REJOINDER

THE PROPER ROLE FOR COLLATERAL ATTACK IN CLASS ACTIONS: A REPLY TO ALLEN, MILLER, AND MORRISON

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Although Professors Kahan and Silberman would applaud a narrowing of the collateral attack remedy created by Matsushita II, *as suggested by Miller and by Morrison, they argue that the interpretations offered by those two commentators are inconsistent with what the decision actually says and with its doctrinal rationale. The Ninth Circuit's reliance on* Phillips Petroleum v. Shutts *offers no support for a distinction between inadequate representation due to structural deficiencies and inadequacy for other reasons. Moreover, the limiting interpretations offered by Miller and by Morrison would still permit collateral attack in a broad array of cases. In this rejoinder, the authors also respond to particular criticisms from Morrison and Allen, and conclude by noting the unanimity among all of the commentators that broad collateral attack on class actions is undesirable.*

This is our third opportunity to comment on the *Matsushita* litigation. Our first article[1] followed the opinion by the U.S. Supreme Court (*Matsushita I*),[2] which held that a state court class action settlement may not be denied full faith and credit on the ground that the claims released are subject to exclusive federal jurisdiction, and thus could not have been litigated in state court.[3] In our article, we identified various problems with state settlements that release exclusive federal claims and discussed how and when state courts should exercise the power granted by *Matsushita I* to approve such settlements. We also argued that collateral attacks on state settlements releasing exclusive federal claims should be reserved for instances in which the settle-

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1 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.

2 Matsushita Indus. Elec. Co. v. Epstein, 516 U.S. 367 (1996) (holding that, under Full Faith and Credit statute, 28 U.S.C. § 1738 (1994), federal court must accord judgment same effect such judgment would receive in courts of rendering state) [hereinafter *Matsushita I*].

3 See id. at 375.

ment structures in state court are not reasonably designed to protect the federal interest in the proper disposition of such claims.[4]

Our second article[5] followed the opinion by the Court of Appeals for the Ninth Circuit (*Matsushita II*), on remand from the Supreme Court, which held that absent class members have a due process right to attack a class action settlement collaterally if they were not adequately represented in the settlement.[6] In that article, we criticized this holding, and the scope of the collateral attack remedy it creates, as excessively broad. We argued that, while multijurisdictional class actions raise problems of plaintiff shopping and forum shopping, these problems were better dealt with by means other than a broad right to bring a collateral challenge.

In this issue, our colleagues Alan Morrison,[7] Geoffrey Miller,[8] and William Allen[9] comment on the arguments we raised in our second piece and, to a lesser extent, on those we raised in our first. Our reply is divided into three Parts. In Part I, we examine the different interpretations accorded to *Matsushita II* by Morrison, by Miller, and by us. In Part II, we respond more specifically to particular criticisms from Morrison. In Part III, we explain why we differ with Allen.

I
THE SCOPE OF *MATSUSHITA II*

Matsushita II contains an important holding and an important finding. In Part I of the opinion, the Court of Appeals held that, as a matter of federal constitutional law, a class action settlement[10] is binding on absent class members only if they were "adequately represented."[11] The language in Part I is unqualified. It does not distinguish between class action settlements rendered in state and in federal court; it places no particular significance on the nature of the

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[4] See Kahan & Silberman, supra note 1, passim.

[5] Marcel Kahan & Linda Silberman, The Inadequate Search for "Adequacy" in Class Actions: A Critique of Epstein v. MCA, Inc., 73 N.Y.U. L. Rev. 765 (1998).

[6] Epstein v. MCA, Inc., 126 F.3d 1235, 1241, 1248 (9th Cir. 1997), reh'g granted (9th Cir. 1998 [hereinafter *Matsushita II*].

[7] See Alan B. Morrison, The Inadequate Search for "Adequacy" in Class Actions: A Brief Rejoinder to Professors Kahan and Silberman, 73 N.Y.U. L. Rev. 1179 (1998).

[8] See Geoffrey P. Miller, Full Faith and Credit to Settlements in Overlapping Class Actions: A Reply to Professors Kahan and Silberman, 73 N.Y.U. L. Rev. 1167 (1998).

[9] See William T. Allen, Finality of Judgments in Class Actions: A Comment on *Epstein v. MCA, Inc.*, 73 N.Y.U. L. Rev. 1149 (1998).

[10] The holding applies with equal force to judgments rendered in class actions. However, to avoid the awkwardness of referring to "class action judgment or settlement," and because the issue of adequate representation is more likely to arise in the context of a settlement than in the context of a judgment, we will refer in this reply only to settlements.

[11] See *Matsushita II*, 126 F.3d at 1248.

claims released by the settlement; and it specifically states that the holding applies even if the very arguments suggesting that representation was inadequate were made in, and rejected by, the court that approved the settlement.[12] Thus, it would appear, whenever an absent class member raises claims released by an earlier settlement, the court in which those claims are raised (the F2 court) must determine whether, in its opinion, representation in the initial forum (F1) was adequate. Moreover, though *Matsushita II* does not expressly hold so, both the logic of the argument and the lack of any mention of deference indicate that the F2 court makes its determination of adequacy de novo.

In Part II of the opinion, the court found that representation in the Delaware state court settlement was in fact inadequate.[13] That finding was based on several factors, including the fact that the Delaware state court lacked subject matter jurisdiction over the claims asserted in the Ninth Circuit;[14] that the federal claims and the state claims were based on different operative facts;[15] that the federal claims were vigorously litigated while the state claims lay largely dormant;[16] and that Delaware class counsel disparaged the value of the federal claims in the Delaware fairness hearing.[17] Once in Part II of the opinion, and twice in the Conclusion, the court noted that these facts rendered *Matsushita II* "extraordinary."[18]

In separate comments on our article, Alan Morrison and Geoffrey Miller attempt to reduce drastically the scope of the collateral attack remedy created by *Matsushita II*.[19] Morrison reads *Matsushita II* as requiring, as a "threshold" "before the inadequacy allegation [is] even considered . . . the kind of structural deficiency, principally the absence of any power of the state court to litigate the federal issue,

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12 See id. at 1241-42.

13 See id. at 1248-56.

14 See id. at 1248-49.

15 See id. at 1249-50.

16 See id. at 1250.

17 See id. at 1251.

18 See id. at 1250, 1255.

19 While Morrison minimizes the holding in *Matsushita II*, he exaggerates the scope of our critique. We have not argued, as he claims, that "simply alleging a bad result in a prior action is enough to allow the collateral attack to go forward." Morrison, supra note 7, at 1186. We merely suggested that creative (or, for that matter, even not so creative) counsel for absent class members would have little difficulty in alleging that the bad result was due to the class counsel's failure to investigate the claims sufficiently, to overeagerness to earn attorneys' fees, or to some other inadequacy in representation. See Kahan & Silberman, supra note 5, at 774 (observing that bad result "could be said, in one way or another, to be tied to class counsel's failure to represent class members adequately").

that was so prominent" in that case.[20] Striking a similar vein, Miller argues[21] that collateral attack is permitted if counsel in F1 was "disabled" from litigating the issue that forms the basis of the F2 lawsuit and if additional facts are shown indicating that representation in F1 was in fact inadequate.[22]

We have two observations about the positions of Morrison and Miller. Though we would applaud a narrowing of the collateral attack remedy created by *Matsushita II,* their interpretations are inconsistent both with what *Matsushita II* actually says and with the doctrinal rationale for the decision. The opinion repeats no less than eight times that absent class members are entitled to "adequate representation" "at all times."[23] Never does the Ninth Circuit in its discussion of the *ability* to collaterally attack qualify the language by reference to structural deficiencies, an inability to litigate, or, for that matter, in any other fashion.[24] The majority's reasoning draws heavily on *Phillips*

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[20] Morrison, supra note 7, at 1186. We would have been less critical of *Matsushita II* if that were what it held. However, we wonder why Morrison, who devotes a full section of his response to the importance and significance of "adequate representation," would deny the right to bring a collateral attack to an absent class member when the representation was inadequate on other than the "narrow" grounds exemplified in *Matsushita II.* See Morrison, supra note 7, at 1183-84 ("*Matsushita II* is a narrow, if not unique, case that would not, and should not, lead to the kind of broad-scale use of collateral attacks on class action settlements that Kahan and Silberman predict.").

[21] We are not sure to what extent Miller's argument is based on the text of the opinion and to what extent it is based on the fear—which we share—that the reading we attribute to the case would undermine class action litigation. See Miller, supra note 8, at 1169 (stating that *Matsushita II* "cannot signal such a disturbing and perverse result").

[22] See id. at 1174-75. Early in his commentary, Miller suggests the possibility that *Matsushita II* applies only to cases where, due to an inadequacy in the notice, class members lacked a full and fair opportunity to litigate adequacy in the F1 fairness hearing. See id. at 1174 (noting that technically remainder of opinion is dictum).

[23] *Matsushita II*, 126 F.3d at 1243 (stating that Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), requires "adequate representation" "at all times"); id. at 1245 ("[T]he fundamental principal that *Shutts* established [is that] absent class members have a right to adequate representation at 'all times' . . . ."); id. at 1246 ("*Shutts* . . . held that absentees have right to adequate representation at 'all times' . . . ."; "*Shutts* . . . laid out the 'minimum procedural due process protection due to absent class member, including 'adequate representa[tion]' 'at all times.'" (quoting *Shutts*, 472 U.S. at 811-12) (alteration in original)); id. at 1247 ("*Shutts*' requirement of adequate representation 'at all times' may [not] be diluted in class settlement proceedings."(citation omitted)); id. at 1248 (stating that due process safeguards include requirement that class members be "'adequately represented' 'at all times'"); id. at 1250 ("This was not the adequate representation of absent class members that due process requires 'at all times.'"); id. at 1255 ("To bind the [*Epstein*] plaintiffs to the Delaware judgment under these circumstances would violate their due process right to have their interests adequately represented at all times.").

[24] In Part II of the opinion, where the court turns to the *merits* of the adequacy of representation issue, the court addresses not when a collateral challenge is permitted but why in the present action it is successful:

> This was not the adequate representation of absent class members that due process requires "at all times." As we have said, "An adequate representative

Petroleum Co. v. Shutts.[25] We have criticized this reading as "strained" because *Shutts* says nothing about collateral attack.[26] But even if *Shutts* is accepted as the starting point, it still offers no support for a distinction between inadequate representation due to "structural deficiencies" and inadequacy for other reasons. Thus, our characterization of the *Matsushita II* opinion as establishing a broad right to collateral attack fits better with the Ninth Circuit's explanation and rationale than Morrison's and Miller's efforts to narrow the scope of the ruling.[27]

Second, we do not believe that Morrison's or Miller's interpretation would in fact confine collateral attack to an "extraordinary case." Their reading of *Matsushita II* as requiring as a prerequisite to collateral attack a threshold "structural deficiency" (in the case of Morrison) or a "disability to litigate" (in the case of Miller) is satisfied by many settlement class actions[28] and is not limited to state settle-

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> must . . . be free from economic interests that are antagonistic to the interests of the class." The interests of Delaware counsel in this case were nothing but antagonistic to the interests of the MCA shareholders who tendered their shares. As a result of the three factors described above [to wit: the inability to litigate the federal claims in Delaware, the absence of common issues of material fact, and the pendency of a federal action], which make this case extraordinary on its facts, Delaware counsel's overriding economic interest lay in settling the federal claims at any price and winning the race to judgment.

126 F.3d at 1250 (citations omitted).

[25] 472 U.S. 797 (1985). The majority mentions *Shutts*, by our counting, 36 times.

[26] See Kahan & Silberman, supra note 5, at 770.

[27] If *Matsushita II* is to be read narrowly, a more promising approach than the ones pursued by Morrison and Miller would be to focus on Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992), a precedent on which *Matsushita II* explicitly relies and which it purports to follow. See 126 F.3d at 1248 (quoting *Ticor Title*, 982 F.2d at 390, for proposition that "'if the plaintiff was not adequately represented . . . the prior decision has no preclusive effect'"). In *Ticor Title*, the Ninth Circuit held that absent class members can bring a collateral attack if (1) representation in F1 was inadequate and (2) the opposing party was on notice of facts making such inadequacy apparent (though it ultimately found that there was no showing of inadequate representation). See *Ticor Title*, 982 F.2d at 390-91. *Matsushita II* mentions the latter requirement only in a footnote in Part II of the opinion and, without further analysis, notes merely that it is "easily met, as Matsushita was on notice of all of the information in the record on which we base our analysis." *Matsushita II*, 126 F.3d at 1248 n.11. The court's approach virtually subsumes the requirement that the opposing party was on notice of the inadequacy of the representation into the requirement that representation was inadequate since, in most cases, the F2 court will base a finding of inadequate representation on facts known to the opposing party. *Matsushita II* could, however, be interpreted as finding that, in the case at bar, the inadequacy of representation was so egregious that it must have been known to the opposing party. Interpreted in this manner, *Matsushita II* would establish a kind of "gross inadequacy of representation" standard for collateral attack. Gross inadequacy, however, could be due to factors other than structural deficiencies or an inability to litigate.

[28] The term "settlement class action" is used here to refer to the situation where the parties effectively arrive at a settlement before the action is certified as a class. The court preliminarily reviews the settlement, and if it believes it is fair and satisfies the other Rule

ments releasing exclusive federal claims. Any category of case in which a settlement procedure is "untethered to the possibility of actually prosecuting the claim"[29] necessarily alters the bargaining position of class counsel. Thus certification of a class for settlement purposes that could not be certified as a litigation class[30] would seem to satisfy the Morrison-Miller prerequisite even under their more restrictive reading of *Matsushita II*.[31] Additionally, with respect to "competing or overlapping class actions"—even when counsel is not completely disabled from litigating claims it is attempting to release[32]—certain claims may have already been certified by other class counsel creating a "disarming" of class counsel and incentives to settle for a reduced value. Finally, Morrison's reference to "structural deficiencies" implicates an even broader array of cases where collateral attack would be permitted. These include mass tort class actions involving inventory settlements[33] (where class lawyers have a economic interest to trade off the interests of claimants with future injuries for those of class

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23 requirements, then certifies the action "provisionally" as a class action "for settlement purposes" only.

29 Samuel Issacharoff, Class Action Conflicts, 30 U.C. Davis L. Rev. 805, 811 (1997).

30 The Supreme Court in Amchem Products, Inc. v. Windsor, 117 S. Ct. 2231 (1997), disagreed with the Third Circuit's holding that a class can be certified for settlement only if it can also be certified for litigation.

31 Inevitably, disagreements about whether the settlement contained "structural deficiencies" will occur, but some settlement classes should be less vulnerable to collateral attack under the standard suggested by Morrison and Miller. See, e.g., Hanlon v. Chrysler Corp., No. 96-15043, 1998 WL 417581 (9th Cir. July 24, 1998) (affirming district court's certification and approval of nationwide class action settlement involving Chrysler minivan owners with claims for defectively designed rear liftgate latches). The Ninth Circuit distinguished the *Hanlon* settlement from those in In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir. 1995) [hereinafter *GM Pick-Up Truck*], and *Amchem*, noting that each potential plaintiff had claims of similar strength and that there was no disparate treatment between class members, that there was a history of prior state class action litigation by class counsel, and that there was no structural conflict of interest based on variations in state law. See *Hanlon*, 1998 WL 417581, at *4-*6. We emphasize that *Hanlon* involves direct review on appeal and not collateral attack, but in any event the settlement class does not appear to have the characteristics that would make it suspect under either Morrison's or Miller's narrowing of *Matsushita II*.

32 We do not agree, contrary to Morrison's claim (see Morrison, supra note 7, at 1182), that a state court plaintiff has "no leverage" over the defendant if he cannot threaten to litigate in the settlement forum. See Kahan & Silberman, supra note 1, at 235-38 (examining effect of lack of power to litigate on bargaining power); see also Allen, supra note 9, at 1161 and Miller, supra note 8, at 1173 n.25.

33 See Amchem Prods. v. Windsor, 117 S. Ct. 2231 (1997); Flanagan v. Ahearn (In re Asbestos Litig.), 134 F.3d 668 (5th Cir. 1998), cert. granted sub nom. Ortiz v. Fibreboard Corp., 118 S. Ct. 2339 (1998). For brief commentary on *Amchem*, see Issacharoff, supra note 29, at 818-20; Judith Resnik, Litigating and Settling Class Actions: The Prerequisites of Entry and Exit, 30 U.C. Davis L. Rev. 835, 881-87 (1997).

members with present injuries),[34] or other class actions where class members have materially conflicting interests, but are not represented by separate counsel.[35] Thus, the effect of *Matsushita II* is much broader than the Ninth Circuit or Morrison and Miller concede,[36] and applies to many cases besides state court releases of federal securities claims.[37] As such, there can be little comfort in the court's pious hope that "it is the rare exception . . . where an absentee will have a colorable claim for inadequacy,"[38]—a view that is not borne out by the fact that many class action settlements give rise to differing judicial views on the adequacy of representation[39]—or in Morrison's recitation of the mantra that "'[s]tatements in judicial opinions cannot be wrested free of their factual moorings.'"[40]

II
Do It Once, But Do It Right

After laying down his interpretation of *Matsushita II*, Miller makes suggestions for alternative means to reduce the problems in multijurisdictional class actions, such as dismissing actions on grounds

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[34] See John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343, 1373 (discussing problem of "inventory settlements").

[35] See, e.g., *GM Pick-Up Truck*, 55 F.3d at 800-01 (remanding to district court for determination of whether conflicts of interest among class members require subdivision of class); see also David L. Shapiro, Class Actions: The Class as Party and Client, 73 Notre Dame L. Rev. 913, 958-60 (1998) (arguing that adequacy should be focus of class action certification and recommending rule revisions to focus on that issue).

[36] See John C. Coffee, Jr., Class Action Ethics an Oxymoron, Legal Times, Mar. 30, 1998, at 540 (suggesting similarity between *Matsushita*, nationwide class actions in state court confronted with rival plaintiffs' teams in federal court, and settlement classes that cannot be certified for trial).

[37] To keep our reply brief, we will not therefore respond to Morrison's arguments in as much as they relate specifically to federal securities cases. See Morrison, supra note 7, at 1184-91 (discussing statute of limitations for federal securities cases). We note, however, that the statute of limitations for most violations of the Securities Exchange Act of 1934 is the earlier of three years after the violation or one year after its discovery. See Louis Loss & Joel Seligman, Securities Regulation 4492-521 (3d ed. 1993).

[38] *Matsushita II*, 126 F.3d at 1256. The majority bases this view on the "small handful" of cases in which absentees have successfully challenged adequacy. This, however, could obviously also be due to the fact that, prior to *Matsushita II*, an unfettered right to collateral attack had not been recognized.

[39] See, e.g., Amchem Prods. v. Windsor, 117 S. Ct. 2231 (1997) (upholding circuit court's reversal of class certification on grounds of inadequate representation); Flanagan v. Ahearn (In re Asbestos Litig.), 134 F.3d 668 (5th Cir. 1998) (reconfirming prior split panel on whether representation was adequate, 90 F.3d 963 (5th Cir. 1996)), cert. granted sub nom. Ortiz v. Fibreboard Corp., 118 S. Ct. 2339 (1998); *GM Pick-Up Truck*, 55 F.3d at 368 (vacating class certification on grounds that representation was inadequate).

[40] Morrison, supra note 7, at 1184 (quoting Liberty Mut. Ins. Co. v. Commercial Union Ins. Co., 978 F.2d 750, 752 (1st Cir. 1992)).

of comity or *forum non conveniens* or issuing anti-suit injunctions.[41] We consider these suggestions helpful and hope that courts make proper use of these techniques regardless of the eventual outcome of the *Matsushita* litigation.

Morrison's disagreements with us, however, go beyond the proper interpretation of *Matsushita II*. Morrison accuses us, among other things, of undervaluing the importance of "adequate representation,"[42] misunderstanding the nature of due process and res judicata,[43] and offering a counterproductive solution to the problem of state settlements releasing exclusive federal claims.[44] A full response to Morrison would go beyond the scope of this reply. We will therefore just highlight why we believe that Morrison's criticisms are misplaced.

- Contrary to Morrison's attack, we agree with him that adequate representation is very important.[45] Our difference with Morrison relates to whether state courts can be trusted to make a determination of adequacy of representation if they lack subject matter jurisdiction over the underlying claims. We believe they generally can be trusted.[46] Morrison believes

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41 See Miller, supra note 8, at 1176-77.

42 See Morrison, supra note 7, at 1186-87 (arguing that we implicitly suggest that adequacy of representation is "not [a] terribly important aspect of class actions").

43 See id. at 1188 (arguing that our approach "turns the usual presumptions of due process and res judicata on their heads").

44 See id. at 1179 (claiming that our solution "will do virtually nothing to prevent some of the worse abuses").

45 See, e.g., Kahan & Silberman, supra note 5, at 792 (stating that adequate representation "is critical to the fairness and success of class action settlements"). Morrison's main reason for suggesting that we undervalue the significance of adequacy appears largely outcome-based—Morrison notes that our approach would result in dismissal of the federal case. See Morrison, supra note 7, at 1180. He also chides us for citing only once in a footnote to Hansberry v. Lee, 311 U.S. 32 (1940). See Morrison, supra note 7, at 1186. With respect to the first point, we acknowledged that *Matsushita* was a "close" case (although ultimately concluded that the Delaware court's sensitivity to the federal interests was sufficient to insulate it from collateral attack), see Kahan & Silberman, supra note 1, at 278; moreover, we identified several alternative bases for collateral attack in Morrison's "worse abuse" cases, see Kahan & Silberman, supra note 5, at 782 (including instances of material misrepresentations); Kahan & Silberman, supra note 1, at 274-76 (noting that Delaware law itself might permit collateral attack). Our first article contained an elaborate discussion of *Hansberry*, see id. at 266-69, to which our second article referred, see Kahan & Silberman, supra note 5, at 772 n.42, but emphasized that *Hansberry* is not instructive where the court entertaining the class suit has already made a determination of adequacy.

46 We base this belief on the view that state court trial judges generally act in good faith and on the important role that the state appellate courts play in superintending the propriety of class certification. See White v. General Motors Corp., No. 97 CA 1028, 1998 WL 387552 (La. Ct. App. June 29, 1998) (reversing trial court's order certifying nationwide class and approving settlement in litigation concerning placement of fuel tanks in some GM trucks). We also note the real possibility of Supreme Court review when the inadequacy of representation can be said to violate due process. Although the Supreme Court's grant of review in the *Ahearn* asbestos settlement, see Ortiz v. Fibreboard Corp., 118 S. Ct.

they cannot. But even if Morrison were correct, the preferred solution would be to deprive state courts of settlement jurisdiction at the outset—a solution rejected by the Supreme Court in *Matsushita I*—rather than to subject their factual findings of adequacy to review by way of collateral attack in an absent class member's forum of choice.[47]

- Morrison is troubled by our suggestion that a class member who opposes a proposed settlement ordinarily should raise his objections in the court where the proposal is pending and should not be permitted to bring a collateral attack.[48] Such a requirement, he claims, would be tantamount to a doctrine of "mandatory intervention," which he apparently regards as inconsistent with the Supreme Court opinion in *Martin v. Wilks*.[49] We do not see how permitting collateral attack only in the narrow (in his view) set of cases involving structural deficiencies would cure any such inconsistency. More importantly, however, Morrison makes a fundamental mistake in his use of the *Martin* analogy. The Supreme Court in *Martin* held that the attempt to bind a third party who was not (and who could not have been) designated as a member of the class was inconsistent with the principle of permissive intervention em-

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2339 (1998), was from a settlement approved by the federal courts, the issues presented there include both Rule 23 class certification and constitutional due process. A due process challenge to certification orders or settlement approvals by *state courts* would, of course, be a basis for Supreme Court review of state court action.

With respect to federal court class certification orders which are interlocutory, the claim for appellate review in lieu of collateral attack is even stronger. The Supreme Court's promulgation of proposed Rule 23(f) will authorize interlocutory appeals from grants or denials of class action certification at the discretion of the appellate courts. See Amendments to the Federal Rules of Civil Procedure, Criminal Procedure, Evidence, and Appellate Procedure, 66 LW 4323 (1998) (becoming effective December 1, 1998 absent congressional action).

[47] Recent legislative proposals attempt to address concerns about state court jurisdiction in this and other types of class actions by providing for broad "original" and "removal" federal jurisdiction whenever there is a putative class member diverse from any defendant and by allowing for aggregation of claims to meet the jurisdictional amount. See Class Action Jurisdiction Act of 1998, H.R. 3789, 105th Cong. 2nd Sess. (1998); Class Action Fairness Act of 1998, S. 2083, 105th Cong. 2nd Sess. (1998). The House bill, which provides for removal only by defendants, would not affect the problem of "abusive" state court class action settlements; however, the Senate bill provides for a right of removal by defendants or *any class member* who is not a named representative, thereby empowering class members to avoid litigation or settlement in state court. For an interesting discussion and critique of the proposed legislation, see Legislative Hearing on H.R. 3789, the "Class Action Jurisdiction Act of 1998" Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 105th Cong. (1998) (statement of Brian Wolfman, Staff Attorney, Public Citizen Litigation Group).

[48] See Morrison, supra note 7, at 1189.

[49] See id. (discussing Martin v. Wilks, 490 U.S. 755 (1989)).

bodied in Federal Rule 24.[50] The whole point of the class action procedure—and what distinguishes it from permissive intervention—is its basic premise that a judgment does have binding effect on absent class members who are designated as such through the class action certification procedure of Rule 23 or its state counterparts.

- Morrison objects to one element of our proposal that would require opponents of a state settlement releasing exclusive federal claims to voice their objections in state court before they can bring a collateral attack. We imposed this requirement in the context of state court releases of exclusive federal claims and as part of a larger scheme that permits collateral attack on such settlements if state court settlement structures are not reasonably designed[51] to protect federal interests.[52] The requirement has two rationales. First, collateral attack should be available even to class members who make objections in state court; otherwise, class members will have an incentive not to appear and the state court may be deprived of information relevant to an informed decision on whether to approve the settlement.[53] Second, appearance should ordinarily be a prerequisite to making a collateral attack so that class members do not strategically withhold information from the state court that could be used to correct a deficiency in the settlement in order to avail themselves of that deficiency in a

[50] See *Martin*, 490 U.S. at 765 ("The linchpin of the 'impermissible collateral attack' doctrine—the attribution of preclusive effect to a failure to intervene—is therefore quite inconsistent with Rule 19 and Rule 24.").

[51] Again, Morrison misinterprets us. Compare Morrison, supra note 7, at 1189 (arguing that our approach "would almost certainly not permit the federal court to take into account the inherent structural flaw in allowing state courts to pass on the fairness of settlements of federal claims that they have no jurisdiction to adjudicate"), with Kahan & Silberman, supra note 1, at 278 (arguing that, to be insulated from collateral attack, state courts must take reasonable measures to protect against deficiencies of state settlements involving exclusive federal claims, such as refraining from approving settlements when federal claim is stronger than state claim, examining case for presence of plaintiff shopping, and giving special weight to views of federal lead plaintiff).

[52] As we make clear, the requirement to appear in F1 is part of our proposal designed to deal with the particular problem of state settlements that release exclusive federal claims, and does not generally apply to collateral attacks on class actions. See Kahan & Silberman, supra note 1, at 280.

[53] Other elements of our scheme, as well, are designed to channel information about the federal claims to the state court. See Kahan & Silberman, supra note 1, at 255-58 (section entitled "Obtaining information about the federal claims"). We thus fail to understand why Morrison argues that our proposal would force a state judge to decide whether to approve a settlement releasing exclusive federal claims without knowledge of the relevant facts.

collateral attack.[54] As Morrison notes,[55] after hearing the objection the state court may require changes in the proposed settlement or may decide, as we propose for many situations,[56] to refrain from entertaining a settlement releasing exclusive federal claims altogether. While our approach may occasionally result in duplicative litigation,[57] we feel that the benefits gained from channeling information to state courts outweigh the costs of duplication.[58]

III
FEDERALISM IS A TWO-WAY STREET

We agree with most of Allen's arguments insofar as they stress the significance of federalism and finality.[59] What we would add, however, is an admonition to state courts that federalism is a two-way street. When approving a settlement that releases exclusive federal claims, state courts must take caution, particularly if such federal claims are pending in federal court, and even more so if a federal lead plaintiff, appointed under the Private Securities Litigation Reform Act,[60] opposes the settlement.

We do not think that Allen disagrees with these general premises. He disagrees, however, with our proposal that federal courts should be able to review collaterally whether state court settlement structures are reasonable—that is, whether a state court's *decisionmaking processes* take proper account of the fact that the federal claims cannot be litigated in the state court. As Allen admits, his views are

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54 As we understand Morrison's critique, he objects only to requiring a class member to appear in state court before raising a collateral attack, but not to permitting a collateral attack by a class member who did appear. We believe that our scheme would generate substantial benefits even if appearance in state court were just permissive, but not required.

55 See Morrison, supra note 7, at 1185.

56 See Kahan & Silberman, supra note 1, at 259-62.

57 Of course, it is unlikely that there will be more "duplicative litigation" under our proposal than would exist under the present *Matsushita II* regime. There will usually be some objectors at the fairness hearing, and the settlement forum will normally have undertaken a review of the propriety of certification and the fairness of the settlement.

58 In Part IV of his comment, Morrison raises several questions regarding the implementation of our proposal regarding state settlements releasing exclusive federal claims. See Morrison, supra note 7, at 1188-90. We believe that we have answered these questions in our earlier articles. See Kahan & Silberman, supra note 1, at 251 (remarking on who would adopt proposal); id. at 277 (remarking on who would judge reasonableness of settlement structures). We also note that we never suggested that adoption of our proposal in all its details is required to insulate such settlements from collateral attack. See id. at 277; Kahan & Silberman, supra note 5, at 787.

59 See Allen, supra note 9, at 1155-56.

60 See 15 U.S.C.A. § 77z-1C(a)(3)(1998) (requiring appointment of lead plaintiff).

shaped by his long service on the Delaware Court of Chancery.[61] We would note, though, that not all state courts have the reputation for quality enjoyed by the Delaware Chancery Court and that not all state court judges share Allen's respect for the demands of federalism. We therefore feel that our "moderate" (by Allen's description)[62] espousal of collateral attack on state settlements that release exclusive federal claims is warranted and shows disrespect neither for state court judges nor for our federalist tradition.

IV
WHAT'S NEXT?

It appears that Judge Becker's prediction that "the final word [in *Matsushita*] has yet to be written"[63] is correct. The Ninth Circuit recently granted Matsushita's petition for a rehearing. Interestingly, the panel in front of which the rehearing will be held differs from the one that originally heard the case. Judge Norris, the author of (and, one suspects, the driving force behind) the majority opinion in *Matsushita II* has since left the bench and has been replaced on the panel by Judge Thomas. The fate of *Matsushita II* upon rehearing is thus even less certain than that of the typical case for which rehearing is granted.

What is significant about the exchange of views in this *Law Review* colloquy is the unanimity that broad collateral attack on class action settlements is undesirable. The Ninth Circuit now has the opportunity to reconsider and clarify the proper scope of collateral attack in class actions. Whether the new panel agrees with Morrison, with Miller, with Allen, or with us, we hope our exchange proves useful in that endeavor.

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[61] See Allen, supra note 9, at 1164.

[62] See id.

[63] In re General Motors Pick-Up Truck Fuel Tank Products Liability Litigation, 134 F.3d 133, 142 (3d Cir. 1998).