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I. INTRODUCTION

The hulking, nationwide class action has gotten a lot of attention from Congress and the media. The nationwide class action was, after all, the inspiration for the Class Action Fairness Act of 2005 ("CAFA"), and it has been a favorite boogeyman of class action litigation reform efforts.[1] But the nationwide class action has, perhaps, gotten more attention than it deserves. Despite the claims of CAFA's sponsors, multiple single-state class actions against a lone defendant or group of defendants have been far more popular among plaintiffs' lawyers than the all-or-nothing single nationwide class action, and have had more significant real-world consequences. This article is an attempt to shift some of the focus to these "sibling" class actions[2] by examining an issue that is peculiar to them and is not presented by the nationwide class action.

At the outset, some history. Sibling class actions have been on the rise, and largely at the expense of the nationwide class action. Ironically, their rise can be traced to the defense bar's success in opposing nationwide class actions. In 1985, the Supreme Court decided *Phillips Petroleum Co. v. Shutts*[3] and officially blessed the *idea* of a nationwide class action. In the wake of *Shutts,* commenta-

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1. *See* Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005). Proponents of CAFA insisted that the act was necessary to curb nationwide class actions. *See, e.g.*, S. REP. NO. 109-14, at 24 (2005) ("The effect of class action abuses in state courts is being exacerbated by the trend toward 'nationwide' class actions, which invite one state court to dictate to 49 others what their laws should be on a particular issue, thereby undermining basic federalism principles.").

2. We are not aware of any turn of phrase that has been used to describe the kinds of class actions that we address in this article. The term "sibling class actions" seems to best capture the problem, which is why we have coined that term here.

3. Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985). In *Shutts,* the Supreme Court countenanced nationwide class actions provided that a proper choice of law analysis is conducted. It concluded that no such analysis had been performed in *Shutts* because the Kansas Supreme Court had held that Kansas law would govern the claims of all members of the nationwide class. *Id.* at 822. *See* Robert H. Klonoff, Class Action Symposium, *The Twentieth Anniversary of Phillips Petroleum Co v. Shutts: Introduction to the Symposium*, 74 UMKC L. REV. 487, 491 (2006) (remarking that *Shutts* gave the "green light to nationwide class actions in state court").

tors predicted an avalanche of nationwide class actions. With a few notable exceptions,[4] however, the promise—or threat, depending on perspective—of *Shutts* went unfulfilled. In cases like *Castano v. American Tobacco Co.*[5] and *In re Rhone-Poulenc Rorer Inc.*,[6] courts accepted the defense lawyers' argument that differences in the laws to be applied in such cases created predominating individual issues and raised incurable manageability problems; the courts thus rejected class certification in those cases.[7] As the Seventh Circuit explained, where "claims must be adjudicated under the law of . . . many jurisdictions, a single nationwide class is not manageable."[8] While there have been rare—and much publicized—nationwide class actions, most have been confined to "magnet jurisdictions,"[9] involved uniform law (for example, federal law), were creatures of settlement,[10] or fell into two or more of these categories.[11] Where the parties

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4. *See infra* note 13.

5. 84 F.3d 734 (5th Cir. 1996).

6. 51 F.3d 1293 (7th Cir. 1995).

7. To satisfy Rule 23, not only must a case present common questions of "law or fact," but those common "questions of law or fact" must "predominate over any questions affecting only individual members." FED. R. CIV. P. 23(a), (b)(3). *Castano* and *Rhone-Poulenc* found that the cases before them did not satisfy those standards. *See, e.g.*, Linda S. Mullenix, *GridLaw: The Enduring Legacy of Phillips Petroleum Co. v. Shutts*, 74 UMKC L. REV. 651, 656-57 (2006) (identifying *Castano* and *Rhone-Poulenc* as cases in which courts expressed skepticism about nationwide class actions premised on the laws of multiple states). The term "GridLaw" in the title of Professor Mullenix's article is a reference to the fact that, in opposing and supporting class certification in putative nationwide class actions that are premised on multiple states' laws, the lawyers must create competing grids showing differences (if the lawyer represents the defendant) or similarities (if the lawyer represents the plaintiff) among state laws. *See id.* at 653-54.

8. *In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1018 (7th Cir. 2002). Judge Easterbrook gratuitously went on to "add that this litigation is not manageable as a class action even on a statewide basis." *Id.*

9. JOHN H. BEISNER & JESSICA DAVIDSON MILLER, CLASS ACTION MAGNET COURTS: THE ALLURE INTENSIFIES (2002), *available at* www.manhattan-institute.org/pdf/cjr_05.pdf. Others, like the American Tort Reform Association ("ATRA"), describe such jurisdictions less charitably, characterizing them as "Judicial Hellholes®." AM. TORT REFORM ASSOC., JUDICIAL HELLHOLES (2007), *available at* http://www.atra.org/reports/hellholes/report.pdf [hereinafter 2007 ATRA REPORT] (ATRA has trademarked the term). Corporations and those who support them are not the only ones who have coined colorful terms for such jurisdictions. Richard "Dickie" Scruggs, who collected hundreds of millions of dollars in fees for his role in the tobacco settlement many years ago, reportedly has described them as "magic jurisdiction[s]." *Id.*; *see also Trial Lawyers Inc. Illinois: A Report on the Lawsuit Industry in Illinois 2006* at 2, 8 (2006) (purporting to quote Scruggs as characterizing such jurisdictions as "magic jurisdictions" where "it's almost impossible to get a fair trial if you're a defendant"). As ATRA and others have noted, the "magnet" label fits, as class action filings in Madison County, Illinois went from 2 in 1998 to a high of 106 in 2003, before beginning to decline again. *See* 2007 ATRA REPORT, *supra* note 9, at 19. Indeed, examples from "magnet jurisdictions" like Madison County, Illinois provided much of the evidence for CAFA. *See, e.g.*, S. Rep. No. 109-14, at 24-25 (2005). The Senate Report cited a study that found that 77 percent of the class actions filed in Madison County, Illinois were brought as putative nationwide class actions. *Id.*

10. *See* Elizabeth J. Cabraser, *The Manageable Nationwide Class: A Choice-of-Law Legacy of Philips Petroleum Co. v. Shutts*, 74 UMKC L. REV. 543, 545-46 (2006) ("[T]he overwhelming majority of multistate class certification decisions were rendered by federal courts, and most grants of class certification were issued for settlement purposes rather than to structure trials."); *see also* Howard M. Erichson, *Multidistrict Litigation and Aggregation Alternatives Forward*, 31 SETON HALL L. REV. 877, 880 (2001) (noting that state-court certified "nationwide class actions are rare").

litigated class certification through appeal, the court of appeals in most instances reversed the certification of a nationwide class.[12] Thus, the nationwide class action truly has been the exception rather than the rule.[13]

In response to this hostility toward nationwide class actions, plaintiffs' lawyers resorted to filing class actions on behalf of *statewide* classes—in a sense, carrying through on their threats to "inundate" courts with lawsuits if corporate defendants succeeded in defeating their efforts at pursuing nationwide class actions.[14] Literally thousands of such statewide class actions have been filed over the last several years by a relatively small cadre of class action lawyers. Billions of dollars in settlements have been reached. Hundreds of millions of dollars in attorneys' fees have been paid. The consequences have been significant, both for the legal system and for the parties involved.

This article is not, however, another polemic against the consumer class action or class actions in general. Our claim here is not that class actions are bad for America, bad for business, or bad for consumers—though we must confess that we are sympathetic to such views based on our experience in class actions over the last several years. The class action is a litigation mainstay and is not going away any time soon. Besides, that a device is capable of abuse or has been abused

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11. *See* Shaw v. Toshiba America Information Systems, Inc., 91 F. Supp. 2d 926 (E.D. Tex. 1999) (approving $2.1 billion settlement of nationwide class brought under federal law).

12. *See, e.g.*, *Bridgestone/Firestone*, 288 F.3d at 1012-18, 1021; Castano v. Am. Tobacco Co., 84 F.3d 734, 752 (5th Cir. 1996); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1304 (7th Cir. 1995) (granting petition for writ of mandamus to decertify a class). *But see* Klay v. Humana, Inc., 382 F.3d 1241 (11th Cir. 2004) (affirming certification of nationwide class of physicians in suit against health maintenance organizations under laws of multiple states); *In re* General Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig., 55 F.3d 768, 818 (3d Cir. 1995) (class certification was appropriate because "we cannot conceive that each of the forty-nine states (excluding Texas) represented here has a truly unique statutory scheme . . . . "); *In re* Prudential Ins. Co. Sales Practice Litig. Agent Actions, 148 F.3d 283, 315 (3d Cir. 1998) ("Courts have expressed a willingness to certify nationwide classes on the ground that relatively minor differences in state law could be overcome at trial by grouping similar state laws together and applying them as a unit."); Walsh v. Ford Motor Co., 807 F.2d 1000, 1017 (D.C. Cir. 1986) (holding that class certification is appropriate where "variations [in state law] can be effectively managed through creation of a small number of subclasses grouping the states that have similar legal doctrines").

13. *See* Cabraser, *supra* note 10, at 545 ("Given the plain language of *Shutts*, one would have expected an explosion of nationwide state court class actions in the realms of consumer and mass tort litigation; but this was arguably a phenomenon more perceived—or feared—than real."). Cabraser, one of the nation's leading class action plaintiffs' lawyers, laments that "the post-*Shutts* era has seen relatively few nationwide class actions actually granted at the trial level, or affirmed on appeal, for trial purposes." *Id.* While Cabraser admits that her assertions are not based on hard empirical data, but rather her own experience and perceptions, we agree with her that "a survey of complex litigation practitioners" would reveal that most such practitioners, including the authors, share that view. *See id.* at 545. Others, however, seem to have a different view. *See, e.g.*, Klonoff, *supra* note 3, at 491 ("Indeed, the impact of *Shutts*'s first holding, which gave the green light to nationwide class actions in state court, has been so profound that it led directly to the most significant overhaul in class action practice in almost forty years—the Class Action Fairness Act of 2005."). Perhaps it is an overstatement to say that nationwide class actions have not been a problem. It may be more accurate to say that the nationwide class action may present a serious problem, but not a pervasive one.

14. *Cf. Castano*, 84 F.3d at 747-48 (" As he stated in the record, plaintiffs' counsel in this case has promised to inundate the courts with individual claims if class certification is denied.").

is not necessarily an argument for its abolition; it is an argument for reform of the rules governing its use.[15] At any rate, plenty has already been written on those subjects, and the interested reader has a number of excellent articles from which to choose.[16]

Our objective in this article is much more modest. It is our view that the practice of a single lawyer or firm bringing multiple "sibling" class actions against the same defendant raises a serious conflict of interest problem for the lawyers who bring the cases. This article seeks not only to demonstrate that sibling class actions present such a problem, but also to propose a workable solution to it.

Before getting too far, however, we should define our terms. We define the term "sibling class actions" narrowly. Sibling class actions generally share the following five characteristics, three of which are essential and two of which are not. First, there must be at least two class actions, each brought on behalf of different putative classes or on behalf of classes and individuals; these usually are brought in different jurisdictions but are sometimes brought in the same jurisdiction but on behalf of differently defined classes. Second, the cases must be brought against the same defendant. Third, the cases must be brought by the same attorney or firm. Fourth, usually (though not necessarily) the cases are based on similar factual allegations and similar legal theories. Finally, usually (though not necessarily) the cases involve substantial damages, running into the hundreds of millions or even billions of dollars.

Sibling class actions are not the same as "dueling" class actions, which are class actions brought by *different* lawyers on behalf of the same or overlapping classes.[17] Such actions are so named because lawyers duel over who controls the

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15. Indeed, one of CAFA's express "findings" is that "[c]lass action lawsuits are an important and valuable part of the legal system." Class Action Fairness Act of 2005, Pub. L. 109-2, §2, 119 Stat. 4, 14 (2005). Even Judge Posner in *Rhone-Poulenc* was careful to point out that class actions serve a useful purpose. *See* 51 F.3d at 1299 ("We do not want to be misunderstood as saying that class actions are bad because they place pressure on defendants to settle. That pressure . . . must be balanced against the undoubted benefits of the class action that have made it an authorized procedure for employment by federal courts.").

16. See, for example, the articles identified in Debra Lyn Bassett, *The Defendant's Obligation To Ensure Adequate Representation In Class Actions*, 74 UMKC L. REV. 511, 512 (2006) [hereinafter Bassett, *Defendant's Obligation*]. As Professor Bassett has observed elsewhere, "[c]lass actions are a popular scapegoat, seemingly embodying many of the horrors associated with a legal system purportedly out of control." Debra Lyn Bassett, *When Reform Is Not Enough: Assuring More Than Merely 'Adequate' Representation in Class Actions*, 38 GA. L. REV. 927, 927 (2004) [hereinafter Bassett, *When Reform Is Not Enough*]; *see also id.* at 927-28. For a thorough critique of the so-called "consumer fraud" class action in its modern form, see MICHAEL S. GREVE, HARM-LESS LAWSUITS? WHAT'S WRONG WITH CONSUMER CLASS ACTIONS (2005), *available at* http://www.aei.org/docLib/20050404_book814text.pdf; see also Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining In Abuse By Requiring Plaintiffs To Allege Reliance As An Essential Element*, 43 HARV. J. ON LEGIS. 1 (2006).

17. *See* Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 462 (2000) (defining "dueling class action" as "two or more class actions commenced on behalf of the same class or overlapping classes, which present claims arising out of the same transaction or occurrence").

litigation, with the first-filer often becoming the victor by default.[18] Dueling class actions raise their own host of troubling issues, but those are not the same issues that trouble us here.

The problem with sibling class actions, as we have defined them, is that they engender rivalries among the various classes—sibling rivalries, to extend the analogy further. Each class wants to be treated best by the class lawyer, receive the most attention from the class lawyer, and, ultimately, be the class on whose behalf the class lawyer recovers the most money. The rub, however, is that the class lawyer will always have a favorite, whether she admits it or not, and one class will be treated better than the others, whether it is obvious or not. That conflict may manifest itself in everything from negotiating the scheduling order to settling the case.

In such cases, class counsel must deliberately or unconsciously trade the interests of one class against the interests of another—not only in resolving the case, but in all matters leading up to the resolution of the case. With divided loyalties, class counsel cannot adequately represent any of the classes she purports to represent. Indeed, we are of the view that the conflict of interest problem is *structural* and, for this reason, believe that any lawyer who purports to bring sibling class actions should *presumptively* be deemed inadequate to serve as class counsel under Federal Rules of Civil Procedure Rule 23.

Simply stated, a lawyer who pursues sibling class actions cannot maximize the benefit to one class without reducing the benefit to another of the sibling classes. The class action lawyer in such circumstances is "robbing Peter to pay Paul."[19] The conflict is most obviously presented in settling a case where maximizing the settlement for one class would reduce the potential settlement for a different class by a measurable and like amount, but the conflict is not limited to such zero-sum situations. The conflict manifests itself in a variety of ways throughout the life of the lawsuit, with detrimental effects on class members.

The reader may understandably ask why we propose a categorical presumptive approach instead of the case-by-case analytical approach that the adequacy inquiry under Rule 23 generally demands.[20] The answer is three-fold.

First, we are interested in the real world, and the ethical rules governing lawyer conflicts cannot realistically be applied in actual class action litigation.

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18. *Id.*

19. The court in *Moore v. Margiotta* used this well known phrase without attribution in the course of disqualifying class counsel based on their simultaneous representation of sibling classes. Moore v. Margiotta, 581 F. Supp. 649, 653 (E.D.N.Y. 1984). In popular culture, the phrase means to "take money for one thing and use it for another, especially in paying off debts." *See* THE NEW DICTIONARY OF CULTURAL LITERACY (3d ed. 2002) ("To harm one person in order to do good to another; by extension, to use money or resources set aside for one purpose for a different one."), *reprinted at* http://www.bartleby.com/59/4/robpetertopa.html.

20. *See, e.g.*, 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d § 1765, at 322 (3d ed. 2005) ("What constitutes adequate representation is a question of fact that depends on the circumstances of each case.").

Yes, they can inform the decision and provide structure and guidance—but ultimately, the rules governing divided loyalties and conflicts of interests do not "fit" the class action context.[21] Thus, sibling class actions require an approach different than the case-by-case approach the ethical rules prescribe.

Second, the plaintiff bears the burden of showing that class certification is appropriate, and this includes—or should include—demonstrating that both the named plaintiff and the proposed class counsel will fairly and adequately represent the interests of the class. Our experience, as confirmed by recent empirical analysis,[22] has been that courts often do little more than go through the motions in assessing the adequacy of the class representatives and their counsel. A presumption of inadequacy where counsel represents sibling classes will help ensure that the burden remains where it should be—on plaintiff and her counsel.

Third, the stakes are typically too high to take chances in class actions or to wait until a conflict becomes manifest and obvious. We do not intend to limit that point to corporate defendants, for which the stakes are high because of the money involved (though that is a consideration not to be dismissed lightly). Rather, the stakes are too high for all of the players—the court, the parties, the lawyers, and the absent class members—because of the need to ensure that, whatever the outcome of the class action on the merits, the resolution of the case is binding.

Unlike individual litigation, where a settlement or judgment generally binds only the individuals involved, a class action judgment purports to bind potentially thousands (or even millions) of individuals, most of whom do not even know that a lawsuit was filed on their behalf,[23] let alone that a judgment has been rendered. To effectively bind these absent class members to a judgment that they had no part in—and may be wholly unaware of—the class action rule demands that the named class representative and her counsel "fairly and adequately" represent the class. If a judgment is entered in a class action and an absent class member later successfully demonstrates that either the class representative or class counsel was inadequate, the judgment can be undone and will be devoid of any res judicata effect. The binding effect of any class action judgment—as to both the class and the defendant—thus depends on whether both the named plaintiff *and* class counsel "fairly and adequately" represented the interests of the generally voiceless absent class members.

Nothing tests the "fairness and adequacy" of representation more than conflicts of interest. That is true whether the conflicts are between the class representative

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21. *See infra* notes 41-44 and accompanying text.

22. *See* Robert H. Klonoff, *Multi-Jurisdictional and Cross-Border Class Actions: Symposium Issue: The Judiciary's Flawed Application of Rule 23's "Adequacy of Representation" Requirement*, 2004 MICH. ST. L. REV. 671, 673 (2004) (conducting empirical analysis of court decisions concerning adequacy and concluding that most courts do very little to assess adequacy, and virtually none conducted the requisite "rigorous" examination required).

23. *See, e.g.*, Mark Herrmann, *Are You A Class Member?*, NAT'L. L. J. , Sept. 26, 2005, at 23 ("Absent class members simply do not know that class actions have been filed on their behalf.").

and the class, among the class members, or between the lawyer and the class she purports to represent. The Supreme Court has twice expressly dealt with conflicts in the class action context. In both *Amchem Products, Inc. v. Windsor*[24] and *Ortiz v. Fibreboard Corp.*,[25] the Supreme Court concluded that the class action resolutions in those cases were of no binding force because of conflicts of interest. While each case concerned *intra*-class conflicts—and here we are concerned with *inter*-class conflicts—the point is that conflicts are serious business and failure to treat them that way can have unpleasant consequences down the road for all of the class action players. A presumption of inadequacy where counsel is pursuing sibling class actions is thus a rule of caution warranted by the circumstances.

Ultimately, the court is responsible for policing the class action and ensuring that both counsel and the class representative are "adequate." As a practical matter, however, it is up to defense counsel to bring problems with adequacy to the court's attention. Counsel often have more information at their disposal than the court. Indeed, empirical evidence shows quite clearly that courts generally do not independently evaluate the adequacy of class counsel.[26] Defense counsel must take an active and early role in bringing potential conflicts of interest to the court's attention, including identifying the conflict created by sibling class actions. Doing so is not easy; there is a natural reluctance to challenge the ethics of opposing counsel's behavior (despite an ethical obligation to do so).[27] Moreover, some defense lawyers may believe they will gain a tactical advantage by keeping counsel they deem inadequate in the case.[28] Finally, there is the court's natural disinclination to trust a defense lawyer when she claims that she is looking out for the best interests of the class; it seems like the fox guarding the henhouse. But the fact of the matter is that the integrity of any class action judgment—whether by settlement, dispositive motion, or trial and regardless of who wins—depends on the absence of conflicts.

Despite the significance of the issue, remarkably little has been written on this topic. Commentators and courts have focused on *intra*-class conflicts (conflicts among members within a single class) to the virtual exclusion of *inter*-class conflicts. The seminal cases on conflicts of interest in class actions, *Amchem* and *Ortiz*, concerned intra-class conflicts and spawned years of scholarly articles on the subject of conflicts within classes and among members of the same class. Only a handful of courts—almost all of them federal district courts—have

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24. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

25. *Ortiz v. Fibre Board Corp.*, 527 U.S. 815 (1999).

26. *See, e.g.*, Klonoff, *supra* note 22, at 673 (noting that "the vast majority of courts conduct virtually no gate-keeping function and approve class representatives and class counsel with little or no analysis").

27. *Id.* at 696 (noting that some defense counsel may not mount adequacy challenges for fear of angering the court).

28. *See id.* It seems to us, however, that any such tactical advantage pales in comparison to the costs occasioned by the unraveling of any pro-defense judgment or settlement.

tackled the question of whether a lawyer's simultaneous representation of sibling classes presents a conflict of interest. Those courts have come to different conclusions for different reasons. It is time to employ a coherent framework to evaluate whether the existence of sibling class actions creates a conflict of interest sufficient to render class counsel inadequate. This article seeks to provide that framework and the rationale behind it.

II. THE INTERSECTION OF LEGAL ETHICS AND RULE 23

We begin our analysis here in Part II by identifying the source of the duty that class counsel breach when they file sibling class actions—the "fairness and adequacy" requirement imposed by Federal Rule 23 (and its state law analogs), as informed by legal ethics. In Part III, we discuss why the conflict created by sibling class actions is a problem—because it threatens to invalidate class action judgments and settlements. The discussion then turns to defense counsel's role in calling sibling conflicts to the court's attention. After considering Supreme Court precedent on *intra*-class conflicts, we present our proposal for addressing *inter*-class conflicts. We explain our conclusion that the conflict created by sibling class actions is *structural* and requires the invocation of a *presumption* of "inadequacy" to cure the problem. We conclude with an analysis of those few decisions that have wrestled with sibling conflicts, finding that most decisions are consistent with the approach we have advocated.

A. THE DUTY OF LOYALTY

Our starting point is the duty of loyalty imposed on lawyers in all their dealings with clients.

1. THE RULES OF ETHICS

The duty of loyalty is the cornerstone of the attorney's relationship with her client. As Judge Jack Weinstein has written, "[p]erhaps most fundamental to our model of professional ethics is the lawyer's duty of loyalty to his or her client."[29] By virtue of this duty, "[t]he lawyer is required to be an absolutely loyal surrogate for the client," which, in turn, "ensures that justice is served and the client receives the full and fair hearing to which he or she is entitled."[30]

The duty of loyalty prohibits a lawyer from representing two clients with diametrically opposed interests. This prohibition is codified in Rule 1.7 of the *Model Rules of Professional Conduct* ("*Model Rules*"), which provides, in pertinent part:

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29. Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 493 (1994).
30. *Id.*

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
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> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.

As the comments to Rule 1.7 explain, "[l]oyalty to a client is . . . impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests."[31]

The duty of loyalty that animates Rule 1.7 is not, of course, confined to legal ethics. The duty of loyalty exists in every fiduciary relationship—as does the possibility that a conflict of interest may breach it.

2. THE DUTY OF LOYALTY INHERENT IN THE "FAIR AND ADEQUATE" REPRESENTATION RULE 23 REQUIRES

The "touchstone of a fair class action" is the fairness and adequacy of those who purport to represent the class—the named representative and class counsel.[32] Indeed, Professor Klonoff has argued persuasively that "[o]f all the requirements for class certification, none is more important than the requirement that 'the representative parties,' including class counsel, 'fairly and adequately protect the interests of the class.'"[33] Under Federal Rule of Civil Procedure 23 (and most state class action rules), class certification requires a showing that "the representative parties will fairly and adequately protect the interests of the class."[34] It is under the "fairness and adequacy" prong of the analysis that class counsel's loyalty to the class must be evaluated and any conflicts of interest must be addressed.

In December 2003, Rule 23 was amended to add subsection (g), a separate subsection devoted exclusively to the appointment of class counsel. This provision mandates that class counsel must "fairly and adequately represent the interests of the class."[35] In making that determination, the court "must consider" the following factors:

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31. MODEL RULES OF PROFESSIONAL CONDUCT R. 1.7 cmts. 3-4 (2007) [hereinafter MODEL RULES]. The Comment goes on to advise:

> A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Id.

32. Klonoff, *supra* note 22, at 676.

33. *Id.*

34. FED. R. CIV. P. 23(a).

35. FED. R. CIV. P. 23(g)(1)(B).

- the work counsel has done in identifying or investigating potential claims in the action,
- counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,
- counsel's knowledge of the applicable law, and
- the resources counsel will commit to representing the class . . . .[36]

Rule 23(g) also provides that the court "*may* consider any other matter pertinent to counsel's ability to fairly and adequately represent the interest of the class."[37] While class counsel's ability to fairly and adequately represent the class has always been part of the class certification analysis under Rule 23,[38] that analysis is now to take place under Rule 23(g) instead of Rule 23(a).[39] By moving the class counsel evaluation to a separate section, Congress has, at least implicitly, suggested that the evaluation of class counsel should be taken seriously.[40]

Some have argued that legal ethics are irrelevant to the decision whether to certify a class under Rule 23 and that all that matters in the fairness and adequacy inquiry is counsel's competence to do the job.[41] Those critics have a point. Where

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36. FED. R. CIV. P. 23(g)(1)(A).

37. FED. R. CIV. P. 23(g)(1)(C)(ii) (emphasis added). In addition, Rule 23(g) provides that the court "*may* appoint interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action." Congress's use of "may" instead of "shall" leaves to the Court's discretion appointment of "interim" class counsel prior to class certification—counsel presumably subject to replacement post-certification. The Rule's language is somewhat troubling, as it could be read to suggest that the Court need not concern itself with the quality of class counsel's representation until a class is certified. It seems to us, however, that that construction is not what the Rule's framers intended. Pre-certification is a significant stage in the prosecution of a class action—a time when the actions of class counsel can effectively decide whether the case will ever be certified. To the extent class counsel has conflicts at the pre-certification stage, those conflicts can certainly—and irrevocably—impact decision-making and the outcome of the case. Consequently, pre-certification evaluation of class counsel is essential.

38. *See* FED. R. CIV. P. 23.

39. FED. R. CIV. P. 23(g) advisory committee's note ("Rule 23(a)(4) will continue to call for scrutiny of the proposed class representative, while this subdivision will guide the court in assessing proposed class counsel as part of the certification decision.").

40. At least one court, however, has taken the curious—and, we would submit, erroneous—view that Rule 23(g) has eliminated the determination of whether class counsel will "fairly and adequately" represent the class as a "prerequisite" of class certification. Harrington v. City of Albuquerque, 222 F.R.D. 505, 515 (D.N.M. 2004) ("The obvious implication of the amendment is that establishing that class counsel will fairly and adequately represent the class members is no longer a prerequisite to class certification."). According to this court, "amended Rule 23 expressly states that only after the class is certified does the Court appoint class counsel." *Id.* at 519. We do not agree with the court, and we are not alone. As Professor Mullenix has remarked, "[t]he New Mexico court's surprising set of rulings seems inconsistent with some commentary in the advisory committee note." Linda S. Mullenix, *The New Rule 23(g)*, NAT'L L. J., Feb. 7, 2005, at 12. Fortunately, the New Mexico court's construction of Rule 23(g) has not caught on elsewhere. As far as we can determine, no other courts have followed *Harrington*'s reasoning on this issue.

41. *See, e.g.*, Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 97 (1991) (taking the position that ethical rules are not relevant to adequacy inquiry); *see also* Stephen B. Murray & Linda

the federal rule is concerned, the view that ethical rules do not govern finds support in both the text of Rule 23(g) and in the corresponding Advisory Committee Notes. Indeed, the new Rule 23(g) appears to require that the court consider matters that bear on whether class counsel can get the job done (prior class action experience, knowledge of the law, and adequate resources) and whether she "deserves" the job ("the work counsel has done in identifying or investigating potential claims in the action"), but it does not expressly mandate consideration of ethical matters or even potential conflicts in the evaluation process.[42] Instead, the new rule seems to relegate such matters to discretionary consideration under Rule 23(g)(1)(C)(ii). One possible construction of this structure is that, while the court is *free* to consider conflict issues, it is not *required* to do so.

Other considerations also support the view that ethics should not be part of the "fairness and adequacy" analysis. For example, at least until a class is certified, there is no formal attorney-client relationship between the putative class and putative class counsel.[43] Thus, before certification, the duty of loyalty may not yet have arisen, and consideration of potential conflicts of interest that breach that duty may be premature. Moreover, as a practical matter, ethical canons such as Rule 1.7 are simply unworkable in the class action context. For instance, waivable conflicts cannot be resolved through consent, since class counsel cannot

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S. Harang, *Selection of Class Counsel: Is It a Selection of Counsel for the Class, or a Selection of Counsel with Class?*, 74 TUL. L. REV. 2089, 2095 (2000) (citing OXFORD ENGLISH DICTIONARY 150 (2d ed. 1991)); Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 FORDHAM L. REV. 71, 127 (1996) ("The conflict rules do not appear to be drafted with class action procedures in mind and may be at odds with the policies underlying the class action rules."). *But see* Bassett, *When Reform is Not Enough*, *supra* note 16, at 959-70 (lamenting general "fear and loathing" of ethical rules in class action context).

Courts have also expressed doubt about the applicability of ethical rules to class actions. *See, e.g.*, *In re* "Agent Orange" Product Liab. Litig., 800 F.2d 14, 18-19 (2d Cir. 1986) ("[T]he traditional rules that have been developed in the course of attorneys' representation of the interests of clients outside of the class action context should not be mechanically applied to the problems that arise in the settlement of class action litigation.").

As Professor Miller has noted, moreover, some states have even drafted their ethical rules to exclude class actions expressly. *See* Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry Into the Appropriate Standard*, 2003 U. CHI. LEGAL F. 581, 587 n.25 (2003) (discussing North Dakota Rule of Professional Conduct 1.8(g)).

42. Though the factors enumerated by Rule 23 may have some bearing on class counsel's likely competence, an ethical requirement under Model Rule 1.1, the Rule itself does not expressly purport to take ethics into account.

43. Atari, Inc. v. Superior Court, 166 Cal. App. 3d 867, 873 (Cal. Ct. App. 1985) ("We cannot accept the suggestion that a potential (but as yet unapproached) class member should be deemed 'a party . . . represented by counsel' even before the class is certified."); MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.24 (1995) (noting that "no formal attorney-client relationship exists between class counsel and the putative members of the class prior to certification"); *see also* Gillespie v. Scherr, 987 S.W.2d 129, 132 (Tex. App. 1999). *But see* Kleiner v. First Nat. Bank of Atlanta, 751 F.2d 1193, 1207 n.28 (11th Cir. 1985) (internal citations omitted) ("At a minimum, class counsel represents all class members as soon as a class is certified; if not sooner."); *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 801 (3d Cir. 1995) ("Beyond their ethical obligations to their clients, class attorneys, purporting to represent a class, also owe the entire class a fiduciary duty once the class complaint is filed.").

obtain the consent of absent class members.[44]

In our view, however, it would be a mistake to jettison ethical considerations in the class certification decision-making process altogether. The rules, while not necessarily controlling, should inform the analysis.[45] This is so for four reasons.

First, the inquiry Rule 23 and its state law analogs prescribe is not merely an "adequacy" inquiry, but an inquiry into counsel's ability to "fairly" represent the class as well. One cannot be "fair" to the class if one's loyalties are split between that class and one, two, or more other classes that are suing the same defendant.

Second, the die has, in a sense, already been cast in the intra-class conflict decisions. Indeed, Supreme Court decisions recognize the *primacy* of conflicts of interest in determining whether named plaintiffs and their counsel may adequately represent class members with potentially conflicting interests. In *Ortiz v. Fibreboard Corp.*, the Supreme Court reversed the Fifth Circuit's approval of a mandatory settlement class certification because of an irreconcilable conflict between future and current claimants within the class.[46] The Court hypothesized that current claimants would prefer to recover as much as possible immediately, while future claimants would (understandably) prefer a recovery that left enough money to cover their claims in the future. Despite these divergent interests, the two groups were represented by the same class counsel. The Supreme Court held that the settlement approval was improper in the face of this conflict because "a class divided between holders of present and future claims . . . requires division into homogeneous subclasses . . . with separate representation to eliminate conflicting interests of counsel."[47] The court in *Ortiz* premised much of its analysis on the adequacy prong of Rule 23(a).

Likewise, in *Amchem Products, Inc. v. Windsor*,[48] the Supreme Court highlighted the connection between adequacy and conflict of interest: "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent" and requires examining the "competency and conflicts of class counsel."[49] The conflicts uncovered by the Court in *Amchem* under the adequacy prong led the Supreme Court to invalidate the purported class action settlement.[50]

Other authorities recognize that there is a fiduciary relationship between the

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44. "Consent is the lynchpin of these rules, and consent is impossible in class actions." Miller, *supra* note 41, at 587; *see also* Nancy J. Moore, *Who Should Regulate Class Action Lawyers?*, 2003 U. ILL. L. REV. 1477, 1483 (2003) (noting that "'conflicts' cannot be cured by informed consent, due to the lawyer's inability to obtain the consent of absent class members").

45. This seems to be the view of Professor Bassett as well, though she has not analyzed the specific issue with which we are concerned here. *See* Basset, *When Reform Is Not Enough*, *supra* note 16, at 969 ("The current ethical rules provide more helpful guidance than the courts and commentators recognize.").

46. Ortiz v. Fibreboard Corp., 527 U.S. 815, 864-65 (1999).

47. *Id.* at 856.

48. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

49. *Id.* at 625.

50. *Id.* at 629.

class and class counsel. A fiduciary duty can arise even without a formal attorney-client relationship.[51] In any fiduciary relationship, the fiduciary owes a duty of loyalty to those whom she purports to represent.

Third, even if it could be said that the conflicts that so troubled the Court in *Ortiz* and *Amchem* were not formal legal ethical conflicts—after all, neither *Model Rules* nor *Model Code* provisions were explicitly discussed in those decisions—the underlying concerns remain. A court faced with sibling class actions need not find that counsel has violated the governing code of ethics; indeed, that determination is better left to state bar authorities. Instead, when the court "disqualifies" class counsel from representing a class based on a conflict of interest, it can do so because the conflict renders counsel inadequate. Ultimately, the dispute is really about whether we are talking about conflicts with a small "c" or a capital "C"—whether the conflicts are those that are the purview of state ethics authorities or of the judge deciding class certification.[52] We are content with the small "c" version. Our concern isn't whether the lawyer gets in trouble with state bar authorities, but rather whether the lawyer can adequately and fairly represent the class.

Finally, the very nature of class actions imposes on the court an obligation to scrutinize potential conflicts. In individual litigation, it is largely up to counsel and her client to ensure that no debilitating conflicts exist. The attorney-client relationship is governed largely by contract. But class actions are different.[53] In a class action, the court has an affirmative obligation to police the fiduciary relationship between counsel and absent class members and to protect the interests of absent class members.[54] This obligation includes ensuring that class counsel does not have conflicts of interest. Professor Geoffrey Miller has taken this a step further and argued that judges in class actions are "'fiduciaries' for absent plaintiffs," and as such "have an affirmative duty to protect the class, not only at key moments in the litigation such as class certification or settlement

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51. *See In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 801 (3d Cir. 1995) (stating that "class attorneys . . . owe the entire class a fiduciary duty once the class complaint is filed").

52. *See, e.g.*, Moore, *supra note* 44, at 1489-90 (distinguishing "between 'conflicts of interest' in the broad sense, which economists characterize as a form of agency problem, and the far narrower 'conflict-of-interest doctrine,' which is found in Rule 1.7 and the other conflicts rules").

53. *See* Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 805 (1997). As Professor Issacharoff explains:

> Class actions occupy an uncertain position in Anglo-American law. Nowhere else do we find such a clear departure from the premise that no one should be bound to a judgment in personam absent the personal security offered by notice and a full opportunity to participate in the underlying litigation. Nowhere else do we find so clear a departure from the premise that the attorney-client relationship is achieved through contractual voluntarism, with the rules of engagement constrained only by the rules of professional conduct.

Id.

54. Indeed, this is clear from the very structure and wording of Rule 23 itself.

approval, *but always.*"[55] Some courts have also expressed this view.[56] We think suggesting that the court has an actual fiduciary duty takes things too far—and takes class counsel off the hook to a certain extent. The court has a role to play, defined by rule, but it is a supporting role, not a leading role. Only one player in the class action has a fiduciary duty, and that is class counsel. The court and defense counsel merely help ensure that the duty is fulfilled.

Analytically, we believe that conflicts of interest in sibling class actions are best addressed under the "fairness and adequacy" requirement of Rule 23 (and its state counterparts) and informed by the general notions of conflict of interest underlying Model Rule 1.7. But there is little value in debating what the best platform is for resolving this problem. Whether they are properly analyzed under Model Rule 1.7, under more general rules of fiduciary duty, or as part of Rule 23's "fairness and adequacy" evaluation, potential conflicts of interest must be carefully examined because there are serious ramifications down the road when a conflict goes unchecked. In short, technical violations of the rule are not the concern; the concern ought to be whether class counsel's loyalties are divided such that the interests of one or more of the classes will be subordinated to the interests of another class.

B. THE CENTRALITY OF THE "FAIR AND ADEQUATE" REPRESENTATION DETERMINATION TO A BINDING CLASS ACTION RESOLUTION

Adequacy of representation is not only a requirement for bringing a class action; it is "a due process prerequisite to a binding class judgment."[57] It is, therefore, not surprising that adequacy has been characterized "as perhaps the most important prerequisite for a class action."[58] Rule 23(a)(4)'s adequacy of representation requirement "embodies the due process requirement that each litigant is entitled to his day in court."[59]

Whereas the class definition and the factors delineated in Rule 23(b) determine

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55. Miller, *supra* note 41, at 588 nn.28, 29 (2003). Professor Miller has proposed a "hypothetical consent" standard to govern the conflict of interest analysis between class members and class counsel. Under this standard, "a conflict of interest should be deemed impermissible if a reasonable plaintiff, operating under a veil of ignorance as to his or her role in the class, would refuse consent to the arrangement." *Id.* at 582.

56. *See, e.g.*, Reynolds v. Beneficial Nat Bank, 288 F.3d 277, 279-80 (7th Cir. 2002) (so characterizing role of district court with respect to absent class members).

57. Bassett, *Defendant's Obligation*, *supra* note 16, at 515 (citations omitted); *see also* Hansberry v. Lee, 311 U.S. 32, 42-43 (1940) ("It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties."); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 808 (1985) ("The absent parties would be bound by the decree so long as the named parties adequately represented the absent class . . . .").

58. ROBERT H. KLONOFF & EDWARD K.M. BILICH, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION: CASES AND MATERIALS 199; *see also* Bassett, *Defendant's Obligation*, *supra* note 16, at 515 n.23 ("Thus, adequacy of representation is the ultimate due process safeguard.").

59. Gomez v. Ill. State Bd. of Educ., 117 F.R.D. 394, 400 (N.D. Ill. 1987).

who is bound by any judgment, Rules 23(a)(4) and 23(g) determine *whether* those defined to be in the class *should be bound*.[60] "Final judgments . . . remain vulnerable to collateral attack for failure to satisfy the adequate representation requirement."[61] The degree to which the parties, counsel, and the court can comfortably rely on a class action resolution is a function, then, of the care with which the adequacy determinations of Rules 23(a)(4) and 23(g) have been undertaken. If the class is subsequently deemed to have been inadequately represented, "the judgment as to the class . . . will be invalidated under the Due Process Clause."[62] Professor Bassett has summed up the issue nicely: "[A]dequate representation, along with notice and an opportunity to participate (and in some cases the right to opt out) are the essential elements that legitimize the class action and entitle the defendant to use a prior class judgment or settlement as a bar to future litigation by everyone who is part of the certified class."[63]

If an inadequate plaintiff or inadequate class counsel is allowed to represent the class, any resolution—whether by settlement, trial, or dispositive motion—after class certification is vulnerable to collateral attack and, ultimately, to being set aside. Obviously, then, it is important to get the adequacy determination right. And getting it right means taking a hard and serious look at potential conflicts of interest. It also means that defense counsel must be aggressive in bringing problems with adequacy to the court's attention.

C. DEFENSE COUNSEL'S ROLE IN THE ADEQUACY DETERMINATION

As the Supreme Court noted in the seminal case of *Phillips Petroleum Co. v. Shutts*, "[w]hether it wins or loses on the merits, petitioner [the defendant] has a distinct and personal interest in seeing the entire plaintiff class bound by *res judicata* just as petitioner is bound."[64] The class action defendant thus has a "vested interest in ensuring the adequacy of representation of absent class

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60. *See* Graham C. Lilly, *Modeling Class Actions: The Representative Suit as an Analytic Tool*, 81 NEB. L. REV. 1008, 1029 (2003) ("[T]he adequacy of representation by the class representative and class counsel . . . determine[s] the preclusive effect of a class action judgment."); *see also* David J. Kahne, *Curbing the Abuser, Not the Abuse: A Call For Greater Professional Accountability and Stricter Ethical Guidelines for Class Action Lawyers*, 19 GEO. J. LEGAL ETHICS 741, 743-44 (2006) ("As a procedural safeguard, the adequacy of representation requirement is particularly pertinent in the class action context because class action judgments may have a preclusive effect on absent and future claimants."); Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 763 (2005) ("Rule 23 grants district courts the authority to multiply the binding effect of their proceedings enormously, sweeping in huge numbers of absent plaintiffs who will be subject to the court's mandate and bound to the rules of decision embodied in the court's judgment. As a consequence, Rule 23 is hedged about with elaborate protections aimed at ensuring that the court will exercise that authority only to an extent consistent with the interests of the absentees.").

61. Matsushita Elec. Inds. Co. v. Epstein, 516 U.S. 367, 396 (1996) (Ginsburg, J., concurring and dissenting).

62. Lilly, *supra* note 60, at 1037; *see also* Bassett, *Defendant's Obligation*, *supra* note 16, at 519 & n.57.

63. Bassett, *When Reform Is Not Enough*, *supra* note 16, at 937 n.50.

64. 472 U.S. 797, 805 (1985); *see also Hansberry v. Lee*, 311 U.S. 32 (1940).

members, because it is the lack of adequacy that opens the door to a successful collateral attack against the class judgment."[65] The threat of a later collateral attack on a class action judgment should motivate defense counsel to ensure that the class representative and class counsel are adequate to the task and suffer from no conflicts of interest that could later be used to undo a class action judgment.[66]

As commentators have explained, "the practical significance of adequacy of representation becomes most acute after the court enters a class judgment."[67] At this point, "the issue becomes whether the judgment will bind all of the class members so that the matter is fully and finally resolved."[68] If representation is found to have been inadequate, the entire judgment and resolution may unravel from a collateral attack.[69] Indeed, the Supreme Court has assiduously protected the right of absent class members to attack collaterally a class action judgment in order to "safeguard" their due process rights.[70]

Despite the risks, defense counsel may sometimes be reluctant to raise problems with the named plaintiff or class counsel even when they know of potentially debilitating adequacy problems. For instance, they may prefer to litigate against a weak or inadequate plaintiff or incompetent counsel.[71] However, such short-term tactical considerations should not obscure the longer-term strategic consequences that ignoring known adequacy problems might cause.[72] It is black letter law that "a fiduciary does not bind those for whom he

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65. Bassett, *Defendant's Obligation*, *supra* note 16, at 521-22.

66. *See* Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of* Epstein v. MCA, Inc., 73 N.Y.U. L. REV. 765, 784 (1998) (emphasizing that the possibility of collateral attack on a judgment in a class action "increases defendant's exposure to damages").

67. Bassett, *Defendant's Obligation*, *supra* note 16, at 521.

68. *Id.*

69. *Id.* at 521-22.

70. *Id.* at 522.

71. *See* Klonoff, *supra* note 22, at 696.

72. A good but procedurally complicated example of this can be found in the "Agent Orange" class action litigation. In that litigation, plaintiffs brought claims on behalf of members of the armed forces who had been exposed to "Agent Orange" while serving in Vietnam. See *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 720 (E.D.N.Y. 1983) ("*Agent Orange I*"). In 1985, following multiple fairness hearings and other proceedings, Eastern District of New York Judge Weinstein approved the global settlement of a class action on behalf of United States, New Zealand and Austrian servicemen and women injured while in or near Vietnam by Agent Orange. *See In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1396, 1399-400 (E.D.N.Y. 1985) ("*Agent Orange II*"). Membership in the class was determined by exposure, not manifest injury, *Agent Orange I*, 100 F.R.D. at 729, so even those without actual injuries at the time of the settlement were part of the class. The settlement, however, provided for payment only to those whose injuries had actually become manifest by the time of the settlement; further, the settlement provided for payment only through the end of 1994. *See Agent Orange II*, 611 F. Supp. at 1417. The Second Circuit affirmed class certification and approved the settlement. *See In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 154 (2d Cir. 1987). *Amchem* and *Ortiz* were still years away.

More than a decade later, two Vietnam-era U.S. servicemen, Stephenson and Isaacson, filed a lawsuit alleging injuries from their exposure to Agent Orange during the Vietnam War. Stephenson v. Dow Chem. Co., 273 F.3d 249, 251 (2d Cir. 2001), *aff'd by an equally divided Court*, 539 U.S. 111, 111-12 (2003). Both were members of the prior settlement class. *Stephenson*, 273 F.3d at 260 ("Both Stephenson and Isaacson fall within the class

acts as against third parties who are aware of the fiduciary's failure to fulfill his responsibility."[73] Under this principle, "a judgment is not binding on the represented person . . . where, to the knowledge of the opposing party, the representative seeks to further his own interest at the expense of the represented person."[74] Thus, while it may be viewed as opportunistic to do so,[75] defense counsel's failure to raise the issue of a potential conflict could effectively preclude her from using that judgment against class members following any judgment.

Defense counsel cannot assume that the court will undertake an independent adequacy determination or that the court even has the information necessary to evaluate adequacy. Indeed, empirical research has shown that courts historically have not engaged in any sort of rigorous analysis of adequacy without a serious challenge by the defendant.[76] Moreover, as a practical matter, defense counsel is likely to have more information regarding potential conflicts and other issues relating to adequacy than the court.[77] Thus, if the defendant wants to do all it can to ensure that, whatever the outcome, the resolution of the class action will bind the class, its lawyers must actively bring any issues of adequacy to the court's attention.

D. *AMCHEM*, *ORTIZ*, AND THE INTRA-CLASS CONFLICT

The *intra*-class conflict is well-recognized. It has been the subject of extensive commentary.[78] Briefly, an intra-class conflict is one in which the interests within a single class conflict to such an extent that the named plaintiff or her counsel cannot be said to fairly and adequately represent the entire class. Such conflicts

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definition of the prior litigation . . . ."). But because the plaintiffs' injuries did not manifest until after 1994, neither received payment under the settlement. *Id* at 260-61. Judge Weinstein dismissed their case, "concluding that the prior [classwide] settlement barred their suits." *Id* at 251. The Second Circuit reversed, holding that the "plaintiffs were inadequately represented in the prior litigation" because the settlement purported to resolve future claims while allowing recovery only for those who had presented claims before 1994, an intraclass conflict under *Amchem* and Ortiz. *Id.* at 261. The lesson of *Stephenson* is clear: In the post *Amchem/Ortiz* world, defendants who ignore adequacy problems created by class conflicts do so at their peril.

73. RESTATEMENT (SECOND) OF JUDGMENTS § 42 cmt. f.

74. *Id.*

75. One court has said that this "is a bit like permitting a fox, although with a pious countenance, to take charge of the chicken house." Harrington v. City of Albuquerque, 222 F.R.D. 505, 512 (D.N.M. 2004) (quoting Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130, 657 F.2d 890, 895 (7th Cir. 1981)).

76. *See* Klonoff, *supra* note 22, at 689-90.

77. Rule 23(g), however, expressly permits the court to demand information from class counsel and gives the court discretion to determine what information it would like. FED. R. CIV. P. 23(g). Such information could include information pertaining to potential conflicts of interest, such as, for example, counsel's role in other class actions or individual litigation against the same defendant.

78. *See, e.g.*, Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry Into the Appropriate Standard*, 2003 U. CHI. LEGAL F. 581 (2003); Nancy J. Moore, *Who Should Regulate Class Action Lawyers?*, 2003 U. ILL. L. REV. 1477 (2003); Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805 (1997).

stand in contrast to *inter*-class conflicts, where there are conflicts between one class and another class, and those external conflicts render the class representative and/or her lawyer inadequate.

1. *AMCHEM*

In *Amchem*, the trial court had approved a settlement class under Rule 23(b)(3) that included everyone in the United States who had been exposed to asbestos in their occupation but who had not yet filed a lawsuit based on that exposure against one or more of the defendants.[79] Because the price of admission to the class was exposure, rather than current injury, the class necessarily included both those who were currently suffering from asbestos-related disease and those who were not. The same lawyers represented the entire class. There were no subclasses. Objectors sought to prevent approval of the settlement and certification of the class on the grounds that there were inherent intra-class conflicts. The trial court nonetheless certified the class and approved the settlement as fair.[80] The objectors appealed. The Third Circuit reversed the settlement, and the case wound up in the Supreme Court.

The Supreme Court held that the adequacy requirement was not satisfied because of the structural conflict of interest presented by present and future claimants all being part of the same class. The Court explained:

> In significant respects, the interests of those within the single class are not aligned. Most saliently, 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 . . . . The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected.[81]

In the Court's view, the only cure for the conflict was the use of subclasses: "[T]he adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroup."[82]

2. *ORTIZ*

In *Ortiz*, the Supreme Court reversed the Fifth Circuit's approval of a mandatory settlement class certification because of an irreconcilable conflict

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79. *See* Amchem Products, Inc. v. Windsor, 521 U.S. 591, 591 (1997).
80. *Id.* at 606.
81. *Id.* at 626-27.
82. *Id.* at 627 (quoting *In re* Joint E. and S. Dist. Asbestos Litig., 982 F.2d 721, 742-43 (2d Cir. 1992)).

between future and current claimants within the class.[83] Whereas *Amchem* had focused largely on the conflict of the class representative, *Ortiz* focused on the conflict of class counsel.

The court surmised that current claimants would prefer to recover as much as possible immediately, while future claimants would prefer a recovery that left enough money to cover their claims in the future.[84] Despite these divergent interests, the two groups were represented by the same class counsel. The Supreme Court held that the settlement approval was improper in the face of this conflict because "a class divided between holders of present and future claims . . . requires division into homogeneous subclasses . . . with separate representation to eliminate conflicting interests of counsel."[85] As Professor Coffee has written, "[w]hereas *Amchem* had largely focused only on the class representatives, *Ortiz* recognized that representatives in fact rely on class counsel and hence different counsel for each subclass would be necessary."[86] Thus, the court made clear that the conflict analysis in the adequacy determination concerns not only the named plaintiffs, but also "the 'competency and conflicts of class counsel.'"[87]

Though largely concerned with intra-class conflicts, the Supreme Court in *Ortiz* also dealt with an inter-class conflict, or, more precisely, with the conflict created by class counsel simultaneously representing 45,000 individual claimants who were strangers to the class action—that is, not class members.[88] Class counsel had negotiated a "side settlement" on behalf of the 45,000 individual claimants, which was itself "contingent on a successful global settlement agreement" of the class claims.[89] As Justice Souter's majority opinion explained, these facts precluded "any assumption that plaintiffs' counsel could be of a mind to do their simple best in bargaining for the benefit of the settlement class."[90] To the contrary, "[c]lass counsel . . . had great incentive to reach any agreement in the global settlement negotiations that they thought might survive a Rule 23(e) fairness hearing, rather than the best possible arrangement for the . . . class."[91]

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83. Ortiz v. Fireboard Corp., 527 U.S. 815 (1999). For an often critical examination and analysis of *Ortiz*, see George M. Cohen, *The "Fair" Is The Enemy Of The Good: Ortiz v. Fibreboard Corporation and Class Action Settlements*, 8 SUP. CT. ECON. REV. 23 (2000).

84. *See Ortiz*, 527 U.S. at 856.

85. *Id.*

86. John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty In Representative Litigation*, 100 COLUM. L. REV. 370, 394 (2000).

87. 527 U.S. at 857 n.31 (citing *Amchem*, 521 U.S. at 626 n.20).

88. *Id.* at 852.

89. *Id.* 852-53.

90. *Id.* at 852 (internal citation omitted).

91. *Id.* at 852-53 (citing Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 CORNELL L. REV. 811, 832 (1995) ("Side settlements suggest that class counsel has been laboring under an impermissible conflict of interest and that it may have preferred the interests of current clients to those of the future claimants in the settlement class.")).

The court characterized the conflict as "egregious."[92] These considerations of conflict with non-class members, however, merely colored the court's conclusion. The decision focused, quite clearly, on the intra-class conflict, or what the court termed "equity among members of the class."[93] Thus, while *Ortiz* certainly touches on the inter-class conflict, it was in reality a further application of *Amchem* on the issue of intra-class conflicts.

III. THE SIBLING CLASS ACTION CONFLICT OF INTEREST PROBLEM

A. THE SIBLING CLASS ACTION DEFINED

Without intending to denigrate the importance of intra-class conflicts, we believe that inter-class conflicts are just as significant and deserve more attention than they have received to date. Here, we are concerned with a particular species of inter-class conflict—that presented by sibling class actions. As we have used the term, sibling class actions share the following necessary and defining characteristics. *First*, they are brought by the same plaintiffs' lawyer or firm. *Second*, they are brought against the same defendant. *Third*, they are brought on behalf of different classes, which generally means that they are brought in different jurisdictions. *Fourth*, they seek substantial damages, generally in the tens or hundreds of millions of dollars or even billions of dollars. Sibling class actions often have *other* characteristics, but these are not defining characteristics. For instance, they are usually based on identical alleged conduct, proceed under identical or similar legal theories, and assert similar claims. Often, moreover, sibling class actions are filed in jurisdictions perceived as class action-friendly.

B. THE RISE OF THE SIBLING CLASS ACTION

The sibling class action is largely—and ironically—a creature of the class action defense bar's success in defeating nationwide class actions premised on multiple states' laws. While by no means a thing of the past—indeed, the Supreme Court's *Shutts* decision expressly approved of nationwide class actions in concept—the nationwide class action has been on the wane for the last several years.[94] This has been particularly so ever since the Fifth Circuit's seminal decision in *Castano v. American Tobacco Co.*[95] There, the Fifth Circuit reversed class certification of a nationwide class of cigarette smokers, largely on the ground that differences among state laws (and concomitant choice of law issues)

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92. *Id.* at 853 (citing *Amchem*, 521 U.S. at 626-27).

93. *Id.* at 854 ("The explanation of need for independent determination of the fund has necessarily anticipated our application of the requirement of equity among members of the class. There are two issues, the inclusiveness of the class and the fairness of distributions to those within it. On each, this certification for settlement fell short.").

94. *See supra* notes 4-13 and accompanying text.

95. 84 F.3d 734 (5th Cir. 1996).

precluded a finding of predominance.[96]

In the wake of *Castano* and similar decisions hostile to nationwide class actions,[97] plaintiffs' lawyers threatened that they would merely file class action suits in different states on behalf of separate state-wide classes.[98] And they did so against companies not only in the tobacco industry, but in a variety of industries and under several different theories. The problem, therefore, is real and it is continuing. It needs to be addressed.

C. THE STRUCTURAL CONFLICT OF INTEREST CREATED BY SIBLING CLASS ACTIONS, AND THE INVOCATION OF A PRESUMPTION TO CURE THAT PROBLEM

Sibling class actions are alluring to the plaintiffs' lawyer because she needs just one of her sibling cases to succeed in order to win big. They are an entirely rational way to hedge one's bets in litigation. If one case is not going well, counsel can devote more resources and attention to one of the other sibling class actions. While the class receiving the lawyer's attention certainly benefits, the class left hanging clearly does not. The lawyer's loyalties are divided among the rival sibling class actions. Perhaps the lawyer can serve two masters, but she cannot serve both of them with the absolute loyalty the law demands. The only one who consistently benefits from the practice is class counsel.

By bringing multiple sibling class actions, the class action lawyer has created a *structural* conflict that cannot be surmounted or cured. The conflict arising from the sibling rivalry *presumptively* renders the lawyer inadequate by putting her in a situation where she must trade off the interests of one class against those of another class. Indeed, the Supreme Court in *Ortiz* seemed to recognize the inherently incurable conflict in such situations, citing a well-known treatise for the proposition that "an attorney who represents another class against the same defendant may not serve as class counsel."[99] In both *Ortiz* and *Amchem*, moreover, it was the structural subordination of the interests of some claimants in favor of other claimants that generated the conflict. The same tension is present in

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96. *Id.* at 740.

97. *E.g.*, *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995).

98. Castano v. Am. Tobacco Co., 84 F.3d 734, 747-48 (5th Cir. 1996)

99. 527 U.S. at 856 (citing 5 J. MOORE, T. CHORVAT, D. FEINBERG, R. MARMER & J. SOLOVY, MOORE'S FEDERAL PRACTICE § 23.25[5][e] (3d ed. 1998)).

We do not mean to suggest that *Ortiz held* that sibling class actions are prohibited. *Ortiz* concerned intraclass rather than interclass conflicts, so the proposition cited was dicta at best. What we suggest is that the Court recognized the problems created by sibling class actions, and it is therefore troubling that lower state and federal courts often seem oblivious to them. Lower courts (and class action plaintiffs and defendants) should pay closer attention to the Supreme Court's unequivocal but non-controlling statement on this issue, lest they may find themselves confronting a situation like that in *Stephenson*. *See supra* note 72. If interclass conflicts were to receive the same respect that intraclass conflicts currently receive, a defendant that thinks it has settled two class actions may find that only one of those is binding or that it is not *as binding* as it thought—just like the undoubtedly surprised defendants in *Stephenson*.

the sibling class action context, except that the tensions arise from rivalries and conflicts between classes rather than among members within a class. As long as the same lawyer represents all of those rival members or classes, *the lawyer* is subject to a structural conflict, and the only cure is withdrawal from the representations that are creating those conflicts. Just as *Ortiz* and *Amchem* held in the *intra*-class setting that conflicts were not resolved by mere subgrouping but also required that the subgroups be represented by separate counsel, so too the *inter*-class conflicts demand that separate counsel represent the rival sibling classes.

Our proposal does not depend on a showing that the defendant is without the means to satisfy multiple judgments. Such, after all, was not a requirement in either *Ortiz* or *Amchem*. There, the Supreme Court did not express concern over the ability of the defendant to satisfy obligations to all class members. The money was there. The concern, rather, was with how the money was to be distributed among class members. It was the proposed distribution, not the threat that some class members would receive nothing, which animated the decision. So too here. The problem is not that some will recover nothing while others will recover something. The problem, rather, is that some will recover more than others because of the lawyer's divided loyalties.[100]

The presumption we propose is a logical corollary of plaintiffs' burden to establish all of the prerequisites to class certification.[101] Unless class counsel can demonstrate that no class will be subordinated to the interests of another class, she is not an adequate class representative. Her inadequacy could threaten the binding effect of any judgment in any of the cases. In the class action context, even the appearance of a genuine conflict of interest should be enough to trigger

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100. A similar problem arises when counsel represent both a class and individual plaintiffs who are suing the same defendant, a situation addressed in, but not central to the resolution of, *Ortiz*. This was the concern in *In re* Sulzer Hip Prosthesis and Knee Prosthesis Liability Litig., 268 F. Supp. 2d 907 (N.D. Ohio 2003). That decision concerned the award of attorneys' fees to the class lawyers. The court was troubled by the disclosure that class counsel were also representing individual plaintiffs "*under the same theory of liability as in this class action*" against the same defendants. *Id.* at 928. The court saw a clear conflict of interest in that dual representation, much like the conflict presented by the dual representation and side settlement in *Ortiz*:

> From the beginning, the primary interest of class members was to maximize their compensation from [defendant], through imposition of the highest possible monetary settlement payable to the class. Any non-class member who sued Sulzer necessarily sought compensation that would *not* be available to the class, an interest in direct conflict with that of the class members.

Id. at 928-929. This "simultaneous representation" was, "at the least, highly problematic." *Id.* at 929. Notably, while the court observed that class counsel's pursuit of sibling actions might "put at risk [the defendant's] ability to make all promised payments to the class," that risk was not at the heart of its concern. Rather, its concern properly was focused on the inherent trade-offs class counsel was forced to make between the non-class claimants and the class claimants. *Id.* at 929. Perhaps most remarkable of all is that the court in that case apparently had just become aware of the problem, even though it was one that presumably could have been discovered much sooner, thus reinforcing the recommendation we make here that defense counsel should not be bashful about bringing such conflicts to the court's attention early and often.

101. *See, e.g.*, Gen. Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982).

the presumption. Unless class counsel can rebut the presumption—and our expectation is that will rarely occur—the only safe course is to "disqualify"[102] the lawyer bringing sibling class actions from acting as counsel for the class in all but one of them.[103]

Some practical objections might be raised. How, for instance, is the court to know whether counsel is representing rival sibling classes? Then there is the problem of "chicken." Which court will act to disqualify first? And suppose all of the courts act to disqualify class counsel or force her to withdraw as a condition of certification. That wouldn't be fair, would it?

As to the first concern, the obvious response is that defense counsel ought to make the court aware of sibling class actions brought by class counsel.[104] If she is representing the defendant in all pending class litigation nationwide or at least is part of the group of lawyers doing so, defense counsel would be aware of the conflict. But even in those circumstances where this is not the case, there are ways for defense counsel to gather the necessary information. For example, a staple of any defense lawyer's discovery requests ought to be a request for the

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102. We use the term generically, rather than formally. "Disqualified" is merely shorthand for saying that the lawyer is to be removed from the case, either in the context of Rule 23(g) in the federal system or under analog to Rule 23(g) or 23(a) in the states.

103. The concerns raised by sibling class actions (as we have used that term) may also be presented by class actions brought by the same attorney or group of attorneys against *different* defendants. For example, in the so-called "charity care litigation" (in which the authors were heavily involved), a small group of plaintiffs firms brought several dozen class actions against hospital systems located throughout the country. Most of these cases were dismissed on motion, and the few that remain are being handled mostly by lawyers who are not members of the consortium that initiated the litigation. One cannot help wondering, however, how these attorneys could have serviced literally millions of clients if the cases had survived and classes had been certified. After the consortium's petition to multi-district the cases failed, they were forced to deal with them individually. Did these firms—even with the assistance of the local counsels with whom they associated—have the resources to process mountains of information, conduct or defend scores of depositions, and proceed to trial *in each case*? The conclusion seems inescapable that the lawyers in the consortium would have had to set priorities and that, in so doing, they would subordinate one class' interests to another's. *Cf.* MODEL RULES R. 1.7(a)(2) (stating that a conflict of interest exists when "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client . . . ").

We could argue that the "charity care" cases are different from "sibling" class actions because the various classes are not seeking the same pot of gold—i.e., each class is pursuing a different hospital system, and a recovery by one class against Hospital A will not affect another class's ability to recover against Hospital B. But that explanation is not wholly satisfying—particularly not since, as we suggest elsewhere in this article, the existence of a conflict in "sibling" class actions is not dependent on a showing that the defendant's treasury is insufficient to satisfy multiple judgments.

On one level, the problems presented when an attorney pursues multiple class actions against different defendants are akin to those faced by any attorney who has bitten off more work than she can comfortably chew. At some point, counsel may have become so over-committed that she cannot discharge her duty of loyalty to some or all of her clients. We believe that, in making the "adequacy" determination that Federal Rule of Civil Procedure 23(g)(1)(B) requires, the court may fairly take into account counsel's participation in other class actions brought against other defendants based on the same or different underlying facts. We do not, however, propose a *presumption* of conflict in such circumstances, as we do for "sibling" class actions. Instead, those potential conflicts should be addressed on a case-by-case basis.

104. *See supra* notes 26-28 and accompanying text.

identities and descriptions of all cases against the same defendant. Of course, the information may be provided by class counsel themselves as part of their submission for proving their adequacy to serve as counsel under Rule 23(g). There is also another way for the court to obtain this information. Rule 23(g) expressly authorizes the court to "direct potential class counsel to provide information on any subject pertinent to the appointment."[105]

As to the second concern, forced withdrawal is analogous to the situation in which a lawyer is scheduled for trial in two different cases at the same time. Class counsel should be expected to keep each court where a sibling class action is pending apprised of the fact that he represents other classes against the same defendants. Counsel and the court can then work it out. Typically, this would be accomplished by counsel's withdrawal in one or more of the cases.

D. HOW COURTS HAVE DEALT WITH THE SIBLING CLASS ACTION CONFLICT OF INTEREST PROBLEM

Given the prevalence of sibling class actions, there are remarkably few published decisions addressing the conflict of interest problems such actions raise. Those courts that have considered the issue, however, have overwhelmingly found conflicts of interest to exist by virtue of class counsel's simultaneous representation of competing classes against a single defendant. Only a handful of courts has found no conflict.

1. CASES FINDING A CONFLICT OF INTEREST

a. *Fiandaca*

The only *appellate* case to deal with the conflict created when lawyers represent two classes simultaneously against the same defendant is far afield from the scenario that began this article, but it illustrates quite well the dangers of sibling class actions. In *Fiandaca v. Cunningham*,[106] lawyers represented two classes simultaneously against the same defendant, the State of New Hampshire. In one case, the lawyers represented a class of residents of the Laconia State School ("LSS"), New Hampshire's home for the mentally challenged, complaining of conditions within that facility (the "*Garrity* class"). In *Fiandaca*, the same lawyers served as lead counsel on behalf of a class of female state prison inmates who challenged conditions in the state prison system as inadequate under the Equal Protection clause (the "*Fiandaca* class").[107]

The *Fiandaca* class sought temporary boarding for the class complainants during the construction of improved prison housing. One of the defendant's

105. FED. R. CIV. P. 23(g)(1)(C).
106. 827 F.2d 825 (1st Cir. 1987).
107. *Id.* at 826.

formal settlement offers included providing such accommodations on the LSS campus. The class lawyers rejected the offer, stating that "plaintiffs do not want to agree to an offer which is against the stated interests of the plaintiffs in the *Garrity* class."[108] Based on that assertion, the defendant moved to disqualify class counsel, arguing that the assertion demonstrated an irresolvable conflict of interest between the two classes. The court, while noting that there was probably a conflict, declined to order disqualification and began to try the case shortly thereafter.[109]

The First Circuit reversed, holding that class counsel's representation of the *Garrity* class materially limited its representation of the *Fiandaca* class within the meaning of the Rules of Professional Conduct, requiring their disqualification. The question, the court found, was not whether the settlement would have been successful, but, rather, "whether plaintiffs' counsel was able to represent the plaintiff class unaffected by divided loyalties, or as stated in Rule 1.7(b), whether [class counsel] could have reasonably believed that its representation would not be adversely affected by the conflict."[110]

b. *Moore*

In *Moore v. Margiotta*,[111] the court confronted the issues presented by a single law firm's representation of two distinct classes against the same defendant and the conflicts that representation created. The case involved an alleged "kickback" scheme arising out of a county's award of insurance contracts.[112] Claims were brought under the federal RICO statute.[113] In one case, the lawyers represented a class of taxpayer-residents who sought treble damages.[114] In another case, the lawyers represented a class of insurance brokers who sought damages measured by the insurance premiums and commissions received by the winning "bidder."[115]

The court analyzed the issue in terms of state ethical rules, rather than as a question of adequacy. It concluded that there was a disqualifying conflict because "[i]t would be difficult to award the whole sum to both classes of plaintiffs. Clearly, at some point the two theories of recovery will cause an active conflict of interests between the two classes of plaintiffs."[116] The issue was whether class

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108. *Id.* at 827.

109. *Id.*

110. *Id.* at 830; *see also* MODEL RULES R. 1.7(b)(1) (permitting a representation, notwithstanding a concurrent conflict of interest, when "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client").

111. 581 F. Supp. 649 (E.D.N.Y. 1984).

112. *Id.* at 650.

113. *Id.*

114. *Id.* at 652.

115. *Id.*

116. *Id.*

counsel's simultaneous representation of two competing classes against the same defendant would limit their ability to give either class the undivided loyalty to which it was entitled. The court concluded that the dual representation was irreconcilable with the duty of loyalty. As the court explained, "[t]he mere risk of compromising professional judgment, tactics, and pursuit of the two groups' interests is enough to cast the joint representation in a dubious light."[117] The court flatly rejected counsel's offer to adjust their tactics to meet the needs of each class, finding that "the mere fact of adjusting or compromising legal tactics or arguments to accommodate both classes of plaintiffs obviously impairs counsel's use of independent professional judgment as to each class."[118]

c. *Sullivan*

In *Sullivan v. Chase Investment Services of Boston, Inc.*,[119] counsel for a putative class of investors in a securities fraud class action in the Northern District of California (*Sullivan*) simultaneously represented a group of individual investors in a different case pending in the District of Maryland (*Lions*). The court's "major concern" was that the defendant might be unable to satisfy judgments in both cases and that this possibility would weigh on the minds of counsel as they prosecuted the case: "The possibility that assets and insurance of the defendants who may have committed fraud against the plaintiffs will be insufficient to satisfy an alleged liability to the class of over $20 million is great enough to influence litigation strategy."[120] Indeed, the court pointedly observed that the sibling class's "interest in collecting some money from [the defendant] before this class litigation is concluded is obvious, and the diminution of the defendants' assets by payment to the Lions would equally obviously affect the interests of this class."[121]

The court ruled that class counsel's continued representation of the plaintiffs in *Lions* would violate its duty of loyalty to the class in *Sullivan*.[122] According to the court, there was no sense waiting for a judgment to determine if an actual conflict existed because the mere possibility that the defendant would not be able to provide absolute loyalty in each case created an "appearance of impropriety." That was sufficient to raise troubling issues in a class action: "[T]he responsibility of class counsel to absent class members whose control over their attorneys is limited does not permit even the appearance of divided loyalties of counsel."[123] Though the court did not believe that class counsel's representation in the case

117. *Id.* at 653.
118. *Id.*
119. 79 F.R.D. 246 (N.D. Cal. 1978).
120. *Id.* at 258.
121. *Id.*
122. *Id.*
123. *Id.*

before it had been "influenced" by their responsibilities to the Maryland class, the court nonetheless ordered them to withdraw from the Maryland action as a condition of continuing to represent the *Sullivan* class.[124] Notably, there is no indication in the court's opinion that it undertook a thorough analysis of the defendant's financial health in reaching its decision.

d. *Jackshaw*

In *Jackshaw Pontiac, Inc. v. Cleveland Press Publishing Co.*,[125] the conflict issue was presented in a slightly different factual context. There, plaintiffs' counsel sought to represent a class of advertisers in an antitrust action while simultaneously representing a group of individual plaintiffs against the same defendant, a bankrupt newspaper, for employment-related claims.[126] The defendant argued that the simultaneous representation prevented the named representative from "vigorously prosecut[ing] the interests of the class through qualified counsel."[127] The defendants contended that, because the class and the individual plaintiffs were "seeking to tap the same pool of . . . assets," there was a conflict of interest between them.[128]

The court denied class certification for the advertisers, finding that the dual representation created a conflict of interest for class counsel, rendering them inadequate under Rule 23(a)(4). The court was persuaded that a conflict existed because the defendant there was bankrupt, and thus "its assets [we]re finite."[129] Consequently, "[i]t [wa]s not inconceivable" that the amounts sought by the class in one suit and the individual plaintiffs in the other would "exceed the total assets" of the defendant.[130] Citing state ethical rules, and relying on *Sullivan,* the court concluded that the special responsibilities of counsel to the absent class members did not permit "even the appearance of divided loyalties of counsel."[131] As in *Sullivan*, the court apparently was not presented with concrete record facts demonstrating that the defendant would be unable to satisfy judgments in favor of both classes. The court simply found that it had not been demonstrated otherwise, thus putting the burden squarely where it belongs—on the plaintiff.

e. *Kurczi*

In *Kurczi v. Eli Lilly & Co.*,[132] lawyers brought a class action on behalf of

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124. *Id.*
125. 102 F.R.D. 183 (N.D. Ohio 1984).
126. *Id.* at 192.
127. *Id.* (quoting Senter v. General Motors Corp., 532 F.2d 511, 525 (6th Cir. 1976)).
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* (quoting Sullivan v. Chase Inv. Serv. of Boston, Inc., 79 F.R.D. 246, 258 (N.D. Cal. 1978)).
132. 160 F.R.D. 667, 679 (N.D. Ohio 1995).

female Ohio residents who were exposed to the drug DES[133] in vitro and suffered certain injuries as a result.[134] The same lawyers also brought separate individual actions on behalf of many, if not all, of the named plaintiffs for the same claims and injuries.[135]

The court found that the class had not satisfied Rule 23(a)(4)'s adequacy requirement based on (among other things) class counsel's dual representation of both class and individual plaintiffs in separate lawsuits against the same defendant. The named plaintiffs in the class action were also individual plaintiffs in the other lawsuit filed by the same lawyers. The court distinguished *Jackshaw Pontiac* on this basis, but found the distinction to be without a difference and one that, at any rate, "d[id] not cure the difficulty" presented by counsel's dual representation. In the court's view, "[e]very decision to hasten or delay the litigation on behalf of one set of plaintiffs could alternately harm or benefit the other set of plaintiffs."[136] Indeed, the fact that the named representatives in the class action were also individual plaintiffs in the parallel suit made even more acute the risk to absent class members. The absent class members were "at great risk of being sold out" because the named representatives would be indifferent "as to whether they won a verdict in *Kurczi*" or in the parallel state action.[137] Notably, the court did not rely at all on any claimed or actual limitations of the defendant's ability to satisfy competing judgments.

f. *Kuper*

The court in *Kuper v. Quantum Chemical Corp.* denied class certification because class counsel simultaneously was representing another putative class in a different jurisdiction.[138] As in *Jackshaw*, both classes were "seek[ing] recovery from a common pool of assets."[139] Class counsel represented that a wrongful dividend payment had "substantially denuded [defendant] of its liquid assets and net worth" and that his clients' interests in the company had therefore been jeopardized by the resulting decline in the corporation's net value.[140] That argument backfired. Adopting the reasoning in *Jackshaw*, the court concluded that, since there was a substantial likelihood that the defendant would be unable to satisfy large judgments against it in both actions, the competing claims "may

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133. DES is an acronym for Diethylstilbestrol, a synthetic estrogen given to pregnant women from 1938 until 1971 as a means of preventing miscarriage or other pregnancy complications. It was pulled from the market based on allegations that it caused birth defects. Its manufacturer, Eli Lilly, was the subject of numerous lawsuits based on such allegations.

134. *Kurczi*, 160 F.R.D. at 671.

135. *Id.* at 679.

136. *Id.*

137. *Id.*

138. Kuper v. Quantum Chemical Corp., 145 F.R.D 80, 83 (S.D. Ohio 1992).

139. *Id.* at 83.

140. *Id.*

impair counsel's ability to vigorously pursue the interests of both classes":

> Although few reported cases appear to address the propriety of simultaneously representing potentially competing classes, numerous decisions have held that an attorney cannot act as both a class representative and counsel to the class. The rationale for those holdings—that class counsel should not be subject to divided loyalties—applies equally to the competing interests of separate classes vying for relief from the same limited source. *In light of Plaintiffs' counsel's commitment to zealously represent . . . other class interests with a very real possibility of impairing this class' ability to recover*, this Court concludes that Plaintiffs have failed to demonstrate that they "will vigorously prosecute the interests of the requested class through qualified counsel."[141]

g. *Krim*

Krim v. PCOrder.com, Inc. was a securities fraud class action in which plaintiff investors alleged that the defendant had filed a misleading registration statement with the Securities and Exchange Commission.[142] The class lawyers in *Krim*, however, also represented different plaintiffs in other putative class actions against the same defendant in a variety of jurisdictions.[143] The court conditioned class certification on class counsel's withdrawal from the case. The court observed that "[c]onflicts of interest may exist for class counsel if they are involved in multiple lawsuits for the named representative or against the same defendants."[144] The court concluded that the special responsibilities of class counsel to "absent class members whose control over their attorneys is limited does not permit even the appearance of divided loyalties of counsel."[145] In a single passage, the court captured the fundamental problem with sibling class actions and the structural conflict they create:

> At the hearing, counsel presented a plan to the Court they believe ameliorates any conflict or appearance of conflict. Mr. Baskin and Milberg Weiss both offer to withdraw from representing the class in the Martens case, but Milberg Weiss will continue as lead counsel in the New York Litigation. Milberg Weiss would also withdraw as lead counsel in this case and Mr. Baskin would alone serve as lead counsel and make all decisions required of lead counsel. *This proposal not only fails to erase all of this Court's concerns about potential conflicts, it clearly illustrates them and causes the Court to question the zeal with which counsel are looking after their clients' interests as opposed to their own. Counsel quickly dropped the class in the lower-dollar state action, but decided*

141. *Id.* (emphasis added).
142. Krim v. PCorder.com, Inc., 210 F.R.D. 581, 583 (W.D. Tex. 2002).
143. *Id.* at 589.
144. *Id.*
145. *Id.* (citations omitted).

> *to stay involved in this and the New York Litigation, both potentially more lucrative.*[146]

Importantly, the *Krim* court rejected counsel's attempt to distinguish other cases on the ground that the defendant in *Krim* was solvent: "The Court rejects the notion the Defendants' solvency erases potential conflict."[147]

h. *Cardinal Health*

In re Cardinal Health, Inc. ERISA Litigation[148] involved a number of ERISA actions. The conflict issue arose in the context of a contest among various law firms and named plaintiff groups to be given leadership positions for the class. One of the firms was simultaneously representing another class of ERISA plaintiffs against a company that recently had merged with Cardinal Health, and, thus, the companies were effectively one and the same.[149] One of the firms competing for the lead role challenged the other law firm's dual representation, asserting that it presented an irreconcilable conflict of interest.[150]

The court agreed. It categorically held that "[c]ounsel cannot represent different classes of plaintiffs with conflicting claims who are seeking recovery from a common pool of assets."[151] According to this court, the test is whether "the amount sought by each proposed class could exceed the total assets of the Defendants."[152] If it does, "then 'competing claims may impair counsel's ability to vigorously pursue the interest of both classes.'"[153]

2. CASES FINDING NO CONFLICT OF INTEREST

Only a handful of courts has declined to find a conflict warranting a finding of inadequacy or requiring disqualification or withdrawal of class counsel as a condition for class certification. In *Sheftelman v. Jones*,[154] the court had "some concern" about the "potential" conflict of interest, but nonetheless concluded that the potential conflict was insufficient to "render plaintiffs' counsel inadequate."[155] The court offered two reasons for its decision. First, the court deemed the claimed conflicts too "speculative" to warrant consideration. Second, the court believed that "procedural safeguards" would protect against any conflicts

146. *Id.* (citation omitted) (emphasis added).
147. *Id.*
148. 225 F.R.D. 552 (S.D. Ohio 2005).
149. *Id.* at 556-57.
150. *Id.* at 557.
151. *Id.*
152. *Id.*
153. *Id.* (citations omitted).
154. 667 F. Supp. 859, 865 (N.D. Ga. 1987).
155. *Id.*

should they materialize.[156] The conflict was "speculative" because the other putative class action had not been certified and plaintiffs in both cases would have to secure judgments which the defendant would be unable to satisfy.[157] The "procedural safeguards" were (1) that the putative class was represented by co-counsel, (2) the court would have to approve any settlement, and (3) the court "can and will require that the notice to the class members disclose the alleged conflict."[158]

In *In re Bearingpoint, Inc. Securities Litigation*,[159] the court was similarly unpersuaded that a conflict of interest requiring denial of certification or withdrawal of class counsel existed. The court there characterized the defendants' disqualification efforts as "rest[ing] on a string of suppositions."[160] The court found it particularly significant that, in the sibling action, the defendant had been dismissed. Thus, in order for a conflict to arise by virtue of the duplicative action, the dismissal would have to be reversed and the defendant brought back into the case,[161] which was, obviously, a mere hypothetical at the time.

3. WHERE THE CASE LAW GOT IT RIGHT AND WHERE IT WENT WRONG

The cases finding a conflict based on class counsel's prosecution of sibling class actions reached the right result, but not necessarily for the right reasons, under our proposed presumption of inadequacy. *Moore* perhaps comes closest to our approach. There, the court concluded that the "mere risk of compromising professional judgment, tactics, and pursuit of the two groups' interests" was enough to warrant a finding of conflict and disqualification of class counsel.[162] While *Moore*, like most of these cases, pre-dated *Ortiz* and *Amchem*, its analysis is consistent with those cases. The salient point is that *Moore* recognized that it is better to nip a potential conflict in the bud before the case proceeds than wait for some "manifestation" of an actual conflict before finding a debilitating conflict. By that time, the damage could be done and the hope of ever reaching a resolution that would be immune from serious challenge could be lost.

Sullivan's approach also comes close to our own, though the court there seemed to rely heavily on the inability of the defendant to satisfy competing judgments. In our view, while certainly a factor weighing in favor of a finding of inadequacy, evidence concerning a defendant's ability to satisfy competing judgments should not be a necessary condition to a finding of conflict. Regardless of whether the defendant might ultimately be able to pay two judgments, class

156. *Id.*
157. *Id.*
158. *Id.*
159. 232 F.R.D. 534, 540-41 (E.D. Va. 2006).
160. *Id.* at 541.
161. *Id.*
162. Moore v. Margiotta, 581 F. Supp. 649, 653 (E.D.N.Y. 1984).

counsel will necessarily "adjust[] or compromis[e] legal tactics or arguments to accommodate both classes of plaintiffs," and this prevents class counsel from giving undivided loyalty to either class.[163] It is not just the ultimate judgment reached in the case that is relevant to the conflict analysis, but how the litigants get there. Any test that focuses exclusively (or even principally) on whether a judgment could be satisfied from a common pool of assets misses this fundamental point.[164]

For this reason, the court in *Sheftelman* got things horribly wrong. The court concluded that it could not find a conflict until one actually manifested itself at the time of judgment. The court also seemed to believe that it could fix things through "procedural safeguards."[165] By the time the conflict manifests itself, however, it is too late. Class counsel's divided loyalties are what will lead to a tainted resolution—one that will be subject to collateral attack. It is true that the court could reject a settlement or even a judgment if it finds, years later, that class counsel was conflicted. But that is cold comfort to the litigants and would result in a monumental waste of judicial—and party—resources.

Further, the court's belief that it could cure the problem by "disclos[ing] the alleged conflict" in a class notice following certification (and, presumably, before manifestation of the conflict) seems to rest on the unrealistic belief that absent class members effectively "consent" to the conflict by not opting out of the class.[166] In no way, however, can absent class members be said to "consent" to a conflict; most class members would never even see the notice.[167] It is difficult to imagine how the absent class member could meaningfully consent to conflicts, the dimensions of which might not become clear for years.

E. WHAT ABOUT CAFA?

Conspicuously absent from the discussion to this point is any mention of CAFA and its impact on sibling class actions. As we have pointed out elsewhere, CAFA has spawned a "cottage industry" of commentary,[168] and the reader can consult numerous articles and even blogs[169] for predictions about CAFA's effect

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163. *Id.*

164. Of course, in some cases, class counsel might say things in one case that make clear their objective belief that actions in that case may negatively impact the other case. Such statements would serve as further evidence of the conflict and would make it exceedingly difficult for counsel to overcome the presumption of inadequacy.

165. Sheftelman v. Jones, 667 F. Supp. 859, 865 (N.D. Ga. 1987).

166. *Id.*

167. *See* Herrmann, *supra* note 23, at 23.

168. Richard G. Stuhan & Sean P. Costello, *The Class Action Fairness Act: Enough Rope to Pull Class Action Defendants out of 'Judicial Hellholes' or Just Enough to Hang Them?*, 25 ANDREWS AUTOMOTIVE LITIG. REP. 17 (2005).

169. *See, e.g.*, CAFA Law Blog, http://www.cafalawblog.com (last visited Apr. 23, 2008) (containing articles, cases, and discussion of CAFA and developments under the statute in the two years since its passage).

on class action litigation and practice. Though CAFA does not explicitly address class conflicts, we would be remiss if we did not at least address some of the potential effects CAFA might have on sibling class actions. Unfortunately, all that we can offer at this juncture is speculation.

Arguably, CAFA could reduce the frequency of sibling class actions simply by shifting class actions into federal court and away from the "magnet" courts—most of which are state courts—favored by class action plaintiff lawyers. If CAFA reduces the number of class actions filed *overall*—and even three years in, it is too early to tell if it will—then it is reasonable to suppose that there will be a proportionate reduction in the number of sibling class actions. But CAFA really does no more than subject certain cases to federal jurisdiction; it does nothing to eliminate the practice of filing multiple actions against the same defendant. Sibling class actions can just as easily be filed in federal courts as they can in state courts. Indeed, the conflict of interest cases discussed above were all federal cases.

Equally plausible is the prediction that CAFA will make sibling class actions more prevalent. Although there is a handful of plaintiffs' class action firms with a nationwide practice, that is the exception, not the rule. Most class counsel prefer to play in their own backyards. When they file sibling class actions, they generally do so in state courts where they feel comfortable. By forcing more cases into federal court and out of their "comfort zone," CAFA could drive the "local" firms into consolidations with a national firm having the resources, scope of practice, and reputation to handle class actions in federal court. When the class action work is concentrated in fewer firms, the odds that the same firm will file multiple class actions in different courts against the same defendant increases. Cutting against this prediction is the fact that the federal system affords litigants a multidistrict litigation option, where sibling class actions could be consolidated into a single proceeding. Unless a single class action complaint is filed on behalf of a nationwide or multi-state class, however, having all class actions before a single court will not eliminate the inter-class conflict; rather, it will serve only to make the conflict more apparent to the court.

Only time will tell whether, how, and to what extent CAFA affects sibling class actions. But whatever CAFA's impact, the conflict of interest problems remain for those sibling class actions that are filed, and those problems must be addressed.

IV. CONCLUSION

Counsel, courts, and commentators largely have ignored *inter*-class conflicts. But the conflicts presented by sibling class actions are every bit as troublesome as the conflicts condemned in *Amchem* and *Ortiz*. We believe that the likelihood of compromising the lawyer's duty of loyalty to at least some of her clients is sufficiently great that it is reasonable to *presume* that lawyers bringing sibling class actions are "inadequate" within the meaning of Federal Rule of Civil

Procedure 23(g)(1)(B) and its state-law analogs.

The conflict presented by sibling class actions is *structural*. While class counsel will be afforded an opportunity to rebut the presumption as part of her efforts to establish that she meets all the prerequisites to class certification, our expectation is that, with rare exceptions, the conflict will prove insurmountable and incurable. Thus, in the usual case, the courts should either dismiss counsel in the case *sub judice* or condition a finding of "adequacy" on counsel's withdrawal from the sibling cases.