THE INADEQUATE SEARCH FOR "ADEQUACY" IN CLASS ACTIONS: A CRITIQUE OF *EPSTEIN v. MCA, INC.*

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Professors Kahan and Silberman offer a doctrinal and policy critique of the Ninth Circuit's 1997 remand decision in Epstein v. MCA, Inc. (Matsushita II), *which held that class counsel in a state court class action failed to adequately represent the class, and thus the class was not bound by the global settlement approved by the state court. As a result of the* Matsushita II *decision, absent class members have an unfettered ability to collaterally attack the "adequacy" of their representation by class counsel. The authors argue that this holding, premised on a misreading of the Supreme Court's decision in* Phillips Petroleum Co. v. Shutts, *threatens to impede both state and federal class action settlements, create the potential for multiple and wasteful litigation of the issue of "adequacy of representation," and motivate a new kind of forum shopping in the class action context. Although multi-jurisdictional class actions give rise to potential "plaintiff shopping" and "forum shopping" abuses, the authors contend that a broad right to collateral attack created by* Matsushita II *is not a good way to deal with these problems. In place of the Ninth Circuit rule, Professors Kahan and Silberman propose providing incentives to all parties to participate in the settlement action coupled with a narrower, process-based standard for collateral attack.*

Epstein v. MCA, Inc.[1] (*Matsushita II*) represents the latest, though probably not the last, chapter in the litigation that ensued from Matsushita's 1990 acquisition of MCA. In an opinion with far-reaching implications for the conduct of class actions, and particularly settlement class actions, the Court of Appeals for the Ninth Circuit has held that absent class members have an unfettered ability to collaterally attack the "adequacy" of their representation by the class counsel.

In this Article, we critically examine the Ninth Circuit opinion from a doctrinal and a policy perspective. We argue that *Matsushita II* is premised on an expansive, novel—and, in our view, erroneous—

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[1] 126 F.3d 1235 (9th Cir. 1997) [hereinafter *Mastushita II*].

reading of the Supreme Court's decision in *Phillips Petroleum Co. v. Shutts*,[2] a holding limited to a discussion of the due process requirements for jurisdiction over class action plaintiffs.[3] Moreover, the unchecked opportunity for collateral attack created by *Matsushita II* will impede both state and federal class action settlements, will create the potential for multiple and wasteful litigation of the issue of "adequacy of representation," and will result in a new kind of forum shopping in the class action context. We acknowledge that some class attorneys advance settlements that are not in the best interest of the class members and that some courts have been too quick to approve such settlements—and therefore *Matsushita II* may have some beneficial effect in reining in such actions. However, we believe that an unfettered ability to collaterally attack "adequacy" is not a well-designed solution to this problem. Instead, we suggest a substantially narrower opportunity for collateral challenge, along with certain procedural reforms for the settlement forum, to curb potential class action settlement abuse.

I

THE *MATSUSHITA* LITIGATION

In 1990, Matsushita Electric Industrial Co. made a tender offer for, and eventually acquired, MCA, Inc., a Delaware corporation. This transaction resulted in two parallel class actions: one in the Dela-

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[2] 472 U.S. 797 (1985).

[3] *Shutts* itself discussed the opt out requirement in a situation where there was no basis for personal jurisdiction over absent class members and construed a failure to opt out of a class suit as consent to personal jurisdiction. See id. at 813-14; see also Patrick Woolley, Rethinking the Adequacy of Adequate Representation, 75 Tex. L. Rev. 571, 580 n.38 (1997). Several courts and some commentators have suggested that *Shutts* should be read more broadly to require a due process right to opt out of a class suit when monetary claims are involved, without regard to the jurisdictional issue. Compare Brown v. Ticor Title Ins. Co., 982 F.2d 386, 392 (9th Cir. 1992) (citing *Shutts* in holding that minimal due process requires that absent plaintiffs be given opportunity to opt out of class action if monetary claims would be precluded, without discussion of personal jurisdiction), with In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 292 (2d Cir. 1992) (reading *Shutts* as mandating right to opt out of class only when court lacks jurisdiction over plaintiff); see also Adams v. Robertson, 117 S. Ct. 1028, 1072 (1997) (dismissing writ of certiorari as improvidently granted and noting jurisdictional context of *Shutts*); Linda S. Mullenix, Class Actions, Personal Jurisdiction, and Plaintiffs' Due Process: Implications for Mass Tort Litigation, 28 U.C. Davis L. Rev. 871, 880-83 (1995) (discussing briefs filed in Supreme Court in *Ticor Title*, which focus on question of whether there existed independent due process right to opt out of class actions that would preclude monetary damages); Steven T.O. Cottreau, Note, The Due Process Right to Opt Out of Class Actions, 73 N.Y.U. L. Rev. 480, 510-21 (1998) (arguing that due process requires opt out rights in some cases where adjudicatory jurisdiction over class members exists and setting forth framework to determine when such rights are required).

ware state court, the other in federal court.[4] The Delaware action, filed in September 1990, alleged that MCA's directors had breached their fiduciary duties to MCA's shareholders by failing to obtain the best price in the acquisition of MCA. The federal action, commenced three months later, alleged that the tender offer violated Rule 14d-10—the so-called "all holder best price" rule—under the Securities Exchange Act,[5] because two principals of MCA allegedly were to receive a better price. The Delaware plaintiffs did not raise the violation of Rule 14d-10 in their complaint, and indeed could not have done so since claims under the Securities Exchange Act are subject to the exclusive jurisdiction of federal courts.[6]

Eight days after the federal claims were filed, the parties in the Delaware action announced a settlement in principle that released all state *as well as all federal* claims arising from the acquisition of MCA. In April 1991, however, the Delaware Chancery Court rejected the settlement. The court found that, even though the state law claims were "at best, extremely weak,"[7] the federal claims to be released by the settlement had "substantial merit."[8] The proposed settlement, which offered only "illusionary" value to class members, was therefore not fair.[9]

While the Delaware action lay dormant for the next eighteen months, the federal action proceeded—albeit initially without success: In February 1992, the district court rejected the federal plaintiffs' motions for class certification and summary judgment and granted summary judgment in favor of Matsushita and the other defendants.[10] The federal plaintiffs appealed to the Ninth Circuit.

In October 1992, with the federal appeal pending, a second settlement agreement—again encompassing both state and federal claims—was submitted to the Delaware court. This time, the Chancery Court approved the settlement. The court found that the federal claims, having been dismissed by the federal district court, now had "minimal

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[4] For a more detailed description of the proceedings leading up to *Matsushita II*, see Marcel Kahan & Linda Silberman, Matsushita and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims, 1996 Sup. Ct. Rev. 219, 221-28. For other commentary on the litigation, see G. Chin Chao, Securities Class Actions and Due Process, 1996 Colum. Bus. L. Rev. 547.

[5] See 17 C.F.R. § 240.14d-10 (1997).

[6] See Securities Exchange Act of 1934 § 27, 15 U.S.C. § 78aa (1994).

[7] In re MCA, Inc. Shareholders Litig., 598 A.2d 687, 694 (Del. Ch. 1991).

[8] Id. at 696.

[9] Id. at 695-96. The proposed settlement provided for a modification of a "poison pill" regarding an MCA subsidiary to be spun off to MCA shareholders as well as for a "generous" $1 million fee to the Delaware class counsel. See id. at 695.

[10] See Epstein v. MCA, Inc., 50 F.3d 644, 648 (9th Cir. 1995) (summarizing district court judgments).

economic value";[11] thus, the settlement, though "meager,"[12] was in the best interest of MCA shareholders.[13] (The federal class plaintiffs neither objected to nor opted out of the Delaware settlement, though other class members did.) The Delaware Supreme Court affirmed the Chancery Court's ruling in September 1993.[14]

When the dismissed federal securities case reached the Ninth Circuit, Matsushita both pressed for an affirmance on the merits and argued that the Delaware settlement barred litigation of the federal claims. On the merits, the Court of Appeals reversed the decision of the district court, granted plaintiffs' motion for summary judgment on the issue of liability and remanded for a determination of damages.[15] The court also instructed the district court to certify the case as a class action.[16] On the preclusion point, the court held that a state settlement could not release exclusive federal claims when, as in the case at bar, the claims did not rest on an identical factual predicate.[17]

The Supreme Court unanimously reversed the Ninth Circuit on the preclusive effect of a state court settlement.[18] As the product of a "judicial proceeding" within the meaning of the "full faith and credit" statute,[19] the Court said, a state class action settlement was entitled to the same effect that it would have under the law of that state.[20] In addition, the Court concluded that, under Delaware law, state courts have the power to approve a global settlement that encompasses exclusive federal claims.[21] Justice Ginsburg, joined by Justices Stevens and Souter, concurred on this point, but stressed that the Ninth Circuit remained free to consider the due process issue of whether the

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11 In re MCA, Inc. Shareholders Litig., Civ. A. No. 1174, 1993 WL 43024, at *4 (Del. Ch. Feb. 16, 1993), reprinted in 18 Del. J. Corp. L. 1053, 1061 (1993).

12 Id., reprinted in 18 Del. J. Corp. L. at 1062.

13 The settlement provided for a $2 million fund which, after attorneys' fees, resulted in a recovery of 2 to 3 cents per share of MCA stock. As we have noted elsewhere, the proper measure of damages for violating Rule 14d-10 is unclear, but such damages could plausibly exceed $700 million. See Kahan & Silberman, supra note 4, at 223 n.18.

14 See In re MCA, Inc. Shareholders Litig., 633 A.2d 370 (Del. 1993).

15 See *Epstein*, 50 F.3d at 648.

16 See id. at 668-69.

17 See id. at 661-66.

18 See Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996) [hereinafter *Matsushita I*].

19 See 28 U.S.C. § 1738 (1994).

20 See *Matsushita I*, 516 U.S. at 373.

21 See id. at 377-78. Justices Ginsburg and Stevens dissented from a portion of the opinion, arguing that the content of Delaware preclusion law was for the Ninth Circuit to decide on remand, not the Supreme Court. See id. at 394 (Ginsburg, J., concurring in part and dissenting in part).

Delaware courts fully and fairly litigated the adequacy of class representation.[22]

On remand, the Ninth Circuit was thus again faced with deciding what effect to accord the Delaware settlement. Matsushita had raised two reasons why the Delaware settlement barred the federal claims. First, Matsushita argued that the issue of adequacy had actually been litigated by objectors to the Delaware settlement, and that the federal courts must attach issue preclusion to the Delaware court's determination of adequacy. Second, and more broadly, Matsushita argued that the Delaware settlement releasing the federal claims was entitled to "full faith and credit" and could not be collaterally attacked, in spite of any "due process" deficiencies that a later court might find to have been present in the Delaware action, since class members had a full and fair opportunity to raise these deficiencies in the Delaware action itself.

In *Matsushita II*, a divided Court of Appeals rejected both of these arguments in an unnecessarily broad opinion that granted absent class members an unrestricted right to collaterally attack a class action settlement—or, for that matter, the outcome of a class action trial—on the basis of lack of adequate representation. As an initial matter, the court rejected Matsushita's claim that issue preclusion attached to the finding of adequate representation by the Delaware courts. Here, the court stated that "adequacy" was never actually *litigated* in the Delaware courts.[23] Though objectors appeared in the Chancery Court, their objections were based on "inadequate notice" and on "collusion," rather than on "adequacy of representation."[24]

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[22] See id. at 398-99 (Ginsburg, J., concurring in part and dissenting in part). Justice Thomas's majority opinion did not address the due process contention, observing in a footnote that "[w]e need not address the due process claim, however, because it is outside the scope of the question presented in this Court." Id. at 379 n.5.

[23] See *Matsushita II*, 126 F.3d 1235, 1240-41 (9th Cir. 1997).

[24] Id. The court also noted that the notice to class members failed to state that the purpose of the hearing was to determine the adequacy of representation. See id. at 1240. The significance of this omission is presumably that it helps explain the failure of class members to object on the grounds of "inadequate representation." In his dissent, Judge O'Scannlain argued that the objectors did litigate the "adequacy of representation." Id. at 1257-58 (O'Scannlain, J., dissenting). In a footnote, the court offered, without deciding, a second basis under Delaware law for rejecting preclusion, namely a failure to "'articulate on the record its findings regarding the satisfaction of the Rule 23 criteria and supporting reasoning' before it approves a class action settlement." Id. at 1241 (quoting Prezant v. De Angelis, 636 A.2d 915, 925 (Del. 1994)). In *Prezant*, the Delaware Supreme Court held that such findings, including a finding that the due process right to adequate representation had been satisfied, could protect a class settlement from possible collateral attack. See *Prezant*, 636 A.2d at 925-26. In our earlier article, we discussed the possibility that Delaware law might itself allow a collateral attack for failure to meet the *Prezant* standard. See Kahan & Silberman, supra note 4, at 275-76.

Furthermore, the court added, even if objectors had litigated the "adequacy of representation," such litigation *by objectors* would not, under Delaware law, and could not, under the Due Process Clause of the Constitution, bind absent class members who did not appear.[25]

We agree with the Court of Appeals that the presence of objectors in the initial forum, and the arguments they raised, should not determine the ability of absent class members to collaterally attack a class action settlement.[26] But the more significant, and more controversial, part of the opinion dealt with Matsushita's second argument that the Delaware determination of adequacy was entitled to full faith and credit, and not subject to collateral attack, as long as the Delaware court employed adequate procedures in rendering the judgment. The Court of Appeals' rejection of this argument was premised on its strained reading of the Supreme Court's decision in *Phillips Petroleum Co. v. Shutts*.[27] In *Shutts*, the Supreme Court defended the legitimacy of exercising jurisdiction over absent plaintiff class members who did not have traditional "minimum contacts" with the forum court by contrasting the position of ordinary defendants and absent class plaintiffs: "Unlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection."[28]

In this context, the Supreme Court in *Shutts* identified various safeguards that are necessary in order to bind absent class plaintiffs, such as notice, the opportunity to be heard, the opportunity to opt out, and adequate representation.[29] But nowhere in its opinion did the Supreme Court intimate that adequacy of representation—if determined by a court in a class proceeding—is subject to collateral attack. Indeed, other language of the Supreme Court in *Shutts* could be understood to lead to precisely the opposite conclusion. The Court referred to the fact that "[t]he *court* and named plaintiffs"[30] protect

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25 See *Matsushita II*, 126 F.2d at 1241.

26 In dissent, Judge O'Scannlain argued that the *Epstein* plaintiffs were barred by issue preclusion from relitigating the adequacy of representation because that argument had been raised and rejected by other objectors in the Delaware fairness hearing. As we explain later, see infra notes 98-99 and accompanying text, we do not believe that plaintiffs are barred because of the litigation activity of objectors whom they did not control. Of course, if there was tacit participation by the *Epstein* plaintiffs in raising these objections, as was suggested by Judge O'Scannlain, see *Matsushita II*, 126 F.3d at 1257 (O'Scannlain, J., dissenting), they may be precluded through the doctrine of "virtual representation." See infra note 99.

27 472 U.S. 797 (1985).

28 Id. at 810.

29 See id. at 812.

30 Id. at 809 (emphasis added).

the interests of the absent class member, and that from the plaintiffs' perspective, a "class action resembles a 'quasi-administrative proceeding, conducted by the judge.'"[31]

In *Matsushita II*, the Ninth Circuit relied upon the language in *Shutts* to hold that "a class member is not required to do anything during the course of a class-action proceeding. He is free to sit it out, assured that he will be bound by the result if, but only if, the proceeding comports with the special due process requirements designed to safeguard" his interests.[32] Because absent class members "have no duty to intervene in the initial proceeding"[33] in order to protect their rights, and because "absent class members have a right to adequate representation at all times,"[34] the Ninth Circuit concluded they are free to collaterally attack a judgment on the grounds of inadequate representation.

The "sit back and allow the litigation to run its course" passage of *Shutts*, quoted by the Court of Appeals, is, as we suggest above, subject to a quite different interpretation: namely, that an independent obligation is imposed *on the court* in the initial forum to determine "adequacy of representation" and that absent class members, if they want to be heard on that issue, must state that objection to that court.[35] This interpretation, moreover, is consistent with the Supreme Court's decision in *Kremer v. Chemical Construction Co.*,[36] which held that a judgment is entitled to full faith and credit so long as the procedures employed in reaching it satisfy the "minimum procedural requirements"[37] of due process. In other words, *Shutts* contemplates that the initial forum should make a finding of "adequate representation," and *Kremer* requires that the initial forum employ fair procedures in making this finding. So long as this finding is made and the procedures for making it are fair, the substance of the finding itself is not subject to collateral attack.

The Court of Appeals in *Matsushita II* rejected this interpretation. First, the court reasoned that it is inconsistent with *Gonzales v. Cassidy*,[38] a Fifth Circuit opinion pre-dating *Shutts*, which permitted collateral attack of a class action judgment (not a settlement) on the

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31 Id. (quoting James W. Moore & John E. Kennedy, 3B Moore's Federal Practice ¶ 23.45 (2d ed. 1984)).

32 *Matsushita II*, 126 F.3d 1235, 1243 (9th Cir. 1995).

33 Id. at 1245.

34 Id.

35 Presumably, even the Ninth Circuit believes this is the obligation of the class members with respect to any objections to the fairness of the settlement.

36 456 U.S. 461 (1982).

37 Id. at 481.

38 474 F.2d 67 (5th Cir. 1973).

grounds of inadequate representation.[39] *Gonzales*, however, involved a case where the alleged deficiency in class counsel's conduct—the failure to appeal—occurred after certification when there was no longer opportunity to opt out and when it was beyond review of the certifying court.[40] Second, the Ninth Circuit distinguished *Kremer* as applying only to collateral challenges of judgments rendered in traditional, nonclass, litigation: "*Kremer* was not a class action and did not address the special due process problems of binding persons not parties to the action."[41] Since "[n]o procedure can reliably protect an absent plaintiff who does not *in fact* have an adequate representative in court championing his cause,"[42] the Ninth Circuit viewed the protections offered by *Kremer* as insufficient in the class action context.

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[39] See *Matsushita II*, 126 F.3d at 1243 (discussing *Gonzalez*).

[40] See *Gonzalez*, 474 F.2d at 71-72.

[41] *Matsushita II*, 126 F.3d at 1245.

[42] Id. at 1246. In addition to a reference to the "salutary principle" of Hansberry v. Lee, 311 U.S. 32 (1940), that a class member cannot be bound if there was no adequate representation, the Court of Appeals also cited the Supreme Court's recent decision in Richards v. Jefferson City, 517 U.S. 793 (1996), and Ninth Circuit precedent. See *Matsushita II*, 126 F.3d at 1246.

As we have pointed out elsewhere, see Kahan & Silberman, supra note 4, at 266-67 & n.154, in *Hansberry* the court in the initial suit did not formally designate the action as a class suit and made no finding of adequate representation; in *Richards*, the taxpayer plaintiffs did not sue on behalf of a class and the judgment did not purport to bind taxpayers who were nonparties. Therefore, the prior Supreme Court cases do not provide guidance in situations where the court entertaining the class suit has made a determination of adequacy of representation.

Prior Ninth Circuit cases have permitted collateral attacks on federal class action settlements, although not necessarily with success. See, e.g., Brown v. Ticor Title Ins. Co., 982 F.2d 386, 390-91 (9th Cir. 1992):

> [T]o avoid the binding effect of a prior class action based on class counsel's error, a party must show not only that the prior representative "'failed to prosecute or defend the action with due diligence and reasonable prudence,'" but also that "'the opposing party was on notice of facts making that failure apparent.'"

(quoting Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1278 (9th Cir. 1992) (quoting Restatement (Second) of Judgments § 42(1)(2) (1982))). Two other Ninth Circuit cases in which "adequacy" challenges were also unsuccessful—Torrisi v. Tucson Elec. Power Co., 8 F.3d 1370 (9th Cir. 1993), and Marshall v. Holiday Magic, Inc., 550 F.2d 1173 (9th Cir. 1977)—were distinguished by the Ninth Circuit as involving class members who participated in the initial proceedings. Neither case, however, involved a collateral attack; in each case, the issue was presented on a direct appeal from the settlement judgment, and the challenges were rejected on the merits.

Several courts in other circuits have refused to permit collateral attacks based on inadequacy of representation where the absent class member had not previously raised the objection but other objectors had. See, e.g., Grimes v. Vitalink Communications Corp., 17 F.3d 1553, 1562 (3d Cir. 1994). The Ninth Circuit expressly stated that it disagreed with *Grimes* and "respectfully decline[d] to follow it." *Matsushita II*, 126 F.3d at 1242.

For a more extensive discussion of collateral attack on class actions and class action settlements, see Kahan & Silberman, supra note 4, at 262-74.

Having determined that the federal plaintiffs can collaterally attack the Delaware judgment on the grounds of inadequate representation, the Court of Appeals had no trouble finding that representation in the Delaware action was, in fact, inadequate. In this regard, the court pointed to both structural factors and to the actual conduct of the Delaware class counsel:

- The bargaining power of the Delaware class lawyers was undermined by the fact that the federal claims could not be litigated in Delaware (they were subject to the exclusive jurisdiction of the federal courts).[43]
- The facts relevant to the subject matter of the federal claim had no apparent relevance to the state claim. This impeded the ability of the Delaware class lawyers to conduct discovery with regard to the federal claims. Moreover, it meant that a judgment on the state claims could not be used as an "offensive" estoppel in a future litigation of the federal claims, thereby reducing the threat value of going to trial on the state claims.[44]
- The pendency of the federal claims meant that Delaware counsel had an incentive to settle quickly in order to profit from these claims.[45]
- Delaware counsel, in fact, failed to investigate the federal claims to determine what constitutes a fair settlement before agreeing to the first Delaware settlement. And after the Chancery Court rejected the first settlement, Delaware counsel let the case lie dormant.[46]
- In advocating the second settlement, Delaware counsel disparaged the federal claims by, among other things: failing to point out that the Ninth Circuit reviews summary judgment decisions de novo; failing to report that, contrary to the district court, two federal circuit courts had found a private right of action to exist under Rule 14d-10; stating without support that the Court of Appeals was unlikely to overturn the district court's holding that the tender offer complied with Rule 14d-10; and exaggerating the extent to which damages for violating Rule 14d-10 were uncertain.[47]

II
THE CRITIQUE

Matsushita II, by permitting absent class members to collaterally attack a class action judgment on the grounds of inadequate represen-

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[43] See *Matsushita II*, 126 F.3d at 1248-49.
[44] See id. at 1249-50.
[45] See id. at 1250.
[46] See id. at 1251-53.
[47] See id. at 1253-54.

tation, in effect enables a judge in the second forum (F-2) to set aside a determination of adequacy by a judge in the settlement forum (F-1) because the F-2 judge disagrees with the substance of that determination. This holding of *Matsushita II* is very broad in three respects. First, it applies to all types of initial and secondary fora: Whether initially rendered by a state or federal court, a class action judgment can be collaterally challenged in either state or federal court. Second, it applies to any absent plaintiff who has not previously brought a collateral challenge. Thus, a class action judgment is subject to multiple collateral challenges, arguably even if brought on the same grounds, as long as they are brought by different absent class members. Third, the grounds for attack are broad: no process deficiencies in F-1 need to be alleged to bring a collateral attack in F-2; the factual finding of adequacy in F-1 apparently receives de novo review in F-2; and the concept of "adequate representation" is itself potentially far-reaching, as anything that goes wrong in a class action—be it the substantive fairness of the settlement, the failure to provide opt out rights, or the amount of attorneys' fees—could be said, in one way or another, to be tied to class counsel's failure to represent class members adequately.

Because of its breadth, *Matsushita II* has the potential for fundamentally changing the conduct of class action settlements and class action litigation more generally. In this Part, we analyze this potential from a policy perspective. In doing so, we focus on the significance of *Matsushita II* on class actions conducted in a federal system where different state and federal courts can exercise jurisdiction both over the initial class action and over the collateral attack. Though the issue of collateral attack is also important in the single jurisdictional setting, both the benefits and drawbacks of permitting collateral attack are best illustrated in the multijurisdictional setting.

A. Class Actions in a Multijurisdictional and Multicourt Setting

Although class actions have the potential for leading to the efficient resolution of legal disputes, their deficiencies, even in the single court setting, are well-known. Those limitations flow from the nature of the class action; class members have insufficient incentive to monitor the actions of the class attorney. This, as we have noted elsewhere, "creates the danger that unscrupulous class counsel will settle a class claim for a generous attorney fee, but a paltry recovery."[48] The various process features attached to class actions—the need for court approval of settlements, the right to notice and to object or opt out, court review of attorneys' fees, and the requirement of adequate rep-

[48] Kahan & Silberman, supra note 4, at 232.

resentation—can reduce that danger. But the danger of abuse in class actions cannot be eliminated without eliminating class actions themselves. Thus, rules for class actions and class action settlements must maximize the potential of the class device for efficiency and finality and at the same time minimize the dangers of abuse.

In a multijurisdictional or multicourt setting, two additional problems aggravate the danger of self-serving actions by class attorneys: the "plaintiff shopping" or "lawyer shopping" problem and the "forum shopping" problem. The plaintiff/lawyer shopping problem arises when a second competing class action covering the same or a related set of claims is filed (or, for that matter, when a class attorney is worried that a competing action *may* be filed). When there are competing class actions, the outcome of the action that is concluded first is binding on the whole class. Because judges typically award attorneys' fees predominantly to the lawyers who act as class counsel in their courts, each set of competing lawyers has a strong financial incentive to bring its action to a speedy conclusion. Defendants, well aware of these incentives, can thus go plaintiff and lawyer shopping: By indicating that they will deal with class counsel who is willing to settle for the least, they implicitly create a "reverse auction" in which competing class lawyers "underbid" each other in order to have their own action settled first and earn attorneys' fees.[49]

The forum shopping problem is most significant when a class counsel has a choice of bringing a class action in different jurisdictions or judicial systems. Conventionally, forum shopping refers to a plaintiff's ability to commence an action in the forum with the most favorable "law," whether in the formal or informal sense.[50] In the class action context, however, forum shopping takes a different, and more sinister, form. It entails the ability of class counsel to commence an action in a forum that is most favorable to *counsel's own* (rather than the class members') interests, such as a forum in which judges are predisposed to exercising little scrutiny of class action settlements. It should come as no surprise that particular courts and judges are likely to differ in their predispositions to class action settlements, which can be the result of different experiences with caseload dockets, differing relations between the judiciary and the class action bar, different perceptions about how a failure to approve class action settlements will affect judicial resources, and, more generally, different assessments of

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[49] See generally John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343, 1370-72 (1995).

[50] Plaintiffs may forum shop for favorable choice of law rules that will result in applicable law favorable to plaintiff, favorable jury pools likely to result in high jury awards, a hometown bias for the "local" party, or regional and cultural preferences by judges or jury.

the class action device as a litigation tool. And although similar influences affect forum choice in nonclass litigation, an important safeguard to conventional forum shopping is often absent in class action forum shopping. Conventionally, plaintiff's forum shopping is constrained by a defendant's incentives to have the case heard in a forum more favorable to itself, for example, by urging an alternative forum through removal, transfer, or *forum non conveniens* or obtaining a dismissal for lack of jurisdiction. In class action forum shopping, however, both class counsel and defendant may prefer a forum that rubberstamps any settlement they reach.

The policy issue raised by *Matsushita II* is whether a liberal collateral attack mechanism is the best—or, for that matter, a good—way to deal with the potential for plaintiff shopping and forum shopping. Our position is that it is not.

B. Matsushita II *and Plaintiff Shopping*

Concern over plaintiff shopping—and the resulting impairment in the bargaining power of the Delaware class counsel—was an important basis for the Ninth Circuit's finding in *Matsushita II* that Delaware class counsel failed to represent adequately the class members:

> [C]lass counsel had an extraordinary incentive to settle and settle *quickly* because that was the *only* way they could extract a fee out of the federal claims. . . . Moreover, the pendency of a parallel action in federal court—the *Epstein* case—meant that Delaware class counsel were at risk of being "beaten to the punch" and getting no return on the federal claims at all.[51]

As the court noted, and as we have argued elsewhere,[52] the problem of plaintiff shopping is compounded where, as in *Matsushita II*, one class counsel (Delaware's), as a jurisdictional matter, can settle, but cannot litigate, one set of claims (the federal securities claims).[53]

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[51] *Matsushita II*, 126 F.3d at 1250.

[52] See Kahan & Silberman, supra note 4, at 235-38.

[53] See *Matsushita II*, 126 F.3d at 1249. The Court of Appeals also noted two further reasons why it believed that the problem of plaintiff shopping in the Delaware litigation was compounded. First, the court suggested that Delaware counsel would have been unable to conduct discovery with respect to the federal claims even if it had tried to do so. See id. at 1249. We doubt that this is a significant factor. To the extent that the state and federal claims are transactionally linked, most discovery regimes are broad enough to provide access to information relevant to either claim. See Kahan & Silberman, supra note 4, at 246 n.104. Second, since the state and federal claims shared no common issues of material facts, Delaware class counsel "lacked the ability to make a credible threat that they could put Matsushita at risk by going to trial on the state claims and proving facts material to the federal claims that would be binding upon Matsushita through issue preclusion." *Matsushita II*, 126 F.3d at 1249. By the same token, however, Matsushita would not be able to prove, in a trial on the state claims, facts material to the federal claims that would

But though more severe in *Matsushita II* than in many other cases, the potential for plaintiff shopping looms large over many multijurisdictional class actions. Given the pervasiveness of the potential for plaintiff shopping, and the well-known deficiencies of class actions even where there is no plaintiff shopping, we doubt that the Court of Appeals is correct in its assessment that it will be a "rare exception for representation in a class action even to approach the point where an absentee will have a colorable claim for inadequacy."[54]

Although plaintiff shopping can be a severe problem that needs to be addressed, we doubt that granting absent class members a right to attack collaterally a determination of adequacy is the right way to deal with it. The plaintiff shopping problem is better addressed directly, by attacking its root causes. First, there are a number of methods for limiting competition among class actions. One attractive option would be for the forum with the lesser overall nexus to the asserted claims to stay its proceeding until the other action is resolved, or to limit the scope of its settlement authority. However, as others have pointed out,[55] some courts appear to be in the market to attract class action business, and therefore unlikely to participate in such cooperative efforts. In such circumstances, the availability of anti-suit injunctions may prevent class members—or even defendants—from pursuing or settling competing class actions,[56] although there are obvious limitations to this type of approach. The recent decision of the Third Circuit Court of Appeals in *In re General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation (GM)*,[57] although technically an example of forum shopping rather than plain-

be binding upon the federal class through issue preclusion. To the extent that "issue preclusion" applies either to both sides or to neither, the lack of the potential for issue preclusion does not reduce one's bargaining power.

[54] *Matsushita II*, 126 F.3d at 1256.

[55] See John C. Coffee, Jr., Class Actions: Interjurisdictional Warfare, N.Y. L.J., Sept. 25, 1997, at 5 (noting that Alabama, Louisiana, and Texas courts attract large numbers of class actions and routinely certify last minute settlement classes).

[56] See Geoffrey P. Miller, Overlapping Class Actions, 71 N.Y.U. L. Rev. 514, 523-25 (1996); see also White v. National Football League, 41 F.3d 402, 409 (8th Cir. 1994) (approving settlement in class action suit and enjoining related actions in other fora).

[57] 134 F.3d 133 (3d Cir. 1998) [hereinafter *GM*]. In the *GM* litigation, a class action settlement in the Pennsylvania federal court was reversed on appeal and remanded to the district court to determine whether a class could be certified pursuant to the standards enunciated by the Third Circuit. However, rather than continue the proceedings in Pennsylvania, the class plaintiffs pursued parallel litigation that had been brought in Louisiana and reached a settlement there. The Third Circuit refused to enjoin the Louisiana proceedings on numerous grounds: (1) lack of jurisdiction over absentee plaintiffs, see id. at 140-41; (2) the full faith and credit statute and the *Rooker-Feldman* doctrine, see id. at 141-43; and (3) the anti-injunction act, see id. at 143-46.

tiff shopping,[58] illustrates some of the obstacles to seeking an injunction against proceedings elsewhere.[59]

Another way to deal with competing class actions is to induce counsel with competing claims to enter the F-1 proceedings, in order to assure, at a minimum, that the value of the F-2 claims will be given prominence.[60] One incentive might be for the court to take account of the respective contributions of other counsel in the award of attorneys' fees, thus encouraging lawyers in competing class actions to participate in a single resolution of the case. Fees to lawyers who have filed competing class actions could be based on equitable considerations—such as who made the greater contribution to the investigation and development of the claims—rather than on who is the attorney of record in the forum that approves the settlement.[61] If incentives for cooperation are ineffective and if, as the recent *GM* litigation indicates, "hijackings" of class action proceedings cannot be prevented, federal legislative intervention might be desirable. One way to reduce undervaluation of class members' claims would be to strengthen the "monitoring" of class counsel by obtaining more effective monitors than ordinary class members, such as state attorneys general, who would be given notice and have the authority to intervene in order to protect the interests of absent class members in nationwide class actions.[62] Alternatively, the selection and conduct of class counsel might be made subject to greater control by class members.[63]

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[58] It appears that the class plaintiffs and the class counsel in the Louisiana state court action were the same class plaintiffs and counsel in the multidistrict litigation federal action, where the district court's approval of a settlement on behalf of the class was disapproved, not only because the district court did not make the necessary findings under Rule 23 to certify the class, but also because the settlement was not fair, reasonable, and adequate.

[59] See *GM*, 134 F.3d at 137-38. Interestingly, Judge Becker, writing for the majority, referred to both *Matsushita I* and *II* in his opinion, noting that the "final word has yet to be written in (or about) *Matsushita*." Id. at 142. Judge Becker also suggested that the Supreme Court might have something to say about the Louisiana settlement in "due process" terms and the way in which it "facilitated an end run around the Eastern District of Pennsylvania proceedings." Id. For another refusal by a federal court to enjoin parallel class action litigation in state court, see J.R. Clearwater, Inc. v. Ashland Chemical Co., 93 F.3d 176, 177 (5th Cir. 1996).

[60] See Kahan & Silberman, supra note 4, at 256. Under present practice, it is probably not possible to require their intervention, but legislation might be able to achieve such a result.

[61] In Kahan & Silberman, supra note 4, at 256-58, we have suggested such measures as part of a framework designed to deal with the specific problems created by state court class action settlements that release exclusive federal claims.

[62] One such bill has already been proposed in Congress. See The Class Action Fairness Act of 1997, S. 254, 105th Cong., 1st Sess. (1997), discussed infra at note 88.

[63] Suggestions along these lines have been made by Professor John Coffee. See Class Action Lawsuits: Examining Victim Compensation and Attorneys' Fees: Hearings Before

In contrast to these measures, the right to mount a collateral attack does not change the potential for plaintiff/lawyer shopping per se. It merely affects how often a judge, and how many different judges, must evaluate the severity of plaintiff shopping before the outcome of a class action reaches finality.[64] From the perspective of efficiency, such multiple determinations of the same issue undermine the very efficiencies sought to be achieved by the class action mechanism. Moreover, absent concerns over forum shopping (which we address below), there is no a priori reason to believe that the determination of (a lack of) adequate representation in a collateral attack is more likely to be correct than the determination of (the presence of) adequate representation in the initial action. More importantly, the potential for multiple collateral attacks creates a significant possibility that a class action settlement will unravel: As long as one collateral attack succeeds, a new class action on the same claims can be brought, encompassing presumably all but the named plaintiffs in the previous action, objectors to adequacy in the previous action,[65] and plaintiffs who had previously brought unsuccessful collateral challenges. This potential for double liability will increase the expected liability of defendants and severely impede the ability to settle a class action to start with.[66]

What justifies, from a policy perspective, these costs of permitting collateral attack? Why should class members not be forced to raise their objections to the adequacy of representation in F-1—a court with the power to exercise personal jurisdiction over absent class members[67]—or lose their objections if they do not? The Court of Ap-

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the Senate Comm. on the Judiciary Subcomm. on Administrative Oversight and the Courts, 105th Cong. (Oct. 30, 1997) (statement of Professor John C. Coffee, Jr. of Columbia University Law School), available in 1997 WL 683686 [hereinafter Coffee Testimony] (outlining "bill of rights" for class members, which includes having selection and conduct of class counsel subject to more democratic means of control by class members).

64 Although we cannot point to specific examples of successive collateral attacks and therefore the specter of successive collateral attacks may seem far-fetched, the new regime offered by *Matsushita II* clearly opens such possibilities.

65 As we argue below, we do not believe that objection in a prior action should be grounds for preclusion. See infra notes 97-100 and accompanying text.

66 This is because a later challenge to the settlement is now possible, however weak its merits. Defendants who have settled may need to "buy off" later "objectors" to the settlement, who are now armed with "collateral attack." Cf. Woolley, supra note 3, at 618-19 (discussing leverage of objectors in class actions generally). Indeed, dissatisfied class members may be encouraged *not* to appear in the forum where the settlement proceedings are ongoing, but rather to wait and raise their objections in a collateral proceeding where their bargaining power may be greater. Alternatively, defendants may just decide to forego settlement altogether.

67 The right to bring a collateral attack in *Matsushita II* is without regard to whether there is a basis for personal jurisdiction over the absent class members. *Shutts* held that

peals in *Matsushita II* offered one policy rationale. Absent class members should not be required to monitor the actions of the class counsel "in real time," so that they can intervene speedily and raise their objections *before* the court in F-1 makes a finding of adequacy and approves a settlement. What if, the court posited, class counsel's inadequate conduct occurs at the fairness hearing? Surely class members cannot be expected to attend the fairness hearing just so they can object on the spot. Much better, the court reasoned, to permit them to challenge adequacy in a subsequent, collateral attack.[68]

While this rationale may justify some after-the-fact review of a determination of adequacy, it falls short, in our view, of justifying the unlimited ability to mount a collateral attack created by *Matsushita II*.[69] The argument that, without the ability to mount a collateral chal-

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even in the absence of traditional minimum contacts, a court can exercise personal jurisdiction over absent members of a plaintiff class who are "presumed to consent" to jurisdiction if they do not exercise their right to opt out of the class. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 813 (1985). Absent plaintiffs were bound, the Court held, as long as the absent class members were given an opportunity to remove themselves from the class through an opt out, had notice and an opportunity to participate in the litigation, and were adequately represented at all times by the named plaintiff. See id. at 811-12. *Shutts* might be read to hold that opt out rights and actual "adequate representation" confer personal jurisdiction over class members who lack traditional minimum contacts on the court and that, in the absence of actual adequate representation, a judgment by the court can be collaterally attacked for lack of personal jurisdiction (a well-established basis for collateral attack in the absence of appearance). We do not understand the Ninth Circuit to have read *Shutts* this way, nor do we think *Shutts* should be so interpreted. However, even under such a reading of *Shutts*, the Delaware courts would probably have had personal jurisdiction due to traditional minimum contacts over claims related to the ownership of stock of a Delaware corporation. See Hynson v. Drummond Coal Co. 601 A.2d 570, 571-72 (Del. Ch. 1991) (Allen, C.).

[68] See *Matsushita II*, 126 F.3d 1235, 1243-44 (9th Cir. 1997).

[69] There is no reason to think that collateral attack is the appropriate remedy in a multijurisdictional system. A subsequent appeal to a higher court alleviates some of the problems of "on-the-spot" monitoring that might be required by the "settlement" hearing, though not all courts provide standing to appeal to absent class members who do not object or intervene. See Timothy A. Duffy, Comment, The Appealability of Class Action Settlements by Unnamed Parties, 60 U. Chi. L. Rev. 933, 934 (1993) (observing that courts have developed three positions on issue of whether unnamed class member may appeal settlement, of which only most permissive position grants standing to class members who did not intervene or object to settlement in court below); Christopher R. Thyer, Note, Un-Appealing Class Action Settlements: Why No One Has Standing to Challenge Settlements after *Haberman v. Lisle*, 49 Ark. L. Rev. 375, 392 (1996) (observing that Fifth, Eighth, and Eleventh Circuits had denied standing to appeal for dissatisfied unnamed class members, while Third, Seventh, and Ninth Circuits had granted such standing). We believe that absent class members, whether or not they object or intervene, should have a right to appeal both the adequacy of representation and the fairness of the settlement, including attorneys' fees, and that the right of appeal is highly preferable to collateral attack. See Kahan & Silberman, supra note 4, at 269 n.168.

Of course, restrictive time limits on the right of appeal pose a problem *if* there is a real time lag on the information available to absent class members. However, most judicial

lenge to "adequate representation," an absent class member would have to engage in real time monitoring needs to be placed in proper perspective. First, in competing class actions, the burden to monitor class counsel often will fall on the competing class counsel—who is better able to satisfy the burden—rather than on unnamed plaintiffs. Second, prior to the fairness hearing in F-1, class members (or competing class counsel) often have sufficient notice of the conduct amounting to inadequate representation so that they are well able to appear at the fairness hearing and raise their objections. For example, in *Matsushita II*, federal class counsel was well aware of the conduct of the Delaware class counsel prior to the fairness hearing on the second settlement and of the terms of the second settlement; similarly, we find it unlikely that federal counsel was surprised to learn that Delaware counsel, in the fairness hearing, disparaged the federal claims. Third, permitting collateral attack for lack of adequate representation would not obviate the need for timely monitoring as long as collateral attack is not permitted on *any* ground that forms the basis for an objection (such as the substantive fairness of a settlement). Finally, unlike adversarial class litigation, there is no ongoing monitoring burden in a settlement class action like *Matsushita*: Class action notice of the fairness hearing provides class members with information regarding the settlement terms, and absent class members have the choice of opting out or objecting to the adequacy of the representation or to the terms of the settlement.[70] There is no reason to believe absent class members will gain access to substantially more information than they have at the time of the settlement hearing.[71]

More significantly, the principal burden to monitor class counsel falls on the court considering the settlement. The judge in F-1, who approves a settlement and makes a finding of adequate representation (as well as substantive fairness), will be in a position—in fact, is re-

systems also provide for relief from a judgment on grounds similar to those in Fed. R. Civ. P. 60(b), such as mistake, newly discovered evidence, and fraud. Under this procedure, relief is sought in the forum that rendered the judgment and prevents forum shopping for favorable collateral attacks.

[70] This observation in no way underestimates the information deficiencies that exist for absent class members. Class members are often not in a position at this stage of the process to evaluate whether or not the settlement represents a superior alternative to litigation, or whether they are being adequately represented. The point here, however, is that there is no "monitoring" burden as there might be in adversarial class litigation.

[71] Allegations of fraud and collusion based on later-acquired information would generally be grounds for relief from the judgment. See Restatement (Second) of Judgments § 70 (1982). Whether the challenge to a judgment on grounds of fraud or the like can be made in a subsequent action in another jurisdiction or must be raised in a motion before the rendering court or through an independent action in the original jurisdiction is not entirely clear. See id. at § 82 cmts. (a), (b).

quired—to find out whether class counsel up to this point adequately represented the class members. A class member can thus, to quote *Shutts*, "sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection."[72] To be sure, the judge in the settlement forum may not be able to monitor whether the conduct of class counsel after the approval of a settlement (or after the conclusion of a trial) meets the standard of adequate representation. We therefore do not take issue with the holding in *Gonzales* that a collateral attack on adequacy can be brought challenging the conduct of class counsel when that conduct is no longer in the purview of the court in F-1.[73] Moreover, in making its finding of adequacy, the court in F-1 necessarily relies on the accuracy of factual representations made in the fairness hearing. Those representations include the nature of the investigation undertaken by class counsel to ascertain the status of a competing class action or the likelihood that such claims will be filed as well as representations about the litigation value of to-be-released claims and the basis for counsel's assessment. To the extent these representations are materially false, some avenue must be provided to reassess the finding of adequate representation.

But the "collateral attack" remedy created by *Matsushita II* is disproportional to the more general problem absent class members face in monitoring the conduct of class counsel. The problem, in our view, is best addressed by a careful review of the adequacy of representation in F-1, before a settlement is approved. Such a careful review entails, and *Shutts* seems to impose, an affirmative duty on the judge in F-1 to make a determination of adequacy and proper procedures enabling class members to raise objections. In addition, such a careful review is aided by providing incentives to all interested parties to appear and voice their arguments at a fairness hearing in F-1. Revisiting a determination of adequacy by F-1 should only be permitted in a narrow set of circumstances where the conduct amounting to inadequate representation occurs after the approval of the settlement or after the conclusion of the litigation; where the determination of adequacy was based on material misrepresentations;[74] or where new material information was presented at a fairness hearing of which class

[72] *Shutts*, 472 U.S. at 810.

[73] See Gonzales v. Cassidy, 474 F.2d 67, 76-77 (5th Cir. 1973) (permitting collateral attack on class action judgment for inadequate representation where class representative secured better monetary deal for himself than for rest of class and noting behavior of class representative after certification gave rise to challenge on adequacy grounds).

[74] It might be suggested that this is the situation in *Matsushita* itself. That may well be, but the Ninth Circuit in *Matsushita II* did not purport to adopt this as the standard. In addition, we note that application of a "material misrepresentations" standard would normally entail a factual hearing to determine just what the behavior of counsel was and the

members had not been given notice or to which they had no opportunity to respond.

By contrast, *Matsushita II* grants absent class members the right to collateral attack with no such limitations. The scope of collateral attack under *Matsushita II* is thus substantially broader than the scope of collateral attack we would accept. Moreover, rather than creating incentives to participate in the proceeding in F-1, *Matsushita II* creates something of the opposite incentive for absent class members: to refrain from raising their objections in F-1. It is true, of course, that this course of behavior could prove risky, as the Ninth Circuit itself observed in *Matsushita II*.[75] The majority indicated that it is the "rare exception" where an absentee will have a colorable claim for inadequacy;[76] therefore the court rejected the "alarmist" cry that the decision poses a threat to the finality of class action judgments.[77] Still, the decision rewards absent class members who abstain from objecting whereas class members who voice their objections in F-1 completely lose their ability to bring a collateral attack. Creation of such a regime, we suggest, is counterproductive.

C. Matsushita II *and Forum Shopping*

Although the forum shopping issue was not expressly discussed by the Ninth Circuit in *Matsushita II*, that concern may also have influenced the court's decision.[78] Several facts suggest that forum shopping may have occurred—including the apparent eagerness of the defendants to keep the Delaware action alive[79] and the limited inquiry conducted by the Vice Chancellor regarding the second settlement agreement.[80] More importantly, regardless of whether the court in

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nature of the alleged misrepresentations before the settlement court, thus requiring a remand to the district court.

75 See *Matsushita II*, 126 F.3d 1235, 1256 (9th Cir. 1997).

76 Id.

77 Id. at 1242.

78 The court refused to reach the issue of whether the failure by the court in F-1 to supervise adequately the settlement proceedings is a basis for collateral attack. See id. at 1255.

79 Matsushita submitted to the personal jurisdiction of the Delaware Chancery Court after the first settlement agreement was negotiated, and defendants took no action to have the Delaware action dismissed after the Chancery Court, in rejecting the first settlement agreement, noted that the state claims were "at best, extremely weak." In re MCA, Inc. Shareholders Litig., 598 A.2d 687, 694 (Del. Ch. 1991). These actions, of course, are also consistent with plaintiff shopping rather than forum shopping.

80 In approving the second settlement, the Delaware Vice Chancellor failed to follow up on "suspicions" of collusion that he recognized to exist. See In re MCA, Inc. Shareholders Litig., No. 11,740, 1993 WL 43024, at *5 (Del. Ch. Feb. 16, 1993), reprinted in 18 Del. J. Corp. L. 1053, 1063 (1993). Moreover, in an earlier case (later reversed by the Delaware Supreme Court), the Vice Chancellor approved a class action settlement, finding

Matsushita II was affected by concerns over forum shopping, the broad collateral attack right granted by *Matsushita II* does inhibit the incentive of class counsel to engage in forum shopping. Indeed, the impact on forum shopping may be more direct and effective than its effect on plaintiff shopping. If the problem is that F-1 fails to scrutinize with care the adequacy of representation of class members, allowing the issue to be redetermined by F-2 cures the defect and also reduces the incentives to file the class action in F-1 to start with.

On the other hand, the collateral attack remedy created by *Matsushita II* entails substantial costs. Recall, in this respect, the breadth of the remedy: A collateral attack appears to be available without a threshold showing that forum shopping has in fact occurred; a de novo determination of "adequate representation" seems to be permitted; and multiple collateral attacks appear to be possible. While the availability of collateral attack may operate to reduce forum shopping by class counsel, it is likely to result in "reverse forum shopping," shopping by class members—or, more likely, by competing class counsel—for the forum most hospitable to collateral attack and most skeptical of a prior determination of adequacy.[81] Moreover, there may well be several bites at the apple. If the collateral attack brought on behalf on one class member in one forum fails, another collateral attack on behalf of a second class member in another forum is available, and if that fails, a third; and so on. Such reverse forum shopping entails duplicative, and wasteful, relitigation of the same issue; creates enduring uncertainty by undermining the finality of the resolution in F-1; inhibits class action settlements;[82] and increases defendant's exposure to damages.

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it "fair and reasonable" under "heightened scrutiny" despite deficiencies in the settlement process but failing to make a finding that the plaintiff was an adequate representative of the class. See De Angelis v. Salton/Maxim Housewares, Inc., 641 A.2d 834, 836, 839, 840 (Del. Ch. 1993), rev'd sub nom., Prezant v. De Angelis, 636 A.2d 915 (Del. 1994). On the other hand, the Vice Chancellor rejected the first MCA settlement as unfair, substantially reduced the attorneys' fees awarded to Delaware class counsel, and took special note of the fact that the Ninth Circuit had denied the federal plaintiffs' motion for expedited appeal. See *In re MCA*, 1993 WL 43024, at *2, *5, *6, reprinted in 18 Del. J. Corp. L. at 1058, 1062, 1064.

[81] Note that our argument here is not that the level of oversight exercised by the Chancery Court was too low, but rather that the parties could have reasonably (and, it turns out, accurately) predicted that the Ninth Circuit would exercise more oversight than the Delaware courts. Compare, in this regard, the discussion of adequacy of representation and fairness in the Delaware Chancery and Delaware Supreme Court with the discussion of these issues by the Ninth Circuit in *Matsushita II*.

[82] Even though *Matsushita II* in principle permits collateral attacks both on class action settlements and on the outcome of class action trials, see *Matsushita II*, 126 F.3d at 1241, the potential for collateral attack will tend to impede settlements. Obviously, the issue of collateral attack becomes moot if plaintiffs prevail in a trial. And even if defendant

The Full Faith and Credit Clause of the Constitution,[83] and the implementing statute[84] reflect a policy in favor of finality and respect for the judgments of courts of other jurisdictions.[85] Class actions, of course, are different from traditional bi-party litigation, and introduce the additional concern of the need to protect absent class members. To be sure, different courts may evaluate "adequacy of representation" in different ways; and class counsel may try to bring a class action in a forum in which its representation is most likely to be found "adequate." But as long as that determination is made through a process of decisionmaking that meets due process standards, it is not clear that concerns about forum shopping should outweigh values of finality and respect for the judgments of sister states.

At the same time, we are conscious of circumstances that indicate the need for some check on a court's ability to take control over class action litigation. Federalism values include norms that limit courts from usurping jurisdiction over disputes that properly belong in another forum.[86] Some recent widely criticized settlements of nationwide class actions in state courts[87] illustrate that intervention beyond

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prevails in a trial, the chances of succeeding in a collateral attack are likely to be lower than the chances of succeeding in an attack on a settlement. In the former case, defendants often will have litigated the issue of "adequate representation," and class counsel will have nothing to gain by failing to press plaintiffs' case forcefully (as success at trial is the only way to get attorneys' fees); in the latter case, defendants typically support class counsel's appointment, and class counsel can gain by agreeing to a settlement favorable to defendants that entails generous attorneys' fees.

[83] U.S. Const. art. IV, § 1.

[84] 28 U.S.C. § 1738 (1994).

[85] The Supreme Court recently reaffirmed this principle in Baker v. General Motors Corp., 118 S. Ct. 657, 664 (1998), and rejected any possibility that local public policy could justify nonrecognition of another state's judgment. However, in the context of deciding whether a Michigan injunction, which incorporated a stipulation by one party that he would not testify against the other in any litigation without consent, could prevent testimony in litigation elsewhere involving third parties, the Court held that the injunction could not determine evidentiary issues in a Missouri forum brought by parties who were not subject to the earlier decree. See id. at 667.

[86] In Kahan & Silberman, supra note 4, we discuss when state courts should approve class actions settlements that involve exclusive federal claims. We believe that the Delaware courts showed sufficient sensitivity (if barely so) to the federal interest when it approved the settlement. See id. at 278-79.

[87] See, e.g., Kamilewicz v. Bank of Boston Corp., 100 F.3d 1348, 1349 (7th Cir. 1996) (Easterbrook, J., dissenting from denial of rehearing en banc) (commenting on state court settlement that gave "more than $8 million to the class attorneys in legal fees and credited most accounts with paltry sums"); Adams v. Robertson, 676 So. 2d 1265 (Ala. 1995) (affirming appeal of class action settlement regarding cancer insurance policies despite objections by class members for failure to provide opt out right), cert. granted, 117 S. Ct. 37 (1996), cert. dismissed as improvidently granted, 117 S. Ct. 1028 (1997); White v. General Motors Corp., No. 42,865 (La. Dist. Ct., Iberville Parish, Dec. 19, 1996) (approving voucher settlement on terms slightly revised from those disapproved by Court of Appeals in *GM*, 55 F.3d 768 (3d Cir. 1995)). See also the comments of Senator Kohl introducing Senate

what is realistically available by certiorari review of state court judgments in the United States Supreme Court may be called for.[88] Nonetheless, for the reasons we have already identified in this Article, we do not favor the broad collateral attack remedy created by *Matsushita II*.

III
AN ALTERNATIVE APPROACH

Our own view of the proper balance in assuring adequacy of representation for absent class plaintiffs yet retaining finality and stability for class action settlements is (1) to impose a set of substantive and procedural safeguards in the initial class action litigation and (2) absent fraud and the like, to confine collateral attacks to a check on the "process values" that were undertaken by the initial forum to make its determination of adequacy.[89] As we have explained elsewhere in the

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Bill 254 and commenting on the Alabama state court settlement against BancBoston Mortgage Corp. in which a class member received a refund of $4.38 but was charged $80.00 to pay the attorneys' fee, 143 Cong. Rec. S897 (daily ed. Jan. 30, 1997); Coffee Testimony, supra note 63, at *11 (criticizing, among others, settlement in Broin v. Philip Morris, Inc., Case No. 91-49738 (11th Judicial Dist., Dade County, Fla.), where $300 million settlement resulting from action by flight attendants for employment-related exposure to tobacco smoke was to be paid to proposed foundation to study tobacco related illnesses).

[88] Various legislative proposals have been introduced in Congress. See, for example, the Class Action Fairness Act of 1997, S. 254, 105th Cong. (1997), which would require that state attorneys general be notified about potential class action settlements that would affect residents of their states and would allow them to intervene in cases where they think the settlements are unfair. If a class member resides in a state where the state attorney general has not been provided notice, a class member may choose not to be bound by any settlement. Other bills may be forthcoming as congressional hearings continue to examine potential class action abuse. See, e.g., Hearings on Class Action Lawsuits: Examining Victim Compensation and Attorneys' Fees, Before the Subcomm. on Administrative Oversight and the Courts of the Senate Comm. on the Judiciary, 105th Cong. (1997).

With respect to securities litigation in particular, several bills have been introduced to ensure the effectiveness of the Private Securities Litigation Reform Act of 1995 by halting migration of class actions to state courts and avoiding inconsistent standards in state court litigation. See, e.g., Securities Litigation Improvement Act of 1997, H.R. 1653, 105th Cong. (1997), which would require individual cases and class actions involving securities to be brought in federal court, and Securities Litigation Uniform Standards Act of 1997, H.R. 1689, 105th Cong. (1997) and S. 1260, 105th Cong. (1997), which would prohibit state court "class actions" alleging certain types of securities claims. Another goal for some proponents of these bills was to eliminate the strategic use of easy state court settlements to release exclusive federal claims in the wake of *Matsushita I*. An exception in the legislation that would continue to permit class actions based on state law in certain circumstances might undermine that goal. For the status of this legislation, see Karen Donovan, Full Stop for Fraud Suits in States?, Nat'l L.J., Mar. 23, 1998, at A1.

[89] With respect to fraud, see supra note 71. The process point is consistent with Justice Ginsburg's observation in *Matsushita I*, that Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982), sets forth the scope of full faith and credit in that a "'[s]tate may not grant preclusive effects in its own courts to a constitutionally infirm judgment, and other state

context of state court settlements of exclusive federal claims,[90] a court, when considering a global settlement should adopt a process for investigating the relative merits of the respective claims (the claims that can be litigated as compared to the ones to be released) as part of the formal hearing process. The process should invite participation of all class counsel. The court should consider the respective merits of the claims and should "abstain" from a global settlement in certain cases.[91] Only a state with a substantial nexus to the litigation should approve a global settlement and the settlement should be limited to claims that have a transactional relationship to the asserted claims.[92] No one of these requirements can be said to be mandated by "due process," but the inquiry is whether the process undertaken by the court in approving the settlement and in making a finding of adequate representation was sufficient to protect the due process rights of absent class members.[93]

It has been suggested that such a "process" standard for collateral attack would be meaningless because most state courts follow procedures similar to those set forth in Rule 23.[94] But in our view, it is not Rule 23 standing alone that determines whether an appropriate process for determining adequacy has been followed in F-1 with respect to a settlement class action. Indeed, Rule 23 has no express provision for settlement class actions, and the proposals of the Advisory Com-

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and federal courts are not required to accord full faith and credit to such a judgment.'" *Matsushita I*, 516 U.S. 367, 395 (1996) (Ginsburg, J., concurring in part and dissenting in part) (quoting *Kremer*, 456 U.S. at 482).

[90] See Kahan & Silberman, supra note 4, at 251-54. For a summary of the proposals, see 18 Charles Alan Wright et al., Federal Practice and Procedure § 4470 n.36.20 (1997 Supp.).

[91] In the context of a proposed state settlement that releases federal claims, we offer guidance on how that analysis should proceed. See Kahan & Silberman, supra note 4, at 258-62. Professor Coffee has made a similar, albeit more generalized, proposal for situations where a settlement purports to release claims that are not asserted; courts should, he argues, conduct a prospective valuation of the competing claims and a court should not release claims that might be considered "more valuable." See Coffee, supra note 55.

[92] See Kahan & Silberman, supra note 4, at 248, 254.

[93] We recognize that there may be some uncertainty as to when this standard is met. But "due process" has always been a flexible standard and understood as requiring an interpretation in context. We venture that courts, rule makers, and legislatures, aware of the process deficiencies in class action settlements and serious about protecting the interests of absent class members, will be able to construct fair processes for ensuring adequacy and thus assure finality to their settlements. Our proposal, we believe, offers the necessary incentive to do so.

[94] See John C. Coffee, Jr., 'Epstein II': Adequacy v. Finality, N.Y. L.J., Jan. 29, 1998, at 5. Such a concern may explain why in *Matsushita II*, the Ninth Circuit majority rejects the *Kremer* "procedures only" approach and relegates it as applicable only to "collateral challenges of judgments in traditional litigation, where individual parties are bound by virtue of their *presence* before the court." *Matsushita II*, 126 F.3d 1235, 1245 (9th Cir. 1997).

mittee with respect to settlement class actions[95] seem to have been put on the shelf. Rather, the inquiry should be whether the court approving the settlement—in this litigation, the Delaware Chancery Court—took reasonable measures to protect the federal interests and guard against the deficiencies of global state court settlements in fashioning their settlement structures.[96] We believe this limited form of collateral attack should be available even to those plaintiffs who objected to the adequacy of representation in the first proceeding and were unsuccessful.[97] Encouraging plaintiffs to raise objections in state courts has the benefit of providing state courts with the requisite information to evaluate the settlement and to make an informed decision about whether or not to include exclusive federal claims within the scope of that settlement.

On this latter point, it should be apparent that we also differ, at least in part, with the approach taken by Judge O'Scannlain in his dissent in *Matsushita II*. Judge O'Scannlain believed that because the issue of adequacy of representation was in fact litigated in the Delaware court by other objectors, the *Epstein* plaintiffs were barred from relitigating the adequacy issue on grounds of issue preclusion.[98] To the extent that Judge O'Scannlain viewed any objector as a "virtual representative" of absent class members,[99] we think the issue preclusion argument is flawed. The more important fact, we believe, is that the *Epstein* class members—who chose not to opt out of the class and over whom the Delaware court had jurisdiction—had the opportunity to raise the adequacy objection before the Delaware court. It is for this reason they should be precluded from raising that issue in a second forum. The issue has been decided by a court in which they had

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[95] See Proposed Amendments to the Federal Rules of Civil Procedure, 167 F.R.D. 559 (1996); see also Linda S. Mullenix, The Constitutionality of the Proposed Rule 23 Class Action Amendments, 39 Ariz. L. Rev. 615 (1997).

[96] See Kahan & Silberman, supra note 4, at 278.

[97] As we pointed out in our earlier article, we view participation in the state proceedings as a prerequisite for collateral attack—at least as long as such an appearance is not clearly futile. See id. at 279. We recognize that this is not the existing rule. See, e.g., Grimes v. Vitalink Communication Corp., 17 F.3d 1553, 1558-61 (3d Cir. 1994) (barring absent class members who did not raise objections to adequacy of representation, as well as objectors who did, from later collaterally attacking finding of adequate representation even where settlement class contained no opt out right); Nottingham Partners v. Trans-Lux Corp., 925 F.2d 29, 33 (1st Cir. 1991) (stating that plaintiff, having raised objection to adequacy and lost, could not maintain collateral attack).

[98] See *Matsushita II*, 126 F.3d 1235, 1259 (9th Cir. 1997) (O'Scannlain, J., dissenting).

[99] Of course, to the extent a "non-objector" controls or "substantially participates" in the control of the presentation on behalf of a party, he will be bound through doctrines of virtual representation. See Restatement (Second) of Judgments § 39 (1982). For a history of "virtual representation" and a theory for its expansion, see Robert G. Bone, Rethinking the "Day in Court" Ideal and Nonparty Preclusion, 67 N.Y.U. L. Rev. 193 (1992).

the opportunity to participate; their only recourse now should be an argument that the process for making that determination was so flawed as to violate due process.[100]

The more limited collateral attack we advocate has substantial advantages over the approach adopted by the Ninth Circuit in *Matsushita II*. A collateral attack limited to a check of *processes* in the settlement forum provides an incentive to courts, particularly state courts considering the release of federal claims, to adopt standards and procedures for allocating settlement authority in class actions and for making informed decisions about potential conflicts within the class.[101] As the Supreme Court's recent decision in *Amchem Products, Inc. v. Windsor*[102] illustrates in a somewhat different context,[103] it is not the settlement forum alone but also that forum's appellate process that can assess potentially conflicting interests of class members in order to identify the scope of an appropriate settlement class.[104]

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100 See supra note 93.

101 For some of the various suggestions made recently, see Judith Resnik, Litigating and Settling Class Actions: The Prerequisites of Entry and Exit, 30 U.C. Davis L. Rev. 835, 863-72 app. (1997) (including proposal for settlement classes); William W. Schwarzer, Settlement of Mass Tort Class Actions: Order Out of Chaos, 80 Cornell L. Rev. 837, 843 (1995) (suggesting, as addition to Fed. R. Civ. P. 23(e), several criteria by which judges should assess proposed class action settlements).

102 117 S. Ct. 2231 (1997).

103 The adequacy of representation issue in *Amchem* arose from the potential conflict of interests between asbestos claimants, some of whom suffered present injuries and some of whom were only exposed. See id. at 2250-51.

104 For a discussion of an economic model assessing the incentives at work in class action settlements, see Samuel Issacharoff, Class Action Conflicts, 30 U.C. Davis L. Rev. 805 (1997). While Professor Issacharoff is critical of the Supreme Court's opinion in *Amchem* for failing to articulate the appropriate standard for assessing settlement classes under Rule 23, he has no disagreement with the Court's factual conclusion—and that of the Third Circuit below—that the named plaintiffs were not adequate representatives for the sprawling class of asbestos claimants, some of whom suffered present injuries and some of whom were only exposed. See id. at 818-20.

Of course, disagreement about what "adequate representation" is in any given case will persist. See, e.g., Ahearn v. Flanagan, 134 F.3d 668 (5th Cir. 1998). In *Ahearn*, a panel majority reaffirmed its approval of a class action settlement of asbestos related claims. The Supreme Court had vacated an earlier ruling, Ahearn v. Flanagan, 90 F.3d 963 (5th Cir. 1996), vacated, 117 S. Ct. 2503 (1997), and remanded for reconsideration in light of *Amchem*. On remand, the panel majority, in a short per curiam opinion, wrote that they could "find nothing in the *Amchem* opinion" to change their earlier ruling. *Ahearn*, 134 F.3d at 669. The majority observed that any "conflict between members of the future claimant class" was over "larger and earlier shares of available money and that the non opt out limited fund class was designed precisely to control such conflict." Id. at 670. Judge Smith wrote a sharp dissent, stressing several structural conflicts, including the same conflict between present and future claimants identified in *Amchem*. See id. at 675-79 (Smith, J., dissenting).

Such uncertainty about when the standard of "adequate representation" has been met underscores the need to limit the availability of collateral attack.

The availability of a collateral attack based on "inadequate processes" in the forum that approves the settlement should deter plaintiff/lawyer shopping and forum shopping because the existence of such factors will increase the likelihood that "inadequate representation" will be found in the initial forum; alternatively if those factors are not considered by the court approving the settlement, a finding of adequacy may be subject to collateral attack. "Inadequate process" also sets a substantially higher threshold for allowing collateral attack, thereby decreasing the dangers of reverse forum shopping by class counsel for favorable collateral attacks, which pose a continuing threat to the finality of class action settlements.

In its decision in *Matsushita I*, the Supreme Court never reached the question of whether class counsel were in fact "adequate" representatives to conclude a settlement that released exclusively federal claims, given their impaired bargaining position resulting from their inability to litigate those claims and their incentive to reach a settlement. However, in refusing to read an exception into the requirements of 28 U.S.C. § 1738 and in insisting that full faith and credit be given to state court settlements even when exclusive federal claims are being released, the Supreme Court stated that "the concerns underlying the grant of exclusive jurisdiction in § 27 [of the Securities Exchange Act] are not undermined by state court approval of settlements releasing Exchange Act claims."[105] That statement must be read, at least in part, as a rejection of the *Epstein* plaintiffs' argument (and the Ninth Circuit's first opinion) in *Matsushita I* that because class counsel could not *litigate* the exclusive federal claims, they could not adequately represent the class for the purposes of settling those claims. While the Ninth Circuit did not rely exclusively on these incentive problems to support its finding of inadequate representation in *Matsushita II*,[106] the emphasis on those points in the second decision seems inconsistent with the Supreme Court's ruling in *Matsushita I*.

There is no question that the bargaining power of state class attorneys is impaired in negotiating global settlements that include the release of exclusive federal claims.[107] This fact could have provided the Supreme Court with a rationale for carving out an exception to 28 U.S.C. § 1738 or limiting the settlement authority of the state court in

105 *Matsushita I*, 516 U.S. 367, 384 (1996).

106 The Ninth Circuit reviewed the course of conduct by Delaware counsel for the class and concluded that counsel did not make even a reasonable effort to investigate and assess the fair settlement value of the federal claims. See *Matsushita II*, 126 F.3d 1235, 1251-55 (9th Cir. 1997).

107 See Kahan & Silberman, supra note 4, at 235-38.

Matsushita I.[108] Indeed, the *Epstein* plaintiffs made precisely this argument to the Supreme Court in insisting that state courts should not have settlement authority to release exclusively federal claims with respect to a prospective federal class.[109] By entrusting state courts with the authority to approve global settlements in *Matsushita I*, the Supreme Court implicitly entrusted the state courts with the obligation to consider how the impaired bargaining position of class counsel might affect the adequacy of representation with respect to a settlement that released exclusive federal claims. If the concerns emanating from the plaintiff shopping and forum shopping we have previously discussed are such that state courts cannot be trusted to make the necessary evaluation of "adequate representation," then the Supreme Court should have established a prophylactic rule against state court settlements that released exclusive federal claims.[110] To grant state courts the authority to approve global settlements with the concomitant obligations that such authority entails and then to allow them to be second-guessed as to their findings is to create the worst of all possible worlds. It leads not only to the creation of even more litigation but also to a disregard of principles of federalism and finality.

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[108] Cf. Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 386 (1985):

> Only if state law indicates that a particular claim or issue would be barred, is it necessary to determine if an exception to § 1738 should apply. Although for purposes of this case, we need not decide if such an exception exists for federal antitrust claims, we observe that the more general question is whether the concerns underlying a particular grant of exclusive jurisdiction justify a finding of an implied partial repeal of § 1738. Resolution of this question will depend on the particular federal statute as well as the nature of the claim or issue involved in the subsequent federal action.

[109] In arguing that Section 27 was fully applicable to settlements, the *Epstein* plaintiffs argued that global settlement authority in the state court, if upheld, was "bound to generate unseemly judge—or, more accurately, lawyer—shopping by defendants seeking the cheapest settler." Brief for Respondents, *Matsushita I*, 516 U.S. 367 (1996) (No. 94-1809), available in 1995 WL 551027, at *32.

[110] In commenting on the *Matsushita I* decision in the Wright, Miller & Cooper treatise, Professor Ed Cooper observed that the "issues of exclusive federal jurisdiction and adequate representation may be intertwined." He notes that the adequate representation issue has not yet been resolved but that reactions to the decision in *Matsushita I* "may be affected by the strong sense of uneasiness that the Delaware settlement invokes" and that "this uneasiness also plays a legitimate role in addressing the abstract balance between full faith and credit, exclusive federal jurisdiction, and class-action settlements." As he points out, "the case for preclusion cannot be stronger than faith in the approval process," on which he casts some doubt. Charles Alan Wright et al., supra note 90, § 4470 at 526; see also John C. Coffee, Jr., After 'Matsushita,' Litigants Should Focus on the Due Process Limits on a State Court's Authority to Settle Claims Over Which It Lacks Jurisdiction, Nat'l L.J., Apr. 15, 1996, at B5 (discussing how *Matsushita I* leads to radically revised incentive structures for defendants and some plaintiffs' attorneys and creates "reverse auction" under which defendants will settle with lowest bidder among them).

Our attention here has focused primarily on state court settlements releasing exclusively federal claims, which is the factual context of the *Matsushita* litigation. But as we pointed out in the introduction, the collateral attack permitted by the Ninth Circuit's opinion in *Matsushita II* has no inherent limitation and applies equally to collateral attack by a state court of an adequacy determination made in a federal class settlement, to a state court's review of the adequacy of representation in a class action as determined in another state or even within the same state, and to the redetermination by one federal court of another federal court's finding of adequacy. The more limited form of collateral attack we suggest is designed to address the more likely set of process deficiencies that occur in particular kinds of settlements;[111] it should also provide incentives for legislation and rules of practice to curb such abuses in the settlement forum.

"Adequate representation" is critical to the fairness and success of class action settlements. But the task of ensuring adequacy must be left to the forum in which the settlement proceedings are to be approved and to the safeguards of the appellate process in that forum. To permit that search for "adequacy" to continue in a second forum through the availability of a broad collateral attack would surely itself be "inadequate."

111 See, e.g., Romstadt v. Apple Computer, Inc., 948 F. Supp. 701, 704-09 (N.D. Ohio 1996) (announcing that federal district court would refuse to give full faith and credit to any final Texas settlement due to procedural unfairness in that forum, which included certification of class and preliminary approval of class where no notice was given to federal plaintiffs and no information about pending federal action was given to state judge).