The Agent Orange litigation of the 1980s was the prototypical mass tort class action. It broke new ground, and many of the issues presented in more recent mass tort cases are simply footnotes to or refinements of the difficulties faced by the two judges—George C. Pratt and Jack B. Weinstein—that managed the case on its way to a $180 million settlement on the eve of a 1984 trial. In particular, many of Judge Weinstein’s decisions on procedural, evidentiary, substantive, and choice-of-law matters remain standard, even if controversial, fare for those who work in the field of complex litigation.

Curiously, despite repeated requests to step into the largest tort case of its time, the Supreme Court—before this past November—consistently refused to examine the die cast by Agent Orange. The legal wrangling in the case appeared to be over in 1989 with the final denial of the final certiorari petition seeking review of the Second Circuit decisions that had affirmed, with only a couple of modest modifications, the work of Judge Weinstein, Judge Weinstein’s prosaic task then became the creation of distribution criteria and a distribution mechanism for the settlement funds. This was an enormous undertaking. The Agent Orange class consisted of 2.4 million Vietnam veterans, of whom 240,000 were estimated to have had some exposure to the class of defoliants of which Agent Orange was the most widely used and known. Judge Weinstein ultimately decided to distribute most of the proceeds to those class members who had died or were permanently disabled; the remainder went toward attorney fees and a program designed to assist veterans.

One of the critical distributional issues was the duration of the compensation program. The military had discontinued the use of chemical defoliants in Vietnam in 1971. The best available scientific information suggested that the illnesses, if any, from Agent Orange and other defoliants would manifest themselves within 20 years of exposure. Therefore, the class settlement called for an end to the fund’s distribution program on December 31, 1994. This term was agreeable to the class representatives and class counsel, and approved and implemented by Judge Weinstein. The Agent Orange compensation system issued a final accounting and closed its doors in 1995.

This was bad news for Daniel Stephenson and Joe Isaacson, Vietnam veterans who claimed that their exposure to Agent Orange had caused, respectively, multiple myeloma in 1998 and non-Hodgkin’s lymphoma in 1996. Because their injuries manifested themselves after December 31, 1994, they were unable to seek compensation from the settlement fund. Therefore, Stephenson sued the chemical manufacturers in federal court, while Isaacson sued in state court. The defendants removed Isaacson’s case to federal court and then had both cases transferred to Judge Weinstein’s court.

Judge Weinstein dismissed the cases. He held that both plaintiffs were members of the class, both were adequately represented by the class representatives during the case, and therefore both were precluded from seeking to avoid a settlement—albeit a settlement that provided them with no remedy for their injuries—to which they were legally bound. The Second Circuit reversed, holding that the class representatives could not simultaneously represent those whose injuries manifested themselves before January 1, 1995, and those whose injuries first arose after January 1, 1995. At the time that the class had been certified and the settlement had been approved in 1985, Judge Weinstein had found that the class representatives were adequate. But the Second Circuit did not believe that Stephenson and Isaacson should be bound by this finding, since they were not, as it eventually turned out, adequately represented in fact. Under traditional notions of class-action practice, a class member that is not adequately represented is not bound by the class judgment, and res judicata does not bar his or her individual action. According to the Second Circuit, this actual deficiency in representation permitted Stephenson and Isaacson to attack Judge Weinstein’s finding of adequacy in their individual lawsuits.
It is on this issue—the power of class members to attack the adequacy of representation in collateral proceedings—that the Supreme Court has now entered the Agent Orange fray, recently granting Dow Chemical’s petition for certiorari in the Stephenson matter (oral argument dates have not yet been set). As esoteric as the issue might seem, it is today one of the two hottest of all the hot buttons in class-action practice. The stakes are enormous. One of the great benefits of the class action, from the viewpoints of both the defendant and the court, is the ability of the action to buy a measure of finality and peace. If litigants are able to attack a class judgment in collateral proceedings even when the class action has determined that the representation is adequate, defendants are receiving far less peace than they desire and need.

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The concerns on the other side are no less weighty. Class actions constitute an uneasy exception to the usual rule that each plaintiff possesses the unfettered autonomy to decide when, where, and against whom to file suit. This usual rule, the Court found in Hanstory v. Lee, is constitutionally grounded in the due process clause: “one is not bound by a judgment in personam in a litigation in which he is not designated as a party.” Hanstory recognized that the class action constituted an exception to this rule, but it demanded, as a matter of due process, that the class members be adequately represented by the class representatives at all times. Adequate representation is the cornerstone on which Rule 23, the modern class-action rule, has been built.

In a series of cases beginning with Hanstory, continuing into the 1970s with General Telephone v. Falcon, and ending in the late 1980s with Amchem Products v. Windsor and Ortiz v. Fibreboard, the Supreme Court found that class representatives whose interests diverged from those of some of the class members did not adequately represent those members. Moreover, Hanstory, the granddaddy of all modern class-action practice, involved a collateral attack by a class member. The Supreme Court refused to bind the member to a judgment obtained by an inadequate representative. The logic was simple: “No adequate representation, not a proper party. Not a proper party, not bound by the class judgment. Not bound by the judgment, proceed with the individual case.”

Hanstory seems to dispose of the matter and require a summary affirmance of the Second Circuit’s decision in favor of Stephenson. (The court, under a ruling issued in an unrelated case the day after the Stephenson cert grant, is almost certain not to have jurisdiction over Isaacson’s case.) But Hanstory did not precisely resolve the question on which defendants are likely to focus whether Stephenson is barred from contesting the issue of inadequate representation because of Judge Weinstein’s specific finding in the 1980s that the class representatives were adequate. If Stephenson is bound, as a matter of issue preclusion, to that finding, he cannot later contend that he was in fact inadequately represented. If he cannot make that argument, he cannot hope to escape the claim preclusive effect of the class judgment.

This nesting of an issue preclusion question within the claim preclusion question presents brain-numbing complications for those not steeped in class-action practice. Thus far, the courts of appeal have split on the issue, with the strongest position opposing Stephenson staked out by Ninth Circuit judge Darmuid O’Scannlain in Epstein v. MCA. Epstein is distinguishable from Stephenson, but its distinctions cut both ways. The issue has also divided the academy.

To some extent, what is really at stake is our very understanding of what a class action is. Is it an amalgam of autonomous claimants, its centrifugal forces held in check only by the guarantee at every stage of actual, adequate, and vigorous representation whose goal is to maximize each individual’s interests? Or is it a cohesive collective entity, in which individual identity and interest are subsumed within the search for the collective’s common good? For the former view supports Stephenson, the latter Epstein. Particularly in its recent Amchem and Ortiz decisions, the court has moved rather strongly toward the former view.

Reversing Stephenson would require some rethinking of the class-action paradigm. At the level of theory, therefore, much hangs in the balance.

At the level of practice, too, much hangs in the balance—for Stephenson makes class judgments less secure, makes defendants more reluctant to enter into settlements and more likely to oppose class certification motions, and makes global peace for large-scale litigation a fainter hope.

On its facts Stephenson should be affirmed. The type of class action involved in Stephenson is a (b)(3) class—which is generally understood as an efficient amalgam of individual interests. Concerns for autonomy are strong in such classes. So are concerns for a sellout: Class representatives with present injuries have little incentive to negotiate worse terms for themselves simply in order to obtain better terms for those not yet injured. Stephenson had no ability to know at the time of the settlement whether he would ever meet the eligibility criteria for the settlement, or to know whether his eligibility would fall on the right or wrong side of December 31, 1994. To expect him, or others like him, to mount an effective challenge to the class representation in 1985 (when no one anticipated the possibility of post-1994 injuries) is asking too much. The right solution is to allow the contest over adequate representation to occur when the best information about inadequacy becomes available.

Whatever the outcome, Agent Orange continues, many years after its seeming denouement, to generate issues at the cutting edge of complex litigation and mass torts. It is good to see the old warhorse finally get its moment in the spotlight.