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IN THE SUPREME COURT OF THE UNITED STATES

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DOW CHEMICAL COMPANY, ET AL., :

Petitioners :

v. : No. 02-271

DANIEL RAYMOND STEPHENSON, :

ET AL. :

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Washington, D.C.

Wednesday, February 26, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

SETH P. WAXMAN, ESQ., Washington, D.C.; on behalf of the Petitioners.

GERSON H. SMOGER, ESQ., Oakland, California; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

(11:05 a.m.)

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

Mr. Waxman.

ORAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

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

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

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

Now, at footnote 12 --

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

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

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

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

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

Now, Justice Ginsburg --

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

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

MR. WAXMAN: Well --

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

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

QUESTION: But it purported to apply traditional common law.

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

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

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

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

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

QUESTION: There are.

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

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

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

QUESTION: Mr. --

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

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

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

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

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

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

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

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

MR. WAXMAN: Asymptomatic?

QUESTION: Yes, were any of them?

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

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

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

run dry in 1994.

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

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

MR. WAXMAN: They were all --

QUESTION: Okay.

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

representative. This is --

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

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

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

First of all, the way that the distribution, the

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

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

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

First --

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

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

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

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

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

For example --

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

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

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

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

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

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

QUESTION: Mr. --

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

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

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

QUESTION: Sure.

MR. WAXMAN: -- and I will.

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

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

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

collateral review.

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

QUESTION: Why? Why?

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

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

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

MR. WAXMAN: Well, the --

QUESTION: Now, to know whether they're right or wrong about that, I guess I have to read 500,000 pages of this settlement hearing and find out everything about this case in order to decide whether they're right or wrong --

MR. WAXMAN: Well --

QUESTION: -- about their ultimate judgement. How do I do that?

MR. WAXMAN: Justice Breyer, first of all the Second Circuit did not do that. Notably it didn't do it. It didn't do it in a case in which there are 60 reported decisions, something like 13,000 docket entries in the district court alone. What it said is, we're going to retroactively apply Amchem. We're going to conclude that Amchem was a due process decision, even though it explicitly disavowed that, and --

QUESTION: There's one thing --

QUESTION: It has to be -- I think the answer to my question has to be, is just tell the Second Circuit, wait, Amchem's a different thing, go back and do it over.

MR. WAXMAN: Our submission that you --

QUESTION: Is that what you're saying we should do?

MR. WAXMAN: Certainly not.

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

a), if I reject --

MR. WAXMAN: Certainly not.

QUESTION: Right.

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

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

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

QUESTION: Two district court decisions.

MR. WAXMAN: And --

QUESTION: Not a single court of appeals decision.

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

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

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

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

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

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

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

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

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

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

QUESTION: If the representation is adequate.

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

May I reserve the balance of my time?

QUESTION: Very well, Mr. Waxman.

Mr. Smoger, we'll hear from you.

ORAL ARGUMENT OF GERSON H. SMOGER

ON BEHALF OF THE RESPONDENT

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

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

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

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

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

QUESTION: I think you have to.

MR. SMOGER: Yes.

QUESTION: In light of that case.

MR. SMOGER: In light of Syngenta, yes.

QUESTION: It was a state court matter.

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

QUESTION: Yes.

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

QUESTION: Yes. Thank you.

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

QUESTION: Yes, okay.

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

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

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

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

QUESTION: Mr. Smoger, supposing this is back in

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

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

MR. SMOGER: 1996 and 1998.

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

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

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

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

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

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

QUESTION: Yes.

QUESTION: At least not a mass tort action.

MR. SMOGER: You can settle --

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

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

MR. SMOGER: I --

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

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

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

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

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

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

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

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

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

MR. SMOGER: Yes.

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

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

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

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

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

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

MR. SMOGER: Well --

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

MR. SMOGER: I --

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

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

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

them to have separate litigation.

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

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

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

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

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

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

MR. SMOGER: Certain of the --

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

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

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

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

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

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

MR. SMOGER: Well --

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

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

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

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

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

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

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

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

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

QUESTION: What about the Texas litigation?

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

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

QUESTION: Is Ivy in the same position as Stephenson?

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. SMOGER: It does --

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

apply a higher one.

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

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

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

MR. SMOGER: At best.

QUESTION: Stare decisis, though?

MR. SMOGER: Yes. Yes.

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

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

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

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

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

MR. SMOGER: On -- on notice, as -- as the Chief Justice wrote in the Shutts decision, the minimum of due proces is --

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

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

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

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

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

MR. SMOGER: Yes.

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

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

MR. SMOGER: Well, let me --

QUESTION: What do I do?

MR. SMOGER: Let me raise two things, because when the Second Circuit here said it, and Judge Cardamone sat on both Ivy and this case. He was on both cases and said we never considered this before, and when he said we never considered this before, it was that this person was getting nothing, and their justification in Ivy, that the -- that Ivy was still eligible for funds was no longer applicable to Stephenson, who was eligible for nothing, so that's one part of, of, of the equation.

The other part is that adequacy itself, once -- we go to what's litigated before. What happened after the settlement has never, could not have been litigated before, and it was never -- the adequacy deficiencies that occurred after the settlement were not before any court before.

QUESTION: When you say, after the settlement, do you mean after the settlement figure was announced but before the judge made the division of proceeds and so on?

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

QUESTION: Or --

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

QUESTION: After the judgment was entered?

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

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

Thank you.

QUESTION: Thank you, Mr. Smoger.

Mr. Waxman, you have 2 minutes.

REBUTTAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

MR. WAXMAN: He is indeed bound --

QUESTION: Because?

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

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

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

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

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