When Futures Fight Back: For Long-Latency Injury Claimants in Mass Tort Class Actions, Are Asymptomatic Subclasses the Cure to the Disease?

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WHEN FUTURES FIGHT BACK: FOR LONG-LATENCY INJURY CLAIMANTS IN MASS TORT CLASS ACTIONS, ARE ASYMPTOMATIC SUBCLASSES THE CURE TO THE DISEASE?

Samantha Y. Warshauer*

INTRODUCTION

Consider the following true scenarios of two Vietnam veterans:

Daniel Stephenson served in Vietnam from 1965 to 1970, serving both on the ground in Vietnam and as a helicopter pilot in Vietnam. He alleges that he was in regular contact with Agent Orange during that time. On February 19, 1998, he was diagnosed with multiple myeloma, a bone marrow cancer, and has undergone a bone marrow transplant.

Joe Isaacson served in Vietnam from 1968 to 1969 as a crew chief in the Air Force, and worked at a base for airplanes which sprayed various herbicides, including Agent Orange. In 1996, Isaacson was diagnosed with non-Hodgkin's lymphoma.1

When the Agent Orange litigation started in 1978,2 Isaacson and Stephenson were living healthy, productive lives and showed no signs of injuries whatsoever from their exposure. When Judge Jack B. Weinstein of the Eastern District of New York established the $170,000,000 payment program component of the class settlement in 1984,3 and the settlement funds ran out in 1994,4 both men still

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2. See Peter H. Schuck, Agent Orange on Trial: Mass Toxic Disasters in the Courts 37 (1986) (describing the inception of the Agent Orange suits in 1978). The suits alleged that the defendant chemical companies were liable for the injuries Vietnam veterans and their families sustained, based on a variety of theories such as negligence, strict liability, and intentional harm. See id. at 45.
3. See Jack B. Weinstein, Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolidations, and other Multiparty Devices 157 (1995) (analyzing the 1984 settlement allocation). Although the value most often associated with the settlement is $180,000,000, when the court added interest monies and split up the settlement, $170,000,000 went into the payment fund. See id. Judge Weinstein presided over the Agent Orange Settlement after the litigation was transferred to his
remained asymptomatic. The Agent Orange litigation was as far removed from their lives as the foreign lands of Southeast Asia in which they had fought. However, that settlement and its subsequent depletion took on a new meaning to Joe Isaacson and Daniel Stephenson in 1996 and 1998, respectively, when both men learned that they had cancer.

Because the Agent Orange settlement fund depleted in 1994, both men would have obtained a large award for their suffering if, ironically, they had not been so healthy for so long. However, in June of 2003, the Supreme Court handed down an ambiguous decision that questioned whether plaintiffs such as Isaacson and Stephenson belonged in the original class action plaintiff class at all. The suggestion that future injury plaintiffs require special, unrealized procedural protections challenges the legal and equitable underpinnings of class actions today. Yet failure to enact procedural reforms would allow courts to continue to tell sick people that their cases were finished before they even began.

This Note argues that subclasses for long-latency future injury plaintiffs could provide a procedurally sound method to combine future and current injury plaintiffs in the same class action, albeit in different plaintiff classes. However, this Note also identifies and explores equally pressing procedural and constitutional problems that a subclass for futures might unleash, including the difficulties of

district court in the Eastern District of New York. See Schuck, supra note 2, at 110.
4. See Weinstein, supra note 3, at 158 (establishing that the fund did not give out money after 1994).
5. See Stephenson, 273 F.3d at 255 (explaining that both men manifested injuries after 1994).
6. See id.
7. See supra note 4 and accompanying text.
9. This Note uses the phrase “future injury plaintiffs,” or “futures” for short, to encompass all holders of future claims. Accordingly, this Note refers to the problems these plaintiffs face as the “futures problem.” Cf. Geoffrey C. Hazard, Jr., The Futures Problem, 148 U. Pa. L. Rev. 1901, 1903 (2000) (“[A] [futures] claim is one where a claimant cannot presently prove a causal connection between an injury and a supposed source of injury, but nevertheless suspects or fears that he or she is suffering injury that has its origin in the suspect source.”). Hazard’s definition of future claims presumes that a putative claimant is aware of a possibly toxic exposure and thus “suspects or fears” an injury will appear. See id; see also infra note 36 (describing Judge Diane Wood’s criticisms of Professor Hazard’s commentary about the futures problem). Professor Hazard’s article ultimately suggests a proposed legislative solution in the form a federal statute. See Hazard, supra, at 1917-18 (suggesting the statute include methods for distributors of potentially hazardous products to register “with a federal agency” optionally, and formulating recovery for plaintiffs based on a formula similar to workers’ compensation).
10. See Dow, 123 S. Ct. at 2161-62 (affirming the Second Circuit’s decision that future injury plaintiffs may sue despite the binding effects of the 1984 Agent Orange settlement).
providing notice or a collateral attack to such a class. This Note concludes that the drawbacks of a futures subclass on the notice requirements, bankruptcies, settlements and class action management techniques ultimately outweigh its possible benefits as a procedurally sound subclass for futures.

Part I discusses the procedural requirements of class actions and how courts have interpreted previous class actions combining plaintiffs with different interests. Also, this part gives a brief overview of In re "Agent Orange" Product Liability Litigation, and Amchem Products, Inc., v. Windsor, two litigations involving long-latency future injury plaintiffs.

Part II of this Note observes that the Supreme Court has mandated subclasses for future injury plaintiffs. Also, it analyzes different circuit courts' suggestions that futures who shared a plaintiff class with current injury plaintiffs may collaterally attack those previous judgments. Next, this part analyzes the circuits that do not permit such a collateral attack, and speculates whether parties could give notice to this subclass about the class action. Part II also explains how futures subclasses could impact defendants' settlements and bankruptcy proceedings both beneficially and detrimentally.

Finally, Part III of this Note identifies the flaws in the Supreme Court's confusing treatment of futures and proposes a method to manage futures in class actions. Ultimately, this part proposes that courts must clarify the propriety of subclasses for future injury plaintiffs to ensure that futures are involved in class actions when appropriate.

I. CLASS ACTION REQUIREMENTS AND MASS TORT CASES

This part provides background information about class actions and their procedural and constitutional requirements. It also offers a brief synopsis of the Agent Orange and asbestos mass tort class actions and the problem of future injury plaintiffs therein. Parts I.C.1. and I.C.2. present the asbestos and Agent Orange litigation as two case studies exemplifying the problems of so-called long-latency future injury plaintiffs in mass tort class actions.

13. In this Note, long-latency future injury plaintiffs refers to those plaintiffs who manifest injuries a long, but indeterminate, amount of time after their exposure to a toxin. See Stephen J. Carroll et al., RAND Inst. for Civil Justice, Asbestos Litigation Costs and Compensation 67 (2002) (explaining that asbestos exposure creates illnesses that have "long latency periods," and that "claimants will continue to come forward years into the future"). In the asbestos context, Judge Weinstein projected in 1995 that claimants file 10,000 new claims per year and that this trend will continue "every year well into the twenty-first century." See Weinstein, supra note 3, at 140.
A. Class Actions Under Rule 23

All class actions in federal court must satisfy four prerequisites: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. In addition, the class action must fall under one of three categories, a limited fund class action, an injunctive class action, or a class action in which aggregation is the best method to adjudicate the class members' claims because of significant overlaps in questions of law and fact. If the parties devise a settlement, the court must still approve it. On certain occasions, parties will ask the court to certify a class for the exclusive purpose of a settlement.

15. See Fed. R. Civ. P. 23(b)(1)(a)-(b). These provisions state that:
   An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: (1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

16. See Fed. R. Civ. P. 23(b)(2) ("[T]he party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.").
17. See Fed. R. Civ. P. 23(b)(3) ("[T]he court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."). This type of class action is commonly referred to as a damages class action.
18. See Fed. R. Civ. P. 23(e) (explaining that "[a] class action shall not be dismissed or compromised without the approval of the court). Thus, the courts have a great deal of power over class action settlements. This responsibility is "particularly weighty when reviewing a settlement involving a non-opt-out class or future claimants." See Manual for Complex Litigation (Third) § 30.42 (1995).
19. See Manual for Complex Litigation, supra note 18, § 30.45 ("Occasionally, before a class is certified, parties enter into settlement agreements, which provide for certification of a class as defined therein, for settlement purposes only. Such settlement classes facilitate global settlements."). The manual specifies that for such classes, judges must scrutinize the case more carefully. See id. (explaining that at an early stage, all parties would have uncertainties resolving the "strengths and weaknesses" of the case and the "appropriate membership of the class, and... how class members will benefit from settlement"). In the context of settlement classes, the manual stresses that protection of future claimants is extremely important:
   The court should consider the impact of the settlement on persons who may not currently be aware that they have a claim or whose claim may not yet have come into existence. Since they cannot be given meaningful notice, they may be particularly prejudiced by the settlement, and their opt-out rights (in a Rule 23(b)(3) action) may be illusory.

Id; see also infra notes 210-45 and accompanying text (suggesting that it is impossible to notify future injury plaintiffs).
Finally, when there are significant divisions between the plaintiff class members, a court may divide the class into subclasses.  

1. Adequacy of Representation

The Federal Rule of Civil Procedure 23(a)(4) adequacy of representation requirement is similar to the 23(a)(3) requirement of typicality in that both requirements examine any potential for conflict within the class. To fulfill the adequacy requirement, the class representative must have claims similar to the other class members' claims, no conflicts of interest, and an adequate counsel to represent the class. When there is potential for intra-class conflict, courts are usually less likely to find the adequacy requirement fulfilled, and consequently may deny class action certification. Courts often scrutinize this requirement carefully, since it is an important tool to monitor and police the "legitimacy" of a class action.

When a court determines that plaintiffs did not have their interests adequately represented in the class action, those plaintiffs may collaterally attack the action's judgment or settlement. Increasingly,
courts have justified such attacks by finding that inadequate representation violates a plaintiff's due process rights.26

In Hansberry v. Lee,27 the Supreme Court delineated the contours of the adequacy of representation requirement in the class action context. Carl Hansberry and his family moved into an Illinois housing development that had a land use restriction forbidding blacks, such as the Hansberry family, from living there.28 Respondents argued that the decision of a prior class action29 was binding upon Hansberry, a new homeowner, since his residential predecessor was a plaintiff in that class action.30

However, Hansberry’s predecessor was a plaintiff in the prior class action seeking to enforce the restrictive housing agreement against a limited number of defendants who were trying to breach the agreement.31 Hansberry, although representing a plaintiff class, had interests aligned with the defendants from the previous case, not his residential predecessor.32 The Supreme Court found that since Hansberry had a different set of interests than his predecessor,33 his rights were not concluded in the previous plaintiff class of those

been definitively settled by judicial decision.” Id. at 1312. Defendants use res judicata as an affirmative defense to prevent “the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been—but was not—raised in the first suit.” Id. Thus, if a plaintiff wants to collaterally attack a prior court’s judgment, a defendant may use the res judicata affirmative defense to stymie the plaintiff’s desire to re-litigate that claim.

26. See, e.g., Issacharoff, supra note 24, at 352 (describing how asbestos cases stress that an absent plaintiff’s due process rights lie within the “faithfulness of the agent that has litigated on [the absent class member’s] behalf”). Issacharoff concluded that the Court’s recent decisions in Amchem and Ortiz focus more on due process than on Rule 23 formalities. See id. at 391 (linking the critical due process concerns to “capable representation by an agent who must be faithful to the interests of the nonparticipants that are to be so bound”).

27. 311 U.S. 32 (1940) (finding that a plaintiff class cannot consist of both those seeking to challenge the validity of a housing agreement and those seeking to uphold the agreement).

28. See id. at 37-38.

29. See Burke v. Kleiman, 277 Ill. App. 519 (App. Ct. 1934). The Burke opinion referred to the facts of an Illinois decision. See Hansberry v. Lee, 24 N.E.2d 37 (Ill. 1939) (restricting a stretch of residential property from inhabitation by black families in a class suit). The Illinois court reasoned that, “[t]he principle of res judicata covers wrong as well as right decisions, for the fundamental reason that there must be an end of litigation.” See id. at 39.

30. See Hansberry, 311 U.S. at 38.

31. See id. at 45-46 (explaining that the plaintiffs in the prior class action did not designate those defendants as representatives of a class, so that subsequent parties seeking to invalidate the restrictive agreement did not have their rights concluded in the prior class action).

32. See id. at 46.

33. Namely, Hansberry did not think the restrictive land agreement should apply to him since he was not a party in the original litigation, and the defendants sought to enforce the land restriction to include him into the scope of the Burke decision. Id. at 37-38.
seeking to enforce the restriction.\textsuperscript{34} Thus, the Supreme Court found that the prior class action plaintiffs did not adequately represent Hansberry and that binding Hansberry would violate his due process rights.\textsuperscript{35}

While courts are often vigilant regarding a plaintiff’s adequacy of representation during the course of a class action, the courts establish another hurdle by requiring the plaintiffs to provide notice to the class about the class action’s existence.

2. Notice

Both the Constitution and the Federal Rules of Civil Procedure require a court to ensure that the parties provide notice to all plaintiffs for whom a Rule 23(b)(3) class action settlement will be binding.\textsuperscript{36} Notice gives the plaintiff the opportunity to opt out of a

\textsuperscript{34} See id. at 44 (“Because of the dual and potentially conflicting interests of those who are putative parties to the agreement in compelling or resisting its performance, it is impossible to say, solely because they are parties to it, that any two of them are of the same class.”). Additionally, the Court reasoned that:

If those who thus seek to secure the benefits of the agreement were rightly regarded by the state Supreme Court as constituting a class, it is evident that those signers or their successors who are interested in challenging the validity of the agreement and resisting its performance are not of the same class in the sense that their interests are identical so that any group who had elected to enforce rights conferred by the agreement could be said to be acting in the interest of any others who were free to deny its obligations.\textsuperscript{id} at 44. Also, the Court noted that the defendants in the prior class action did not constitute a class or represent the interests of any other people. Id. at 46 (“The defendants in the first suit were not treated... as representing others or as foreclosing by their defense the rights of others...”).

\textsuperscript{35} See id. at 45 (“Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires.”).

\textsuperscript{36} See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178-79 (1974) (“The usual rule is that a plaintiff must initially bear the cost of notice to the class... the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit.”). Although plaintiffs usually finance the class notice, there are exceptions when the parties have a pre-existing fiduciary duty, such as in the context of shareholder derivative suits. See id; see also infra notes 41-53 and accompanying text (describing the procedural and constitutional notice requirements).

There are other important constitutional concerns underlying the problem of binding futures in class actions, but this Note focuses on providing adequate constitutional notice. See Hazard, supra note 9, at 1914-15 (discussing how a mandatory settlement-only class action might violate a future plaintiff’s Seventh Amendment right to a jury trial, as well as a future plaintiff’s due process right to have a day in court).

Professor Hazard based his discussion about these two fundamental rights on the concerns Justice Souter raised in Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999). As to the Seventh Amendment, the Ortiz Court seemed willing to accept that forfeiting a right to a jury trial in the class action context is a necessary evil. See Ortiz, 527 U.S. at 846 (“By its nature, however, a mandatory settlement-only class action with legal issues and future claimants compromises their Seventh Amendment rights without their consent.”).
class action if the plaintiff would rather pursue the claim by other methods. However, the requirement is extremely problematic for future injury plaintiffs because some level of notice is always

Professor Hazard, on the other hand, seemed infinitely more troubled than the Court by this suggestion, and followed this possibility through to the outer bounds of its logic: “If this line of analysis governs Rule 23, no adjudication, and presumably no settlement either, would be permissible if its effect would be to preclude a jury trial for an absent class member.” Hazard, supra note 9, at 1914-15. Importantly, Judge Diane Wood characterized that suggestion as an “apocalyptic prediction[].” Diane P. Wood, Commentary on The Futures Problem, By Geoffrey C. Hazard, Jr., 148 U. Pa. L. Rev. 1933, 1937 (2000) (describing Hazard’s interpretation of the Ortiz Court “hint[ing] that all judgments under Rule 23 are invalid” as “[n]ot at all” correct).

Hazard premised his second concern, that these settlements violate a future plaintiff’s right to a day in court, on another portion of the Court’s decision in Ortiz:

[M]andatory class actions aggregating damages claims implicate the due process “principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process,” it being our deep-rooted historic tradition that everyone should have his own day in court. Although we have recognized an exception to the general rule ... in certain limited circumstances ... the burden of justification rests on the exception. 527 U.S. at 846 (quoting Hansberry v. Lee, 311 U.S. 32, 40 (1940)) (internal quotations omitted).

However, Hazard sees the natural progression of this due process problem as invalidating the use of class actions at all times. See Hazard, supra note 9, at 1915 (“But if there is such a right, it surely precludes the use of a class suit for any purpose. The very essence of a class suit is that it determines rights of individuals who are not to have their individual day in court.”). Not surprisingly, Judge Wood’s response to this notion is that Hazard “[a]gain ... goes much too far.” Wood, supra, at 1939 (suggesting that class actions which expressly serve as representative tools by necessity eliminate an absent plaintiff’s day in court and do not violate that plaintiff’s due process).

37. Notice is especially important for Rule 23(b)(3) class actions because the judgment concludes a plaintiff’s rights to money damages, unless the plaintiff opts out of the class. See supra note 17 and accompanying text (describing Rule 23(b)(3) class actions). Importantly, recent amendments to Rule 23 create discretionary notice for Rule 23(b)(1) and 23(b)(2) class actions, but the notice requirements for Rule 23(b)(3) class actions remain unchanged. See, e.g., Rivlin & Potts, supra note 21, at 538 (explaining that “the Judicial Conference did not suggest amendments to the current notice requirement” for Rule 23(b)(3) class actions except that it should “be in plain, easily understood language” (citations omitted)).

38. See, e.g., Paul D. Rheingold, Mass Tort Litigation § 3:66 (2003) (positing that it is “near-impossible” to give constitutionally adequate notice to future injury plaintiffs). The author further suggests that futures arguably do not meet the Article III constitutional requirement that a plaintiff present a case or controversy to support their standing to sue. Id; see also Jeremy Gaston, Note, Standing on Its Head: The Problem of Future Claimants in Mass Tort Class Actions, 77 Tex. L. Rev. 215 (1998) (analyzing the standing of future injury plaintiffs and advocating a bright line rule that courts should not afford standing to future injury plaintiffs in light of the many competing interests at stake).

Gaston described his Note as very much “a response” to another Note published two years before, in 1996, by the Harvard Law Review. Id. at 217 n.12 (citing Note, And Justiciability for All?: Future Injury Plaintiffs and the Separation of Powers, 109 Harv. L. Rev. 1066 (1996)). Gaston’s suggestion of a bright line rule was
necessary\(^{39}\) to provide plaintiffs the possibility of opting out of a 23(b)(3) class action for damages.\(^{40}\) It is unclear how the parties could deliver such notice to plaintiffs who may not be aware that they are injured.

\textit{a. Early Requirements for Notice}

The Fourteenth Amendment of the United States Constitution guarantees all citizens due process of the law.\(^{41}\) In \textit{Mullane v. Central Hanover Bank & Trust Co.},\(^{42}\) the Supreme Court held that in the context of class actions, a plaintiff's "fundamental requisite of due process" included the plaintiff's opportunity to be heard and to choose "whether to appear or default, acquiesce or contest."\(^{43}\) Additionally, the notice sent to the plaintiff must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."\(^{44}\) Thus, the Supreme Court determined that the Due Process Clause requires the parties to deliver some form of

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his response to the earlier Note's proposition that such a bright line rule "would be an impermissible violation of separation of powers," and would "allow courts to do as they please, confident that they will make the right choices in the right cases." \textit{Id.} (referring to Note, \textit{supra}, at 1068). While the issue of standing may still be the subject of debate, this Note assumes that futures do in fact have Article III standing, in order to facilitate the discussion of constitutional notice requirements. Even if the courts were to resolve the standing issue, the problem of how practically to disseminate constitutional notice would remain, and is therefore worthy of treatment here.

\(^{39}\) \textit{See infra} notes 45-52 and accompanying text (describing different interpretations of how a court should provide notice).

\(^{40}\) \textit{See supra} notes 14-17 and accompanying text (explaining the different types of Rule 23 class actions).

\(^{41}\) U.S. Const. amend. XIV § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

\(^{42}\) 339 U.S. 306 (1950) (holding that the Central Hanover bank, when combining funds, had a duty to notify beneficiaries by mail, as opposed to publication notice, if the addresses of the beneficiaries were known).

\(^{43}\) Patrick Woolley, \textit{Rethinking the Adequacy of Adequate Representation}, 75 Tex. L. Rev. 571, 620 (1997) (quoting \textit{Mullane}, 339 U.S. at 314). In \textit{Phillips Petroleum Co. v. Shutts}, the Court elaborated upon \textit{Mullane} and found that to meet due process requirements, "[t]he plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel." 472 U.S. 797, 812 (1985).

\(^{44}\) \textit{Mullane}, 339 U.S. at 314. In fleshing out the constitutional requirements of due process, the \textit{Mullane} Court did, however, recognize the potential ambiguities in the Clause:

Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

\textit{Id.} at 313.
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notice to plaintiffs before binding their property in a class action judgment.45

b. Subsequent Requirements for Notice

The Federal Rules of Civil Procedure require that the notice sent to a plaintiff be timely, as well as "the best notice practicable under the circumstances."46 The plaintiff must send actual notice to members of the class whose name and address are ascertainable before terminating that plaintiff's right to bring a cause of action.47 Twenty-four years after the Mullane decision, the Court refined that notice requirement by establishing a rigorous standard for how the parties must provide notice.48

In Eisen v. Carlisle & Jacquelin,49 the Court held that when a plaintiff's address is known, publication notice is unacceptable and the court must send notice via mail.50 Any plaintiff that does not participate in the class action proceedings is considered an absent class member; courts afford special attention to the notice absentees receive.51 However, notice is not always necessary to bind an absent

45. The Mullane Court distinguished between actual and constructive notice. Actual notice is "[n]otice given directly to, or received personally by, a party." Black's Law Dictionary, supra note 25, at 1087. Constructive notice is very different because it is "notice presumed by law to have been acquired by a person and thus imputed to that person." Id. at 1088. Thus, actual notice requires the parties to expend more effort ensuring that plaintiffs receive it. Since the Mullane Court used the phrase "reasonably calculated" to discuss notice, the Court was presumably suggesting that constructive notice is the minimum baseline requirement. See Mullane, 339 U.S. at 314; see also supra note 36 (explaining which party is responsible for providing notice to the plaintiffs in the class action).


47. See Mullane, 339 U.S. at 314. However, the Mullane Court did not rule definitively on the permissibility of publication notice when post office addresses are not known.

48. Compare Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974) (finding in a class action of millions of stock traders that individual notice, even when prohibitively expensive, is necessary when plaintiffs' addresses are identifiable), with Mullane, 339 U.S. at 318 (noting that "[w]here the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency").


50. See id. at 176. Since the Eisen Court mandated mailing actual notice when plaintiffs' addresses are identifiable and prohibited just publication notice in those situations, the Eisen requirements are more explicitly demanding than the Mullane notice requirements.

51. See, e.g., Hansberry v. Lee, 311 U.S. 32, 41-43 (1940) (explaining that "where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter," a class action will be binding upon absentees without violating their due process rights). Thus, an "absent" class member is a plaintiff who may not be present during the class proceedings, but for whom the class action settlement or judgment is nevertheless binding, when the class representative who was present duly represented the absent parties' interests. See id.
class member. For example, an important state interest can outweigh an individual plaintiff's due process rights to actual notice.

C. Mass Tort Class Actions: The Background of the "Futures"

Many scholars and the drafters of the Federal Rules themselves have doubted the propriety of using the class action as a vehicle to resolve mass torts. Nevertheless, class actions have been widely used for mass tort cases such as airplane crashes, diet drug product liability, and even the terrorist attacks of September 11, 2001. However, the

52. See Woolley, supra note 43, at 619 (noting that "Shuts did not purport, however, to hold that an absent class member may never be bound unless he has received notice and an opportunity to be heard").

53. See id. at 620 (discussing how a government interest may subjugate the Mullane Court's individual due process rights when the Court deems there to be a "vital state interest" (citing Mullane, 339 U.S. at 314)). However, Woolley states that even when such a governmental interest exists, "some quantum of due process is [still] required." Id. Thus, if notice is impossible, the plaintiff should still be adequately represented in order to afford the plaintiff some permutation of due process rights despite the practical defect that there is no method to deliver any notice. Id.

Woolley bases this notion on the Mullane Court's mandate that courts ought to strike a balance between an individual's due process rights and the government's interest in denying those rights. See Mullane, 339 U.S. at 313-14. Based on Woolley's notion that some due process interest should always survive, this balancing test is not a zero-sum game.

54. See, for example, the Advisory Committee's Note to Rule 23, 39 F.R.D. 69, 103 (1966) [hereinafter Advisory Committee's Note]; Schuck, supra note 2, at 46 ("As a matter of procedural law, its validity was seriously in doubt; indeed, the draftsmen of Rule 23 of the Federal Rules of Civil Procedure, which authorizes the class action device, explicitly advised against its use in such situations."). Schuck elaborated on why class actions are often inappropriate for mass tort accidents: "[T]he likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried." Id. at 65 (citing Advisory Committee's Note, supra); see also Weinstein, supra note 3, at 126-27 (discussing criticisms by lawyers for plaintiffs and defendants, legal academics and business world players of using aggregative devices to manage mass tort cases). Judge Weinstein sees the fundamental conflict of using class actions to solve mass tort cases as balancing formal rules of law with "intuitive" notions of justice:

Balancing the various equities in mass tort litigation inevitably will lead to conflict between the rule of law—that is to say, the "formal and procedural correctness of the means used to reach substantive results"—and justice—by which is meant the intuitive correctness of the substantive end result of the legal system. This conflict is not new. John Locke warned that sometimes "a strict and rigid observation of the laws may do harm." Much of equity jurisprudence, of course, has developed out of this tension between predictability based on rigid rules of the past and flexibility based on present needs of a changing society.

Id. at 127 (citations omitted). Judge Weinstein interpreted the Advisory Committee's Notes on the 1966 amendments to Rule 23 as "specifically admonish[ing] against using the class action device in mass tort litigation." See id. at 135. Judge Weinstein concedes that "[i]n the earlier 1960s we did not fully understand the implications of mass tort demands on our legal system." Id.

55. See Francis E. McGovern, Settlement of Mass Torts in a Federal System, 36
Agent Orange and asbestos cases are unique in that their physiological effects very frequently have a long latency period and can go undetected for many years. Thus, these two case studies directly capture the problem of combining current and future injury plaintiffs within the same plaintiff class.

1. Agent Orange

During the Vietnam War, the United States government exposed thousands of veterans to the defoliant Agent Orange, which contains a toxic ingredient. As many veterans and their families became ill after the war, they began filing lawsuits in 1978. In May of 1979, the

Wake Forest L. Rev. 871, 874-75, 886 (2001) (highlighting the fundamental differences between "inelastic" torts such as airplane crashes, which have a limited number of plaintiffs, and "elastic" torts such as tobacco, asbestos and Agent Orange which have virtually unlimited tort liability as potential plaintiffs can appear at any time). Agent Orange pathologies fit into McGovern's category of "elastic" torts because anyone exposed to Agent Orange in Vietnam could still, to this day, have yet to manifest an injury. Although plaintiffs have used the class action vehicle for many types of cases, Judge Weinstein has suggested that for a mass tort class action to be appropriate, it should meet seven different criteria:

Those criteria are: (1) the concentration of decision making in one or a few judges; (2) a single forum responsible for resolving legal and factual issues; (3) a single substantive law; (4) adequate judicial support facilities; (5) reasonable fact-finding procedures, particularly as to scientific issues; (6) a cap on the total cost to defendants such as by limiting punitive damages and allocations for pain and suffering and a method of allocating that cost among multiple defendants; and (7) a single distribution plan with fairly inflexible scheduled payments by injury based on the need of those injured, rather than the social and economic status of plaintiffs, and tailored to the availability of private resources.

Weinstein, supra note 3, at 131-32.

56. See, e.g., Georgine v. Amchem Prods., Inc., 83 F.3d 610, 618 (1996) (discussing how, based on past filing data showing that asbestos related injuries can have a forty-year latency period, "a continuing stream of claims can be expected").

57. In framing this discussion, this Note keeps the terminology regarding future injury plaintiffs as consistent as possible with that of the Supreme Court. The Court refers to all plaintiffs that manifest no injuries at the time of a court's judgment or settlement (regardless of their awareness of exposure to a toxin) as everything from "holders of... future claims," Ortiz v. Fibreboard Corp., 527 U.S. 815, 856 (1999), to "exposure-only plaintiffs," Amchem Prods., Inc., v. Windsor, 521 U.S. 591, 626 (1997). See supra note 9 for an explanation of this Note's definition of a future injury plaintiff.

58. See Ryan v. Dow Chem. Co., 781 F. Supp. 902, 907 (E.D.N.Y. 1991). This case offers a comprehensive description of the Agent Orange litigation and also provides a very thorough citation list for the entire span of the litigation. Id. at 904-07. See also Brief for Respondents at 1 n.1, Dow Chem. Co., v. Stephenson, 123 S. Ct. 2161 (2003) (No. 02-271) (explaining that "Agent Orange" is generally used to describe a variety of phenoxy herbicides used in Vietnam."). Many of those herbicides "were contaminated with the known human carcinogen, 2,3,7,8-TCDD (dioxin)." Id.

59. See Schuck, supra note 2, at 37 (describing the first plaintiff, Paul Reutershan, to file suit against Agent Orange manufacturers in 1978). Reutershan had an inexplicable case of "virulent abdominal cancer," and after hearing about a Veterans Administration study linking "health problems and exposure to Agent Orange in
Multi-District Litigation Panel\textsuperscript{60} consolidated the Agent Orange cases, assigning them to Judge George C. Pratt's district court in Uniondale, Long Island, in the Eastern District of New York. \textsuperscript{61} By 1980, Judge Pratt had made a "preliminary" class certification, marking the contours of the Agent Orange plaintiff class. \textsuperscript{62} While all parties were struggling to begin discovery and think about possible settlements, Judge Pratt announced in October of 1983 that he "could no longer preside over the case."\textsuperscript{63} Then, the Multidistrict Litigation Panel transferred the case to Judge Jack B. Weinstein's court\textsuperscript{64} in Brooklyn, in the Eastern District of New York; he assumed jurisdiction over the litigation and approved that class certification on December 12, 1983.\textsuperscript{65}

In 1983, Judge Weinstein certified a Rule 23(b)(3) damages class,\textsuperscript{66}
as well as a Rule 23(b)(1)(B) limited fund class to provide for punitive damage claims. Then, the court had to authorize notice to members of that Rule 23(b)(3) class. Judge Weinstein “authorized” the plaintiffs to mail notice to people who had either filed claims in court or registered in the Agent Orange Registry. For everyone else, he permitted radio and television advertisements on a global scale, and newspaper announcements in the United States, Australia, and New Zealand. Although the 23(b)(3) class the court certified did not include future injury plaintiffs, the Settlement Agreement in 1984 included them. Consequently, when they later manifested injuries,

dioxin and plaintiffs’ injuries.” Id. Importantly, one of the main reasons Judge Weinstein was able to certify the class as a Rule 23(b)(3) class action, where aggregation is the most effective means of proceeding, was the “government contract” defense. See Schuck, supra note 2, at 61 (explaining the theory that since the government controlled the manufacturing of the herbicide, the manufacturers were not liable). Amongst other legal issues all plaintiffs had in common, such as Agent Orange’s “defectiveness,” all defendants had the same affirmative government contract defense. See id. at 64 (explaining that not only did the veterans meet the numerosity requirement of Rule 23, but they also shared “many of the factual and legal claims (for example, the government contract defense and the issue of Agent Orange’s defectiveness) [which] had to be resolved in the same way for all”); see also Stephenson v. Dow Chem. Co., 273 F.3d 249, 252 (2d Cir. 2001) (explaining that the district court based its class certification on the government contract defense, “that those questions predominate over any questions affecting individual members,” and that a class action would be “superior to all other methods” of adjudication (citing In re “Agent Orange,” 100 F.R.D. at 729)).

67. A Rule 23(b)(1)(B) class action is commonly referred to as a “limited fund” class action because courts use it when plaintiffs all seek redress from a limited amount of funds that could run out, leaving some plaintiffs at a disadvantage. See Fed. R. Civ. P. 23(b)(1)(B) (establishing the use of class actions for “adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests”). For Agent Orange, the trial court created that limited fund class “without opt-out rights” to “cover plaintiffs’ punitive damage claims.” Ryan, 781 F. Supp. at 908.

68. The class definition was:

[T]hose persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides. . . .
The class also includes spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure.

Id. at 908 (emphasis added) (citation omitted).

69. See Schuck, supra note 2, at 127. Schuck also mentions that the veterans’ lawyers had proposed this “solution” to the notification problem. See id.

70. See id. In addition, Judge Weinstein ordered a toll-free telephone number that veterans could call for more information about the lawsuit. Id. Also, Judge Weinstein sent “letters from the court requesting each state governor to use all efforts to notify veterans in their states.” Id. Schuck characterizes this notice as “innovative but highly questionable as a matter of law,” id., because Weinstein ignored the Eisen standard of ascertaining mailing addresses “through reasonable effort,” id. at 126.

71. See Ryan, 781 F. Supp. at 908 (“Concerned with the potential for new actions and recognizing the need for finality, the Settlement Agreement expressly stated that ‘[t]he class specifically includes persons who have not yet manifested injury.’”) (citing
those future injury plaintiffs' only recourse was the money the 1984 settlement provided; after 1994 the original settlement fund provided nothing.\(^7\)

2. Asbestos

Asbestos is a heat and fire-resistant material used by many industries, for much of the twentieth century, in a large variety of products.\(^7\) Over twenty-one million Americans have been exposed to asbestos in both commercial and industrial settings.\(^7\) In 1970, Congress banned the use of asbestos in industrial settings.\(^7\)

In 1973, the first occupational asbestos-exposure suit named asbestos manufacturers as defendants.\(^7\) The plaintiff prevailed on a

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In re "Agent Orange," 597 F. Supp. at 865). Thus, the court did not provide notice to future injury plaintiffs, whom it could not identify in the first place, yet bound them in the class action settlement because of "the need for finality." Id.

The final settlement included many provisions, most notably that defendants would pay $180,000,000 plus interest to the plaintiffs, that the class included those currently asymptomatic and that a special distribution plan would primarily take care of veterans’ children. See Schuck, supra note 2, at 171. For those born after the settlement, the settlement allocated $45,000,000 to a fund with a twenty-five year "life span." See id. at 220. That fund, the Agent Orange Class Assistance Program, made grants to agencies helping Vietnam veterans and gave money to families of veterans as well; it constituted approximately 25% of the $180,000,000 fund, plus interest. See Stephenson v. Dow Chem. Co., 273 F.3d 249, 253 (2d Cir. 2001). For more information about the Agent Orange Class Assistance Program, see infra notes 128-29, referring to the Agent Orange Payment Program. Judge Weinstein calculated the final distribution numbers, interest included, to be $170,000,000 for the Payment Program, $55,000,000 to the Class Assistance Plan, $5,000,000 to Australian and New Zealand trusts, and $10,000,000 for plaintiffs' attorneys' fees. See Weinstein, supra note 3, at 157.

72. See supra notes 3-4 and accompanying text (describing the time frame for the Agent Orange settlement fund). While the settlement payment program expired in 1994, the Class Assistance Plan's funds did survive. See Ryan, 781 F. Supp. at 910. A board of Vietnam veteran advisors oversees the funds the Class Assistance Program pays out. See id. at 911. The program has paid out millions of dollars to "local and national Vietnam veterans' groups, agencies serving adults and children with disabilities, and agencies providing family counseling." Id. Thus, those funds go to veterans organizations and agencies that help Vietnam veterans and their children who suffer disabilities. Importantly, that fund does not provide a secondary recourse for Vietnam veterans who manifested their injuries after 1994 and are ineligible for the Agent Orange Payment Program. See id. at 910.

73. See Weinstein, supra note 3, at 139 (listing how asbestos is present in insulation for "buildings, water and steam pipes, ships, and many other connections such as brake linings and fire retardant curtains").


75. See Gallegos, supra note 74, at 64-64 (describing the Federal Occupational Safety and Health Act of 1970).

76. See Borel v. Fibreboard Paper Prods., Corp., 493 F.2d 1076 (5th Cir. 1973) (giving judgment to the plaintiff and finding liability for different asbestos
theory of strict liability.\textsuperscript{77} By 1982, the litigation had produced 21,000 claimants, 300 defendants, three bankruptcies, and one billion dollars in transaction costs.\textsuperscript{78} To manage this high volume of litigation, the Judicial Panel on Multidistrict Litigation\textsuperscript{79} consolidated all the federal suits and moved them to the federal district court for the Eastern District of Pennsylvania.\textsuperscript{80}

Once the Multidistrict Litigation Panel consolidated the cases, the attorneys reached a settlement agreement allowing the defendants to pay a set amount of money to extinguish all present and future claims, without having to admit liability.\textsuperscript{81} To “effectuate” this settlement,\textsuperscript{82} the transferee claimants had to pick a representative\textsuperscript{83} and form a class action under the requirements of Rule 23.\textsuperscript{84} The district judge certified the class,\textsuperscript{85} and the defendants appealed.\textsuperscript{86} Ultimately, the Supreme Court found that this class of asbestos claimants could not be certified for a class action, even solely for settlement purposes,\textsuperscript{87} because the plaintiff class improperly included plaintiffs with different medical conditions.\textsuperscript{88} Although no court has since certified a class of asbestos claimants, there are currently Multidistrict Litigation Panels manufacturers); see also Schuck, supra note 2, at 34 (describing how the Fifth Circuit rejected the manufacturers’ defenses and “applied expansive product liability principles” to the case).

\textsuperscript{77} See Borel, 493 F.2d at 1089-91. Strict liability is “[l]iability that does not depend on actual negligence or intent to harm, but that is based on the breach of an absolute duty to make something safe.” Black’s Law Dictionary, supra note 25, at 926.

\textsuperscript{78} See Carroll et al., supra note 13, at 51.

\textsuperscript{79} See Gallegos, supra note 74, at 72 (explaining that a Judicial Conference Ad Hoc Committee on Asbestos Litigation met in 1990 and recommended that the Multidistrict Litigation Panel transfer and consolidate the cases).

\textsuperscript{80} See In re Asbestos Prods. Liab. Litig., No. VI, 771 F. Supp 415, 424 (J.P.M.L. 1991) (consolidating and transferring the federal asbestos suits to one district for pre-trial determinations).

\textsuperscript{81} See Gallegos, supra note 74, at 72 (explaining that the settlement “dispos[ed] of all pending and future claims against the defendant companies”).

\textsuperscript{82} See supra note 19 and accompanying text (describing the settlement-only class action).

\textsuperscript{83} See supra notes 21-26 and accompanying text (describing the adequacy of representation requirements).

\textsuperscript{84} See supra notes 14-20 and accompanying text (explaining the Rule 23 requirements in general).

\textsuperscript{85} See Gallegos, supra note 74, at 72 (noting that Judge Charles Weiner found that this class met the Rule 23 certification requirements).

\textsuperscript{86} See Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir. 1996) (finding that the class failed many Rule 23 requirements, such as typicality, adequacy of representation, predominance and superiority); see also infra notes 111-20, 212-18 and accompanying text (providing a more thorough analysis of the Third Circuit’s decision).

\textsuperscript{87} See infra notes 167-73, 221-27 and accompanying text (explaining the Supreme Court’s decision in 1999 decertifying the class).

\textsuperscript{88} See Amchem Prods., Inc., v. Windsor, 521 U.S. 591, 626 (1997) (finding that plaintiffs with different medical conditions should be in a “discrete subclass[”]).
that operate as nerve centers to manage asbestos claims brought in many federal districts.89

While state courts have generated assorted solutions for managing asbestos litigation,90 the multitude of suits has put an enormous strain on defendants,91 insurance companies92 and the courts.93 One study found that no less than five large companies have each spent over one billion dollars on asbestos litigation.94 Also, as defendant companies become insolvent, they place a strain on plaintiffs and other defendants.95

One commentator has urged that asbestos class actions are wholly different from other mass torts and require "a true alternative resolution process."96 There are two primary factors that make asbestos a unique problem. First, exposure to asbestos can produce illnesses with a latency period of thirty or forty years or more.97

89. See, e.g., Frederick C. Dunbar & Denise Neumann Martin, Clearing Uninjured Plaintiffs from the Tort System: The Road to a Solution, Legal Backgrounder, July 25, 2003 (noting that the panel operating out of the Eastern District of Pennsylvania runs very efficiently and has adopted certain court practices to manage asbestos cases).
90. See id. (explaining how many state courts have instituted reforms such as an "inactive docket" for "unimpaired claimants").
91. See Carroll et al., supra note 13, at 53 (estimating that as of 2000, defendants have spent between twenty and twenty-four billion dollars).
92. See id. (estimating that insurance companies in the United States have spent twenty-two billion dollars on asbestos costs).
93. See Dunbar & Martin, supra note 89 (citing techniques to help courts clear their overburdened dockets and limit the number of claims plaintiffs are filing in the court systems); see also Weinstein, supra note 3, at 141 ("Moreover, as one judge has noted, 'our attempt to try these virtually identical lawsuits, one-by-one, will bankrupt both the state and federal court systems.'" (citing Spencer Williams, Mass Tort Class Actions: Going, Going, Gone?, 98 F.R.D. 323, 324 (1983))).
94. See Carroll et al., supra note 13, at 53 (estimating that of the defendants litigating, at least five of them have spent over one billion dollars as a result of the litigation).
95. See id. at 67 (explaining that bankruptcy trusts take money away from current injury claimants to reserve it for future claims, and force plaintiffs to sue other, solvent defendant companies). A bankruptcy trust is a fund a company establishes when it emerges from bankruptcy to pay off its liabilities. See id. The most well-known example of a bankruptcy trust is the Manville Trust. See infra note 279 (describing the fate of the MPIST, the Manville Personal Injury Settlement Trust).
96. Mary J. Davis, Toward the Proper Role for Mass Tort Class Actions, 77 Or. L. Rev. 157, 163 (1998). Davis suggests that "[s]eparating asbestos litigation from the rest of the mass tort world, however, does not require the further conclusion that class actions are inappropriate for other mass torts." Id. at 164. Davis advocates the propriety of class actions for mass torts "involving widespread personal injury, currently manifested or reasonably certain to occur, caused by a discrete, though not necessarily a small, number of potentially culpable defendants whose allegedly tortious behavior was/is widely directed to the consuming public." Id. at 163. Davis's suggestions about the unique nature of the asbestos problem, as compared to other mass torts, are worthy of note. However, her suggestions make no attempt to address the futures problem. See id.
97. Toxic Torts: Tort Actions for Cancer and Lung Disease Due to Environmental Pollution 150 (Paul D. Rheingold et al. eds., 1977).
Second, brief exposure to asbestos can cause illness. Thus, the number of people who have inhaled asbestos is enormous and the span of time during which those people will manifest asbestos-related injuries is extremely long. Although past attempts to certify an asbestos class action have failed, the scope of this litigation suggests that courts must keep searching for an efficient way to manage the asbestos problem.

Although Agent Orange and asbestos have different histories in the courts, both sets of litigation illustrate that future injury plaintiffs may not recover compensation when they do become ill. For Vietnam veterans exposed to Agent Orange or workers exposed to asbestos, the courts might have to make procedural modifications to Rule 23 class actions to accommodate the futures and their putative claims: futures may belong in a distinct plaintiff subclass, but such a solution raises important and unresolved legal and policy-based questions. Part II explores these issues.

II. IS THE FUTURES SUBCLASS A CURE?: LEGAL AND POLICY CONCERNS IN CONFLICT

This part examines the confusion in the current legal landscape surrounding the role of future injury plaintiffs in mass tort class actions. First, Part II.A. addresses the legal considerations underlying the possible solution of many courts, including the most recent Supreme Court decision on the issue, to place current and future injury plaintiffs into different subclasses to create a procedurally viable class action. This section discusses which legal considerations some courts have contemplated in support of the futures subclass cure, then examines the opposing legal considerations courts have espoused weighing against the futures subclass cure.

Next, Part II.B. addresses the policy considerations underlying the futures subclass cure. First, it discusses how futures subclasses would increase defendants' incentives to settle. Then, it discusses how futures subclasses would further the goals of the tort system and assist administrative mass tort compensation schemes, such as bankruptcies.

98. Id. (explaining that "a day, a week, a month" of exposure can lead to disease because the inhaled asbestos fibers "remain in the lung").
99. See Gallegos, supra note 74 and text accompanying note 75 for a description of Congress's ban on asbestos in the workplace. However, containment of asbestos still remains an issue and some authorities argue that removal can be more dangerous than containment. Toxic Torts, supra note 97, at 155 (suggesting that disposal of structures containing asbestos raises "thorny problems").
100. E.g., Amchem Prods., Inc., v. Windsor, 521 U.S. 591 (1997); see supra text accompanying note 88 (describing the Supreme Court's decision not to certify an asbestos plaintiff class in 1997).
101. See supra notes 90–99 and accompanying text (describing the scope of the asbestos problem and the problems ensuing from the asbestos litigation).
Finally, this section explores how futures subclasses might just as easily vitiate defendants' settlement incentives and the benefits of current bankruptcy schemes.

A. The Futures Subclass Cure: Legal Considerations

The Supreme Court has suggested that future injury plaintiffs require a distinct subclass from current injury plaintiffs to adequately represent their rights. Also, a few circuit courts support a collateral attack by absent class members when intra-class conflicts have arisen during the litigation, jeopardizing their adequacy of representation. However, other circuits have found that a futures subclass may not retroactively attack such judgments. Furthermore, many courts have suggested that a futures subclass cannot exist at all because courts have no feasible means of providing notice to such plaintiffs.

1. Future Injury Plaintiffs Should Occupy Their Own Subclass

Different courts have suggested that futures cannot be adequately represented in a plaintiff class with the currently injured, and require

103. See, e.g., Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); Amchem, 521 U.S. at 591. To be certified as a plaintiff class, this subclass would also have to meet the requirements of numerosity, commonality and typicality. See supra notes 14-20 and accompanying text (describing the Rule 23 class action requirements). While commonality and typicality could be problematic for a group of futures, the Supreme Court has suggested that the adequacy requirement carries more import than the other requirements because of its constitutional repercussions. See supra notes 21-35 (explaining the importance of the adequacy of representation requirement and the link between adequacy of representation and due process rights). Thus, this Note operates on the assumption that for the courts to certify a futures subclass, adequacy of representation is the most important requirement; courts may overlook the commonality and typicality requirements because the futures present such an anomalous problem in class actions.

104. See supra note 51 (describing an absent class member).

105. See, e.g., Williams v. Gen. Elec. Capital Auto Lease Inc., 159 F.3d 266, 269-70 (7th Cir. 1998) (explaining how intra-class conflicts can arise and turn adequacy of representation from adequate to inadequate); Gonzales v. Cassidy, 474 F.2d 67, 72 (5th Cir. 1973) (setting forth a two-prong inquiry for collateral attack that is aware of changing conditions and the potential for intra-class conflict to develop over time); see also supra notes 21–35 and accompanying text (explaining the background of the Rule 23(a)(4) adequacy of representation requirement).

106. E.g., Epstein v. MCA, Inc., 179 F.3d 641, 648 (9th Cir. 1999) (denying collateral review as a necessary measure to uphold a plaintiff's due process).

107. Amchem, 521 U.S. at 628 ("We recognize the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous."). This Note refers to the "selfconsciousness" of futures to indicate the point in time at which futures realize they have an injury (whether patent or latent), that a class action of plaintiffs might already be in the process of litigating. Futures are "unselfconscious" until they come to this realization.
a distinct subclass to do so. Also, many circuit courts have found that certain absent plaintiffs may collaterally attack a judgment if the class representative could not adequately represent their interests throughout the litigation. Consequently, certain judgments and settlements that concluded the rights of future injury claimants in the same plaintiff class as current injury claimants may not be binding on futures.

a. The Third Circuit: Present and Future Injury Plaintiffs Cannot Comprise the Same Plaintiff Class

The Third Circuit, in Georgine v. Amchem Products, Inc., found that future and present injury plaintiffs have interests that are

108. See, e.g., infra notes 111-19, 138-41 and accompanying text (describing the Third and Second Circuits' findings on adequacy of representation).


110. See, e.g., infra note 140 and accompanying text (explaining the Second Circuit's recent holding that certain futures were not proper parties to the class action and therefore, are not subject to the class action's binding effects). It is extremely important to emphasize at this juncture that the Second Circuit adopted a very nuanced line of reasoning about collateral attack by futures. See supra note 25 and accompanying text (defining collateral attack).

In the context of Agent Orange and futures manifesting injury after 1994, the Second Circuit decided that those futures were not proper parties to the litigation in the first place. See Stephenson v. Dow Chem. Co., 273 F.3d 249, 257-58 (2d Cir. 2001) ("[P]laintiffs' suit can go forward because there has been no prior adequacy of representation determination with respect to individuals whose claims arise after the depletion of the settlement fund."). Therefore, they can sue despite the res judicata effects of the 1984 settlement. See supra note 25 (defining res judicata). Importantly, the Second Circuit found that, "plaintiffs' collateral attack, which seeks only to prevent the prior settlement from operating as res judicata to their claims, is permissible." Stephenson, 273 F.3d at 257 (emphasis added).

Thus, the plaintiffs were not performing a broad collateral attack to re-open the substance of the settlement; they were narrowly attacking the settlement just to prove that it did not pertain to their claims. Id. The plaintiffs did not contest that the settlement treated them unfairly, but contested that the settlement did not treat them at all, a contention with which the Second Circuit agreed. Id. (illustrating the Second Circuit's decision that "plaintiffs' collateral attack is allowed" and would not violate the defendants' due process rights).

However, for this Note's analysis of circuit courts other than the Second Circuit, "collateral attack" refers to a subsequent attack on a judgment or settlement's substance and procedure, not the limited attack the Second Circuit discussed for plaintiffs who were not proper parties to a settlement. Specifically, this Note discusses collateral attack as a possible method for futures to re-open settlements that improperly combined them in the same plaintiff subclass as current injury claimants, thereby violating their right to Rule 23(a)(4) adequate representation. See infra notes 147-63 and accompanying text (describing the Fifth, Seventh and Eleventh Circuits' use of collateral attack for absent class members). These circuits use the collateral attack doctrine for futures who were proper parties to the suit and subsequent settlement, but had the wrong plaintiff classmates.

111. 83 F.3d 610 (3d Cir. 1996) (decertifying a settlement-only class of asbestos plaintiffs). See supra note 19 and accompanying text for a description of a settlement-only class.
inherently at odds with each other.\textsuperscript{112} Although the \textit{Georgine} trial court approved named class representatives that included both present and future injury plaintiffs, the Third Circuit highlighted the trial court’s faulty assumption: the inclusion of future injury plaintiffs as representatives does not necessarily mean that future injury plaintiffs can be sufficiently represented in the first place when combined with present injury plaintiffs in a single plaintiff class.\textsuperscript{113}

In particular, the court enumerated some of the factors that make it nearly impossible to align present and future injury plaintiffs in the same plaintiff class. The factors included conflicts in settlement provisions regarding capped payments,\textsuperscript{114} inflation protection,\textsuperscript{115} and delayed opt-out rights.\textsuperscript{116} The Third Circuit concluded that the intra-class conflicts between the currently and future injured, in addition to other possible rifts within the plaintiff class,\textsuperscript{117} “preclude this class from meeting the adequacy of representation requirement.”\textsuperscript{118}

\begin{itemize}
\item \textsuperscript{112} See \textit{id.} at 630. See also \textit{supra} notes 14-26 and accompanying text for a discussion of Rule 23 requirements and adequacy of representation. The Supreme Court relied upon the Third Circuit’s line of reasoning one year later when the Supreme Court heard the case on appeal. \textit{See Amchem Prods., Inc., v. Windsor, 521 U.S. 591 (1997).}
\item \textsuperscript{113} See \textit{Georgine, 83 F.3d at 630.} See also \textit{supra} notes 14-26 and accompanying text for a discussion of Rule 23 requirements and adequacy of representation.
\item \textsuperscript{114} \textit{Georgine, 83 F.3d at 630-31} (discussing how presently injured plaintiffs would want the bulk, if not all, of their funds immediately whereas future injury plaintiffs would “want reduced current payouts (through caps on compensation awards and limits on the number of claims that can be paid each year)”).
\item \textsuperscript{115} \textit{Id.} (explaining that future injury plaintiffs would want protections against inflation that would devalue their funds when and if they recover their chunk of the settlement funds at a later date). The court discusses additional protective features the future injury plaintiffs would like in the settlement, such as “not having preset limits on how many cases can be handled” as well as “limiting the ability of defendant companies to exit the settlement.” \textit{Id.}
\item \textsuperscript{116} \textit{Id.} (describing how futures by necessity lack certainty about their plight, as it unravels in the future, and would therefore “probably desire a delayed opt out” right). On the opposing side, the currently injured plaintiffs would not want a delayed opt out right, “as the more people locked into the settlement, the more likely it is to survive.” \textit{Id.} at 631 & n.14 (citing the testimony of a representative plaintiff named Anna Baumgartner, whose husband died of mesothelioma, stating her belief that futures do not deserve to be compensated). Mesothelioma is “cancer of the pleural membrane around the lungs and organs.” Michelle J. White, \textit{Why the Asbestos Genie Won’t Stay in the Bankruptcy Bottle, 70 U. Cin. L. Rev. 1319, 1319 n.1 (2002).}
\item Very minimal exposure to asbestos fibers can cause mesothelioma. \textit{See Georgine, 83 F.3d at 633.} Additionally, the family member of someone minimally exposed to such fibers can contract mesothelioma as well. \textit{Id.} The Third Circuit pointed out that “[t]he unpredictability of mesothelioma is further exacerbated by the long latency period between exposure to asbestos and the onset of the disease, typically between fifteen to forty years.” \textit{Id.} Finally, mesothelioma is extremely painful, always fatal, “generally within two years of diagnosis,” and solely caused by asbestos. \textit{Id.}
\item \textsuperscript{117} \textit{Georgine, 83 F.3d at 631-33} (explaining that this class failed other procedural requirements as well, such as typicality and class action superiority to other methods of adjudication).
\item \textsuperscript{118} \textit{Id.} at 630. One of the main reasons the Third Circuit disapproved of this
However, the court suggested that with certain "structural protections," future injury plaintiffs could adequately represent their interests in the same class action as current injury plaintiffs. The Third Circuit's decision that present and future injury claimants must constitute a separate subclass suggests that futures who shared a class with current injury plaintiffs never had a representative that

settlement between presently injured and futures was that a settlement "makes important judgments on how recovery is to be allocated among different kinds of plaintiffs, decisions that necessarily favor some claimants over others." Id. The court described how plaintiffs with "asymptomatic pleural thickening" get no money whatsoever, and patients who contract mesothelioma fifteen years after the settlement was approved would only receive an award that was tiny in comparison to what they could receive in the traditional tort system. Id.

Additionally, the Third Circuit used an example from the Manville Bankruptcy reorganization, where the trial court placed asbestos claimants and co-defendant manufacturers in the same subclass to illustrate the impropriety of placing groups with starkly different interests within the same subclass. Id. at 631 ("'Their interests are profoundly adverse to each other. The health claimants wish to receive as much as possible from the co-defendant manufacturers, and the latter wish to hold their payment obligations to a minimum.'" (quoting In re Joint E. & S. Dist. Asbestos Litig., 982 F.2d 721, 739 (2d Cir. 1992), modified sub nom. Findley v. Blinken, 993 F.2d 7 (2d Cir. 1993))).

The court further explained that housing different groups in their respective subclasses would also ensure that a representative of each subclass could adequately represent the interests of that subgroup in case of a settlement, without the confusion of combining interests within one all-encompassing settlement class. Id. at 631 ("'[A]dversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups.'" (quoting In re Joint E. & S. Dist. Asbestos Litig., 982 F.2d at 743)). See also infra notes 138-41 for a discussion of how the Second Circuit in 2001 also viewed intra-class conflicts as precluding adequacy of representation findings for futures.

119. See Georgine, 83 F.3d at 631 ("Absent structural protections to assure that differently situated plaintiffs negotiate for their own unique interests, the fact that plaintiffs of different types were among the named plaintiffs does not rectify the conflict."). The Third Circuit emphasized that the mere presence of current and future injury plaintiffs in a class action does not guarantee that each will have the capacity to adequately represent their respective injuries. Thus, the court reasoned that the differently situated claimants could only "rectify" their adequacy of representation conflicts with certain "structural protections." Id.

Although the court did not go into detail about what type of "structural protections" it envisioned to make sure that "differently situated plaintiffs" could represent their respective interests, it has certainly left open the possibility that different subclasses could be the cure. See infra notes 250-81 and accompanying text (discussing the benefits of distinct subclasses to protect future injury plaintiffs). However, the court did specifically state in Georgine that the best mechanism for reform was "from the policy-makers, not the courts." Id. at 634. Harmonizing the court's desire for "structural protections" and their emphasis on the power of Congress as opposed to the courts, the Third Circuit seemingly implicates the necessity of legislative reform of structured settlements to solve the problem of the futures. See id.; see also infra note 290 and accompanying text (exploring the possibility of legislative reform for the futures problem).

120. See supra note 118 and accompanying text (explaining the Third Circuit's finding that futures could not adequately represent their interests within a plaintiff class including current injury plaintiffs).
met the Rule 23(a)(4) adequacy of representation requirement. Certain circuits\textsuperscript{121} have suggested that absent class members\textsuperscript{122} may collateralistically attack\textsuperscript{123} a judgment if the class representative did not adequately represent the interests of the entire class.

**b. Implications of the Subclass Cure: An Inadequately Represented Futures Subclass May Litigate Its Rights Independently**

The Second Circuit has recognized divisions between future injury plaintiffs based upon eligibility for Agent Orange Payment Program compensation.\textsuperscript{124} In the past, it did not address the possibility that futures ineligible for settlement funds\textsuperscript{125} might pursue their legal rights independently.

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\textsuperscript{121} See, e.g., Stephenson v. Dow Chem. Co., 273 F.3d 249 (2d Cir. 2001); Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973).

\textsuperscript{122} See supra note 51 (defining an absent class member).

\textsuperscript{123} See supra note 25 (defining collateral attack). See also supra note 110 for an explanation of how the Second Circuit has used a narrow form of collateral attack, but how other circuits use the theory more broadly to re-open past settlements and judgments.

\textsuperscript{124} Ivy v. Diamond Shamrock Chems. Co., 996 F.2d 1425, 1437-38 (2d Cir. 1993) (finding that any futures eligible for settlement compensation had no cause of action).

\textsuperscript{125} See supra note 9 (explaining that for this Note's general purposes, futures are all holders of a future claim, regardless of exposure-awareness or injury manifestation date). Thus, Ivy was helpful because it recognized that not all futures face the same circumstances, but ultimately was not fruitful because in 1993, all Agent Orange futures were still eligible for one more year. 996 F.2d at 1436; see supra notes 3-4 and accompanying text (discussing the timeframe for the Agent Orange settlement fund).

Importantly, all plaintiffs with long-latency futures injuries may have competing interests with those futures who manifest symptoms early on and have the first chance to get funds. Any settlement arrangement or judgment allocating any amount of funds could always run out before a possibly infinite number of futures manifest their injuries. Therefore, the situation of the post-1994 Ivy plaintiffs represents the possible situation any future injury plaintiff could face when the fund or dollar amount that purported to compensate them runs out. This theory also holds true for asbestos, even though there are no equivalent eligibility dates.

However, when the Supreme Court examined the futures problem in the asbestos context, it ignored fund eligibility issues and intra-futures discrepancies by only discussing “exposure-only” plaintiffs. See Amchem Prods., Inc., v. Windsor, 521 U.S. 591, 626 (1997) (contrasting current injury plaintiffs with “exposure-only” plaintiffs); cf. Wood, supra note 36, at 1934 (recognizing possible rifts between futures, since “at least some kinds of futures cases may be amenable to reform”). Wood distinguishes between plaintiffs who are aware of their exposure and therefore presently identifiable, and those who are unaware and only “identifiable only at a much later time.” Id. at 1934-35 (explaining how difficult it is for courts to manage claims when “the claimants themselves have no reason to suspect” the claims exist); see also supra note 9 (specifying that Professor Hazard’s definition of a future injury claimant includes those aware or “suspect” of injury due to exposure).

Judge Wood nevertheless characterizes her distinction between futures as optimistic for the futures problem because courts can presumably handle the futures who are aware of their exposure since that group could “knowingly settle a claim, agree to medical monitoring, or in some other intelligent way participate in a suit designed to resolve definitively claims relating to past behavior that will not recur.” Wood, supra note 36, at 1941.

Judge Wood suggests for the other group of futures that are unaware and “cannot intelligently participate in present litigation,” the traditional tort claim system...
despite the effects of res judicata. Recently, the Second Circuit recognized that futures ineligible for compensation needed a distinct subclass; without that subclass, those futures may proceed with their suit despite the 1984 settlement and its res judicata effects. Finally, the Fifth, Seventh, and Eleventh Circuits have recognized the propriety of collateral attack when intra-class divisions occur after the initial adequacy of representation determination, vitiating that determination.

i. The Second Circuit: The Courts Did Not Create All Futures Equal

For Vietnam veterans, the structure of the Agent Orange Settlement Fund clearly delineated which future injury claimants were included in the class action settlement. However, subsequent

will have to remain the most viable solution. Id. Thus, Wood would presumably limit a subclass of futures to only those who are aware of their exposure. However, even though future claimants may be aware of exposure, if they have not manifested any injury, they may not necessarily have any reason to "knowingly" or "intelligently" participate. Id. See also infra notes 257-62 and accompanying text which suggests the repercussions of too many claimants improperly in the tort system, thereby supporting Wood's suggestion that only certain futures should be in the tort system.

126. Stephenson v. Dow Chem. Co., 273 F.3d 249 (2d Cir. 2001) (finding that plaintiffs suffering from long-latency Agent Orange injuries manifesting after 1994 were not bound by the 1984 settlement); see also supra note 110 (explaining the difference between a broad collateral attack and the Second Circuit's findings that post-1994 injury manifestation veterans were not proper parties in the first place).

127. See infra notes 147-63 and accompanying text (explaining the three circuits supporting collateral attack).

128. The settlement in 1984 purported to bind all Americans, Australians and New Zealanders who had served in Vietnam between the years of 1961 and 1972, regardless of when they manifested their injuries. See supra note 71 and accompanying text (discussing the terms of the Agent Orange Settlement); see also Schuck, supra note 2, at 126 (explaining in great detail Judge Weinstein's class definition). However, the 1984 fund only provided compensation for injured class members until 1994. See id. at 220 (highlighting that although the courts scheduled the $180,000,000 fund to last ten years, the court made additional provisions that would survive twenty-five years after the settlement). Although looking prospectively in 1984, ten years seemed sufficient to include all possible Agent Orange related injuries that could manifest in the future, that ten-year projection proved incorrect. See Ryan v. Dow Chem. Co., 781 F. Supp. 902, 919 (E.D.N.Y. 1991) ("These plaintiffs, like all class members who suffer death or disability before the end of 1994, are eligible for compensation from the Agent Orange Payment Fund."). The Second Circuit further suggested that "[t]he relevant latency periods and the age of the veterans ensure[s] that almost all valid claims will be revealed before that time." Id.

The Second Circuit issued the Ryan decision in 1989. Five years after the court established the settlement fund, most courts still had no idea that a multitude of long-latency injuries would manifest down the road, as late as 2003 and after. Current research data on toxic latency periods, however, harbors no such delusions and fully recognizes that the long-latency periods are a large, indeterminate problem for toxins such as Agent Orange and asbestos. See, e.g., Carroll et al., supra note 13, at 67 ("Because illness from asbestos exposure is characterized by long latency periods, it is likely that claimants will continue to come forward years into the future."); see also The Legacy of Vietnam Veterans and Their Families (Dennis K. Rhoades et al. eds.,
courts’ interpretations of that settlement have highlighted that long-latency future injury plaintiffs were inadequately represented in the settlement proceedings.129

In Ryan v. Dow Chemical Co.,130 a set of plaintiffs who manifested their injuries only after the 1984 settlement tried to argue that the original plaintiff class and its named representative did not adequately represent their interests.131 Specifically, the Ryan plaintiffs insisted that, since there was no distinct subclass of asymptomatic plaintiffs at the time of the settlement, the settlement could not bind them.132

The trial court did not accept this proposition because these plaintiffs, regardless of their manifestation date, were “eligible for compensation from the Agent Orange Payment Fund.”133 On appeal,
the Second Circuit affirmed the trial court, since the settlement structure "cover[ed]" future plaintiffs' injuries. Although those plaintiffs were uninjured at the time of the settlement, they had recourse to settlement funds.

However, the Second Circuit's limited refusal to recognize the need for a futures subclass has important implications. That decision implicitly suggested that a subset of futures, at some point in the future, with no recourse to settlement funds might require a distinct subclass to adequately represent their interests. Essentially, the Second Circuit closed the door on futures subclasses in 1993, but left itself room to re-open that door at a later date.

134. *See Ivy v. Diamond Shamrock Chems. Co.*, 996 F.2d 1425, 1436 (2d Cir. 1993) ("We agree with the district court that designation of a subclass of future claimants and appointment of a guardian to represent their interests was unnecessary 'because of the way [the settlement] was structured to cover future claimants.'" (citing *Ryan*, 781 F. Supp. at 919)).

135. *See Ivy*, 996 F.2d at 1436. The Second Circuit explained that since the plaintiffs are eligible for compensation, it is effectively a moot point to argue that they were inadequately represented as a matter of procedure. However, this line of reasoning begs the question of how the court would treat these plaintiffs if, for example, the settlement funds had depleted as early as 1985 or 1986. Then, these plaintiffs would arguably be in the same situation as Stephenson and Isaacson, *see infra* notes 138-41, arguing that they only manifested their injuries after the depletion of settlement funds. Accordingly, they would presumably constitute a distinct subclass of futures not adequately represented in the suit, therefore, the settlement would not bind them. Thus, this court's reliance on the fortuitous presence of settlement funds seemed to avoid the larger procedural questions at hand.

136. *See Ivy*, 996 F.2d at 1436. The Second Circuit agreed with Judge Weinstein's disapproval of subclasses that he voiced in a fairness hearing at the trial level: 

[T]o appoint another attorney to represent that sub-group would just, in my opinion, increase the amount of legal fees, which is what all of us want to keep to a bare minimum. There are lots of arguments and classes and sub-classes, but if we appoint attorneys and guardians ad litem for everybody who might have... somewhat of a conflict of interest, there is hardly going to be any money left for the veteran.

*Id.* By espousing that opinion, the Second Circuit made practicality and transaction costs trump the procedural necessity of subclasses. Significantly, the court's decision not to require subclasses in this case still brings up the possibility that they could be necessary down the road.

137. The Second Circuit's emphasis that these plaintiffs need not have their own distinct subclass, since the settlement took care of their needs, invariably leads to the conclusion that they would deserve their own subclass if the settlement had not taken care of their needs. *See Ivy*, 996 F.2d at 1436. However, it appears that at the trial level, Judge Weinstein found that the benefits of capping the defendant's liability were more important than answering the harder procedural questions. *See Ryan*, 781 F. Supp. at 919-20 ("Class action settlements simply will not occur if the parties cannot set definitive limits on defendants' liability."). Judge Weinstein also suggested that "[m]aking settlement of Rule 23 suits too difficult will work harms upon plaintiffs, defendants, the courts, and the general public." *Id.*
ii. The Second Circuit: Recent Findings

In 1993, the Second Circuit suggested that a group of Vietnam veterans manifesting injury after 1994 would require a subclass. It recently tackled this very problem. In 2001, the Second Circuit examined the claims of Isaacson and Stephenson after the trial court's decision to bar their claims. The Second Circuit decided that this case illustrated the type of cognizable intra-class conflict that the Supreme Court found preclusive of adequate representation requirements. Thus, the court found that the plaintiff class consisting of those eligible for funds did not adequately represent Isaacson and Stephenson's interests. The Second Circuit, accordingly, suggested that those veterans manifesting injuries after 1994 could sue despite the 1984 settlement.

Other circuits have, in turn, suggested that the lack of a futures subclass at class certification could permit futures to collaterally attack past judgments. Although res judicata normally applies to absent

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139. Id. at 260-61. The Second Circuit elaborated that:

However, they both learned of their allegedly Agent Orange-related injuries only after the 1984 settlement fund had expired in 1994. Because the prior litigation purported to settle all future claims, but only provided for recovery for those whose death or disability was discovered prior to 1994, the conflict between Stephenson and Isaacson and the class representatives becomes apparent. No provision was made for post-1994 claimants, and the settlement fund was permitted to terminate in 1994.

Id.

140. Id. at 261 ("Because these plaintiffs were inadequately represented in the prior litigation, they were not proper parties and cannot be bound by the settlement.").
141. See id. at 258 ("[P]laintiffs' suit can go forward because there has been no prior adequacy of representation determination with respect to individuals whose claims arise after the depletion of the settlement fund."); see also Jennifer L. Reichert, Second Circuit Allows New Agent Orange Suit Despite Class Settlement, Trial, Feb. 2002, at 91 (explaining that the Second Circuit espoused the Supreme Court's teachings in Amchem and Ortiz that, "if plaintiffs were not proper parties to a judgment, res judicata could not defeat their claims"); supra note 110 (explaining the distinct form of collateral attack the Second Circuit advocated in its opinion, allowing the plaintiffs to proceed with their claims because no requisite adequacy of representation findings were made in 1984 as to them). But see Epstein v. MCA, Inc., 179 F.3d 641, 648 (9th Cir. 1999) (proposing that "due process does not require collateral second-guessing" of a rendering court's procedural determinations); infra notes 204-08 and accompanying text. The Stephenson court countered the Epstein court's concerns by emphasizing that the rendering court for the veterans never made any procedural determinations at all for the group of plaintiffs manifesting injuries after 1994. See Stephenson, 273 F.3d at 258 n.6 ("Here, neither the district court nor this Court has determined the adequacy of representation with respect to these plaintiffs whose injuries did not arise until after the settlement expired.").
142. See infra notes 147-63 and accompanying text (explaining the circuits that have upheld collateral attack when intra-class divisions occur after the adequacy of representation finding that subsequently violate some plaintiffs' due process rights).
class members, it does not apply when the class representative has not adequately represented the absentee’s interests. It is unclear whether a current injury class representative could adequately represent the futures’ interests at any point during litigation. Accordingly, long-latency futures without a distinct subclass might be able to collaterally attack a judgment if they shared an overly inclusive plaintiff class.

iii. The Fifth, Seventh and Eleventh Circuits

In *Gonzales v. Cassidy*, the Fifth Circuit set forth a two-prong analysis for determining whether a plaintiff could collaterally attack a judgment. This analysis recognized that conditions often change between a court’s initial determination of adequacy of representation and a subsequent collateral attack. The representative’s actions as

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143. *See supra* note 51 (explaining the definition of an absent class member).

144. *See, e.g.,* Hansberry v. Lee, 311 U.S. 32, 42-43 (1940) (“It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present ...”).

145. *See, e.g.,* Brief for Respondents at 16, Dow Chem. Co. v. Stephenson, 123 S. Ct. 2161 (2003) (No. 02-271) (“In Agent Orange, the class representatives failed to protect Respondents’ needs from the day they were appointed through the day the settlement funds were exhausted.”).

146. *Cf.* Issacharoff, *supra* note 24, at 373 (suggesting that collateral attack to a settlement is a “poor substitute for good governance of class actions ex ante”). Thus, Issacharoff suggests that strong protections for future claimants in a settlement would obviate the need for a later collateral attack, permitting the doctrine of res judicata to control. *See id.* However, Issacharoff does concede that such protection for futures, such as appointing a “guardian[] ad litem” is most likely not a “meaningful protection[] for absent class members in the majority of cases.” *Id.* at 373-74.

147. 474 F.2d 67, 75 (5th Cir. 1973) (finding that a class representative no longer adequately represented the rest of the class when he failed to appeal a judgment that was unfavorable to certain members of the class).

148. *See id.* at 72 (discussing how adequacy of representation requires a two-prong examination upon collateral attack). The court specifies:

To answer the question whether the class representative adequately represented the class so that the judgment in the class suit will bind the absent members of the class requires a two-pronged inquiry: (1) Did the trial court in the first suit correctly determine, initially, that the representative would adequately represent the class? and (2) Does it appear, after the termination of the suit, that the class representative adequately protected the interest of the class?

*Id.* Thus, the *Gonzales* court proposes an initial review of the trial court’s “determination to permit the suit to proceed as a class action” with the stated representative, then reviews the “class representative’s conduct [in] the entire suit.” *Id.*

149. *Id.* (explaining that the suggested second prong of inquiry is only “appropriate in a collateral attack on the judgment” and “not required to be made by the trial court”); *see also id.* at 74 (highlighting that a “court conducting the action cannot predetermine the res judicata effect of the judgment; this can be tested only in [a] subsequent action” (citing Restatement of Judgments § 86, cmt. (h) (1942) (internal citation omitted))).
well as external occurrences\textsuperscript{150} may turn an initially appropriate representative into an inappropriate choice.\textsuperscript{151} Accordingly, the Fifth Circuit suggested that courts should consider adequacy of representation from a prospective and retrospective examination.\textsuperscript{152}

Other circuits have followed the logic behind the Fifth Circuit's two-prong inquiry. For example, in Williams v. General Electric Capital Auto Lease, Inc.,\textsuperscript{153} the Seventh Circuit emphasized the importance of collateral attack for absent class members.\textsuperscript{154} Importantly, the Seventh Circuit permitted an absent class member to use intra-class conflicts that developed in the course of a case to collaterally attack a judgment.\textsuperscript{155} Thus, the Seventh Circuit's

\textsuperscript{150} See, e.g., Stephenson v. Dow Chem. Co., 273 F.3d 249, 258 (2d Cir. 2001) (explaining that for the futures manifesting injury after the settlement ran out of money, “there has been no prior adequacy of representation determination with respect to [those] individuals”). Although the Second Circuit adopted a very specific form of collateral attack for its plaintiffs, see supra note 110, the depletion of the Agent Orange Payment Program after 1994 exemplifies the type of changing conditions the Fifth Circuit contemplated. See Gonzales, 474 F.2d at 72.

\textsuperscript{151} See, e.g., Gonzales, 474 F.2d at 73 (“The second question is whether [the representative’s] conduct of the entire suit was such that due process would not be violated by giving res judicata effect to the judgment in that suit.”). The Fifth Circuit specifies that at this stage in the inquiry, the “question necessarily requires a hindsight approach to the issue” and “in no way reflects” the validity of the trial court’s conclusions. Id. at n.11 (emphasis added).

\textsuperscript{152} Upon collateral attack, a second court would have to examine the first court’s determination in light of the earlier conditions present at that time. See supra note 25 (defining collateral attack). Then, the second court would have to adopt a current perspective and examine the propriety of the first court’s determination in light of the new, current day context. See Gonzales, 474 F.2d at 75 (explaining that during the second inquiry, “[f]actors which were not brought to the attention of the first court— including, most centrally, the adequacy of representation in the first suit— may lead to a changed perspective.” (quoting M. Frankel, Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. 39, 46 (1967) (internal citation omitted))). Furthermore, the Fifth Circuit’s approach resonates with the fundamentals the Court laid forth in the important Hansberry decision. See id. at 74 (“Due process of law would be violated for the judgment in a class suit to be res judicata to the absent members of a class unless the court applying res judicata can conclude that the class was adequately represented in the first suit.” (citing Hansberry v. Lee, 311 U.S. 32, 61 (1942))).

\textsuperscript{153} 159 F.3d 266 (7th Cir. 1998) (granting the defendant car leasing company an injunction against other suits after they had already settled a class action). In this case, the plaintiffs were unable to collaterally attack the settlement because Judge Wood found that they were not truly unnamed plaintiff class members since they had sufficient notice about the settlement. Id. at 275. However, notwithstanding the fact that these plaintiffs had notice and a chance to represent their rights before the settlement, Judge Wood’s explanations of the propriety of collateral attack have important and far-reaching applications beyond the instant case.

\textsuperscript{154} Although this case revolves around a class action that is not in the mass tort context, the theories underlying adequacy of representation, due process of the law, and collateral attack remain the same.

\textsuperscript{155} Id. at 269-70 (explaining that “in the light of the fully developed record,” there is often the possibility that intra-class conflicts arose and rendered an absentee’s representation “inadequate”). This concept has undeniable importance in the Ivy case as well as long-latency torts as a whole. For example, in light of the “fully
recognition that intra-class conflicts may develop and alter adequacy of representation suggests it has adopted the logic underlying the Fifth Circuit's two-prong inquiry.156

Also, the Eleventh Circuit has held that absent class members require special attention in the context of a collateral attack.157 In Twigg v. Sears, Roebuck & Co.,158 the plaintiff claimed that the class action settlement was not binding upon him because his cause of action was different from the rest of the class.159 The court examined the entire course of the litigation and found that Twigg did not receive sufficient notice, thereby qualifying him as an absent class member.160 Accordingly, the court provided that such an absentee may "collaterally attack the prior judgment on the ground that to apply claim preclusion would deny him due process."161 Thus, the Eleventh Circuit recognized that after a class settlement, different circumstances in light of a "fully developed record"162 might prove
devolved" course of events of the Agent Orange Payment Program and its depletion, claimants who manifested injuries after 1994 presumably have an intra-class conflict with those who manifested their injuries when funds were available. See supra notes 134-37 (explaining how the Ivy court suggests certain futures would not be eligible for settlement funds and therefore may require a distinct subclass).

Following the Seventh Circuit's rationale, those future plaintiffs could collaterally attack such a judgment that did not respond to the intra-class conflicts which arose, "in light of the fully developed record." Williams, 159 F.3d at 269-70. In 2001, the Second Circuit permitted those post-1994 futures to sue on the theory that they were never even proper parties; the Seventh Circuit's intra-class conflict logic suggests that, even if the Second Circuit had not used that theory, those futures would still be able to collaterally attack the settlement. See supra note 110 (describing the narrow and broad uses of collateral attack that the Second Circuit highlighted in its recent dealings with claims of Vietnam veterans who manifested injuries after 1994).

156. See supra notes 147-52 and accompanying text (outlining the Fifth Circuit's two-prong standard of review).

157. See Twigg v. Sears, Roebuck & Co., 153 F.3d 1222 (11th Cir. 1998) (finding that a class action judgment is not binding upon an absent plaintiff that received insufficient notice). Although this case is about fraud charges against Sears for servicing new tires on cars, it clarifies principles of due process for absent class members generally.

158. See id.

159. Id. at 1226 ("Twigg contends that he is not a member of the settlement class and that his claims are not identical to those raised in the 1992 National Class Action, and therefore that the earlier action cannot bar his suit."). Twigg argued, therefore, that "barring his claims would deny him due process" because he did not receive sufficient notice. Id. Sears countered this suggestion by arguing that Twigg was indeed a member of the settlement class because his claim arose "out of the same operative nucleus of fact" as the others, thereby rendering claim preclusion appropriate. See id. at 1225 (quoting Manning v. City of Auburn, 953 F.2d 1355, 1358 (11th Cir. 1992)).

160. Id. at 1227 ("[W]e conclude that even if Twigg had received the notices, their language was insufficient to notify him that claims like his were being litigated in the action."); see also supra note 51 and accompanying text (defining an absent class member).

161. Twigg, 153 F.3d at 1226 (citations omitted).

that, in hindsight, the settlement violates a plaintiff's due process rights.\textsuperscript{163}

As this section demonstrates, courts have grappled with the questions of (1) whether to use futures subclasses, (2) which futures truly belong in a subclass, and (3) when futures may collaterally attack a judgment that lacked those subclasses. However, the Supreme Court, while acknowledging the uncertainty in this area, has yet to resolve these questions definitively.

c. The Supreme Court's Treatment of the Subclass Cure

In 1997, in \textit{Amchem Products, Inc. v. Windsor}, the Supreme Court suggested a solution to the futures problem within its invalidation of a plaintiff class including future and current injury plaintiffs.\textsuperscript{164} It is possible to infer from the Court's language that futures do not belong in a class with current injury plaintiffs. The Court's decision two years later in \textit{Ortiz v. Fibreboard Corp.}\textsuperscript{165} reinforced the Court's belief that futures do belong in a distinct subclass. However, the practicality and legality of that solution remain unclear. In 2003, in \textit{Dow Chemical Co. v. Stephenson}, the Court handed down a very ambiguous decision that seemingly supports the subclass solution, but again did not resolve the attendant questions.\textsuperscript{166}

i. \textit{Amchem Products, Inc., v. Windsor}

Justice Ginsburg issued the Court's opinion when the \textit{Georgine} asbestos settlement reached the Court in 1997.\textsuperscript{167} Just as Justice Ginsburg deferred to the Third Circuit's discussion of notice requirements,\textsuperscript{168} so too did she defer to the Third Circuit's findings regarding the adequacy of the class representation.\textsuperscript{169} Specifically,

\begin{itemize}
  \item 163. See Twigg, 153 F.3d at 1226. Although the Eleventh Circuit did not explicitly base its review upon the hindsight approach that the Fifth and Seventh Circuit espoused, its analysis of Twigg's notice and whether he was an absent class member effectively accomplishes the same prospective and retrospective inquiry.
  \item 164. See Amchem Prods., Inc., v. Windsor, 521 U.S. 591 (1997). For a comprehensive discussion of the \textit{Amchem} case and its repercussions, see S. Charles Neill, Comment, \textit{The Tower of Babel Revisited: The U.S. Supreme Court Decertifies One of the Largest Mass Tort Classes in History}, 37 Washburn L.J. 793, 826-27 (1998), which concludes that "[h]owever, unlike the Tower of Babel, class actions have not been destroyed. The \textit{Amchem} Court has merely ordered the tower be built on a fortified foundation." \textit{Id.}
  \item 165. 527 U.S. 815, 856-57 (1999) (decertifying an asbestos settlement-only class in the context of a limited fund class action).
  \item 167. See Amchem, 521 U.S. at 591.
  \item 168. See \textit{infra} note 224 and accompanying text (explaining the \textit{Amchem} Court's reliance on the Third Circuit's notice findings).
  \item 169. See \textit{Amchem}, 521 U.S. at 627-28 ("The Third Circuit found no assurance here—either in the terms of the settlement or in the structure of the negotiations—that the named plaintiffs operated under a proper understanding of their
Justice Ginsburg espoused the Third Circuit’s logic that it is more appropriate for named plaintiffs with different medical conditions to represent a “discrete subclass[]” as opposed to a “single giant class.”

Thus, the Court found that present and future injury plaintiffs’ legal interests are too disparate to share the protections of the same plaintiff class. The Amchem Court used the differences between present and future injury plaintiffs as illustrative of the most fundamental “rift” within a plaintiff class that precludes either group from adequately representing their interests. However, the Court did not extend its discussion to address whether a collateral attack would be appropriate for improperly bound futures.

representational responsibilities.” (citation omitted)). Justice Ginsburg concluded that the Third Circuit’s assessment was “on the mark.” Id. at 626 (explaining that the interests between plaintiffs with different illnesses are not aligned and should therefore not be lumped together into one large class). Furthermore, the Court explained that even though the chemical company could pay for a settlement of all these different medical claims, that does not justify combining presently injured and exposure-only plaintiffs in one class. Id.

See id; see also Patrick Woolley, The Availability of Collateral Attack for Inadequate Representation in Class Suits, 79 Tex. L. Rev. 383, 433 (2000) (explaining how it is often difficult for courts to determine the “line between substantial and insubstantial divergences between class members” but finding that in Amchem, those “divergences” were “sufficiently substantial to require separate representation”). Woolley also suggests that finding inadequate representation would make a judge’s management of the suit infinitely more difficult, and indeed might even render judges “unduly biased toward finding that a class member has been adequately represented.” Id. at 434.

See supra note 118 and accompanying text (citing the Georgine court’s logic that differing interests between present and future injury plaintiffs create insurmountable intra-class conflicts); see also Mark C. Weber, A Consent-Based Approach to Class Action Settlement: Improving Amchem Products, Inc. v. Windsor, 59 Ohio St. L.J. 1155, 1175 (1998) (discussing that the currently “injured have large, immediate payments as their overriding goal, while exposure-only claimants have a conflicting interest in an ample fund to compensate future injuries, one that will be protected from potential inflation”); cf. Weinstein, supra note 3, at 66 (“As we have learned in the Manville Trust litigation, the more subclasses created, the more severe conflicts bubble to the surface and inhibit settlement.”). Judge Weinstein concludes his discussion of the potential costs of distinct subgroups by suggesting that courts strive to achieve an “appropriate balance between allowing the various voices within the community to be heard and compromising disputes in a way that provides relatively prompt succor to the injured. The resources of defendants and, ultimately, the community must not be exhausted by protracted litigation.” Id. Judge Weinstein’s insights represent a “communitarian ethic” that he believes should underlie the equitable resolution of mass tort cases. Id. at 65.

Cf. Graham C. Lilly, Modeling Class Actions: The Representative Suit as an Analytic Tool, 81 Neb. L. Rev. 1008, 1037-38 (2003) (explaining the Supreme Court’s finding of inadequate representation in Hansberry “thus supports the principle that a post-judgment attack on the adequacy of representation, even if not ideal, is a constitutionally mandated means of securing the due process rights of class absentees”). No commentators have suggested that the Court’s decision in Amchem stands for such a proposition. See Issacharoff, supra note 24, at 372 (explaining that the Supreme Court has defended the propriety of collateral attack for non-class members, but has yet to do so formally for “absent class members” claiming to be “nonparties to the original litigation”). Importantly, Issacharoff wrote that article in
ii. Ortiz v. Fibreboard Corp.

In 1999, the Supreme Court applied its rationale from Amchem in the context of a Rule 23(b)(1)(B) limited fund class action.\(^{174}\) Finding that this case did not fit into the true meaning of a limited fund,\(^{175}\) the Court cited Amchem's teachings about futures subclasses and adequacy of representation.\(^{176}\) Specifically, Justice Souter declared that holders of present and future injury claims require separate, "homogenous subclasses under Rule 23(c)(4)(B)."\(^{177}\)

Because the district court had failed to do so, the present and future injury plaintiffs could not share a representative to adequately represent the futures' interests under Rule 23(a)(4).\(^{178}\) Additionally, provisions in the settlement giving equal allocation of funds to all plaintiffs did not cure the class certification defect of combining present and future injury claims in one plaintiff class.\(^{179}\)

\(^{174}\) See Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999); see also supra note 67 (describing a limited fund class action). While the district court and Fifth Circuit found that the defendant had a $235 million limited fund, "[t]he same, however, cannot be said for the value of the disputed insurance." Ortiz, 527 U.S. at 851. The Court criticized the trial court's finding that there was a limited fund in the first place because there were no factual findings that the insurance assets had an "upper limit" necessary to secure limited fund treatment. Id. The Court specified that "[i]nstead of undertaking an independent evaluation of potential insurance funds, the District Court (and, later, the Court of Appeals), simply accepted the $2 billion Trilateral Settlement Agreement figure as representing the maximum amount the insurance companies could be required to pay tort victims." Id.

\(^{175}\) Id. at 848 ("The district court failed to demonstrate that the fund was limited except by the agreement of the parties, and it showed exclusions from the class and allocations of assets at odds with the concept of limited fund treatment and the structural protections of Rule 23(a) explained in Amchem.").

\(^{176}\) See id. at 856-57 (highlighting that Amchem's requirements for adequacy of representation were necessary for a limited fund class action, although the Ortiz case did not even qualify as a true limited fund).

\(^{177}\) Id. at 856. Thus, while Amchem suggested the subclass cure by stating that future and present injury plaintiffs could not share a plaintiff class, the Ortiz Court reinforced the necessity of separate subclasses for future injury plaintiffs.

\(^{178}\) Id. at 856-57. See also supra notes 21-35 and accompanying text for an explanation of the requirements of Rule 23(a)(4) adequacy of representation.

\(^{179}\) See Ortiz, 527 U.S. at 857 (explaining that the Fifth Circuit's logic to ignore intra-class conflicts because of equal allocation of resources "as between the conflicting classes" is faulty). The Court specified that "[t]he very decision to treat them all the same is itself an allocation decision with results almost certainly different from the results that those with immediate injuries or claims of indemnified liability would have chosen." Id.
iii. Agent Orange: The Dow Decision

In 2003, six years after Amchem and four years after Ortiz, the Court had the opportunity to revisit its understanding of Rule 23(a)(4)'s adequacy of representation requirements in the context of Agent Orange in Dow Chemical Co. v. Stephenson. Although the Supreme Court's Amchem decision in 1997 had shifted the legal landscape for asbestos victims, it remained unclear how subsequent Supreme Court decisions would treat the Amchem opinion in the context of other mass torts. The Dow Court affirmed the Second Circuit in a 4-4 decision with no opinion. This most recent future injury plaintiff mass tort decision neither elaborated nor clarified the findings of Amchem.

The Court's decision, however, left the Second Circuit's 2001 opinion as the current state of the law. In 2001, the Second Circuit decided that the 1984 settlement was not binding for veterans who manifested injuries after the depletion of the settlement funds. The Second Circuit drew much of its reasoning from "the Supreme Court's teaching in Amchem and Ortiz." The Second Circuit's interpretation of Amchem and Ortiz is thus the precedent that the Dow Court selected to control this issue. Accordingly, the Dow Court supported the Second Circuit's rationale that long-latency

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182. Stephenson v. Dow Chem. Co., 273 F.3d 249 (2d Cir. 2001). See also supra notes 138-41 and accompanying text for more discussion of the Second Circuit's findings.
183. See Stephenson, 273 F.3d at 261 ("For the foregoing reasons, we hold that the prior Agent Orange settlement does not preclude these plaintiffs from asserting their claims alleging injury due to Agent Orange exposure."). The Second Circuit was referring to plaintiffs who had not manifested any injuries prior to the depletion of the settlement funds, and thus had no legal redress for their grievances. See id.
184. Id.
185. This proposition presupposes that the Dow Court agreed with the entirety of the Second Circuit's rationale surrounding the status of future injury plaintiffs, because the Dow Court would have presumably reversed in part any pertinent section of the Second Circuit's decision with which it disagreed.
186. See Dow, 123 S. Ct. at 2161-62 ("With respect to respondents Daniel Raymond Stephenson ... the judgment is affirmed by an equally divided Court."). In the Agent Orange context, 1994 was the date that divided those futures eligible for compensation and those who were not. See supra note 141 and accompanying text (describing the Second Circuit's findings about veteran eligibility). In that context, long-latency is the functional equivalent of post-1994 injury manifestation. However, for asbestos and other toxins, no such global date exists because of the complexity of different bankruptcy trusts and other compensation schemes. See supra note 125 (explaining how the same long-latency theories apply in both the Agent Orange and asbestos contexts).
future injury plaintiffs cannot be in the same plaintiff class as the currently injured and require their own subclass.\textsuperscript{187}

2. Future Injury Plaintiffs Should Not Occupy Their Own Subclass

Although certain courts have suggested that future injury plaintiffs require a distinct subclass from current injury plaintiffs to adequately represent their rights,\textsuperscript{188} futures subclasses may not be a sufficient solution to manage long-latency future injury plaintiffs. First, different circuit courts have found that a subclass of absent members cannot retroactively collaterally attack past judgments.\textsuperscript{189} Second, once a distinct futures subclass passes the hurdle of adequate representation, many courts and commentators have suggested that the requirement of providing notice to such a subclass still remains a

\textsuperscript{187} See Stephenson, 273 F.3d at 261 (analyzing Amchem and Ortiz to find that "Stephenson and Isaacson were not adequately represented in the prior Agent Orange litigation."). The Second Circuit also noted that "the conflict between Stephenson and Isaacson and the class representatives becomes apparent" since they did not manifest injury until after 1994; accordingly, they were inadequately represented in the prior litigation, were not proper parties and cannot be bound by the settlement." \textit{Id.} at 260-61.

That reasoning, coupled with the Second Circuit's reference to the Court's mandate in Ortiz to divide a class "between holders of present and future claims... into homogenous subclasses under Rule 23(c)(4)(B)" strongly suggests that Stephenson and Isaacson belonged in a futures subclass. \textit{Id.} at 260 (citing Ortiz v. Fibreboard Corp., 527 U.S. 815, 856 (1999)); see also supra note 110 (explaining how the Second Circuit took a narrow approach to the collateral attack doctrine by finding the veterans were not parties in the first place and could proceed with their suits despite the 1984 settlement); cf. supra notes 147-63 (explaining how other circuits would presumably allow a collateral attack by the veterans manifesting injury post-1994, even if they were proper parties in the first place).

\textsuperscript{188} See, e.g., Ortiz, 527 U.S. at 856; Amchem Prods., Inc., v. Windsor, 521 U.S. 591, 626 (1997).

\textsuperscript{189} See generally Epstein v. MCA, Inc., 179 F.3d 641, 648 (9th Cir. 1999); Nottingham Partners v. Trans-Lux Corp., 925 F.2d 29, 32-33 (1st Cir. 1991).
significant problem.\textsuperscript{190} If a party is unable to give notice to a subclass of people not cognizant of their injuries, the subclass cure for adequate representation may, in fact, be meaningless.

\textbf{a. A Subclass of Future Injury Plaintiffs May Not Collaterally Attack Past Judgments}

The First, Third and Ninth Circuits have all found that collateral attack is an inappropriate tool for absent class members to avoid a binding judgment. As a result, futures may only appeal a previous court’s decision through direct appeal, not through a collateral attack.

\textbf{i. The First Circuit}

In \textit{Nottingham Partners v. Trans-Lux Corp.},\textsuperscript{191} the First Circuit found that an absent class member cannot attack a binding settlement if the rendering court utilized “acceptable procedural safeguards.”\textsuperscript{192} Although the plaintiff was unhappy with the settlement and retrospectively wished the courts had permitted him to opt out,\textsuperscript{193} the First Circuit found no flaw in the initial court’s certification

\textsuperscript{190} See, e.g., Weber, supra note 172, at 1159 (explaining that people who do not know they are sick have no reason to pay attention to any class action notice).

\textsuperscript{191} 925 F.2d at 29 (concluding that release in a shareholders’ class action settlement collaterally estopped those class members from litigating those issues again in federal court). Although this case revolved around issue preclusion more so than claim preclusion, the court addressed the plaintiff’s arguments about claim preclusion and adequacy of representation anyway, before ultimately deciding that those claims lacked merit:

Unhappy with the district court’s map of the case’s topography, appellants strive mightily to transmogrify this appeal into an exploration of res judicata (claim preclusion) rather than release and issue preclusion. Their expedition, we suggest, is misguided... Since further prosecution of appellants’ federal suit is foreclosed by the release defense... it would be pointless to discuss at any length whether their action is also claim-precluded.

\textit{Id.} at 32 (internal cross-reference omitted).

\textsuperscript{192} \textit{Id.} at 33; cf. Hansberry v. Lee, 311 U.S. 32, 42 (1940) (suggesting that “this Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it.”(citation omitted)).

\textsuperscript{193} See \textit{Nottingham Partners}, 925 F.2d at 32 (explaining how this case revolved around a Rule 23(b)(2) class action where a court determines that an objecting “party will not be allowed to opt out” of the class). As opposed to Rule 23(b)(3) class actions, which afford plaintiffs notice and the opportunity to opt-out, Rule 23(b)(2) class actions are mandatory and do not provide plaintiffs an opportunity to opt out. Generally, those suits are used for injunctive, equitable relief for a given class. See Fed. R. Civ. P. 23(b)(2) (“[T]he party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.”). Because, in \textit{Nottingham Partners}, the defendants were trying to enjoin the shareholder class from relitigating their claims, a 23(b)(2) class was appropriate. See 925 F.2d at 32.
decisions. Following this ruling, collateral attack was inappropriate and the court affirmed that the settlement was indeed binding upon the plaintiff. According to this reasoning, the Ryan and Ivy courts, unaware that Agent Orange futures would be situated differently after 1994, would be immune from collateral attack as employing "acceptable procedural safeguards" at the time of their decisions.

ii. The Third Circuit

In Grimes v. Vitalink Communications Corp., the Third Circuit recognized that absent class members must have some recourse if they find a settlement unfair. However, the Third Circuit emphasized that such recourse is usually an appeal, as opposed to a collateral attack. Since the plaintiffs in this case appealed their unfavorable decision to the highest Delaware court and then to the Supreme Court, the Third Circuit decided that the plaintiff and "the other class members had been granted all the process that was due." This case suggests that a futures subclass must suffer the hardship of a seemingly unfair settlement, since those plaintiffs missed the window of opportunities that due process affords.

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194. See Nottingham Partners, 925 F.2d at 32 ("Appellants received notice . . . . They were given, and vigorously exercised, a constitutionally adequate opportunity to be heard.").

195. See id.

196. See supra notes 130-37 and accompanying text (explaining how the Ryan and Ivy courts discussed futures but presumably did not provide relief for long-latency for futures).

197. Nottingham Partners, 925 F.2d at 33. This proposition begs the question underlying this entire Note: whether a futures subclass, at the time of certification, is a necessary "procedural safeguard[]." Id. If the First Circuit did view a futures subclass as an important "safeguard[]," then the court would presumably permit a collateral attack by long-latency futures who did not have such a subclass. However, if the futures subclass is not a necessary "procedural safeguard[]," then the First Circuit would presumably forbid a collateral attack by futures. See id. Alternatively, there is always the chance that other circuits could adopt the Second Circuit's reasoning that such futures may perform a narrow collateral attack, trying to litigate in the first instance, if they were never proper parties to the class. See supra note 110 (explaining the Second Circuit's nuanced use of the collateral attack doctrine).

198. 17 F.3d 1553 (3d Cir. 1994) (affirming a state court release of plaintiff shareholders' claims in favor of the defendant).

199. See id. at 1558 (explaining that objecting plaintiffs have the "opportunity to address the court as to the reasons the proposed settlement is unfair or inadequate" and stating that "federal plaintiffs pursuing this case on appeal were provided with such an opportunity in the state court litigation").

200. Id. It is critical to note that for long latency future injury plaintiffs, it may seem impossible to appeal an unfair decision, since a future is by definition healthy during the court proceedings. However, an exposure-aware plaintiff might be able to appeal. See infra note 217 and accompanying text (explaining the difference between asymptomatic plaintiffs who are aware and those unaware of their exposure to a toxin).

201. See id. at 1558. While it is unclear whether the Third Circuit would extend its
When the Third Circuit did examine the futures problem in *Georgine v. Amchem Products, Inc.*, it held that present and future injury claimants could not share a plaintiff class, but did not discuss whether it would permit a collateral attack by a futures subclass. The Third Circuit, therefore, contributes to the confusion surrounding a futures subclass' right to collaterally attack a judgment that improperly combined future and present injury plaintiffs.

iii. The Ninth Circuit

In 1999, the Ninth Circuit handed down a decision that denied a collateral review of a class action adequacy determination. It emphasized that as long as a trial court follows the certifying requirements laid forth in *Phillips Petroleum Co. v. Shutts*, then *Shutts* by no means guarantees plaintiffs a collateral attack. Accordingly, the Ninth Circuit rested an absent class plaintiff's rights on the conduct and procedures of the certifying court as opposed to the potential fruits of a collateral attack. Like the First Circuit, the rationale to future injury plaintiffs, it nevertheless expressed a potential policy concern that after an appropriate period for appeals, the defendant should have some repose. Also, it is possible that such a hardship could fall primarily upon exposure-unaware future injury plaintiffs, and would be less of a concern for the exposure-aware. See infra note 217 and accompanying text (explaining the differences between long-latency plaintiffs aware and unaware of their exposure to a toxin).

202. 83 F.3d 610 (3d Cir. 1996); see also supra notes 112-19 and accompanying text (describing the Third Circuit's finding that future injury plaintiffs cannot share a plaintiff class with the currently injured because the two groups have different interests).

203. See *Georgine*, 83 F.3d at 630 (finding that a plaintiff class combining present and future injury plaintiffs did not meet Rule 23(a)(4)'s adequacy of representation requirement).

204. See *Epstein v. MCA Inc.*, 179 F.3d 641 (9th Cir. 1999) (holding that a Delaware state court securities law judgment precluded a federal suit based on the Full Faith and Credit Act). In this case, while plaintiffs were appealing the trial court's decision, the Delaware Chancery Court approved a class action settlement which released all federal claims. The appellants in *Epstein* were members of both the state and federal plaintiff class at the time and therefore claimed that this turn of events violated their due process and inadequately represented their interests. See id. at 643.

205. 472 U.S. 797 (1985); see supra note 43 and accompanying text (describing the *Shutts* requirements for notice and due process).

206. See *Epstein*, 179 F.3d at 648 ("*Shutts* does not support the broad collateral review that the *Epstein* appellants seek."); cf. id. at 648 ("*Shutts* in fact implies that such review is unwarranted by emphasizing that the certifying court is charged with protecting the interests of the absent class members.” (citing *Shutts*, 472 U.S. at 809)).

207. See id. ("Simply put, the absent class members' due process right to adequate representation is protected not by collateral review, but by the certifying court initially, and thereafter by appeal . . ."). The Ninth Circuit cited as support the First Circuit in *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 33 (1991) and the Third Circuit in *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1558 (1999). The *Epstein* court also quoted the *Hansberry* Court for the proposition that "there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who
Ninth Circuit would presumably forbid a collateral attack in the Agent Orange context as improper “collateral second-guessing” of the 1984 certification and settlement decisions.\(^{208}\)

While these three circuit courts suggest that long-latency futures may not collaterally attack a settlement,\(^{209}\) other courts have underlined even more problematic repercussions of a distinct future injury subclass.

b. **Courts Cannot Provide Adequate Notice to a Subclass of Future Injury Plaintiffs**

If a court certifies future injury plaintiffs in a subclass, the procedural and constitutional notice requirements may still preclude

\[^{208}\] Epstein, 179 F.3d at 648 (citing Hansberry v. Lee, 311 U.S. 32, 42 (1940) (emphasis added)); see also Brief for Petitioners at 30, Dow Chem. Co. v. Stephenson, 123 S. Ct. 2161 (2003) (No. 02-271) (explaining how the Epstein court took adequacy of representation precautions that did not exist at the time of the Hansberry decision). The petitioners brief specifies that in Hansberry:

- The absent class members there received none of the protections accorded respondents and other unnamed class members under Rule 23: the Hansberry trial court was under no obligation to, and did not in fact, take any steps either to ensure the adequacy of the class representation or to provide notice to absent class members . . . . Just the opposite is true in suits proceeding under Rule 23.

\[^{209}\] Epstein, 179 F.3d at 648 (explaining that if the certifying court uses “appropriate procedures” then due process does not require a collateral attack of such procedures); see also supra note 197 (explaining the confusion surrounding whether a futures subclass is a procedural necessity and the implications therein for the propriety of a collateral attack by futures). Furthermore, the Ninth Circuit’s reasoning leaves opens the possibility that futures who were not proper parties to the litigation could sue for the first time. See supra note 110 (explaining the Second Circuit’s theory about improper parties’ right to sue). Importantly, the Second Circuit suggested that improper parties could sue even when the Ninth Circuit might forbid a collateral attack to “second—guess[]” the trial court’s determinations. Epstein, 179 F.3d at 648 (discouraging the use of collateral attack to question retrospectively the certification court’s decisions).

209. These three circuits discuss when absent class members may collaterally attack a judgment, albeit not in the context of future injury plaintiffs. However, their focus on respecting a rendering court’s decision about adequacy of representation could be persuasive in the context of futures as well, since it might be unfeasible to expect any rendering court to anticipate what the future will hold. See supra note 208 and accompanying text (advocating that subsequent courts should not be able to question retrospectively an initial court’s determinations if the initial court took all the appropriate procedural steps at that time). Importantly, these cases do not suggest what type of procedure a rendering court should use to make sure futures are adequately represented. Therefore, these cases do not shed any light on whether futures subclasses are the best way to take care of futures’ interests. Rather, they suggest that if the rendering court made its determinations properly and did not place futures into a subclass, then plaintiffs complaining that they should have been in a subclass would not be able to collaterally attack the rendering court’s decision. See id.
the viability of the subclass cure. Several courts have suggested that any notice to futures may be ineffective; futures who are ignorant of both their latent injuries and their putative legal claims might not be capable of making a meaningful decision to stay in the class action or opt out.

i. The Third Circuit’s Treatment of Notice

In *Georgine v. Amchem Products, Inc.*, the Third Circuit recognized the problems inherent in providing notice to future injury plaintiffs, as well as possible arguments defendants could raise that futures who are identifiable may be better off having courts notify them about a possible settlement offer. However, although the court went out of its way to discuss these problems, it reined in its discussion at a very critical juncture. Importantly, the Third Circuit stated that “although we have serious concerns as to the constitutional

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210. See *supra* notes 42-53 (explaining the procedural and constitutional notice requirements).

211. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (holding that “due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an ‘opt out’ or ‘request for exclusion’ form to the court”). Importantly, the Court qualified that statement with an important exception that resonates loudly for the future plaintiff: “Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments. *Id.* at 811 n.3 (emphasis added). See also *infra* note 239 and accompanying text for a discussion of how unimpaired claimants have little incentive to pay attention to any notice that may be provided at the outset of a class action.

Additionally, Professor Mark C. Weber has explained that certain people within a class have “no reason to know of or to be concerned about their potential injuries” and that there is no way to give those people “meaningful notice” that would permit them “to make sensible individual decisions whether to accept or reject the settlement.” See Weber, *supra* note 172, at 1159. Additionally, Judge Diane P. Wood has suggested that the problem of providing notice to futures has important repercussions in possible bankruptcy solutions. See Wood, *supra* note 36, at 1936 (explaining that after bankruptcy proceedings, a “critical prerequisite to a valid discharge ... is a complete and honest schedule of debts, which is then followed by constitutionally adequate notice furnished to all creditors”). Thus, if courts cannot identify potential future creditors to a bankruptcy proceeding, it cannot provide notice to them, thereby rendering the bankruptcy impossible to realize when individual creditors do not know who they are. *Id*; see also *infra* notes 278-80 and accompanying text (discussing how a futures subclass solution runs against the grain of effective bankruptcy proceedings).

212. 83 F.3d 610 (1996).

213. See *id.* at 622 (“[I]n this futures class action with virtually no delayed opt-out rights, notice to absent class members cannot meet the requirements of Rule 23 or the Constitution.” (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950))).

214. See *id.* at 623. The court recited the settling parties’ proposition that future injury class members are in fact in a very powerful position because they have notice, the “terms of the settlement before them,” and are therefore in a better position to make a choice than plaintiffs who have no idea how their case and settlement will “come out.” *Id.*
adequacy of class notice, we decline to reach these issues, and pass on to the class certification issues.\textsuperscript{215}

Because the Third Circuit found the certification question dispositive,\textsuperscript{216} it did not need to address the notice problems in its resolution of the case.\textsuperscript{217} The court’s decision to touch upon the notice problem, and subsequently abandon it, left open a window for the Supreme Court to elaborate upon the issue.\textsuperscript{218}

ii. The Supreme Court’s Treatment of Notice

The Supreme Court’s leading cases discussing class action settlements which have purported to bind future injury plaintiffs cast much doubt upon how a court can uphold notice and adequacy of representation requirements. The Third Circuit and the Supreme Court have suggested that future injury plaintiffs need a distinct subclass in order to meet the adequacy of representation requirements.\textsuperscript{219} As long as that requirement of due process has not been satisfied, the courts have invalidated resulting settlements without reaching the notice problem. One scholar has characterized the Court’s choice not to deal explicitly with the notice problem as fraught with “core difficult[ies].”\textsuperscript{220}

\textsuperscript{215} See id. at 623.

\textsuperscript{216} See supra note 118 and accompanying text (discussing the Third Circuit’s treatment of adequacy of representation and how the Georganie class did not meet class certification standards).

\textsuperscript{217} See Georganie, 83 F.3d at 633 (“Problems in adequately notifying and informing exposure-only plaintiffs of what is at stake in this class action may be insurmountable.”). Importantly, the Third Circuit distinguished between exposure-only plaintiffs who were aware and those who were unaware of their exposure. See id. The court cited as an example, the “spouses of the occupationally exposed” who might be unaware of their family member’s exposure, but still within the terms of the class action as eligible for some monetary recovery. Id. Next, the court reasoned that those plaintiffs aware of their exposure might still pay little attention to any class notice a court could provide, as well as “lack adequate information to properly evaluate whether to opt out of the settlement.” Id. (“Without physical injuries, people are unlikely to be on notice that they can give up causes of action that have not yet accrued.”).

Finally, the Third Circuit emphasized that “[i]t is unrealistic to expect every individual with incidental exposure to asbestos to realize that he or she could someday contract a deadly disease and make a reasoned decision about whether to stay in this class action.” Id; see also Wood, supra note 36, at 1941 (drawing a similar distinction as the Third Circuit did between futures who “know who they are today” and those “who cannot intelligently participate in present litigation for various reasons”); see infra note 224 and accompanying text (describing Justice Ginsburg’s similar concerns about providing adequate notice).

\textsuperscript{218} See infra notes 224-27 and accompanying text (showing how Justice Ginsburg in Amchem chose not to decide the notice issue left unresolved by the Third Circuit).

\textsuperscript{219} See supra notes 118, 170-72 and accompanying text (discussing the Georganie court and Amchem Court’s position on adequacy of representation).

\textsuperscript{220} See Issacharoff, supra note 24, at 340. Issacharoff gracefully refers to Amchem and Ortiz as “identif[y]ing rather than fully explain[ing] the potential mischief in the class action settlements it condemns.” Id.
1. Amchem Products Inc. v. Windsor

After the Third Circuit vacated and remanded the Georgine settlement class, the Supreme Court granted certiorari in 1997. In an opinion reflecting a six-justice majority, Justice Ginsburg found that the requirements for class certification were not met. She broached the notice requirements by mentioning some of the issues, without coming to a decision on the merits. Justice Ginsburg agreed with the Third Circuit’s determination that giving notice is “highly problematic... to tie to a settlement class persons with no perceptible asbestos-related disease at the time of the settlement.”

After presenting the impossibility of giving notice to an exposure-only plaintiff, Justice Ginsburg avoided resolving the issue. Instead, she relied on the dispositive nature of the Court’s adequacy determination; however, Justice Ginsburg suggested in dicta that the constitutional and procedural notice problem may be insoluble in the context of futures. Indeed, one scholar has pointed out that the

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222. Justice Breyer filed an opinion concurring in part and dissenting in part, which Justice Stevens joined. See id. at 629 (Breyer, J., concurring in part, dissenting in part). Justice O’Connor recused herself.
223. See Amchem, 521 U.S. at 597. The Court also held that a request for a settlement-only class certification had the same requirements as a non-settlement class, except that a court need not take into consideration “whether the case, if tried, would present intractable management problems.” Id. at 620 (citing Fed. R. Civ. P. 23(b)(3)(D)). The court’s rationale was that the 23(e) settlement provision was not meant to obviate the necessity of meeting all the other class certification requirements. Id. at 620-21. Those hurdles, such as meeting typicality and commonality, represent important policy and procedural interests, even if the case may or may not present management difficulties under 23(e). Id. Rather, the court construed 23(e) as “an additional requirement, not a superseding direction.” Id. at 621.
224. Amchem, 521 U.S. at 628. Justice Ginsburg elaborated that exposure-only plaintiffs “may not even know of their exposure, or realize the extent of the harm they may incur. Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide intelligently, whether to stay in or opt out.” Id.; see also supra note 217 and accompanying text (explaining the Third Circuit’s reasoning that even plaintiffs aware of toxic exposure might not have enough information to decide whether to opt out of a class action).
225. Amchem, 521 U.S. at 628 (“Because we have concluded that the class in this case cannot satisfy the requirements of common issue predominance and adequacy of representation, we need not rule, definitively, on the notice given here.”).
226. See id. See also supra notes 170-72 and accompanying text for a discussion of the Amchem Court’s adequacy of representation decision.
227. See Amchem, 521 U.S. at 628 (“In accord with the Third Circuit, however, we recognize the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous.” (citation omitted) (emphasis added)). In the Second Circuit’s decision in Stephenson v. Dow Chemical Co., the court points to this section of the Amchem decision as standing for the proposition that it is nearly impossible to give notice to exposure-only class members. 273 F.3d 249, 261 n.8 (2d Cir. 2001) (“Amchem indicates that effective notice could likely not ever be given to exposure-only class
Court is "troubled by the inherent difficulty in alerting uninjured individuals, including family members with unripe consortium claims, to the terms of the settlement."\textsuperscript{228} The "inherent difficulty" of notifying people who suffer no injuries is a fundamental problem that all exposure-only futures share, from workers who unknowingly inhale asbestos to soldiers serving in Vietnam.

2. Agent Orange: The Dow Decision

In the 1984 Agent Orange class action, Judge Weinstein decided that notice would be sent by mail to all veterans who had already filed a claim in court or listed on the Veterans Administration's Agent Orange Registry.\textsuperscript{229} Additionally, Judge Weinstein decided that publication through radio and television announcements throughout the United States, Australia, and New Zealand would be sufficient notice for those veterans who had not filed claims or were not registered.\textsuperscript{230} In conceeding the efficacy of Weinstein's idea, one scholar has questioned the legality of such notice.\textsuperscript{231} Furthermore, on a practical level, the timing of the notice was questionable since the court mailed the notice in mid-March, and the deadline for opting out was May 1.\textsuperscript{232}

In 1984, neither Daniel Stephenson nor Joe Isaacson had filed a claim in court or placed themselves on the Veterans Administration's Agent Orange Registry.\textsuperscript{233} They were asymptomatic\textsuperscript{234} and did not fall

members. "); see also infra notes 242-43 and accompanying text (explaining how the Amchem Court's reasoning has forged an important role in the Supreme Court's jurisprudence, because the recent Dow decision used the Second Circuit's Amchem-based rationale). Additionally, Professor Hazard has suggested the fundamental difficulty in providing notice to exposure-only plaintiffs is that, "[s]tated in epistemological terms, a 'futures' therefore is a hypothetical person. A hypothetical person cannot have real legal rights or be owed real legal obligations." Hazard, supra note 9, at 1907 (suggesting in the bankruptcy solution context that a hypothetical person may or may not be a bankruptcy creditor); see also infra notes 297-301 and accompanying text (explaining how a futures subclass will hurt bankruptcy solutions).

\textsuperscript{228} See Eric D. Green, What Will We Do When Adjudication Ends? We'll Settle in Bunches: Bringing Rule 23 Into the Twenty-First Century, 44 UCLA L. Rev. 1773, 1777-79 (1997) (advocating the use of "classwide settlements" in the wake of Amchem and Ortiz).

\textsuperscript{229} Schuck, supra note 2, at 127. The notice alerted the 23(b)(3) plaintiff class that the suit was commencing and gave that class the opportunity to opt-out. See supra notes 67-68 (explaining to whom the courts provided notice).

\textsuperscript{230} Schuck, supra note 2, at 127.

\textsuperscript{231} Id. ("Weinstein's solution, which the veterans' lawyers had proposed, was innovative but highly questionable as a matter of law."). Schuck bases his criticism partly on Weinstein's failure to mention Eisen, which set forth the importance of mailing notice whenever possible, as well as his failure to "discuss defendants' argument that more individualized notice was reasonably feasible." Id.

\textsuperscript{232} Id.

\textsuperscript{233} Regardless of their knowledge of exposure, neither man had manifested any injuries at the time. See supra note 1 and accompanying text. Doctors diagnosed Daniel Stephenson with bone marrow cancer in 1998 and Joe Isaacson, with non-
into the class definition, but did fall into the category of veterans to whom Weinstein directed publication notice. According to the veterans and their attorney, neither man saw such notice. Furthermore, they had no reason to believe that the Agent Orange litigation pertained to them because they suffered no physical manifestations from their exposure to Agent Orange.

When Dow Chemical Co. v. Stephenson reached the Supreme Court in 2003, the 4-4 opinion shed no new light on the notice requirements in class actions for future injury plaintiffs. Rather, the Court reaffirmed without opinion the Second Circuit’s decision. There, the Second Circuit picked up on Ginsburg’s position in Amchem and similarly suggested the potential practical difficulties of notifying the unimpaired. However, despite the uncertainty

234. See supra note 1 and accompanying text (describing the health of Isaacson and Stephenson).
235. See supra note 68 and accompanying text (explaining the class definition of people to whom the court provided notice).
236. See supra note 71 and accompanying text (summarizing the class action settlement).
237. See supra note 230 and accompanying text (describing the class action notice Judge Weinstein authorized).
238. See Brief for Respondents at 23 n.26, Dow Chem. Co. v. Stephenson, 123 S. Ct. 2161 (2003) (No. 02-271) (“Neither Respondent ever received the 23(c)(2) opt out notice, the 23(e) settlement notice, or the subsequent ‘distribution notice.’” (citation omitted)). Additionally, although both men knew they had been in contact with Agent Orange, see supra text accompanying note 1, publication notice was not necessarily meaningful to them because their injuries were still latent at the time. The court provided notice of the settlement, which was binding on futures, to the 23(b)(3) class, which only included injured veterans and family members suffering from a derivative injury. See Ryan v. Dow Chem. Co., 781 F. Supp. 902, 908 (E.D.N.Y. 1991).
239. See Brief for Respondents at 23-24, Dow (No. 02-271) (explaining that even if petitioner had made notice available to respondents, they would have had no reason to pay it attention as they were uninjured at the time).
240. 123 S. Ct. 2161 (2003) (affirming the Second Circuit’s opinion that the 1984 Agent Orange settlement did not bar Stephenson’s suit).
241. Although Joe Isaacson’s claim was remanded to state court in light of Syngenta Crop Protection, Inc. v. Henson, 537 U.S. 28 (2002) (holding that for removal jurisdiction to be appropriate, the federal court must have some form of original jurisdiction over the case, which the All Writs Act cannot provide), the judgment from the Second Circuit decision was affirmed for Daniel Stephenson, with no other explanation or any dicta. See supra note 185 (explaining that this Note presumes that the Supreme Court would have reversed in part any section of the Second Circuit’s opinion with which it disagreed). The remand of Isaacson’s claim in light of Syngenta is about the propriety of removal jurisdiction, see supra note 61, and has no bearing on the propriety of futures subclasses in mass tort class actions.
242. Stephenson v. Dow Chem. Co., 273 F.3d 249, 261 n.8 (2d Cir. 2001) (“Because we have already concluded that these plaintiffs were inadequately represented, and thus were not proper parties to the prior litigation, we need not definitively decide whether notice was adequate.”). This language mirrors almost exactly Justice Ginsburg’s dicta in Amchem. See supra note 227 (explaining Justice Ginsburg’s
surrounding the notice requirements, the Second Circuit ultimately disposed of the case on the adequacy of representation grounds.\textsuperscript{243}

Thus, both \textit{Amchem} and \textit{Dow} illustrate that when class certification issues are dispositive, the Court need not decide the question of notice.\textsuperscript{244} However, the two cases suggest that even if the Court were to find adequacy requirements met for a futures subclass, it would still be impossible to provide notice to that group of plaintiffs.\textsuperscript{245}

A futures subclass faces not only constitutional and procedural hurdles,\textsuperscript{246} but also important policy concerns. A futures subclass has important repercussions on possible settlements,\textsuperscript{247} the tort system at large,\textsuperscript{248} and bankruptcy proceedings.\textsuperscript{249} On the policy front, different concern that notice could ever be given to futures, the "legions so unselfconscious and amorphous.").

\textsuperscript{243} See Stephenson, 273 F.3d at 261 n.8.

\textsuperscript{244} Both \textit{Amchem} and \textit{Dow} were chances for the Supreme Court to speak on the notice issue, even though it was not necessary for the outcome of the case. However, the Court's repeated refusal to decide the issue seems to suggest that the Court is hesitant to create any precedential value on this matter.

\textsuperscript{245} See supra note 228 and accompanying text (explaining that the Court's vacillation on the matter might be fueled by the problem-riddled prospect of notifying asymptomatic people). It is possible that the Court does not want to reach the notice problem decisively because giving notice to people who have no patent injuries is problematic, regardless of whether they are aware of possible toxic exposure. See also supra note 217 (distinguishing between asymptomatic plaintiffs who are aware and unaware of their exposure). Thus, the class certification issues that prevented the Court from reaching the notice requirements may reflect the reality that certain groups of futures will inevitably fall through the cracks of the notice requirements. Accordingly, courts' attempts to uphold stringently the adequacy of representation requirement is a worthwhile pursuit, but ultimately a Pyrrhic victory if courts remain unable to notify those adequately represented futures subclasses. See supra notes 210-11 and accompanying text (suggesting that the adequacy hurdle is important but ultimately not relevant if courts cannot solve the problem of notice).

\textsuperscript{246} See, e.g., supra notes 118, 171, 178, 187 and accompanying text (discussing various class settlements, including futures, which failed to meet the federal requirements). Additionally, Professor Linda Mullenix has suggested that "prior attempts at dealing with the futures problems have been ineffectual—if not illegal." See Linda S. Mullenix, \textit{Back to the Futures: Privatizing Future Claims Resolution}, 148 U. Pa. L. Rev. 1919, 1924-25 (2000) (advocating a severance of future claims from present claims and privatizing those future claims). Professor Mullenix is another participant in the published dialogue between Hazard and Wood about the best mechanisms to manage futures. See supra note 36 (explaining Wood's criticisms of Hazard). Mullenix shares in Professor Hazard's pessimistic thoughts regarding futures, but has important criticisms and suggestions regarding Hazard's proposed legislation, see supra note 9 (describing Hazard's legislative proposal), and the privatized future claims resolution she feels would work better, see Mullenix, supra, at 1924 ("He has, of course, neglected to tell us why this proposal would appeal to Congress, as opposed to all other failed attempts to federalize products liability law.").

\textsuperscript{247} See infra notes 251-55, 283-94 and accompanying text (describing the beneficial and detrimental effects a futures subclass could have on settlements).

\textsuperscript{248} See infra notes 257-62 and accompanying text (describing the role of futures in the tort system as opposed to class actions).

\textsuperscript{249} See infra notes 263-81, 295-01 and accompanying text (describing a futures subclass' effects on bankruptcy proceedings).
courts and commentators are split on whether the subclass cure is an effective remedy for the futures problem.

B. Futures Subclass Cure: Policy Considerations

How courts manage future injury plaintiffs affects not just the rights of the futures, but defendants, current compensation schemes, and court dockets. Thus, the subclass cure entails both benefits and drawbacks for the litigating parties and the court system.

1. The First View: A Subclass Will Resolve the Policy Concerns of Binding Futures in Class Actions

In the aftermath of the Supreme Court's *Amchem* and *Dow* decisions, futures cannot be adequately represented in the same plaintiff class as the currently injured. Thus, either futures belong in their own plaintiff subclass, or they belong in the tort system. Courts employing a futures subclass could secure three possible benefits. First, a futures subclass could encourage defendants to settle class actions. Also, creating a futures subclass will comport with the underlying goals of the tort system. Finally, putting futures in a subclass could make current bankruptcy schemes more efficient. Therefore, retaining future injury plaintiffs in class actions, in their own distinct subclasses, may be a viable cure to the futures problem.

a. Futures Subclass Will Increase Defendants' Incentive to Settle

While many scholars have suggested that the *Amchem* and *Ortiz* decisions will inhibit defendants from settling, an implementation of

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250. See infra notes 305-08 (describing proposed amendments to the Federal Rules of Civil Procedure that would purportedly monitor a subclass of future injury plaintiffs).

251. See, e.g., Weber, supra note 172, at 1157 ("The Supreme Court's new, heightened attention to predominance and representative adequacy is likely to bar useful class action litigation and settlements."); see also id. at 1187 (explaining that "useful cases will not be brought, and valuable settlements will not be achieved, because of strict application of the predominance and representative adequacy tests"); Laurens Walker, *A Model Plan to Resolve Federal Class Action Cases by Jury Trial*, 88 Va. L. Rev. 405, 407-08 (2002) (noting that the defense's main interest is to settle "litigation as early and as cheaply as possible, with the least publicity" (citing Deborah R. Hensler et al., RAND Institute for Civil Justice, Class Action Dilemmas: Pursuing Public Goals for Private Gain (2000))). However, as Walker points out, often the global settlements the defense seeks "create little value for class members or society." Id; cf. Deborah R. Hensler, *As Time Goes By: Asbestos Litigation After Amchem and Ortiz*, 80 Tex. L. Rev. 1899, 1902 (2002) (comparing the asbestos settlement problems to the ostensible success of the Agent Orange settlement, when the defendants had been hoping to reach "a conclusion to the litigation" with an opt-out class settlement and seemingly achieved their goal) [hereinafter Hensler, *As Time Goes By*]. However, Hensler's illustration of the Agent Orange case as a success story for defendants seeking finality is now inaccurate in light of the Supreme Court's *Dow* decision. See supra notes 240-45 and accompanying text (describing the *Dow*
those cases' suggested futures subclass remedy may actually encourage defendants to settle class actions. Presumably, defendants will be more inclined to settle cases knowing that their future liabilities are accounted for within a futures subclass, as opposed to remaining adrift in the tort system at large. This would both ensure that some monies remain available for the futures and their protection, as well as providing certainty of funds to the currently injured. In addition to helping the respective parties settle, a futures subclass could also aid the tort system at large.

b. A Futures Subclass Will Avoid Fundamental Tort System Problems

If future injury plaintiffs could not occupy a distinct subclass, they would have to enter the tort system when their injuries manifest. In theory, plaintiffs and defendants use the tort system to achieve

decision and how it may have dissolved the finality of Judge Weinstein's 1984 settlement for all defendants involved).

252. See Alex Raskolnikov, Note, Is There a Future for Future Claimants After Amchem Products, Inc. v. Windsor?, 107 Yale L.J. 2545, 2551 (1998) (suggesting that defendants have little incentive to make a global settlement because they cannot "evaluate future claims"). Grouping futures together in a subclass is one possible method allowing defendants to "evaluate," estimate, and manage the liabilities future injury plaintiffs entail. Id; cf Report of the Advisory Committee on Civil Rules and the Working Group on Mass Torts to the Chief Justice of the United States and to the Judicial Conference of the United States 35 (1999) (suggesting that futures within class actions could possibly opt-out if they so desired, hurting the integrity of possible settlements, when they "become aware of actual injury") [hereinafter Mass Torts Report]; Elizabeth J. Cabraser, A.L.I.-A.B.A. Course of Study Materials, Products Liability: The Legacy of Asbestos Litigation: Challenges and Complications in the Certification and Settlement of Product Liability Class Actions (2000) (suggesting that symbolically, the Amchem decision has led many defendants to contest class certification). An implementation of futures subclasses after Amchem could presumably reverse this trend and make defendants more eager to see courts certify classes, and to settle those class actions.

253. Defendants would probably have one set of settlement terms for current injury plaintiffs and a different set for the future injury plaintiffs. Despite those possible differences, defendants could still achieve finality, and current injury and future injury plaintiffs could gain settlement terms appropriate to their level of injury, or putative injury, respectively. A settlement for a subclass of future injury plaintiffs would be difficult to fashion, but it is still possible. One possibility would be to give futures their own fund subject to inflation adjustments, or perhaps a compensation scheme similar to workers' compensation. See, e.g., Hazard, supra note 9, at 1917 (suggesting courts use a "workers' compensation formula" to calculate recovery).

254. See Mass Torts Report, supra note 252, at 35 ("Inclusion of future claimants becomes a question not merely of achieving peace for the defendant but also of ensuring that future claimants have an opportunity for compensation reasonably equal to that of present claimants.").

255. Cf. Carroll et al., supra note 13, at 65 (explaining that sixty-five percent of asbestos dollars go to claimants who do not suffer from cancer, whereas only seventeen percent of dollars end up in the hands of those suffering from mesothelioma).

256. See supra notes 170-87 (explaining the Supreme Court's recent decisions suggesting that future injury plaintiffs cannot procedurally share a subclass with currently injured plaintiffs).
individualized justice.\textsuperscript{257} In class action practice, this is very infrequently the case.\textsuperscript{258} Thus, a distinct futures subclass would prevent those plaintiffs from entering the tort system, which some scholars argue provides dubious results in class actions.\textsuperscript{259}

One scholar emphasized that preserving the futures’ right to enter the tort system is dangerous because it eventually undermines the tort system’s goals.\textsuperscript{260} As more plaintiffs become involved in litigation, they sue companies with an increasingly attenuated link to asbestos production.\textsuperscript{261} This trend jeopardizes the principles of “corrective justice and deterrence” that tort litigation strives to achieve.\textsuperscript{262} Thus,

\begin{itemize}
\item \textsuperscript{257} See Carroll et al., \textit{supra} note 13, at 88 (discussing how most tort cases, whether regular or mass, infrequently grant “individualized treatment,” and how that failure is exacerbated in the asbestos context).
\item \textsuperscript{258} See \textit{id.; see also} Weinstein, \textit{supra} note 3, at 127 (noting that some criticize class actions on the ground that “mass dispositions compromise principles of due process and interfere with the plaintiff’s property right to control his or her claim”). Weinstein also cites the criticism that “compelling mass settlements precludes the vindication of individual rights and denies plaintiffs the cathartic effect of telling their stories to a judge and jury.” \textit{Id.} However, Weinstein does stress the importance of flexibility and adjusting legal standards and devices to keep in tune with “the harms of modern technological society.” \textit{Id.}
\item \textsuperscript{259} See Carroll et al., \textit{supra} note 13, at 88 (“In asbestos litigation, individualized process is a chimera.”); \textit{see also} Hensler, \textit{As Time Goes By, supra} note 251, at 1923 (suggesting that the \textit{Georgine} settlement’s purported protection of futures’ “individualized due process” might be misplaced since due process in the asbestos context is a “chimera” and unattainable despite what may be the court’s best intentions).
\item \textsuperscript{260} See Hensler, \textit{As Time Goes By, supra} note 251, at 1923-24 (discussing the “Future of ‘Futures’”); \textit{cf.} Weinstein, \textit{supra} note 3, at 143 (explaining that the tort system can also offer substantial rewards to individuals as opposed to class members). Judge Weinstein mentions that class action plaintiffs will usually fare better in a class, as opposed to suing individually, but “they would forego the possibility that any given individual would receive a windfall verdict by a sympathetic jury.” \textit{Id.}
\item \textsuperscript{261} See Hensler, \textit{As Time Goes By, supra} note 251, at 1924 (stating that many companies which plaintiffs are currently naming as defendants are assuming liability that “bears little relationship to their own actions”); \textit{see also} Mark A. Behrens, \textit{Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation}, 54 Baylor L. Rev. 331, 340 (2002) (listing defendants with a very remote link to asbestos production that plaintiffs are now naming as defendants, such as Campbell Soup Co. and 3M Co., “the maker of Scotch® tape and Post-it® notes”).
\item \textsuperscript{262} See Hensler, \textit{As Time Goes By, supra} note 251, at 1923-24 (discussing how plaintiffs are naming defendants who are far removed from their injuries, thereby undermining “the deterrence objective of tort”). However, Judge Weinstein has suggested that the tort system’s goals have shifted in recent years from “deterrence or punishment of wrongdoers” to compensation of the injured. \textit{See} Weinstein, \textit{supra} note 3, at 148. If that suggestion is true, then Hensler’s concern that plaintiffs are raiding the pockets of relatively remote defendants is not so pressing. \textit{But see} McGovern, \textit{supra} note 55, at 880 (explaining that plaintiffs can jeopardize the fundamental tort system goal of “individualized justice” by participating in a mass tort class action and its settlement). Additionally, McGovern questions whether “the tort system would ever countenance the contracting away of personal rights. Just as tort law frowns upon general waivers of access to the judicial system . . . there may be a
to maintain the traditional deterrence aim of the tort system, future injury plaintiffs should occupy their own subclass, and not sue individually when their injuries manifest. In addition to the theoretical aims of the tort system, a futures subclass may provide succor on a more practical level to help ineffective bankruptcy schemes of the past.

c. A Futures Subclass Will Remedy Past Bankruptcy Solutions

The subclass cure is one possible way to heal the severe flaws in the current regime of toxic mass tort class actions. One scholar has suggested four criteria that any administrative compensation plan must meet, and illustrated why it is so difficult to implement these in the context of the asbestos litigation. Specifically, anyone designing parallel limitation to even partial de facto waivers in mass tort settlements.”  

263. See, e.g., Deborah Hensler, Fashioning A National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman, 13 Cardozo L. Rev. 1967, 1990 (1992) (“However well the tort system has served us... the current system of litigating asbestos claims is failing to deliver compensation in an equitable, efficient fashion.”). In this article, Hensler expresses deep skepticism of any administrative compensation solution for the asbestos problem because of the factors that make asbestos unique. See id. at 1978 (listing such factors as the “scale of the litigation,” the “changing nature of the asbestos caseload,” the “impact of the bankruptcies” and the “uncertainty about the status of claims, parties, and the law”). Hensler’s article was a response to Professor Lester Brickman’s administrative scheme to help the asbestos litigation. See Lester Brickman, The Asbestos Claims Management Act of 1991: A Proposal to the United States Congress, 13 Cardozo L. Rev. 1891 (1992) (proposing that the Legislature set up an administrative asbestos trust to help plaintiffs and defendants, as well as to regulate attorneys’ fees). Additionally, Professor Brickman’s proposal would not give compensation to “unimpaired pleural plaque claimants” until they manifested an injury. Id. at 1892. Pleural plaque refers to non-cancerous growths that x-rays can detect in the “pleural membrane” surrounding the lungs, which often turn into cancer at a later date. See supra note 116 (describing mesothelioma and cancerous effects on the pleural membrane surrounding the lungs). Whereas Brickman proposes giving such claimants no compensation at all, other courts have generated different mechanisms, such as “pleural registries,” to keep these claimants in the court system, without deciding their fate until they manifest cancer at a later date. See infra note 302 and accompanying text (describing how courts use “pleural registries”).

264. See Hensler, supra note 263, at 1985-86. Namely, “the program must define eligibility for compensation; specify the nature and amount of benefits available; specify the source(s) of funding; and establish procedures for determining eligibility and benefits in individual cases, and for appealing administrative decisions.” Id.

265. See id. at 1986 (explaining that administrative programs encounter trouble when “they underestimate the size of the population that will prove eligible for benefits” and “the percent of that population that will come forward”). This is exactly what has happened in the asbestos context. See Behrens, supra note 261, at 333 (explaining that costs keep rising and claims keep coming forward, to the extent that the litigation might cost another $43.4 billion over the next twenty years (citing Christopher Oster, Some Insurers Face Shortfall in Reserves for Costly Claims Related to Asbestos, Wall St. J., May 7, 2001, at A4)). Behrens hypothesized that the main reason the original estimates of asbestos claims were so wrong was that “nobody could have predicted the enormous number of unimpaired or mildly impaired
such a scheme must be cognizant of the diverse interests of parties advocating for plaintiffs and defendants, the need to limit transaction costs, and overriding equitable concerns. Thus, it has been and will be extremely difficult to establish an administrative compensation scheme that can handle all these competing concerns.

In the asbestos litigation, bankruptcies and bankruptcy trusts constitute the only administrative schemes enacted by the courts and Congress. These schemes have not been very successful, frequently

individuals who would file asbestos claims. Individuals who have little or no physical impairment now account for as much as ninety percent of all new asbestos-related filings. Thus, Behrens attributes the difficulty in managing asbestos claims to the phenomenon of mildly impaired or healthy claimants “driving the avalanche of filings” into the system. See Hensler, supra note 263, at 1986 (discussing how some parties are concerned with the moral rights of injured victims, or the need to keep transaction costs low with “simple ‘schedules’” and “highly bureaucratized procedures determining eligibility,” or the equity of individual victims).

The only administrative compensation schemes that have been tested in the asbestos arena are bankruptcy trusts. See infra notes 269-76 and accompanying text (discussing past bankruptcy proceedings). However, scholars have been generating proposals for an asbestos-specific administrative compensation scheme for many years; in fact, Professor Hensler’s article was in response to one such proposal. See Brickman, supra note 263 (proposing an administrative asbestos solution to Congress).

See Hensler, supra note 263, at 1987 (“I would expect that the path to reaching such compromises with regard to asbestos injury compensation will be extraordinarily rocky.”); cf. Mullenix, supra note 246, at 1928-29 (proposing an administrative scheme that entails the privatization of future claims). Professor Mullenix envisions a streamlined administrative process where judges transfer the management and compensation of a set of future claims to a “future claims vendor” via a bidding process. Id. at 1929. These vendors would, in turn, work with defendants to assume the responsibility for the futures. Id.

Mullenix thinks that the privatized vendor would then have an economic incentive to accurately predict the number of future claims in their bargaining with defendants to take on the futures. See id. at 1930 (“The privatization of future claims resolution would work because it would call into existence commercial vendors with an economic incentive to maximize profit by accurately estimating the universe of future claimants and by minimizing transaction costs in administering claims.”). However, Mullenix admits that her proposal is “semi-shocking,” id. at 1931, and therefore does not contradict Hensler’s assertion that administrative suggestions are a “rocky” path, Hensler, supra note 263, at 1987.

See White, supra note 116, at 1321 (explaining that Congress adopted in 1994 a set of “bankruptcy provisions designed to facilitate the reorganization of firms with large asbestos liabilities” (referring to 11 U.S.C. § 524(g)-(h) (1994))). Those special chapter 11 provisions provided defendants with “a discharge from present and future personal injury and property damage claims” and established trusts for personal injury, including present and future, as well as property damage claims. Id. at 1322. Also, the new Bankruptcy Code “requires that a representative be appointed to negotiate on behalf of the future personal injury claimants” and that present and future claimants receive similar treatment. Id. Ultimately, “in return for half or more of the reorganized firm’s equity, the firm can emerge from bankruptcy free of asbestos liabilities.” See id. (citing G. Marcus Cole, A Calculus Without Consent: Mass Tort Bankruptcies, Future Claimants, and the Problem of Third Party Non-Debtor “Discharge,” 84 Iowa L. Rev. 753 (1999)); cf. Alan N. Resnick, Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability, 148 U. Pa. L. Rev.
hurting those plaintiffs who are currently extremely sick\textsuperscript{270} and short-changing the future injury plaintiffs as well.\textsuperscript{271} A subclass of future injury plaintiffs could obviate the past insufficiencies and problems for all parties that have been involved in past bankruptcy solutions.\textsuperscript{272}

If futures occupy their own subclass, then courts could model bankruptcy trusts for the ascertained and currently injured, and possibly a separate one for the subclass of futures.\textsuperscript{273} Establishing bankruptcy trusts for the currently injured, without the concomitant uncertainties of future claims, would both preserve funds for the futures\textsuperscript{274} and make more money available for the currently injured.\textsuperscript{275} Also, this scheme would stop the pattern of plaintiffs suing defendants who are only “peripherally” involved in asbestos products.\textsuperscript{276}

\textsuperscript{270} See, e.g., Hensler, \textit{As Time Goes By}, supra note 251, at 1924 (explaining how most asbestos workers seeking a settlement have “little or no impairment,” as opposed to those who are extremely sick); see also Behrens, supra note 261, at 338 (“As a result of the asbestos lawsuit explosion, resources needed to compensate truly injured people are steadily being depleted.”).

\textsuperscript{271} See Hensler, \textit{As Time Goes By}, supra note 251, at 1924 (explaining that Amchem and Ortiz’s mandates to protect all future injury plaintiffs might “put at risk those future victims who have the most at stake” since presumably there will be “very little money left on the table” in the future, based on the current trend of the asbestos litigation).

\textsuperscript{272} See, e.g., Resnick, supra note 269, at 2076 (suggesting that courts must strike a balance between the needs of reorganized companies and the needs of future injury claimants). Resnick proposes altering Bankruptcy Code section 101, defining “claim,” to include a new definition for “mass future claim” as one way to solve this problem. Id. at 2075. He further suggests that companies should be able to fashion bankruptcy around future claims if there is a “rational basis” for estimating the number of possible future claims. Id. at 2077 (adding that if the future tort liability is too “speculative” for a rational basis for estimation, that company should delay bankruptcy until a later date when this is feasible).

\textsuperscript{273} See infra notes 277-80 and accompanying text (describing a bankruptcy scheme solely addressing future injury claimants).

\textsuperscript{274} See generally Carroll et al., supra note 13, at 67 (explaining that the Manville Trust had been paying ten percent of future claims’ liquidated value but had to drop down to five percent in July of 2001 to “preserve” the quickly depleting funds).

\textsuperscript{275} See Behrens, supra note 261, at 349-50 (explaining that combining future and current injury plaintiffs in “mass trial procedures” gives less money to the currently injured than they would get if “their cases were decided individually”). He explains that many futures currently receive money “at the expense of impaired victims.” Id. at 350.

\textsuperscript{276} See id. at 339-40 (highlighting how bankruptcies of large corporations have “strong ripple effects” because plaintiffs’ lawyers bring in other “peripheral defendants” to sue when the “traditional defendants” are bankrupt (quoting \textit{In re Joint E. & S. Dists. Asbestos Litig.}, 129 B.R. 710, 747-48 (E. & S.D.N.Y. 1991))); Hensler, \textit{As Times Goes By}, supra note 251, at 1920 (emphasizing that attacking new defendants when others go bankrupt creates more bankruptcies such that “more litigation is stayed,” more money is unavailable for all claimants, and the new targets for bankruptcy “may adopt new defensive strategies” since the stakes are so high, increasing overall transaction costs); White, supra note 116, at 1328 (explaining that
To fix the past bankruptcy problems, one judge—Judge Wood—has made a suggestion that takes the futures subclass cure one step further. Wood has emphasized that futures fall into two categories: those who are ascertainable and aware of their exposure, and those who are unaware of their exposure, and are therefore unascertainable. Thus, defendants could fashion bankruptcy trusts on a reliable number of ascertainable futures. For the unascertained, defendants could either fashion a separate bankruptcy trust for them, or possibly leave them to fend for themselves in the tort system. Additionally, courts could also funnel this group of asbestos claims are now filed “against more than 6,000 corporations” in “half of the industries in the U.S. economy”). Behrens describes this vicious cycle as a domino effect:

Payments to the unimpaired have encouraged more filings by other unimpaired claimants; this has further depleted the assets of the defendant companies and forced many of them into bankruptcy; as more companies have been driven into bankruptcy, the process has accelerated because more and more liability is pushed over onto fewer and fewer companies; to make up for the shares of those companies, defendants with increasingly attenuated connections to asbestos are being pulled into the litigation; these peripheral defendants are now starting to collapse under the great weight of claims against them, just as the companies that came before them in the litigation.

Behrens, supra note 261, at 341.

277. See Wood, supra note 36, at 1941 (suggesting how to reconcile the interests of futures with bankruptcy solutions by focusing on future claims that are ascertainable).

278. See id. at 1934-36. This Note combines ascertained and unascertained futures in the same fashion, since both may have long-latency period injuries. However, Judge Wood's suggestion to split the futures along the lines of exposure-awareness might be effective, and echoes the Third Circuit's dicta in Georgine. See supra note 217. Wood's suggestion might be especially beneficial in the bankruptcy arena since the crux of bankruptcy is comparing assets to liabilities and creditors' claims. See supra note 211 (describing how ascertained plaintiffs would be putative creditors, helping a corporation to formulate their “schedule of debts” in bankruptcy and gaining their “valid discharge” against future claims). Thus, it is valuable to include ascertained futures in bankruptcy calculations. Judge Wood's suggestion then effectively splits the futures into two different subclasses, the ascertained and the unascertained. See id.

279. See Carroll et al., supra note 13, at 67-68 (explaining how the increasing number of futures coming out of the woodwork has deeply impacted bankruptcy trusts and their ability to pay out liquidated claims); see also White, supra note 116, at 1323 (“The MPIST [Manville Personal Injury Settlement Trust] did not find the compensation business to be smooth sailing.”). White has documented the success, or lack thereof, of the MPIST: as of 2000, “nearly 500,000 claims had been filed, $2.2 billion had been paid out, and the average payment to claimants over the history of the MPIST had dropped to about $8,000.” Id. at 1324 (citing a table from the MPIST website, at http://www.mantrust.org (last visited Jan. 29, 2004)).

280. See Wood, supra note 36, at 1937. Judge Wood suggests putting that group of unknown and unaccounted for futures out of a subclass and into the tort system. However, that could potentially undermine the tort system’s goals and decrease the defendant’s incentive to settle. See supra notes 256-62 and accompanying text (explaining why futures subclasses will avert the possible undermining of the tort system).
futures into a payment scheme similar to workers’ compensation, at the time of injury manifestation.\textsuperscript{281}

Overall, the entire theory behind a futures subclass is inherently uncertain because it predicts future injuries and future claims. Thus, the futures subclass has possible drawbacks which may vitiate any possible benefits.

2. The Opposing View: The Subclass Cure Is Worse than the Disease

According to some, a futures subclass is a bad idea not only for procedural and constitutional reasons,\textsuperscript{282} but also because of important practical and policy concerns. First, defendants would not enter into settlements that include futures subclasses of plaintiffs. Second, futures subclasses would destroy the benefits of current bankruptcy solutions effectively managing the long-latency future injury problem. Third, it is nearly impossible for defendants and courts to establish settlements or administrative solutions for a distinct subclass of people that do not currently exist in the eyes of the law.

a. A Futures Subclass Will Encourage Defendants to Settle, if at All, Only with the Currently Injured

One scholar has argued that \textit{Amchem} has made class action settlements, in certain circumstances, “improbable.”\textsuperscript{283} Defendants in personal injury class action settlements have an incentive to settle if they can either secure for themselves a bill of peace,\textsuperscript{284} or “receive a

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  \item \textsuperscript{281} See Hazard, \textit{supra} note 9, at 1917 (suggesting that part of his proposed Legislative solution comprise a payment scheme similar to workers compensation).
  \item \textsuperscript{282} See \textit{supra} notes 191-249 and accompanying text (describing the procedural and constitutional shortcoming of a futures subclass for mass tort class actions).
  \item \textsuperscript{283} McGovern, \textit{supra} note 55, at 878. McGovern also suggests that it has “also prompted substantial introspection at a more conceptual level regarding fundamental questions of fairness and efficiency in the tort compensation system.” \textit{Id.}
  \item \textsuperscript{284} See \textit{id.} at 872 (explaining that defendants have a “search for certainty” that fuels their desire to settle, and how recent decisions have made the future of such settlements “skeptical” and “have created barriers to early global resolution”); see \textit{also} Weinstein, \textit{supra} note 3, at 136. Judge Weinstein suggested that Rule 23(b)(3) class actions allowing plaintiffs to opt out “theoretically reduce the ability of this device to deliver ‘global peace’ in the mass tort context—as does what some perceive (wrongly, in my opinion) to be the inability to join claims filed in state court or to bind future claimants.” \textit{Id.} Based on that statement, Weinstein presumably thinks that, contrary to what many believe, it is quite possible to bind future injury claimants. This viewpoint is in keeping with his decision regarding Isaacson and Stephenson’s claim in 2001 to grant defendant’s motion to dismiss. \textit{See Stephenson v. Dow Chem. Co., 273 F.3d 249, 256 (2d Cir. 2001)} (“Judge Weinstein granted this motion from the bench following argument, rejecting plaintiffs’ argument that they were inadequately represented and concluding that plaintiffs’ suit was an impermissible collateral attack on the prior settlement.”). \textit{But see id.} at 261 (finding that contrary to Weinstein’s determination, the plaintiffs “were inadequately represented in the prior litigation, based on the Supreme Court’s teaching in \textit{Amchem} and \textit{Ortiz}”). Accordingly,
discount for paying that money sooner than the litigation system usually requires.\textsuperscript{285} If futures have their own subclass, defendants will not be able to achieve these settlement goals.\textsuperscript{286} First, members of a futures subclass could create a looming threat of collateral attack upon past judgments by arguing that they were improperly bound.\textsuperscript{287} In the post-	extit{Dow} world, a putative futures subclass could sue an unsuspecting defendant at any time.\textsuperscript{288} Second, a futures subclass of indeterminate size would subject defendants to unlimited liability.\textsuperscript{289} Finally, congressional attempts to help defendants achieve global peace through class action settlements have so far failed.\textsuperscript{290}

Empirical studies substantiate these concerns: many defendants have ceased agreeing to settle in the post-	extit{Amchem} era,\textsuperscript{291} because

\begin{itemize}
\item Weinstein's impressions in 1995 regarding a court's ability to bind futures seem fallible today.
\item McGovern, \textit{supra} note 55, at 881. McGovern explains the phrase "discount" by explaining the economic principle that defendants expect to pay less "per item" if they buy a large amount of items at one time. \textit{Id.} In the asbestos context, this proposition means that if the defendants settle a large number of claims in a class action, they expect to pay less per claim than they would otherwise if they were defending against each claim individually.
\item See, e.g., Mass Torts Report, \textit{supra} note 252, at 35 (explaining that giving futures in a class action the opportunity to opt out when they manifest injury, could "discourage settlement by making global peace difficult, if not impossible, for defendants to obtain"). Also, the Report questioned whether defendants could ever form settlements when it is so difficult to notify futures about those proceedings. \textit{See id.} ("It also is difficult, if not impossible, to provide meaningful notice to people who may not even be aware of their past exposure.").
\item See \textit{supra} notes 142-63 and accompanying text (arguing that inadequately represented futures may collaterally attack a judgment that purports to bind them).
\item See \textit{supra} notes 180-87 and accompanying text (discussing the \textit{Dow} case and how futures can no longer adequately represent their interests in the same plaintiff subclass as current injury plaintiffs).
\item See Wood, \textit{supra} note 36, at 1936 (emphasizing, in the bankruptcy context, that defendants are hesitant to get involved with an unknown number of claims of unknown dollar value).
\item See, e.g., Class Action Fairness Act of 2003, H.R. 1115, 108th Cong. (2003). In October of 2003, the Senate "effectively terminat[ed] consideration of... the bill." Robert T. Horst et al., \textit{Civil Justice Reform—Law Firms}, The Metropolitan Corp. Counsel, Nov. 15, 2003, at 45. The A.L.I. commented on the bill's previous incarnation, the Class Action Fairness Act of 1999, as an attempt to "re-federalize" class actions by removing them from state courts and resting them in federal courts. Cabraser, \textit{supra} note 252, at *1. Making class action certification increasingly federalized would create an added incentive for defendants to settle them, since such settlements would be immune from state court attack. \textit{See McGovern, \textit{supra} note 55, at 877-78} ("If, however, it is possible to have a settlement class certified in federal court, the state court problems of finality can be overcome by federal jurisdiction."). However, this legislation failed and "mass tort class actions in federal court are now viewed with skepticism by many parties." \textit{Id.} at 877.
\item See Carroll et al., \textit{supra} note 13, at 61 ("Many interviewees noted that the Center for Claims Resolution (CCR), the leading example of asbestos defendant cooperation, has ceased settling claims against its members."); \textit{see also} Hensler, \textit{As Time Goes By, \textit{supra} note 251, at 1906} (explaining that the CCR has disbanded and stopped settling claims as of August 1, 2000). Hensler noted that after \textit{Amchem}, five members of the CCR have not only ceased settling, but have sought further
previous settlements have not guaranteed global resolution. This trend places defendants in an uncertain settlement position, but also hurts the compensation prospects for plaintiffs and increases the transaction costs for all litigating parties. In addition to settlements, a futures subclass could also have a chilling effect on bankruptcies in the future.

b. A Futures Subclass Will Inhibit Efficient Bankruptcy Solutions

Throughout the vicissitudes of the asbestos litigation, bankruptcy has “emerged as the only means for firms to limit their asbestos liabilities.” Most bankruptcy schemes make provisions for present and future injury plaintiffs. Removing these futures into their own distinct subclass would disturb the current bankruptcy trusts, vitiate the benefits those trusts have provided and would waste the high protection through bankruptcy proceedings. See id. at 1906-07.

292. See generally Carroll et al., supra note 13, at 61 (discussing how defendants are “moving away from block settlements” and litigating individual claims when possible, since presumably block settlements are no longer ensuring global resolution). See also id. at 79 (explaining how the failure of settlements adversely affects futures, in addition to the currently injured, since bankruptcy surges and failure of settlements are working together to deplete the funds available for all the injured); cf. id. at 68 (explaining how many bankruptcies have shifted liability around such that individual defendants are facing costs higher than expected, and subsequently “abandon[ing] previous settlement practices intended to avoid litigation costs and pursu[ing] more aggressive—and more expensive—litigation strategies”).

293. See id. The monies available to pay current and future claims are directly correlated to how much money the defendants have in their coffers. If the defendants are incurring many expenses by litigating as opposed to settling, there will be correspondingly less money for the plaintiffs. See id; see also Behrens, supra note 261, at 332-33 (explaining that settlements create transaction costs, taking away possible funds for plaintiffs).

294. See Carroll et al., supra note 13, at 78 (projecting that total asbestos litigation costs in the future could be between $145 and $210 billion).

295. White, supra note 116, at 1321. But see Edith H. Jones, Rough Justice in Mass Future Claims: Should Bankruptcy Courts Direct Tort Reform?, 76 Tex. L. Rev. 1695, 1722 (1998) (warning that bankruptcies may very well be a poor substitute for a true solution, such as “substantive or procedural tort reform”). Judge Jones raises doubts about whether mass future claims “have anything to do with bankruptcy, or whether they are a contrivance to shoehorn mass tort litigation into a coercive, collective settlement that preserves management control and shareholder equity.” Id. Accordingly, she suggests that bankruptcy is “merely a means, not an end in mass tort litigation” and that Congress should make tort reforms to take care of the futures problem, as opposed to bankruptcy courts. Id.

296. See generally Carroll et al., supra note 13, at 67 (“The trusts are required to provide for future claimants and, consequently, are generally concerned about being sure there will be money for future claimants.”).

297. See, e.g., Resnick, supra note 269, at 2092 (concluding that bankruptcy is “an appropriate framework for resolving enterprise-threatening mass tort liability”).

298. See Carroll et al., supra note 13, at 62 (explaining how the Manville Trust has paid out seventy percent of its total dollars to plaintiffs). But see id. at 64 (highlighting that most defendants pay sixty-five percent of the compensation to non-cancerous plaintiffs, and thirty-five percent to those suffering from lung cancer, other cancers, and mesothelioma). See supra note 116 for a thorough description of mesothelioma.
transaction costs the defendant companies have incurred during bankruptcy proceedings.\textsuperscript{299} Also, it would be difficult on a practical level to fashion bankruptcy settlements around a futures subclass of indeterminate size.\textsuperscript{300} Thus, bankruptcy cannot be effective if futures occupy an amorphous subclass.\textsuperscript{301} The problems that a futures subclass could unleash in the context of bankruptcies are illustrative of the more general management problems the subclass could create in class actions.

c. A Futures Subclass Creates Difficult Management Problems

Although the legality of a futures subclass is unclear, very few commentators have suggested how a court should manage a futures subclass on a practical basis. As one scholar has suggested, it is difficult for courts to treat an unlimited group of hypothetical people.\textsuperscript{302} One method of managing futures would be to allow them to opt out from a Rule 23(b)(3) class at the time when they do manifest injuries.\textsuperscript{303} However, that scheme could create the same

\textsuperscript{299} See Carroll et al., \textit{supra} note 13, at 72 (explaining that a bankruptcy reorganization costs about three percent of a firm's value). However, once a company has formed a bankruptcy trust after the reorganization process, transaction costs are relatively low. \textit{See id.} at 62 (using the Manville Trust as an example, in which plaintiffs receive seventy percent of the funds). The downsides to bankruptcy trusts are that the monies are limited, and that most trusts do not limit attorneys' fees. \textit{See id.} (citing the Manville Trust as an exception, since it limits attorneys' fees to no more than twenty-five percent).

\textsuperscript{300} See Wood, \textit{supra} note 36, at 1936 (asserting that "[a] solution based on bankruptcy is doomed because of the difficulty in measuring liabilities, at least where it is impossible to ascertain at the time of filing either the number of future claimants or the average size of their claims"). Wood notes that after \textit{Amchem} and \textit{Ortiz}, her paper has "a distinctly pessimistic tone" because "[n]othing will really work, we are told, for any kind of futures case." \textit{Id.} (italics omitted).

\textsuperscript{301} \textit{Cf.} Resnick, \textit{supra} note 269, at 2074-75 (explaining how certain companies can use bankruptcy to "insulate" themselves from future liability from future injury claimants); \textit{supra} notes 277-80 and accompanying text (describing Judge Wood's proposal that courts fashion bankruptcy trusts around ascertainable numbers of plaintiffs). However, that suggestion conceded that bankruptcy schemes for the unascertainable futures are problematic. \textit{See supra} note 280.

\textsuperscript{302} \textit{See} Hazard, \textit{supra} note 9, at 1907 (explaining the fundamental difficulty in courts' identifying future claims by putative claimants and subsequently concluding those claimants' rights). \textit{But see supra} note 90 and accompanying text (discussing the inactive docket solution some state courts have espoused to manage future injury plaintiffs). In response to the future injury problem, judges in cities such as Syracuse, Seattle, and Greenville, North Carolina have adopted inactive dockets or "pleural registries," \textit{see supra} note 263, to help manage their overburdened court dockets. \textit{See Dunbar & Martin, supra} note 89 (describing how different courts manage claimants who demonstrate pleural plaque, but not cancer). Importantly, those courts toll the statute of limitations for such "unimpaired claimants," who can enter the active docket when "impairment can be documented." \textit{Id.} However, this solution only encompasses the subset of futures that are aware of their exposure and can sign up for the registry of unimpaired claimants.

\textsuperscript{303} \textit{See}, \textit{e.g.}, Daniel M. Weddle, \textit{Settlement Class Actions and "Mere-Exposure" Future Claimants: Problems in Mass Toxic Tort Liability}, 47 Drake L. Rev. 113, 136-
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inconsistencies and confusion courts are facing today. Some scholars have also suggested amending the Federal Rules of Civil Procedure to take care of a futures subclass. However, courts would still face certain concerns about how to manage this subclass. Importantly, the Advisory Committee on Civil Rules has recently proposed an addition to Rule 23 to incorporate the futures.

38 (1998) (proposing to allow futures to opt-out of a settlement when they manifest their injuries). Weddle recognizes that this plan requires a payment schedule at the time of class certification, and jeopardizes funds for the currently injured. Id. at 137. However, this scheme “avoids zero recovery” for long-latency plaintiffs and helps the “perennial problem” of giving futures “adequate notice of a class action or settlement.” Id. See also supra notes 210-45 and accompanying text for an explanation of the problems of providing notice to futures. Additionally, the Advisory Committee on Civil Rules has suggested a similar Rule 23(b)(3) opt out class action as a possible vehicle for futures. See Mass Torts Report, supra note 252, at 34-35 (discussing the futures problem generally). This proposed Rule suggests that futures should be a class, or a subclass, in order to be certified. See id. app. F-6 at 3. It also makes provisions to adequately represent future injury claimants with a court-designated counsel, and provide notice to the “class or subclass by the best means practicable, including individual notice to each member that can be identified through reasonable effort.” Id. Furthermore, notice “must be directed to a central judicial authority in each state, and must be published in suitable popular media at yearly intervals for the duration of the action.” Id.

304. If futures could opt out whenever they manifest injury, the defendants might still be unable to limit their liability. This futures subclass could prove to be a forever-revolving door of plaintiffs manifesting injuries, staying in, opting out and possibly arguing that intra-class conflicts preclude a finding of Rule 23(a)(4) adequacy of representation. Thus, the futures subclass solution, upon application, could move in a full circle back to the original problem of combining future and current injury plaintiffs in one plaintiff class.

305. See Brian Wolfman & Alan B. Morrison, Representing the Unrepresented in Class Actions Seeking Monetary Relief, 71 N.Y.U. L. Rev. 439, 495-98 (1996) (suggesting a possible amendment to Rule 23(e) and a new rule to ensure the protection of future claimants). The authors suggested Rule 23(e) should read:

In considering any proposed settlement under this Rule in which some class members would only be entitled to relief if certain events occur in the future, the court shall determine whether, for such class members, other or additional relief is required to assure that the settlement is fair to those class members.

Id. at 497.

306. See id. (suggesting that this amendment would force courts to examine whether special protections in the settlement, such as medical monitoring, might be required “relief” for futures). However, Wolfman and Morrison concede that a court may very well decide that certain settlement protections for futures are not necessary after all. See id. (“The court might ultimately conclude that the other benefits for future class members warranted the abrogation of the medical-monitoring claims, but it could not avoid the issue.” (emphasis added)). Thus, Wolfman and Morrison are primarily concerned with courts confronting the issue of future claims. Their proposal does not specify what type of settlement benefits nor how many benefits would render that settlement “fair” as to the futures. Id. at 495-98. Finally, Wolfman and Morrison propose a new Rule that would give courts discretion to include inflation adjustments in a settlement that binds futures. See id. at 497. While Wolfman and Morrison's second proposed Rule addresses one concern futures subclasses may face, it does not clarify what types of settlements for futures are fair in the first place.

307. See Mass Torts Report, supra note 252, app. F-6 (proposing Civil Rule 23.3,
However, that proposal encompasses all holders of future claims, leaving intact the confusion surrounding the treatment of futures who "know who they are today." That important distinction might necessitate a new approach to analyzing the futures problem today.

III. THE FUTURE OF A FUTURES SUBCLASS: COURTS MUST SPLIT FUTURES IN TWO

Although most commentators doubt whether a court can include futures in mass tort class actions with current injury plaintiffs, a partial solution might lie in a closer examination of the futures themselves. Courts might address the differences between futures aware and those unaware of their exposure to a toxin by allocating some futures to the tort system and the remainder to a plaintiff subclass.

A. Futures and Current Injury Plaintiffs Do Not Belong Together

The Supreme Court has clearly stated that future injury plaintiffs cannot adequately represent their interests in the same plaintiff class as current injury plaintiffs. The Ortiz Court even specified that plaintiffs with these differing injuries must occupy "homogenous subclasses." The Court's recent jurisprudence has little doubt that future injury plaintiffs can no longer share a plaintiff class with current injury plaintiffs.

However, each of the Supreme Court's decisions suggesting futures subclasses has also raised equally important concerns about how to provide notice to such a subclass. Neither Amchem nor Ortiz reached these notice issues because the Court disposed of the cases on class certification grounds. Nevertheless, the Court seemed highly

“Future Mass Tort Claimant Class Action”). This proposed Rule suggests that futures should be a class, or a subclass, in order to be certified. See id. at 2. It also makes provisions to adequately represent future injury claimants with court-designated counsel, and provide notice to the “class or subclass by the best means practicable, including individual notice to each member that can be identified through reasonable effort.” Id. at 3.

308. See Wood, supra note 36, at 1941 (describing how courts should separate the futures who are aware of their exposure from those who are not).

309. See supra notes 167-87 and accompanying text (describing the Amchem, Ortiz and Dow Courts' findings about adequacy of representation).

310. See supra note 177 and accompanying text (explaining the Ortiz Court's mandate that futures constitute a distinct subclass).

311. See supra notes 219-45 and accompanying text (describing the Amchem and Dow Courts' treatment of notice).

312. See supra notes 221-45 and accompanying text (describing the Amchem and Dow Courts' failure to decide the notice issue since adequacy of representation was dispositive in both instances).
skeptical that future injury plaintiffs could ever receive sufficient notice. 313

Part of the reason the Court may have been so skeptical is because it had yet to address the differences between the future claimants themselves. While the Court has made great strides to separate the future injury from the current injury plaintiffs, the treatment of futures is still a work in progress. It is important that the Court recognize that future injury plaintiffs themselves have significant differences that might demand different treatment.

B. All Futures Do Not Belong Together

Some lower courts have differentiated between futures who have manifested injuries after a settlement and those who have manifested injuries after settlement fund depletion. 314 However, those distinctions overlook a critical and more fundamental divide: the split between futures aware of their exposure and those with no knowledge of it whatsoever. 315 Exposure-awareness does not depend on class action settlement deadlines or dates of fund depletion. Thus, deciding the fate of futures based on their date of manifestation and subsequent eligibility for compensation is an incomplete solution to the problem. 316

As an example, a worker in an asbestos-producing factory and a Vietnam veteran who loaded Agent Orange onto planes would presumably be aware of their exposure to a toxin from the moment of engagement with the product. These two hypotheticals are examples of exposure-aware plaintiffs. 317

Courts need to oversee or provide class action notice that pinpoints the unique situation of such futures. 318 Although some scholars doubt that those currently healthy would ever heed such notice, 319 courts

313. See, e.g., supra note 245 and accompanying text (hypothesizing that if the Amchem or Dow Courts had reached the question of notice, the Courts would have found such notice impossible to provide).

314. See supra notes 128-37 and accompanying text (discussing the findings of the Ryan court and Second Circuit's findings in Ivy, both of which stressed the futures' eligibility for compensation, as opposed to whether they were sick at the time of the settlement).

315. See supra notes 278-80 and accompanying text (describing Judge Diane Wood's division of futures into the "ascertained" and "unascertained").

316. See supra notes 128-37 and accompanying text (describing the Second Circuit's early decisions in this area and flaws in those decisions).

317. See supra note 217 and accompanying text (explaining the Third Circuit's distinctions between types of plaintiffs based on their awareness of exposure).

318. See supra note 125 (explaining that the Supreme Court has combined all futures together under the term "exposure-only").

319. See supra note 211 and accompanying text (explaining Professor Mark Weber's view that courts cannot provide "meaningful notice" that would permit plaintiffs "to make sensible individual decisions whether to accept or reject the settlement").
should shoulder the burden\textsuperscript{320} of providing "meaningful notice"\textsuperscript{321} that would make futures become selfconscious\textsuperscript{322} enough to decide how they want to redress their latent injuries.

A court could place these exposure-aware futures into a futures subclass at the time of class action certification. Then, the court would provide widespread notice\textsuperscript{323} to alert the exposure-aware futures of their legal status as a subclass in the litigation.\textsuperscript{324} At this point, all exposure-aware futures who wish to join the class action could opt-in to the futures subclass. The opt-in decision would have very little practical significance to them at the time, but would have manifold significance later if and when they became sick.\textsuperscript{325}

This opt-in futures subclass would permit defendants to form settlements with both currently injured plaintiffs\textsuperscript{326} and the

\begin{itemize}
  \item \textsuperscript{320} This Note does not propose that courts should be solely economically responsible for providing this notice. An equitable division of costs for futures subclasses is beyond this Note's scope. By "burden," this Note suggests that courts must take control of the notification of futures and bear the responsibility of making sure this notice is sufficient to alert currently healthy people to their inclusion in a futures subclass.
  \item \textsuperscript{321} \textit{See supra} note 211. This Note does not propose the specifics such notice would entail. However, a clearly worded disclaimer addressed to anyone aware of toxic exposure, whether currently sick or healthy, could sufficiently alert putative plaintiffs of their legal rights. It does not seem overly burdensome for courts to explain that, because of the long latency period associated with some chemicals, holders of future injury claims might be healthy today.
  \item \textsuperscript{322} \textit{See supra} note 107 and accompanying text (explaining the use of the term "selfconsciousness" and "unselfconsciousness" in this Note).
  \item \textsuperscript{323} To cast as wide a net as possible, courts should consider serving notice through multiple media, from television, radio and newspapers to union offices, locker rooms and company bathrooms. While this proposal might seem farfetched, all proposals to deal with a problem of this scope will inevitably be "semi-shocking." \textit{See supra} note 268 (explaining Professor Mullenix's privatization proposal and her own characterization of its shock value). Also, this suggested notice is similar to the widespread notice the Advisory Committee has proposed. \textit{See supra} note 303 and accompanying text (explaining the Advisory Committee's suggestion of spreading notice through the media for the duration of the litigation involving futures' rights).
  \item \textsuperscript{324} While courts usually disseminate notice to permit plaintiffs to opt out of Rule 23(b)(3) class actions, \textit{see supra} notes 37-40 and accompanying text, this proposal advocates the reverse scenario of opting-in to a futures subclass after notice. Importantly, this Note does not address the procedural and constitutional implications of an opt-in class. The author only proposes an opt-in class to illustrate one possible way for courts to capture the exposure-aware plaintiffs, and distinguish them from their exposure-unaware counterparts. \textit{See supra} notes 125, 278-80 and accompanying text (explaining Judge Diane Wood's suggestion to split up futures depending on their awareness of exposure).
  \item \textsuperscript{325} \textit{See supra} notes 233-39 and accompanying text (explaining that Isaacson and Stephenson saw no notice and had no idea that a class action was adjudicating their rights). Importantly, Isaacson and Stephenson were both aware of their exposure to Agent Orange. \textit{See supra} note 1 and accompanying text (highlighting that both veterans knew they were in close contact to Agent Orange when they were serving in Vietnam).
  \item \textsuperscript{326} \textit{See supra} notes 283-84 and accompanying text (describing how a broad futures subclass would inhibit defendants from settling with the currently injured).
\end{itemize}
ascertained subclass of future injury plaintiffs. For defendants' purposes, both groups would look like present injury plaintiffs. However, for the ascertained subclass, the defendants could fashion settlements with terms specific to their situation. Thus, an ascertained futures subclass would help future injury plaintiffs receive funds and current injury plaintiffs would not suffer from the inclusion of the futures subclass.

It may be difficult for plaintiffs to discern which category they occupy along the spectrum between exposure-aware and exposure-unaware. For example, a typical worker in a soup can company would have an equal probability of being aware or unaware of asbestos exposure. As to that grey area of plaintiffs, courts should try to disseminate detailed, informative notice to catalyze these plaintiffs into selfconsciousness. The plaintiffs who remain unselfconscious after such notice would remain, by default, exposure-unaware futures without a distinct subclass to protect their rights.

Finally, an asbestos worker sitting in a clean office overseeing other workers, or a Vietnam veteran who never saw a can of defoliant or spent any time in the jungle represent the opposite end of the exposure-aware spectrum; they are exposure-unaware plaintiffs. The opt-in scheme proposed here—for exposure-aware plaintiffs—does not work for them.

People who are unaware that they have inhaled a toxin could be

327. See supra note 125 (explaining Judge Wood’s division of ascertained futures in the bankruptcy context, which is equally applicable in the settlement context). Judge Wood believes that once courts identify futures aware of their exposure, such futures could “in some . . . intelligent way participate in a suit.” Wood, supra note 36, at 1941.

328. See supra note 186 (describing medical monitoring and how the futures ascertainable by the court can look like present injury claimants to defendants).

329. For example, the settlement might contain inflation protection. See supra note 115 and accompanying text (discussing the settlement terms that are specifically favorable for futures as opposed to current injury plaintiffs).

330. See supra note 125 (explaining that ascertained futures could participate in the suit in some form). Presumably, such participation would entail procuring funds when healthy ascertained futures do become sick.

331. See supra notes 283-88 and accompanying text (explaining how a general futures subclass containing unascertained futures hurts current injury plaintiffs’ chance of coming to a settlement with defendants).

332. See supra note 261 and accompanying text (describing how the asbestos litigation has spread to industries that many people would not necessarily link to asbestos, such as soup production).

333. See supra notes 320-23 and accompanying text (explaining how the courts must give detailed notice to inform asymptomatic but exposure-aware plaintiffs of their rights).

334. See supra note 217 (explaining the Third Circuit’s description of exposure-unaware plaintiffs).

335. See supra text accompanying note 325 (describing this Note’s futures subclass opt-in proposal).
unselfconscious forever;\textsuperscript{336} no widespread, court-ordered notice\textsuperscript{337} could possibly alert them to their role in a class action. Exposure-unaware futures could only become aware when they manifest injuries\textsuperscript{338} or receive some fortuitous reminder or external notification telling them that they were exposed.\textsuperscript{339} If certain futures are not aware of their own exposure, the court cannot be aware of their exposure either. Accordingly, the court cannot fashion those futures into a distinct futures subclass.\textsuperscript{340}

Therefore, exposure-unaware futures should enter the traditional tort system when they do manifest injuries. While this might eventually undermine tort theories of deterrence,\textsuperscript{341} it would support theories of individualized justice for claimants seeking compensation for injury.\textsuperscript{342} Also, while some scholars and the Federal Rules Advisory Committee have proposed changing the Federal Rules of Procedure to manage all futures together,\textsuperscript{343} such suggestions do not

\begin{footnotesize}
336. See supra note 107 (explaining the concept of a plaintiff's selfconsciousness in
the future injury context).

337. See supra note 321, 323 and accompanying text (describing the type of notice a
court would have to provide to alert ascertained futures).

338. At the point of injury manifestation, an unascertained future would become a
current injury plaintiff and, depending on the timing, could potentially be ineligible
for settlement funds altogether. See supra notes 3-4, 71-72 and accompanying text
(explaining the Agent Orange settlement and its time frame). Thus, although the
unascertained future becomes selfconscious at the point of injury manifestation, that
revelation could be too late to preserve any legal rights. See id. This Note's futures
subclass opt-in proposal is one possible way to manage futures, ex ante, to avoid this
very situation. For futures, the story of Isaacson and Stephenson shows that they
need to preserve their legal rights, if possible, before they become sick. See supra
notes 1, 233-39 and accompanying text (describing the two veterans who knew they
were exposed to Agent Orange, but remained ignorant of their exposure's legal
repercussions).

339. For example, one co-worker might remind another that, years ago, the
products they manufactured contained asbestos threads. But it is thoroughly
impractical, if not impossible, for courts to rely on exposure-aware futures to bring all
their friends, family and co-workers into exposure-awareness as well. However, an
effective, widespread court notice could possibly tip off some exposure-unaware
futures. See supra notes 321, 323 and accompanying text.

340. See supra note 125 (discussing Judge Wood's view that unascertained futures
do not belong in class actions).

341. See supra notes 261-62 and accompanying text (describing how too many
asbestos litigants in the tort system could undermine deterrence, shifting blame
around defendants only remotely connected to the offending industry).

342. See supra notes 257, 259-62 and accompanying text (describing the traditional
tort goals of individualized justice in mass tort class actions).

343. See supra notes 305-08 and accompanying text (explaining proposed
amendments to the Federal Rules of Civil Procedure to give future injury plaintiffs
“fair” settlements, adequate representation and notice). The fundamental problem
underlying these proposed amendments is that a settlement might be “fair” for some
futures, but unfair to others. See supra note 125 (explaining the inherent conflicts
among future injury plaintiffs). This problem suggests one of the most basic flaws of
the subclass cure: there is no practical, logical way for courts to administer justice to a
futures subclass of plaintiffs that may come into existence at any given moment,
exhibiting any number of injuries against any number of defendants. Thus, a practical
account for the nuances between holders of future claims. Until courts and commentators generate substantive proposals about how to manage unascertained futures those futures have a dismal class action outlook, but possibly a bright future in the tort system.

CONCLUSION

Isaacson and Stephenson have yet to receive any relief to compensate them for their suffering. Their case is still moving through the court system, and no subsequent courts have shed any light on how to treat the Dow decision. Presumably, the 2001 Stephenson decision will permit Daniel Stephenson to sue the chemical companies for the first time as a procedurally proper litigant. However, there is the looming possibility that the "government contract" affirmative defense will defeat Stephenson's claims and he will recover no money. Although that defense might operate as a hardship upon Stephenson, his case could be a small setback within a larger victory.

After the Dow decision, future injury plaintiffs in long-latency toxin application of the futures subclass cure tears apart its curative powers by possibly invalidating the entire adequacy of representation function that the cure seemed to preserve at first glance.

344. See supra notes 305-08 and accompanying text (explaining proposed amendments in the Federal Rules to manage futures). Rather, these proposals seem only to reinforce and codify the Supreme Court's findings that future injury plaintiffs cannot adequately represent their interests in the same plaintiff class as current injury plaintiffs without protections for diverging interests between futures. This Note asserts that the proposed amendment does not help the futures problem because it reminds courts to protect futures, but does not tell courts how to do so and, importantly, does not recognize that different futures require different protections.

345. See supra notes 246, 263, 268 and accompanying text (explaining Professors Hensler's, Mullenix's and Brickman's different proposals and commentary about managing futures, none of which account for the differences between futures' exposure-awareness).

346. See supra note 300 (explaining Judge Wood's pessimism that courts can manage futures at all, whether or not in class actions).

347. See supra note 260 (explaining that plaintiffs suing individually can potentially recover a large amount of money in the tort system).

348. See Stephenson v. Dow Chem. Co., No. 00-7455, 2003 WL 22227965, at *21 (2d Cir. 2003) (per curiam) ("With respect to the Stephenson plaintiffs, we remand this case to the district court for further proceedings consistent with our panel opinion." (citing Stephenson v. Dow Chem. Co., 273 F.3d 249 (2d Cir. 2001))). Since the Isaacson plaintiff sparked a federal removal jurisdictional problem, see supra note 241, the Second Circuit found that it had to remand Isaacson's claim to state court; he requires a new ground for federal removal jurisdiction in lieu of the All Writs Act. See Stephenson, 2003 WL 22227965, at *21 (citing Syngenta Crop Protection, Inc. v. Henson, 537 U.S. 28 (2002) (holding that the All Writs Act did not provide proper removal jurisdiction)). Therefore, Stephenson's next procedural step at the trial court level is where a judge will presumably have to interpret the Dow decision.

349. See supra note 141 and accompanying text (explaining the Second Circuit's holding in 2001 that the plaintiffs were not proper parties to the 1984 Agent Orange settlement).

350. See supra note 66 (explaining the "government contract" defense).
class actions may not have their own plaintiff subclass, but they will probably have new opportunities and a new role in the tort system. Courts might permit future injury plaintiffs who shared a plaintiff class with the currently injured, before the Dow decision of 2003, to perform a limited collateral attack to sue defendants for the first time. Alternatively, courts may permit those futures to re-open settlements premised on an overly inclusive plaintiff class, on a broad theory of collateral attack. Using either theory, futures may have windfalls coming in their direction should they choose to fight the past.

If courts fashion class actions today and in the future with no futures subclass, all holders of future claims may presumably litigate when they manifest injuries, regardless of settlements purporting to bind them. If courts fashion class actions using a modified futures subclass, litigation might unravel differently. Either way, the courts cannot tell sick plaintiffs that their cases are finished before they even start.

351. See supra notes 110, 124-41 and accompanying text (explaining the Second Circuit's theories about collaterally attacking to prove that a party was not present in the first place).
352. See supra notes 147-63 and accompanying text (analyzing the general theories of collateral attack that the Fifth, Seventh and Eleventh Circuits have suggested).
353. See supra notes 314-42 and accompanying text (describing this Note's proposal of fashioning a futures subclass out of exposure-aware futures and leaving the exposure-unaware futures in the tort system).