Functional Approach to Adequacy of Representation, A; Note

Anthony J. Carucci

Follow this and additional works at: http://scholarship.law.nd.edu/jleg

Recommended Citation
Available at: http://scholarship.law.nd.edu/jleg/vol40/iss1/5

This Note is brought to you for free and open access by the Journal of Legislation at NDLScholarship. It has been accepted for inclusion in Journal of Legislation by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.
A FUNCTIONAL APPROACH TO ADEQUACY OF REPRESENTATION

Anthony J. Carucci*

I. INTRODUCTION

Asbestos is a commonly occurring mineral fiber replete with industrial uses due to its durable and fire-retardant properties. Its characteristics make it an ideal component in a wide range of manufactured goods including building materials, automobile parts, heat-resistant fabrics, packing, gaskets, and coatings. Unfortunately, when asbestos-containing materials are disrupted, microscopic fibers become airborne and can be inhaled into the lungs, causing potentially fatal injuries upon prolonged exposure. The widespread use of asbestos in industrial and residential settings through the early 1970s exposed millions of American workers to the useful but hazardous product, and has resulted in the longest-running mass tort litigation in United States history.

By 2002, of the millions of Americans exposed to asbestos during the twentieth century, approximately 730,000 had filed an asbestos claim against a total of at least 8,400 entities named as asbestos defendants. It is further estimated that a total of $70 billion has been spent adjudicating these claims, with transaction costs on both sides of the litigation totaling approximately $40 billion, leaving only $30 billion in estimated net compensation to claimants.

Asbestos litigation has significantly contributed to the evolution of mass civil litigation, as the complexity of the issues and difficulties with respect to judicial case management have forced judges to come up with innovative solutions to more efficiently handle the caseloads thereby reducing private and public transaction costs.

* J.D. Candidate 2014, Notre Dame Law School.
1. STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION 11–13 (2005) (outlining the most prevalent injuries resulting from asbestos exposure). "Mesothelioma is a cancer of the lining of the chest or abdomen. Asbestos is the only demonstrated cause of mesothelioma, although some mesothelioma cases have not been traceable to an asbestos exposure. . . . The disease is regarded as inevitably fatal, usually within a year or two of diagnosis. Other cancers have also been linked to asbestos, although they all have other causes besides asbestos exposure. Aside from mesothelioma, lung cancer is the most frequently claimed malignant disease. . . . Other cancers asserted by asbestos claimants include leukemia, and cancers of the bladder, breast, colon, esophagus, kidney, larynx, lip, liver, lymphoid, mouth, pancreas, prostate, rectum, stomach, throat, thyroid, and tongue. Asbestosis is a chronic lung disease resulting from inhalation of asbestos fibers that can be debilitating and even fatal. However, a person diagnosed with asbestosis might be asymptomatic or only mildly impaired." Id. The report was conducted by the RAND Institute for Civil Justice, a unit of the RAND Corporation, and is part of the RAND Corporation monograph series, which presents major research findings that address the challenges facing the public and private sectors. Id. at iii.
2. Id. at 11, 21.
3. Id. at 70, 79.
4. Id. at 88.
During the early years of asbestos litigation, asbestos manufacturers vigorously defended claims and raised numerous defenses, preventing many plaintiffs' attorneys from finding the cases economically feasible to bring. Plaintiff law firms eventually discovered that asbestos defendants were willing to settle when the firms took advantage of group litigation—filing a large number of claims, grouping them together, and then negotiating with defendants on behalf of the entire group.

In 1997, the U.S. Supreme Court rejected class certification sought by a proposed class action seeking a global settlement of current and future asbestos-related claims for a proposed class "encompass[ing] hundreds of thousands, perhaps millions, of individuals." The Court's decision hinged in large part on finding the requirement of adequacy of representation unsatisfied when present and future class members had conflicting interests: "for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future." While the Court's ultimate conclusion to withhold certification might have been correct, the decision nevertheless prevented a potential class encompassing millions of people from aggregating their claims to take advantage of the benefits of group litigation without delineating any clear standard for what a realistic conception of adequacy of representation requires.

Despite recognizing the significant implications and hardships imposed by not certifying the class, the Court failed to conduct any inquiry into how the competing interests of present and future plaintiffs could be satisfied by the proposed global

5. See id. at 21, 28; see also discussion infra Part II.B (discussing Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997), both as the last word on adequacy of representation in class action lawsuits and as having promulgated a standard of adequate representation so difficult to meet that class actions have become inordinately difficult to certify).

6. See CARROLL ET AL., supra note 1, at 22–23 (explaining the initial uncertainty of applying substantive legal doctrines to latent injuries). For example, "each claim required the presentation of scientific evidence on the causal link between asbestos exposure and disease, plus extensive factual investigation to demonstrate a causal link between the specific plaintiff's injury and the defendant's products, meaning that asbestos claims were far more expensive to prosecute than ordinary personal injury claims." Id. at 22. Furthermore, "[t]he defendants were large corporations that could afford to invest in protracted litigation and to adopt aggressive litigation strategies in response to plaintiffs' suits." Id.

7. See id. at 23 ("Often, defendants would agree to settle all of the claims that were so grouped, including weaker as well as stronger claims, to reduce their overall costs of litigation. By agreeing to pay weaker smaller-value claims in exchange for settling stronger and larger-value claims, defendants could also contain their financial risk.").

8. Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); see also discussion infra Part II.B.


10. See discussion infra Part II.B. (the proposed global settlement in Amchem would have the result of preventing some far-future plaintiffs from getting any recovery at all); see also Francis E. McGovern, The Tragedy of the Asbestos Commons, 88 VA. L. REV. 1721 (2002) (explaining that asbestos litigation is a paradigmatic example of Hardin's "Tragedy of the Commons" concept). "The classic commons problem is exemplified by the overuse of a public good driven by rational decisionmaking on the part of users who have no individual disincentives to restrain their use because the detriments of their actions are collective, not individual, in nature." Id. at 1722. In the context of asbestos litigation, if there is a limited fund of money accessible to asbestos plaintiffs, and no restriction on their access to that fund, then it will become depleted before all claimants have been compensated.
settlement. Instead of taking into consideration how the competing interests of present plaintiffs and future plaintiffs balanced against one another, the Court pronounced a rigid and simplistic holding declaring representation inadequate whenever there are conflicting interests among class members. This overly reductionist holding misses the point: there will always be conflicting interests in class actions. The real issue—if class actions are going to be considered a realistic procedural device for social benefit—is when are the conflicts so bad that courts should be unwilling to tolerate them. The Court failed to ask that question over fifteen years ago in Amchem, and exploring the deficiencies of Amchem sheds light on why a better understanding of adequacy of representation is necessary before class actions can be considered a serious procedural device for litigants.

By granting certiorari in Standard Fire Insurance Co. v. Knowles, the Supreme Court had an opportunity to clarify the meaning of adequacy of representation by articulating a more realistic and workable standard. The question before the court was whether a class representative can defeat a defendant’s right of removal under the Class Action Fairness Act of 2005 (“CAFA”) by binding absent putative class members using a “stipulation,” filed with the class action complaint, limiting the damages sought for the absent putative class members to less than the $5 million threshold for federal jurisdiction, despite the fact that absent the stipulation, the actual amount in controversy exceeds $5 million. Put in terms of adequacy of representation: can the class representatives satisfy their duty to adequately represent the interests of putative class members when stipulating to a lower damage amount in order to prevent removal to federal court?

The Supreme Court failed to take advantage of the opportunity Knowles presented to clarify the requirement of adequate representation in class actions. Instead, the Court rejected Knowles’s ability to use the stipulation to avoid federal jurisdiction on the narrowest grounds possible by holding the question of adequate representation cannot be asked until the class seeks certification. The Court, through Justice Breyer, construed the issue as “whether the stipulation makes a critical difference” in defeating CAFA jurisdiction. The Court found the stipulation

11. See Amchem, 521 U.S. at 629–30 (Breyer, J., concurring in part and dissenting in part); see also discussion infra Part II.B.
12. See Amchem, 521 U.S. at 594–95.
13. See Charles Silver & Lynn Baker, I Cut, You Choose: The Role of Plaintiffs’ Counsel in Allocating Settlement Proceeds, 84 Va. L. Rev. 1465, 1468–69 (1998) (discussing the reality that in nonconsensual litigation—such as class actions—in which litigants do not have an engagement agreement with the attorney, conflicts of interest are going to occur). “[W]e think that Amchem, if it in fact establishes a strict ‘no conflicts’ rule for class actions, is unworkable and wrong. Conflicts of interests and associated tradeoffs among plaintiffs are an unavoidable part of all group lawsuits and all group settlements. There being no way to eliminate conflicts from multiple-claimant representations, the only question is how to deal with them.” Id.
14. See discussion infra Part II.B.
15. 133 S.Ct. 1345 (2013) (in which Justice Breyer delivered an opinion for a unanimous court on the narrowest grounds possible, thus leaving the uncertainty created by Amchem intact).
18. Knowles, 133 S.Ct. at 1348-49.
19. Id. at 1348.
could not bind putative class members because Knowles "does not speak for those he purports to represent" because "a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified."20 "Because his precertification stipulation does not bind anyone but himself, Knowles has not reduced the value of the putative class members' claims."21 Despite failing to clarify adequacy of representation, the Court did acknowledge the importance of adequacy to the question presented by Knowles's stipulation and implicitly recognized its relevance for the future effect of the Court's holding.22

The Court's holding should have been critical to the future of class actions for two reasons. As the Court's first CAFA case—coming some seven years after CAFA's enactment—the Court was examining for the first time the balance CAFA strikes between promoting the beneficial uses of class actions against their potential for abuse. The Court addressed "whether CAFA is a strong remedy for state court abuses in class actions, as Congress expressly intended, or if it has a loophole that allows plaintiffs' lawyers to easily avoid federal jurisdiction."23 By not allowing Knowles's nonbinding stipulation to be considered binding by federal district courts, the Court recognized its holding is consistent with promoting "CAFA's primary objective: ensuring 'Federal court consideration of interstate cases of national importance.'"24 Second, the Court had the opportunity to resolve the case along adequacy of representation grounds and to clarify the uncertainty created by Amchem. Amchem has left too many issues unresolved and has left the bar for satisfying adequacy of representation so high that clarifying CAFA may not even matter if putative classes are unable to be certified under Amchem's overly demanding standard. By failing to say anything meaningful about adequacy, the Supreme Court did the procedural device of the class action a disservice, and made it clear that the Court does not appear ready to tackle the meaning of adequate representation any time soon.

The inherent complexities of the issues involved in class actions necessitate a functional approach that balances the facts and circumstances of each particular case to determine whether a putative class has satisfied the requirement of adequate representation. There is no one-size-fits-all formula for determining whether adequacy of representation is satisfied. With that in mind, this Note proposes a rulemaking alternative to the Supreme Court's current jurisprudence that will enable class actions to become a realistic option for litigants again and begins to examine the contours of such an alternative. The Advisory Committee on the Federal Rules of Civil Procedure should amend Rule 2325 to add a subsection codifying a functional, multi-factor test for courts to apply in determining whether a putative

20. *Id.* at 1349.
21. *Id.*
22. *Id.* (explaining that because stipulations must be binding and a named plaintiff cannot bind precertification class members, Knowles's stipulation is in effect contingent, and "a court might find that Knowles is an inadequate representative due to the artificial cap he purports to impose on the class' recovery").
class has met the standard of adequate representation.

In outlining such an argument, this Note examines various ways in which the constitutional imperative of "adequate representation" can be understood for the purpose of providing an argument capable of defending a more liberal approach to finding representation adequate in the class action context. Traditional western philosophical doctrines, the work of scholars, and practical considerations will be explored to determine whether they can provide insight into how a court may be able to find representation adequate in a wider array of cases to achieve the goals of class actions. By providing such an argument, the Note makes an implicit argument for certifying more class actions in the interest of achieving justice and efficiency for more litigants. A consequence of this normative argument is the realization that the Supreme Court's decision in Amchem is wholly inadequate for treating class actions as a serious procedural device.

Part II discusses broadly the goals of class actions that underlie the functional approach outlined in this Note. Part II also analyzes the modern class action, including an examination of the purpose and goals to be achieved by CAFA. Part III lays the foundation for a functional, multi-factor approach to adequacy undergirded by traditional western philosophical doctrines and theories propounded by scholars.

II. THE MODERN CLASS ACTION

Class actions provide the opportunity for group litigation of claims when the parties are so numerous that joinder is "impracticable." When appropriate, class actions allow potentially massive groups of individuals to bind themselves together to have each of their legally cognizable claims litigated as one. One of the clearest benefits of class actions is decreased transaction costs, leading to efficiency and justice for litigants. Properly employed, class actions minimize attorneys' fees while maximizing judicial economy and justice—by achieving recovery for as large a group of people as possible as efficiently and easily as possible. Class actions also allow individuals with meritorious claims to litigate claims that would be economically infeasible to bring individually but which promote one of the law's fundamental goals by bringing as a class: deterring wrongdoing. The class action is not a new procedural device. Most scholarly accounts trace the origin of class actions to the late twelfth century, when a rector in Nuthampstead, England sued four of his parishioners—acting as class representatives for the rest—

26. Id. R. 23(a)(1) (stating that a prerequisite to any class action is that "the class is so numerous that joinder of all members is impracticable").

27. See id. R. 23(a)(1)-(4) (delineating the standard for certifying a class action). Rule 23(a) states that "One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Id.

28. The so-called "negative-value" class action occurs when the value of an individual's recovery is less than the costs of bringing the case—no rational person would bring the case individually, but as part of a class, the case becomes worthwhile.
to collect burial fees he felt were owed to him. Despite its medieval roots, class actions remain a deeply unsettled area of law. Balancing the interests of fairness and finality in the judicial process with the efficiency to be had through class actions creates an uncertain tension that currently prevents many putative classes from group litigation. One of the more salient problems currently preventing class litigation is the requirement of adequate representation.

A. The Goals of Class Actions

Over the years, commentators have listed a number of reasons for why we have class actions. What follows are five of the most common goals to be achieved by the class action device.

1. Deterrence Through Internalizing Costs

From an economic standpoint, a fundamental purpose of the law is to punish wrongdoers by forcing them to pay for the harm they cause. "Knowing that they will fully internalize the costs of their wrongs, rational economic actors then have an incentive to take the proper amount of care when deciding how to act." Furthermore, if one takes as a normative premise that the law ought to promote individuals' well-being, then "the law should seek to minimize the sum of accident costs—specifically, the total costs of precautions against accident, unavoidable harm, risk-bearing, and administration of the legal system." The ability on the part of prospective plaintiffs to bring a class action against a defendant contributes to the law's normative aim of deterring wrongdoing on the part of would-be defendants because as rational actors those defendants can internalize the expected costs of their wrongs by taking proper precautions beforehand. Class actions help mediate the

30. See FED.R.CIV.P. 23(a)(4) (stating that "the representative parties will fairly and adequately protect the interests of the class").
31. JAY TIDMARSH, CLASS ACTIONS: FIVE PRINCIPLES TO PROMOTE FAIRNESS AND EFFICIENCY § 1.03[2], at 11 (2014).
33. For an argument that takes the deterrence rationale to the extreme, see id. at 833-840 and 843-44. Professor Rosenberg goes a step further by making a normative argument for adjudicating mass tort cases by using mandatory-litigation class actions because such a system "best deters accidents and insures against accident risks, thus securing maximum individual welfare ex ante." Id. at 839. His argument "proceeds from the premises that the legal system should aim to improve individuals' well-being and that individuals seek to maximize their own welfare. In short, in the face of accident risks, the legal system should do what an individual seeking maximum welfare would prefer." Id. at 840. His central conclusion is that "only mandatory-litigation class action enables the aggregation and averaging of claims that maximizes benefits from scale economies—especially by motivating the optimal investment of legal resources—and from redistribution of claim-related wealth to achieve optimal deterrence and insurance from mass tort liability." Id. "Optimal tort deterrence threatens firms with liability for the total costs of their tortious conduct. In so doing, it provides firms ex ante with the financial incentive to invest efficiently in precautions. Firms invest efficiently when they incur costs for precautions up to the point at which the expense of taking an additional unit of precaution exceeds the benefit of the additional risk involved. Optimal deterrence thus prevents unreasonable risk—risk that costs society more to incur than to avoid—thereby maximizing society's total welfare and each individual's ex ante expected net
preferences of individuals without a need for class litigation with those who do by striving for an optimal level of deterrence. By aggregating many claims, class actions change a defendant’s calculation regarding how much care to take.

2. Lowering Transaction Costs

Transaction costs—such as the costs of litigation represented by the expense of prosecuting or defending a claim—pose a very real constraint on the enforcement of legal rights. While transaction costs are unavoidable, class actions allow litigants to achieve economies of scale, spreading the costs of the litigation across the entire class. One of the purposes of having procedural devices—such as class actions—is to reduce transaction costs on both sides of litigation: “[t]he goal is to economize on litigation expenditures and court time.” According to Judge Posner, the modern class action generalizes a technique “for aggregating a number of small claims into one large enough to justify the costs of suit—or, stated otherwise, for realizing economies of scale in litigation.”

3. Balancing Incentives to Invest in Litigation

Traditional one-on-one litigation is accompanied by a free-rider problem when many plaintiffs have related claims. Plaintiffs are discouraged from optimal investment in litigation, which skews outcomes in favor of defendants “who have an incentive to invest heavily in outcome-influencing litigation expenses, and against individual victims, who do not.” Professor David Rosenberg has analyzed the problem of unequal incentives for investment in litigation in the greatest detail, and he argues the solution to skewed investment incentives is to allow aggregation of plaintiff’s claims. “Hence, class actions help both sides to make rational investment decisions about the amount to spend on the litigation. Put in less formal language, class actions meet power with power.”

4. Obtaining Closure—On Both Sides of Litigation

Unlike traditional litigation, class actions have the unusual ability to end a controversy once and for all. Both victims and defendants are benefitted by such a scheme, as victims are given recovery and markets are able to manage risk through class actions by placing limits on a company’s exposure—often when the company settles the claims. “A class-action settlement allows the company to cap its exposure welfare. Risk aversion magnifies but does not motivate this result; even assuming risk-neutrality, individuals ex ante are made better off when firms take all efficient precautions to avoid accidents.”

34. E.g., TIDMARSH, supra note 31, § 1.03[3].
35. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 780 (8th ed. 2011).
36. Id. at 785.
37. See TIDMARSH, supra note 31, § 1.03[4].
38. Id.
40. TIDMARSH, supra note 31, § 1.03[4].
at a certain amount, and markets can value the company without the drag of litigation risk."^{41}

5. Ensuring the Fair Treatment of Victims

While the first four rationales for using class actions seek to ensure the proper level of investment in safety and litigation, the final goal "is the promise of providing an adequate remedy to a large number of victims."^{42} Class actions ensure that victims are treated fairly in three ways: through the text of Rule 23 of the Federal Rules of Civil Procedure^{43} and by avoiding the problems of horizontal inequity^{44} and temporal inequity. Horizontal inequity is characterized by litigants with similar claims and injuries receiving drastically variable awards. There are two types of temporal inequity. The first type occurs when a defendant has limited assets and the early-filing plaintiffs served will deplete those assets to the point where later-filing plaintiffs are denied any recovery because the defendant is bankrupt. The second type occurs in the context of injunctions, where various plaintiffs prefer different injunctions. The defendant cannot simultaneously comply with all of the options, so if a court allows a later-filing plaintiff's case to proceed, then that plaintiff can deny an earlier-filing plaintiff of a hard-fought victory or force the defendant to comply with multiple injunctions, regardless of whether the costs are prohibitive. Class actions solve issues of horizontal and temporal inequity by preventing variability in awards or by creating a single injunction to represent all interested claimants' competing interests.

B. A Brief History of Adequacy of Representation in Class Action Lawsuits

In any class action, a group of class representatives is appointed to represent the interests of those—"absent class members"—not taking an active part in the litigation. Indeed, "[c]lass actions assume absent class members."^{45} Absent class members are informed "they need not show up in the courthouse, although they may if they choose."^{46} Furthermore, they are told that once the court's decision becomes final, they will be bound by it, forgoing "any and all right to protest the resolution of their claims by the class action court or to bring an individual proceeding on the claims resolved by the class suit."^{47} These conditions, unique to class actions and not adhering in individual litigation, present a specific constitutional challenge that, if not reexamined in a significant way, will continue to hamper the use of class actions...

41. Id.
42. Id. § 1.03[6], at 19.
43. See Fed. R. Civ. P. 23(a)(4) ("[T]he representative parties will fairly and adequately protect the interests of the class.").
44. See e.g., Theodore Eisenberg & Valerie P. Hans, The Predictability of Juries, 60 DEPAUL L. REV. 375 (2011).
46. Id.
47. Id. at 1788.
to achieve justice and efficiency for litigants. The current state of Supreme Court jurisprudence—as embodied by the paradigmatic example of asbestos litigation—has raised the bar to satisfy the requirement of adequate representation to a nearly insurmountable height, and the Court’s recent decision in Knowles has made it clear that the Supreme Court does not intend to resolve the uncertainty created by Amchem’s unrealistic standard any time soon.

The modern class action is embodied in Rule 23 of the Federal Rules of Civil Procedure, as revised in 1966.48 Rule 23 also serves as the basis for all state class action rules, which are modeled after it.49 Rule 23 prescribes as a prerequisite for class certification that “the representative parties will fairly and adequately protect the interests of the class.”50 “The bridge spanning the gulf between the interests of class members and the actions of the class representative and class counsel is the doctrine of adequate representation.”51 Since the Federal Rules of Civil Procedure were first enacted in 1938, only two cases decided by the U.S. Supreme Court have squarely dealt with the issue of adequate representation in class actions.52 In the first of these cases, the United States Supreme Court found that there is a constitutional dimension to adequacy of representation in class actions.53 The Constitution’s requirements are mostly stated at a high level of generality, and the due process requirement of adequate representation is no exception.

In Hansberry, the U.S. Supreme Court considered whether parties who were bound by a judgment in previous litigation to which they were not parties were deprived of their right to due process of law as guaranteed by the Fourteenth Amendment.54 The case was brought as a class action by Anna Lee and other landowners in the Chicago area against Carl Hansberry, an African-American man, to enforce a restrictive covenant preventing land from being sold or leased to people of color.55 The restrictive covenant provided that it would not be in effect unless owners of 95% of the frontage within the area to be bound by the covenant had signed it.56

Hansberry argued that the covenant had never become effective because the landowners had failed to secure signatures from the owners of 95% of the frontage.57 The landowners responded by arguing that an earlier suit had found the covenant effective, and that res judicata prevented Hansberry from litigating the same issue.58 Res judicata—the concept of finality for legal judgments—takes as its underlying principle that “[i]t is just as important that there be a place to end as there should be

48. FED. R. CIV. P. 23.
49. See Koniak, supra note 45, at 1788.
50. FED. R. CIV. P. 23(a)(4).
53. See Hansberry, 311 U.S. at 40.
54. Id. at 37.
55. Id. at 37–38.
56. Id. at 38.
57. Id.
58. Hansberry, 311 U.S. at 38.
a place to begin litigation." The law requires finality in legal judgments in order to make the legal system fair and effective, and so that people do not relitigate the same claims over and over. In *Hansberry*, the landowners argued that because they had already litigated the issue of whether the covenant was in force—whether it had been signed by the required percentage of residents—then Carl Hansberry was precluded by res judicata from raising that question again.

A trial on the merits between Hansberry and the landowners as to the validity of the covenant revealed that only about 54% of the owners of the frontage had signed the covenant. The trial court nevertheless held in favor of the landowners, having found that the issue of whether the covenant was valid was res judicata—meaning Hansberry was precluded from raising the same claim since it had already been litigated by the landowners in a previous case. Similarly, the Supreme Court of Illinois found that the landowners who had signed the restrictive covenant constituted a class in the prior litigation; therefore, as a class once again, they were bound by res judicata to the former holding, which had found that the signature requirement had been satisfied.

In reversing the Supreme Court of Illinois, the U.S. Supreme Court articulated a constitutional rule of adequacy of representation in the class action context: A party is not bound by res judicata from a previous class action if the party was not adequately represented at the prior proceeding. To place its holding in constitutional terms, the Court stated that "there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it." A broad consequence of the Court’s holding is that inadequately represented class members can pursue their claims in other litigation, free of any preclusive consequences of the class judgment. Conversely, when the representation is adequate, a class judgment does preclude further litigation of the class members’ claims.

In the more recent case in which the Supreme Court has confronted adequate representation issues in class actions head on, the Court considered the legitimacy under Rule 23 of using class certification for the purpose of a global settlement

60. See *Hansberry*, 311 U.S. at 38; but see JAY TIDMARSH, The Story of Hansberry: The Rise of the Modern Class Action, in CIVIL PROCEDURE STORIES 233, 265–67 (Kevin M. Clermont ed., 2d ed. 2008) (noting the uncertainty of whether the requisite 95% of the frontage had signed the covenant rather than the 54% figure consistently cited by the defense in the litigation). According to Professor Tidmarsh, "[o]n at least one possible construction of the covenant, the requisite 95% had signed—or, put differently, the plaintiffs had a credible argument that the covenant was effective. The notion that only 54% of the frontage had signed—an important part of the *Hansberry* lore—is demonstrably false." *Id.* Professor Tidmarsh’s extensive study of the primary sources containing signatures to the covenant revealed a number of ambiguities. He concluded that resolving "all the ambiguities in the way most favorable to the plaintiffs, 96.6% of the frontage had signed and the covenant was valid.” *Id.* Resolving "all ambiguities in the way most favorable to the defendants, 71.4% of the frontage had signed and the covenant was invalid.” *Id.*
61. See *Hansberry*, 311 U.S. at 38.
62. See *id.* at 39–40.
63. See *id.* at 44.
64. *Id* at 42.
65. FED. R. CIV. P.
binding both current and future asbestos-related claims.66 In 1990, in response to an asbestos-litigation crisis resulting in "a flood of lawsuits beginning in the 1970s,"67 Chief Justice Rehnquist appointed a special Ad Hoc Committee on Asbestos Litigation to provide a report and recommendations.68 The report recognized in no uncertain terms the most intolerable aspects of asbestos litigation:

[D]ockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.69

The report's conclusion was that real reform required federal legislation providing a national dispute-resolution scheme for asbestos injuries.70 Lacking any congressional response, federal courts—"lacking authority to replace state tort systems with a national toxic tort compensation regime"—tried to work within the bounds of the procedural devices available to improve judicial management of asbestos litigation in federal courts.71 Among the tools available to federal courts was the ability to transfer all asbestos claims that had been filed but not yet tried to a single district court.72

In a settlement class action such as the one proposed for certification in Amchem, the parties come together to negotiate a resolution to the dispute without intending to litigate. The proposed settlement in this case evolved after the Judicial Panel on Multidistrict Litigation consolidated all asbestos cases into the Eastern District of Pennsylvania. After extensive negotiations, counsel for a class of people exposed to asbestos products and counsel representing a group of twenty former asbestos product manufacturers came to an agreement to resolve both present and future claims of asbestos-related injury.73 Not intending to litigate, the settling parties presented the District Court—all on the same day—"a complaint, an answer, a proposed settlement agreement, and a joint motion for conditional class certification."74

A primary motivation for the manufacturers to settle was that the global settlement would limit their liability to the amount of funds placed into the settlement and would preclude future litigation on the part of those "exposure only" plaintiffs

67. Id. at 598 (quoting REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 2–3 (Mar. 1991)).
68. Id. at 597–98.
69. Id. at 598 (quoting REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 2–3 (Mar. 1991)).
70. See id.
71. Id. at 599.
72. See Amchem, 521 U.S. at 599.
73. See id. at 597.
74. Id. at 601–02 (the joint motion for conditional class certification was conditioned upon separate litigation instituted by the defendant asbestos manufacturers against their insurers seeking a declaratory judgment holding the insurers liable for the costs of the settlement).
whose injuries had not yet manifested. Toward that end, the proposed class consisted of:

all persons who had not filed an asbestos-related lawsuit against [one or more of the asbestos manufacturers] as of the date the class action commenced, but who (1) had been exposed—occupationally or through the occupational exposure of a spouse or household member—to asbestos or products containing asbestos attributable to [one or more of the manufacturers], or (2) whose spouse or family member had been so exposed.

Duly motivated to preclude future liability to the greatest extent possible, the defendants focused settlement talks on disposing of future asbestos claims not yet in litigation. Such a broadly composed class presents inherent difficulties, as "untold numbers of individuals may fall within this description." Further compounding this difficulty, "the complaint delineated no subclasses; all named plaintiffs were designated as representatives of the class as a whole." Ultimately, the negotiations were characterized by class counsel endeavoring to represent the interests of future claimants with whom those lawyers did not yet have an attorney-client relationship.

The stipulation of settlement filed with the District Court provided a schedule of payments to compensate class members "who meet defined asbestos-exposure and medical requirements." Those objecting to the proposed settlement raised a number of concerns. A principal objection was that future plaintiffs—those without currently compensable conditions—were severely and unfairly disadvantaged by the settlement because it failed to adjust for inflation, to account for changes in medical understanding over time, and to compensate future plaintiffs as generously as current plaintiffs. Regarding adequacy of representation, "objectors maintained that class

---

75. See id. at 601.
76. Id. at 602.
77. See id. at 601.
78. Id. at 602.
79. Amchem, 521 U.S. at 603.
80. See id. at 601.
81. Id. at 603–04 ("The stipulation describes four categories of compensable disease: mesothelioma; lung cancer; certain 'other cancers' (colon-rectal, laryngeal, esophageal, and stomach cancer); and 'non-malignant conditions' (asbestosis and bilateral pleural thickening).") The stipulation also designated a range of damages to be paid for each qualifying disease category, and provided that the defendants propose the level of compensation to be paid to individual class members within the prescribed ranges. Id. For example, mesothelioma claimants, as the highest compensated category, would be scheduled to receive between $20,000 and $200,000. Id. at 604. Additionally, the stipulation established procedures to resolve disputes regarding medical diagnoses and compensation levels. Id. While the proposed settlement allowed compensation to exceed the fixed ranges for "extraordinary" claims, it also placed numerical caps and dollar limits on such extraordinary claims. Id. The settlement also capped the number of claims payable for each disease in a given year through "case flow maximums." Id. Finally, the settlement would prevent class members from receiving any compensation for certain claims, regardless of whether state law would otherwise recognize them. Id.
82. See id. at 606.
counsel and class representatives had disqualifying conflicts of interest.” The District Court rejected the challenge to adequate representation, “[r]easoning that the representative plaintiffs ‘have a strong interest that recovery for all of the medical categories be maximized because they may have claims in any, or several categories,’” and ultimately finding “‘no antagonism of interest between class members with various medical conditions, or between persons with and without currently manifest asbestos impairment.’” The District Court conditionally certified the class as a 23(b)(3) opt-out class and class members were given the opportunity to opt-out within three months.

On appeal, the United States Court of Appeals for the Third Circuit vacated the certification, holding that the requirements of Rule 23—including the requirement of adequate representation—had not been satisfied. The Court of Appeals found representation inadequate in large part because the proposed settlement “does more than simply provide a general recovery fund. . . . [r]ather, it makes important judgments on how recovery is to be allocated among different kinds of plaintiffs, decisions that necessarily favor some claimants over others.” For the Third Circuit, the “most salient” divergence of interests separated currently injured plaintiffs from future—exposure-only—plaintiffs without manifest injuries at the time of the settlement. Those protecting the interests of future plaintiffs would rationally advocate for protection against inflation and provisions capable of altering the rights of future plaintiffs depending upon changes made in science and medicine. By contrast, current plaintiffs are more focused on achieving the highest possible payout as soon as possible. These countervailing interests convinced the Third Circuit that an undivided set of class representatives could not adequately protect the disparate interests of current and future plaintiffs.

The Supreme Court granted certiorari to determine “the role settlement may play, under existing Rule 23, in determining the propriety of class certification,” ultimately concluding that “[s]ettlement is relevant to a class certification.” In affirming the Third Circuit’s decision to vacate the certification order, the Supreme Court likewise framed its opinion in terms of the elements of Rule 23—each of which must be satisfied for class certification—that the proposed global settlement failed to satisfy

83. Id. at 607.
84. Id. at 608 (internal citations omitted).
85. See Amchem, 521 U.S. at 605–6. See also Fed. R. Civ. P. 23(b) (“A class action may be maintained if Rule 23(a) is satisfied and if: . . . (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (A) the class members’ interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.”).
86. See Georgine, 83 F.3d at 610.
87. Id. at 630.
88. See id.
89. See id. at 630–31.
90. Id. at 631.
and borrowed heavily from the Third Circuit’s reasoning. Nevertheless, had the court opted to, it could have rejected class certification based entirely upon finding the requirement of adequate representation unsatisfied in this context.

In discussing Rule 23(a)(4)’s requirement of adequacy of representation, the Court emphasized that the purpose of a Rule 23(a)(4) inquiry is “to uncover conflicts of interest between named parties and the class they seek to represent.”\textsuperscript{92} Without difficulty, the Court held that class representatives could not adequately represent the interests of absent class members when present and future class members had conflicting interests: “for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future.”\textsuperscript{93} The Court interpreted adequate representation to mean that a “class representative must be part of the class and possess the same interest and suffer the same injury as the class members.”\textsuperscript{94}

Exploring the deficiencies of the majority’s opinion in \textit{Amchem} helps shed light on why a better understanding of adequacy of representation is required before class actions can be considered a serious procedural device for litigants. Justice Breyer’s separate opinion concurring in part and dissenting in part illuminates the shortcomings of the majority’s opinion in two important respects. First, he argues that the need for settlement in a mass tort case of this magnitude is greater than the majority suggests and that the Court should not so easily upend the District Court’s decision to certify the class.\textsuperscript{95} Second, he questions the Court’s determination of adequacy of representation when the district court rejected any objections and the Court of Appeals did not consider the issue.\textsuperscript{96} In fleshing out his criticism of the determination of adequate representation, Justice Breyer delves into the competing interests between current plaintiffs and future plaintiffs to see how they may have balanced out.\textsuperscript{97}

Justice Breyer’s argument stressing the need for a settlement for asbestos claims tracks the argument made in this Note for a more liberal approach to the requirement of adequacy of representation to maximize justice and efficiency for litigants. Among the facts Justice Breyer enumerates concerning asbestos litigation supporting this argument are that individual asbestos filings “have taken up more than 6% of all federal civil filings in one recent year, and are subject to a delay that is twice that of other civil suits.”\textsuperscript{98} He also notes that of “each asbestos litigation dollar, 61 cents is consumed in transaction costs . . . . Only 39 cents were paid to the asbestos victims.”\textsuperscript{99}

“The law gives broad leeway to district courts in making class certification decisions.\textsuperscript{92} Although the Standing Committee on Rules of Practice and Procedure recommended that the Court should set forth the criteria for adequacy of representation, it did not do so.\textsuperscript{93} It is true that in some cases class actions are not an efficient mechanism for litigation, that it is difficult for absent class members to know their rights, and that some class representatives are not adequately able to represent the interests of absent class members.\textsuperscript{94} However, it is also true that the Court’s interpretation of adequate representation is often too narrow, and that under some circumstances class actions are an efficient and effective means of resolving conflicts of interest between absent class members and class representatives.\textsuperscript{95} Moreover, the Court’s interpretation of adequate representation often overlooks the interests of absent class members, and may result in the denial of class certification even in cases where class certification would be beneficial to absent class members.\textsuperscript{96} For example, in \textit{Amchem}, the Court held that class representatives could not adequately represent the interests of absent class members when present and future class members had conflicting interests.\textsuperscript{97} The Court interpreted adequate representation to mean that a “class representative must be part of the class and possess the same interest and suffer the same injury as the class members.”\textsuperscript{98}

92. \textit{Id.} at 625.
93. \textit{Id.} at 626.
95. \textit{See id.} at 629 (Breyer, J., concurring in part and dissenting in part).
97. \textit{See infra} notes 105-107 and accompanying text.
98. \textit{Amchem}, 521 U.S. at 631 (Breyer, J., concurring in part and dissenting in part) (quoting \textit{REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION} 7, 10–11 (Mar. 1991)).
99. \textit{Id.} at 632 (internal citations omitted).
decisions, and their judgments are to be reviewed by the court of appeals only for abuse of discretion.”

Justice Breyer argues that the district court is the proper forum to engage in the intense and complex factual inquiry that leads to a determination of whether the requirement of adequate representation has been satisfied or not. Since the district court is “far more familiar with the issues and litigants than is a court of appeals or [the Supreme Court]” it has “‘broad power and discretion . . . with respect to matters involving the certification’ of class actions.”

In this case, “the District Court’s certification decision rests upon more than 300 findings of fact reached after five weeks of comprehensive hearings.” In approving the settlement, the District Court “concluded that it improved the plaintiffs’ chances of compensation and reduced total legal fees and other transaction costs by a significant amount.”

“The court believed the settlement would create a compensation system that would make more money available for plaintiffs who later develop serious illnesses.”

One of the reasons Justice Breyer notes for disagreeing with the majority’s discussion of adequacy of representation is the opinion’s failure to take into consideration the benefits to future plaintiffs that were unavailable to current plaintiffs, such that the settlement could be viewed as a fair compromise of each group’s interests. Justice Breyer acknowledges that “[w]hat constitutes adequate representation is a question of fact that depends on the circumstances of each case.” He mentions the majority’s use of the lack of an inflation adjustment as evidence of inadequate representation for future plaintiffs. He argues that inflation adjustment “might not be as valuable as the majority assumes if most plaintiffs are old and not worried about receiving compensation decades from now.”

What is important, according to Justice Breyer, is that the Supreme Court is “poorly situated to resolve” such issues from a cold record, whereas the District Court considered such arguments and dismissed them after careful consideration. “The difficulties inherent in both knowing and understanding the vast number of relevant individual fact-based determinations here counsel heavily in favor of deference to district court

---

100. Id. at 630.
101. Id. at 630 (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 345 (1979)).
102. Id. at 630.
103. Id. at 633; see also note 4 and accompanying text.
104. Amchem 521 U.S. at 633 (Breyer, J., concurring in part and dissenting in part).
105. See id. at 638 (“The District Court concluded that future plaintiffs receive a significant value from the settlement due to a variety of its items that benefit future plaintiffs, such as: (1) tolling the statute of limitations so that class members will no longer be forced to file premature lawsuits or risk their claims being time-barred; (2) waiver of defenses to liability; (3) payment of claims, if and when members become sick, pursuant to the settlement’s compensation standards, which avoids the uncertainties, long delays and high transaction costs [including attorney’s fees] of the tort system; (4) some assurance that there will be funds available if and when they get sick, based on the finding that each defendant has shown an ability to fund the payment of all qualifying claims under the settlement; and (5) the right to additional compensation if cancer develops (many settlements for plaintiffs with noncancerous conditions bar such additional claims.”) (internal citations omitted).
106. Id. at 637 (quoting 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1765, at 271 (2d ed. 1982)).
107. Id. at 638.
108. Id.
decisionmaking in Rule 23 decisions.”

As a result, Justice Breyer advocates vacating the judgment and remanding the case so that the lower courts can analyze the factual questions involved in certification.

The majority’s opinion fails entirely to discuss certain details of the settlement that may benefit future plaintiffs more than the majority suggests. The majority essentially neglected to entertain any notion that competing interests between current and future plaintiffs could satisfy the requirement of adequate representation, regardless of the factual circumstances of the case. The majority misunderstands a critical issue inherent in all class actions: there will always be conflicting interests among class members. When this fact of class actions is understood, then the problem can be rephrased from “are there conflicting interests?” to “are the conflicts so bad that courts should be unwilling to tolerate them?”

C. The Class Action Fairness Act of 2005

In 2005, Congress enacted the Class Action Fairness Act of 2005 (“CAFA”) to increase class action litigants’ access to federal courts. The Act itself tells a story about what is good and bad about class actions, and is therefore helpful to understanding the need for a rulemaking solution to the problem of adequacy of representation. In the text of the law, Congress recognized that “[c]lass action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.” However, Congress specifically found that widespread “abuses of the class action device” in state courts had “harmed class members with legitimate claims and defendants that ha[d] acted responsibly.” Among the abuses specifically mentioned in the Act are disproportionately large class counsel fees with respect to class member compensation as well as disparate and unjustified awards for some plaintiffs and not others. Furthermore, Congress found that, in general, “[a]buses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction . . . in that State and local courts are . . . keeping cases of national importance out of Federal court.”

The purpose of the Act is to “assure fair and prompt recoveries for class members with legitimate claims” while “restor[ing] the intent of the framers . . . by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction” and “benefit[ing] society by encouraging innovation and lowering consumer prices.”

109. Id. at 639.
110. See id. at 641.
111. See Amchem, 521 U.S. at 638 (Breyer, J., concurring in part and dissenting in part).
113. Id. § 2(a)(1).
114. Id. § 2(a)(2), (2)(A).
115. Id. § 2(a)(3)(A)–(B).
116. Id. § 2(a)(4), (4)(A).
117. Id. § 2(b).
CAFA increased class action access to federal courts by amending federal district court jurisdiction.118 The new section 1332(d) gives district courts original jurisdiction based upon the amount in controversy and citizenship of the parties.119 Specifically, district courts have original jurisdiction when “the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs” and when “any member of a class of plaintiffs is a citizen of a State different from any defendant.”120 The Act further specifies that the claims of all class members must be aggregated to determine whether the five million dollar threshold is met for federal jurisdiction.121

Despite significantly increasing access to federal courts for putative class actions, Congress included two exceptions in which federal district courts may or should decline jurisdiction.122 Under section 1332(d)(3)’s “interests of justice” exception:

[a] district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction . . . over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed.123

Whereas section 1332(d)(3) grants a district court discretion in determining whether to exercise jurisdiction over a class action, section 1332(d)(4) outlines two circumstances in which a district court must decline to exercise jurisdiction. The “local controversy” exception codified in section 1332(d)(4)(A) requires a district court to decline to exercise jurisdiction when more than two-thirds of the class members in the aggregate are citizens of the State in which the action was originally filed; at least one defendant “from whom significant relief is sought by members of the plaintiff class” and “whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class” is a citizen of the State in which the

118. See § 4(a)(2), 119 Stat. at 9 (codified at 28 U.S.C. § 1332(d)(2) (2006)). (“The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—(A) any member of a class of plaintiffs is a citizen of a State different from any defendant; (B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or (C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen subject of a foreign state.”).
119. See id.
121. Id. § 1332(d)(6).
122. Id. § 1332(d)(3)-(4).
123. Id. § 1332(d)(3); see also § 1332(d)(3)(A)-(F) (providing that the District Court, in making a determination to decline to exercise jurisdiction, must consider a number of factors, including whether the claims involve state or interstate matters; whether the claims will be governed by the laws of the State in which the action was originally filed or the laws of another state; whether the class action was pleaded in a manner suggesting a desire to avoid Federal jurisdiction; whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants; the citizenship of the plaintiff class and whether the class is dispersed among a substantial number of States; and whether, during a three year period preceding the filing of the current class action, one or more other class actions were filed asserting the same or similar claims).
action was originally filed; the principal injuries were incurred in the State in which the action was originally filed; and where no other class action alleging similar facts was filed in the three years prior to the commencement of the current class action. Alternatively, a district court must decline to exercise jurisdiction under the "home state" exception when "two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed."

In order to facilitate increased access to federal courts, CAFA includes a broad right for defendants to remove interstate class actions to federal court. CAFA permits removal to federal court "without regard to whether any defendant is a citizen of the State in which the action is brought," and permits any defendant to remove the case to federal court, regardless of unanimity of consent among defendants. The right of removal is exercised in accordance with section 1446, with the caveat that in class actions defendants are not bound by the 1-year limitation under section 1446(b). In order to effect removal, defendants must file a notice of removal "containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action."

III. A FUNCTIONAL APPROACH TO ADEQUACY OF REPRESENTATION

The law of evidence requires expert testimony to be "reliable." The rule incorporates a "gatekeeper" function for judges to decide whether what an expert proposes to say is reliable or not, despite the fact that judges are not necessarily well-equipped to do so. A judge making a determination of whether expert testimony is reliable is not unlike a judge making a determination of adequacy of representation of a putative class for the purpose of class certification. The U.S. Supreme Court dealt with the inherent difficulty facing judges tasked with determining the reliability of expert witnesses in Daubert v. Merrell Dow Pharmaceuticals, Inc. Ultimately, the Court expounded five "Daubert" factors to help a trial judge faced with the task of assessing the reliability of a scientific theory or technique. A judge in such a situation should ask (1) whether the technique "can be (and has been) tested"; (2) whether it has been "subjected to peer review and publication"; (3) "the known or potential rate of error" of the theory or technique; (4) "the existence and maintenance of standards controlling the technique’s operation"; and (5) "general acceptance" in
the relevant scientific community."  

Similarly, the Copyright Act of 1976 directs courts confronted with a fair use defense to apply a four-factor test in determining "whether the use made of a work in any particular case is a fair use." Courts are to consider:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

This Note makes the argument that courts should deal with adequacy of representation in the same way that trial judges deal with determining the reliability of expert testimony and whether a defendant has made out a claim of fair use. Determining whether adequacy of representation is met in a putative class action is more art than science, and the way in which district courts evaluate a putative class needs to reflect this need for flexibility if class actions are going to become a viable procedural device for social benefit. Toward that end, courts should deal with adequacy of representation through a fact-intensive inquiry on a case-by-case basis, taking into account a number of factors, and ultimately, deciding in the aggregate how those factors balance out against one another.

In fashioning such an approach, the Advisory Committee on the Federal Rules of Civil Procedure can rely upon principles gleaned from the work of scholars and traditional western philosophical doctrines and distilled into a multi-factor test. This approach takes as a premise that conflicts of interest are inevitable in class actions, and that the goal should be to manage them. Thus, the purpose of each factor is to help a judge determine whether the conflicts presented by a putative class are so bad that the court should be unwilling to tolerate them because doing so would frustrate the interests of justice. The public policy underlying CAFA is also intended to tint the lens through which a judge evaluates each factor in the approach.

The argument made by this Note is that the Advisory Committee on the Federal Rules of Civil Procedure should amend Rule 23 to add four subparts—(A)-(D)—to Rule 23(a)(4), to establish a multi-factor balancing test for judges to use when determining adequacy issues. Rule 23(a)(4) would be amended to add the following factors, which are pertinent in determining whether adequacy is satisfied. The first factor is based upon the Rawlsian veil of ignorance. The second factor can be justified through a utility-maximizing utilitarian rationale. The third factor draws upon Kantian ethics, while the fourth relies on a straightforward application of Professor Tidmarsh’s “do no harm” principle. It is important to note at the outset that this is not intended to be an exhaustive list of factors that judges could use in deciding questions of adequacy of representation. Instead, the functional approach.
A Functional Approach to Adequacy of Representation

that follows is intended to be a preliminary consideration of how judges might look at the question of adequacy of representation in class actions differently.

A. Proposed Rule 23(a)(4)(A): Whether putative class members, not knowing how a particular action in the litigation would affect them, would nevertheless consent to the action taken by class counsel or the class representative(s).

In 1971, John Rawls published *A Theory of Justice*, which helped create a revival in political philosophy, a field long dominated by utilitarian thinking. His goal was to present a conception of justice which “generalizes and carries to a higher level of abstraction the familiar theory of the social contract as found, say, in Locke, Rousseau, and Kant.”[136] Rather than thinking of the social contract as one to enter a given society or form a particular government, Rawls wanted to use the concept of a social contract and the forming of an original agreement to define the basic structures of institutions in a just society.[137] Recognizing justice as the first virtue of social institutions, Rawls was concerned with the role that justice plays in a well-ordered society.[138] He wanted his theory to serve as an organizing tool to show how free and equal persons could agree upon a fair system of cooperation.[139] Rawls’s theory can be analogized to the context of adequacy of representation in class actions to provide insight into how a judge should analyze adequacy issues.

The crux of Rawls’s theory of justice as fairness is his concept of the original position. The original position is a hypothetical initial position from which people are to determine the basic structure of society.[140] “In justice as fairness the original position of equality corresponds to the state of nature in the traditional theory of the social contract.”[141] Rawls believes that by placing restrictions on the knowledge of those in the original position, people will then agree to the same basic principles to establish “the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation.”[142]

The restrictions of the original position place the choosers behind a veil of ignorance in which they have no knowledge of their place in society, class position or social status, fortune in the distribution of natural assets and abilities, intelligence, strength, conceptions of the good or special psychological propensities.[143] The justification for the veil of ignorance is simple: “[s]ince all are similarly situated and no one is able to design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain.”[144] By restricting the information available to parties in the original position, the veil acts to eliminate reasonable pluralism and prevent unfair bargaining advantages and leverage, creating fair

---

137. See id.
138. See id.
139. See id.
140. See id. at 11-12.
141. Id. at 12.
142. RAWLS, supra note 136, at 7.
143. See id. supra note 136, at 7.
144. Id.
conditions for people to come to mutual agreement.

Just as Rawls used the original position as an intuition pump to help people agree upon certain facts of well-ordered social institutions, so too can the thought experiment be used by a judge to determine whether all class members are getting a fair shake in the litigation. The original position can be used as a proxy for determining the fairness and adequacy of class member treatment by positing whether someone in the original position would find adequacy of representation satisfied. A judge can place himself behind a veil of ignorance and confront the question of whether adequacy of representation is satisfied. Keeping in mind that the process is more art than science, the judge can weigh the various interests that class members would have and ultimately decide whether the original position weighs in favor of finding adequacy satisfied or not.

Once people are in the original position and behind the veil of ignorance, Rawls believes that, as rational actors, people will accept what he refers to as the “difference principle.” As restated, the difference principle posits that social and economic inequalities “are to be to the greatest benefit of the least-advantaged members of society.”

The driving force behind the difference principle is to modify the distribution of social inequalities to remove the differential effects of luck. Like Rawls’s original position, the difference principle can be extrapolated to the context of adequacy in class actions. Judges can ask whether particular actions within the litigation conform to the difference principle by benefitting specific class members. When there is an apparent conflict between the interests of class members, judges can ask whether the inequality that would result from favoring the interests of some class members over others will result in favoring the least well off among them, where one’s position as well off or not is measured in terms of their position in the litigation.

Rawls places a constraint on individuals in the original position that states that they are rational. As rational agents, those in the original position choose the most efficient means to their ends. The constraint is motivated by the maximin principle, which Rawls wants to govern the eventual social contract that people would enter into. By ensuring that individuals are rational, Rawls can assume that they will adopt the maximin principle of choice, which dictates that when choosing an action from alternatives, never choose any action unless its worst outcome is at least as good as the worst outcome of any of the other alternatives. The maximin principle minimizes the risk individuals take when deciding the rules that will be included in the social contract. Rawls believes the maximin principle to be necessary for choosing a just social contract because it is a one-off choice—choosing once in order to bind the members of society in perpetuity. Rawls argues people will adopt the maximin principle as a safeguard in the event they end up in an unfavorable situation in the resulting society. Class litigation can also be seen as a one-off choice, as class members are bound by the litigation if they have been adequately represented. As Rawls put it, “an injustice is tolerable only when it is necessary to avoid an even
greater injustice." Such ideas should permeate the thoughts of judges confronted with adequacy of representation challenges, and it is possible that Rawls's work can help them to do so.

In applying this proposed factor, a district court judge can combine Rawls's veil of ignorance with the difference principle and the maximin principle in determining whether a particular decision affecting a putative class weighs in favor of finding adequate representation or not. The difference principle and the maximin principle provide indicia for the reasonableness of any given action in class litigation by demonstrating the effects of the action over the entire class. The principles can serve as a proxy for a district judge to aid in conducting Rawls's thought experiment and applying the factor. With respect to any decision in class litigation, a judge determining the adequacy of representation question can hypothetically place the class representatives, class counsel, and all class members behind the veil of ignorance so that they do not know which position they will occupy in the class action. If the action is one in which those behind the veil would consent to, then the factor tilts the balance in favor of finding representation adequate.

**B. Proposed Rule 23(a)(4)(B): Whether certification increases net social benefit by augmenting the net recovery to the class. Net recovery can be measured by an increase in the total compensation delivered to the class itself or by an increase in the total number of plaintiffs compensated, assuming the latter increase does not decrease the value of other class members' claims.**

An ethical theory provides a framework that can be used to determine what is morally right and morally wrong regarding human action and human character. An adequate ethical theory must typically do two things. First, it must have implications that are largely reconcilable with our experience of moral life, and second, it must provide effective guidance where it is most needed—in those situations where substantial moral considerations can be advanced on both sides of an issue. It should illuminate our moral judgment precisely where it is expected to falter—in the face of moral dilemmas.

Utilitarianism is a consequentialist moral theory dictating how people should behave. It maintains that the rightness and wrongness of human action is exclusively a function of the goodness and badness of the consequences resulting directly or indirectly from that action. As a consequentialist theory, utilitarianism is forward-looking, concerned only with the consequences of future actions rather than taking into account past action. John Stuart Mill developed the theory of Utilitarianism to provide people with a universal guide for action, applying to all actions committed by every individual. Mill argues that moral actions can be defined as those that bring about the best possible consequences amongst all alternatives, and that the best consequences will always coincide with whatever action produces the greatest amount of happiness. "The creed which accepts as the foundation of morals 'utility' or the 'greatest happiness principle' holds that actions are right in proportion

146. See RAWLS, supra note 136, at 4.
147. See generally, JOHN STUART MILL, UTILITARIANISM (George Sher ed., 2001).
as they tend to promote happiness; wrong as they tend to produce the reverse of happiness.\footnote{148}

The theory differs from other philosophical arguments in that it employs a formula or "calculus" to measure pleasures and pains and therefore determine moral action. Hedonic values represent the amount of pleasure resulting from an action, while doloric values represent the amount of pain resulting from an action. Taking the hedonic value and subtracting from it the doloric value of an individual action yields the utility of that act, which corresponds to its overall pleasure rating. The utility of action is a measure of the balance of the total amount of pleasure over the total amount of pain that would result if the given action were to take place. Classical utilitarianism's prescription for action is that an individual action, "A", is morally right if and only if there is no alternative—another action available to the person performing "A" at that time—to "A", "B", such that the utility of "B" is greater than the utility of "A".

Judges engaged in determining whether a putative class has satisfied the adequacy standard are forced to balance the consequences that would result from particular actions within litigation in the same way that utilitarianism requires. Framing the inquiry in terms of the utility of the actions and their alternatives would benefit a judge's approach to the standard of adequacy. A judge can ask whether certifying a putative class will maximize utility, thus benefitting the most participants of the litigation as much as possible.

At the outset, it should be clarified that this factor does not refer to negative value class actions, in which it is not entirely clear that increasing the aggregate number of plaintiffs compensated is a good thing when doing so simultaneously decreases the value of other class members' claims. Nevertheless, in the broader scheme of whether to certify a class or not, a judge can productively posit the question of whether finding adequate representation will allow—in aggregate—more plaintiffs to litigate than would otherwise be possible. If the net recovery to the plaintiffs increases as a result of an action in litigation, then it should be clear that adequate representation is satisfied. Situations in which some individuals may not be able to litigate would include reasons such as the statute of limitations, the cost of individual litigation in terms of requiring an attorney to accept the case, and potential issues of proof with respect to an individual's claim that would make the case less worthwhile to bring individually. If certifying the class will enable more plaintiffs with facially credible claims to litigate, then utility is increased through certification.

This factor can also be asked inversely: would finding representation inadequate prevent some class members from receiving any recovery at all? Eliminating certain issues such as a statute of limitations defense or issues of proof can allow litigants with cognizable claims to recover whereas they may not have prevailed in individual litigation. This utilitarian-based factor is intended to promote the class action goal of increased efficiency in litigation through lowering transaction costs. Transaction costs can play an extremely prominent role in preventing individuals with worthwhile and compensable claims from seeing any recovery. By litigating as a class,
transaction costs can be reduced and the pie from which each litigant’s piece is cut can get bigger. A finding that certification will increase the number of plaintiffs that will achieve some recovery than would occur through individual litigation promotes finding representation adequate.

This factor is directly relevant to the deficiencies in the majority’s opinion in Amchem. The Court failed to take into consideration the vast number of putative plaintiffs that would have been able to recover through the global class settlement that would not otherwise have been able to recover as a result of depleted funds, an inability to prove their claims, or the tolling of the statute of limitations.

C. Proposed Rule 23(a)(4)(C): The extent to which the actions of class counsel and class representative(s) reflect an overweening self-interest in maximizing their relative advantages to the detriment of putative or absent class members.

Regarded by many as the greatest modern philosopher, Immanuel Kant focused his ethical theory on human autonomy as the key to understanding the natural world and human experience. His theory was intended to capture a number of common themes in moral reasoning. First, moral reasons are the most important kind of reasons and override all other reasons for acting. Second, the motive behind an action is the key determinant of its moral normative status. Third, each person deserves to be treated with dignity and respect. Finally, Kantianism was designed to reflect that it is morally wrong to take advantage of the forbearance of others.

The centerpiece of Kantianism is Kant’s categorical imperative. Kant reasoned that morality dictates specific action by telling people how they ought to act in certain situations. Morality thus issues commands or orders, which can be expressed by imperatives. Because morality for Kant overrides all other reasons for acting, its demands are unconditional and therefore must be expressed by categorical imperatives. Kant’s categorical imperative can be stated in a variety of ultimately equivalent ways, each differing only with respect to the aspect of our moral thinking it emphasizes. For the purpose of extrapolating Kant’s categorical imperative to adequacy of representation in class actions, the most helpful formulation is: “[a]ct in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.”

Kant argued “man . . . exists as an end in himself, not merely as a means for arbitrary use by this or that will: he must in all his actions . . . always be viewed at the same time as an end.” This form of the categorical imperative states that people should refrain from using others as a means to achieve their own ends, and it is intended to respect the dignity and autonomy of all people. Judges can use Kant’s categorical imperative to ask whether a particular action in litigation would result in absent class members being used as means to an end.

This factor operates on a sliding scale, as all actions can be construed in terms of

150. Id. at 96.
151. Id. at 95.
self-interest, with some reflecting more than others. A negative value class action may be the paradigmatic example of class counsel maximizing relative advantages to the detriment of the class. A case in which class counsel reaps millions in attorneys' fees while the class recovers nothing—or, in the most egregious cases, when class members actually owe money as part of the settlement—is the clearest example of this factor weighing against certification. If the dynamic between the class representatives and class counsel on the one hand and the absent class members on the other suggests that the presence of the absent class members in the litigation is only for the purpose of enhancing the claims and monetary compensation of the class representatives and class counsel, then this factor weighs against certification. This factor is directly aimed at determining the extent of conflict between class members, and applies Kant's categorical imperative as a metric for determining when conflicts are too bad to tolerate.

D. Proposed Rule 23(a)(4)(D): Whether class members are no worse off by litigating as a class than they would be if they had engaged in individual litigation

Among recent attempts to provide a clearer metric for determining adequate representation in class actions is Professor Tidmarsh's "do no harm" principle, which can be used as a factor in the functional approach outlined in this Note. Similar to the goal of this Note, Professor Tidmarsh has set out to "defend[] a test for determining adequate representation that navigates between the reality of internal class conflict and the benefits of class actions." 153

The final factor is a straightforward application of Professor Tidmarsh's "do no harm" principle. The main distinction to be drawn between his approach and the one advanced here is that while he advances the "do no harm" principle as the only metric in determining adequate representation, the multi-factor approach advocated in this Note favors using Professor Tidmarsh's metric as just one of a number of metrics in finding whether adequate representation is satisfied under a totality of the circumstances.

His approach—the "do no harm" principle—posits that "[r]epresentation by class representatives and counsel is adequate if, and only if, the representation makes class members no worse off than they would have been if they had engaged in individual litigation." 154 Stated in slightly different terms: "'adequate representation' with respect to a class member exists when the actions of the class representative and class counsel place that class member in no worse a position than the class member would have occupied by retaining individual control of her litigation." 155

As Professor Tidmarsh has pointed out, "adequate representation is not perfect

152. For a detailed analysis of how to apply the "do no harm" principle, see Tidmarsh, supra note 51, at 1175–80.
153. Id. at 1175.
154. Id. at 1139.
155. Id. at 1175.
representation." This is a central feature of the principle and it reveals a crucial implication of its application: the “do no harm” principle does not require that each class member’s recovery is maximized; it simply requires that the class representative and class counsel do no worse for each individual class member than the class member would have done individually. This implication is crucial specifically for the reason that “a range of actions are likely to be deemed adequate; the class representative and class counsel need not select the action that best advances the interests of each class member.” Professor Tidmarsh acknowledges the importance of this fact for making the principle workable in practice, noting that the nearly inevitable tensions that will exist within any class make it unlikely that class representatives and class counsel can consistently select actions that best advance the interests of each class member. Ultimately, “[t]he ‘do no harm’ principle is designed as a check on self-interested behavior, not as a principle that chooses actions based on the greatest good of a class member or even of the class as a whole.”

A final aspect of Professor Tidmarsh’s principle that carries over to the multi-factor approach suggested in this Note is that the application of the principle requires “constant recalculation of adequate representation as a class action proceeds.” Toward that end, after filing a class action, “a prima facie showing of adequate representation can be made” based upon the multi-factor test, and then again later as new actions in the litigation place adequate representation at issue.

IV. CONCLUSION

The requirement of adequate representation is the cornerstone of the entire class action rule embodied in Rule 23. It is hard to imagine how to construct a rule for class actions without a clear definition and understanding of what adequate representation is, and yet that is precisely the current state of Supreme Court jurisprudence in the wake of Amchem. Amchem appears to stand for the proposition that conflicts of interest among class members precludes the possibility of adequate representation. Until the standard of adequate representation is clarified, then any underlying CAFA issues presented to the Court will remain secondary and class action practice will not improve. The Supreme Court had an opportunity to say something meaningful about adequate representation in Knowles and declined to do so. With the Supreme Court on the sidelines, a

156. Id. at 1179.
157. Tidmarsh, supra note 51, at 1179.
158. Id.
159. Id.
160. Id.
161. Id.
162. Id. at 1189-90.
163. See FED. R. CIV. P. 23.
164. See Amchem, 521 U.S. 591.
165. See id. at 626 (noting “for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future.”).
166. 133 S.Ct. 1345 (2013).
rulemaking solution appears necessary to give effect to Congress's legislative intent in enacting CAFA and in making class actions a viable procedural device for social benefit. Toward that end, this Note outlined a functional approach to adequate representation that is realistic about the difficulties presented by class litigation and navigating the inevitable conflicting interests of class members.