have all been, have been considered.

1 QUESTION: But, I guess these points were made
2 in prior litigation efforts, maybe not by Mr. Stephenson,
3 but these points were litigated, were they not?

4 MR. SMOGER: Certain of the --

5 QUESTION: Adequacy of representation, and
6 notice, and so forth?

7 MR. SMOGER: The issue of adequacy, and the
8 issue of the fact that there was never any adequates
9 chosen does not appear in any decision, and that is one of
10 the questions. The question is, what does Mr. Stephenson
11 have to rely? There's not a designation of an objector
12 that's chosen. We're -- we're here --

13 QUESTION: Well, you're saying that at no time
14 in the previous reviews of this judgment was adequacy of
15 representation dealt with?

16 MR. SMOGER: Adequacy was dealt with writ large,
17 and I'll separate -- there's two types of structural
18 adequacy versus prosecutorial adequacy, of how it's
19 prosecuted. The large part of adequacy was discussed, but
20 not in the terms that -- of the existence of any specific
21 representatives, and as I said, again there were none to
22 begin with.

23 QUESTION: But formally there had to be made
24 an -- you couldn't have a class action. To certify the
25 class action there must be a finding of adequacy. There

1 certainly was such a finding. You're saying that that was
2 incorrect, because your clients were not represented by
3 anybody.

4 MR. SMOGER: Well --

5 QUESTION: To certify a class, you must find
6 that the representatives are adequately representing the
7 class.

8 MR. SMOGER: Theoretically, Justice Ginsburg,
9 but in reality, Justice, Judge Pratt certified the class,
10 saying he'd find adequate representatives in the future,
11 and he would find them

12 When Judge Weinstein certified the class, there
13 was still no representatives, and they were said that -- he
14 asked the plaintiffs' lawyers to find them. It was
15 certified without any single representatives.

16 QUESTION: I thought the adequacy was decided in
17 two separate instances, first directly, when -- I think it
18 was Ivy and somebody out of Texas brought the same kind of
19 claim that you have brought now, and correct me if I'm not
20 right, because I -- and they got to the Second Circuit and
21 the Second Circuit said no, you people were represented
22 adequately, and that was similar.

23 Then I thought the other time, which is not
24 directly adequacy, was at the time of the settlement
25 agreement some objectors came in, and they raised roughly

1 the same kinds of points you're raising now, and there
2 Judge Weinstein said that the settlement was fair, and
3 then it went to the Second Circuit and they said it was
4 fair, despite the presence of that objection. That's not
5 adequacy, but it's raising the point that you want to
6 raise, and base your adequacy argument on.

7 So those are the two things that I thought were
8 relevant. Now, am I right, basically, in that?

9 MR. SMOGER: There were certain people, there
10 was one -- there was one objector in the record who was a
11 very informed objector, having been a law school classmate
12 of Mr. Waxman. He did raise those personally.

13 There was also a lawyer that raised them who was
14 told that he didn't have any standing to raise them, and
15 there was a question. There was no decision that
16 describes the future, the issue of adequate --

17 QUESTION: What about the Texas litigation?

18 MR. SMOGER: The Texas litigation took place,
19 and the Second Circuit had an interesting finding there.
20 The Second Circuit said that since the people pre-1994
21 were getting the same compensation as the original, that
22 as to those people there wasn't any difference, because
23 they were eligible for the same compensation, so the
24 adequacy decision for the Second Circuit went to the fact
25 that the result, that the result was evenhanded between

1 Mr. Ivy that brought the case and the present
2 representatives.

3 QUESTION: Is Ivy in the same position as
4 Stephenson?

5 MR. SMOGER: No, because Ivy did -- was eligible
6 for money from the settlement funds. The settlement funds
7 ran out in 1994. That's why it's different. So they had
8 a very specific holding on efficiency in -- in -- before.

9 Getting back to my other point on prosecutorial
10 adequacy, the defend -- the petitioners would ask every
11 class member to constantly monitor adequacy to make sure
12 that all class actions are adequately handled, when they
13 say you can't challenge the adequacy. In this case there
14 are two -- there's even a -- there's -- in prosecution of
15 it, in not having ever had any people to represent the
16 futures, after the settlement was finalized in 199 -- in
17 1988, there was a promise in -- in -- in the fairness
18 notice that there would still be an adjustment made if
19 there were future scientific findings. Nobody ever even
20 began to look at that, because there was no representative
21 to look for that.

22 Also, there was a \$10 million reserve fund which
23 the -- which the defendants demanded in case of state
24 court action, and they demanded that reserve fund, which
25 certainly anticipates that there would be further state

1 court actions, they demanded that reserve fund go through
2 the year 2008, that in the event of any state court
3 actions they would have money that they would get back,
4 and that was out of the \$180 million.

5 In -- that -- Judge Weinstein had said that that
6 reserve fund would be stay -- would be held for futures
7 after 1994. In 1994, that reserve fund at petitioner
8 Dow's request was then given to the -- to the class
9 assistance program, so the reserve fund that was supposed
10 to be there to 2008, and had the capability of paying some
11 money for post 1994 claimants, was also depleted.

12 That's -- I bring that up because that's the
13 question you had -- the question throughout the
14 proceedings, and as this Court said in Shutts, is -- that
15 adequacy has to be at all times.

16 QUESTION: In this proceeding, what deference
17 should we give to the -- based on the proposition that
18 this is collateral attack and not direct review, and that
19 there have been previous adjudications on this issue?
20 What's the standard of -- of -- what showing must you
21 make, and what's the standard of review that the Court
22 applies?

23 MR. SMOGER: I -- the standard is de novo, and
24 let me say why. There are things that you cannot ask for
25 collateral review on. There -- there are many things in

1 Rule 23. For instance, in Amchem, the predominance
2 question, that, that is for direct review, whether it, the
3 class is certified.

4 The question as to collateral review goes to due
5 process protections, and the protections are -- go to in
6 personam jurisdiction.

7 QUESTION: It's very odd that abuse of
8 discretion is the standard on direct review, and on
9 collateral review you have a more generous standard.
10 That's very odd.

11 MR. SMOGER: It's -- I don't find it -- I don't
12 think it's odd in the sense of what's being reviewed. The
13 question that's being reviewed is whether Mr. Stephenson
14 was properly before the court. Whether somebody's
15 properly before the court is reviewed de novo by the
16 second court because it's a jurisdictional question, so
17 the question, the limited question that's reviewed by the
18 second court is, in this situation we're saying, somebody
19 doesn't have to be personally before the court --

20 QUESTION: But the answer to that question turns on
21 the adequacy of the class certification and the rules for
22 class certif -- service, et cetera.

23 MR. SMOGER: It does --

24 QUESTION: And that has been reviewed under an
25 abuse of discretion standard. Now you're asking us to

1 apply a higher one.

2 MR. SMOGER: We're ask -- it's reviewed by an
3 appellate court for abuse of discretion standard related
4 to the person that made the claim in the prior, in the
5 underlying court. That person was there to appear, voice
6 his objections before the court, have -- have a chance to
7 present evidence, and was -- and the court had personal
8 jurisdiction of that person. That's why we think that
9 the -- the allusions to the habeas corpus are
10 inapplicable.

11 The question, the fundamental question here is
12 not the settlement as a whole. It was, was Mr. Stephenson
13 there?

14 QUESTION: Yes, yes, that's true, but that
15 question was decided before in respect to another person.
16 Now, in respect to that other person, if the Second
17 Circuit has decided it, if he really is in the same
18 position as Stephenson, is that first decision, does it
19 bear the weight of stare decisis?

20 MR. SMOGER: At best.

21 QUESTION: Stare decisis, though?

22 MR. SMOGER: Yes. Yes.

23 QUESTION: So that gives them something, but not
24 more.

25 MR. SMOGER: It's -- it's, yes. It's only stare

1 decisis. There was no class represented. Ivy was there
2 for himself, and goes no far- -. I mean, that -- and that
3 wouldn't -- and Ivy can't revisit it. That would be this
4 decision, this Court's decision in *Moitie*, in *Federated*
5 *Stores v. Moitie*, the -- that -- it wouldn't be for Ivy,
6 but *Stephenson* was not there. He didn't have a chance to
7 make his arguments, and he wasn't -- he --

8 QUESTION: Well, but in some cases the fact that
9 he wasn't there has not -- is not going to mean that he
10 can get de novo review, I would think, of the
11 determination that he's bound by the class settlement.

12 You're saying that when it comes to adequacy of
13 representation, it is de novo on collateral review?

14 MR. SMOGER: On -- on notice, as -- as the Chief
15 Justice wrote in the *Shutts* decision, the minimum of due
16 process is --

17 QUESTION: But *Shutts* -- *Shutts* was not a
18 collateral review, I don't believe.

19 MR. SMOGER: But the base -- my understanding is the
20 basis for this Court to review *Shutts* was that
21 Phillips stated that there was a potential of collateral
22 review, and that's what gave Phillips standing to be
23 before the Court, and in -- in that case the Court decided
24 the jurisdictional standard that would allow -- and it set
25 a minimal jurisdictional standard. You don't -- Phillips

1 had argued you personally have to be there, and this Court
2 said no, you don't. We'll -- we'll deem you to have been
3 there if you have notice and opportunity to be heard, and
4 opportunity to opt out, and adequacy of representation.

5 And the adequacy of representation is very
6 important because we have to assume that the person
7 representing somebody had the same interests at heart as
8 the person who's never before the court.

9 QUESTION: Suppose I agree with you on that.
10 One -- and suppose I agree with you so far.

11 MR. SMOGER: Yes.

12 QUESTION: Just suppose, for argument, and I
13 say, okay, sure, person, claimant, class member number
14 1,000,743 can raise for the fourteen thousandth time class
15 representation being inadequate, if he wants. He's
16 probably going to lose because of stare decisis, but he
17 can do it if he wants.

18 Now, if that's the analogy, here, I would say --
19 the Second Circuit let him raise it and then said he's
20 right, but the reason they said he's right, departing from
21 their prior decisions, is because of our Amchem and Ortiz
22 case. Now, suppose I think Amchem and Ortiz don't really
23 govern. What am I supposed to do with this case, send it
24 back? Or at least, they're relevant but not
25 determinative.

1 MR. SMOGER: Well, let me --

2 QUESTION: What do I do?

3 MR. SMOGER: Let me raise two things, because

4 when the Second Circuit here said it, and Judge Cardamone

5 sat on both Ivy and this case. He was on both cases and

6 said we never considered this before, and when he said we

7 never considered this before, it was that this person was

8 getting nothing, and their justification in Ivy, that

9 the -- that Ivy was still eligible for funds was no longer

10 applicable to Stephenson, who was eligible for nothing, so

11 that's one part of, of, of the equation.

12 The other part is that adequacy itself, once --

13 we go to what's litigated before. What happened after the

14 settlement has never, could not have been litigated

15 before, and it was never -- the adequacy deficiencies that

16 occurred after the settlement were not before any court

17 before.

18 QUESTION: When you say, after the settlement,

19 do you mean after the settlement figure was announced but

20 before the judge made the division of proceeds and so on?

21 MR. SMOGER: No, after -- well --

22 QUESTION: Or --

23 MR. SMOGER: -- after the judgment. I mean --

24 QUESTION: After the judgment was entered?

25 MR. SMOGER: Yes, after the judgement there's --

1 continued the inadequacy, even after the settlement. I
2 mean, it's a peculiar fact in this case in terms of the,
3 the actual settlement and the fairness hearing, the --
4 whether somebody had a reasonable right to object
5 when the fairness hearing gave no distribution at all, and
6 just basically dumped the money into the judge as parens
7 patriae and said, decide it however you want without
8 representation, the petitioner seems to think that's okay,
9 and I think that that would be a very difficult rule of
10 law to say that you can get around any due process
11 protections and any injustice just by putting money into
12 the -- into a court. That's -- courts would have those
13 responsibilities in every case, because that absolves all
14 the parties of anything that might be -- that might have
15 been wrong in any type of representation. .

16 Thank you.

17 QUESTION: Thank you, Mr. Smoger.

18 Mr. Waxman, you have 2 minutes.

19 REBUTTAL ARGUMENT OF SETH P. WAXMAN

20 ON BEHALF OF THE PETITIONERS

21 MR. WAXMAN: Justice O'Connor, the -- the
22 Isaacson case can't just be remanded, because we assert
23 jurisdiction under 1442.

24 Justice Breyer, it is not the case -- adequacy
25 in general, and specifically with respect to futures was

1 specifically raised and determined before the judgment
2 became final as well as in Ivy/Hartman. The Second
3 Circuit's decision at 818 F.2d 167 says, quote, appellants
4 argue that the diverse interests of the class make
5 adequate representation virtually impossible. We
6 disagree. They were responding to a brief that
7 particularly brought the precise issue to their attention,
8 and --

9 QUESTION: I still want to know what to do with
10 this case. I mean, what do I do with this case?

11 MR. WAXMAN: I -- we think that you should
12 reverse the judgment --

13 QUESTION: I mean, he's not bound, Stephenson
14 isn't bound by some other person raising that, but it's
15 stare decisis, like --

16 MR. WAXMAN: He is indeed bound --

17 QUESTION: Because?

18 MR. WAXMAN: -- by the final judgment of this
19 case both because he was adequately represented, and a
20 determination after a full consideration was made. He
21 was -- our submission is that there's no argument that --
22 that procedures that were enacted to protect due process
23 in the vast majority of cases were followed, and therefore
24 he's bound under Walters and those other, that due process
25 line, and in any event, if you take a look at adequacy you

1 should, a) give tremendous deference, and because the
2 issue has been decided, because the consequences of not
3 giving deference would be unbelievably unsettling.

4 These adequacy determinations are not easy, and
5 res judicata doesn't exist for the easy cases. The
6 consequence of hundreds, if not thousands of other
7 cases -- thank you, Your Honor. I see my time has
8 expired.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Waxman.
10 The case is submitted.

11 (Whereupon, at 11:58 a.m., the case in the
12 above-entitled matter was submitted.)
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