

No. 05-1111

IN THE
Supreme Court of the United States

Clara Clark et al.,
Petitioners,

v.

Wyeth, Inc.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

All agree that the Question Presented by the petition – whether and when an absent class member may collaterally challenge the adequacy of representation in a prior class action settlement – merits this Court’s review. The Court, in fact, previously granted certiorari to decide it, but divided evenly. *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (CA2 2001), aff’d by an equally divided Court, 539 U.S. 111 (2003). No intervening event has made the circuit split less significant. See Pet. 7-11. The court of appeals decided the case solely on the basis of its answer to this question, acknowledging that its answer was contrary to the Second Circuit’s decision in *Stephenson*. Pet. App. 6a.

1. Respondents principally argue that the court of appeals was mistaken in recognizing the conflict. They characterize the decision below as holding that the only limit on the right to institute a collateral attack is that an absent party may not relitigate the “very same arguments” previously considered by the settlement court (*Wyeth BIO 2*¹), and assert that the Third Circuit found that “unlike in *Stephenson*, the *very issues* that these Petitioners were attempting to raise on collateral attack” had been considered by the settlement court (*id.* 1 (emphasis in original)). Neither assertion is correct.

Contrary to respondents’ contention, the Third Circuit held that so long as the settlement court considered the general topic of adequacy of representation (which every court will do under Rule 23), every subsequent collateral attack on that question is barred. The court stated its holding unambiguously three times:

- Pet. App. 6a: “Once a court has decided that the due process protections did occur for a particular class

¹ “Wyeth BIO” refers to the Brief in Opposition for respondent Wyeth. “CC BIO” refers to the Brief in Opposition for respondent Class Counsel.

member or group of class members, the issue may not be relitigated.”

- *Id.* 7a: “[I]n *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553 (3d Cir. 1994), we further held that, where the class action court has jurisdiction over an absent member of a plaintiff class and it litigates and determines the adequacy of the representation of that member, the member is foreclosed from later relitigating that issue.”
- *Id.* 8a: “No collateral review is available when class members have had a full and fair hearing and have generally had their procedural rights protected during the approval of the Settlement Agreement.”

There is no dispute that this holding conflicts with an array of precedent in other circuits. See Pet. 7-11; Wyeth BIO 21-22.

Ignoring the Third Circuit’s repeated statement of its holding, respondents instead seize on the following sentence from the opinion below: “Collateral review is only available when class members are raising *an issue* that was not properly considered by the District Court at an earlier stage in the litigation.” Pet. App. 8a (emphasis added). Respondents maintain that the court used the term “issue” to mean the specific claim that underlies the subsequent collateral attack rather than the general issue of adequate representation. But that reading of the opinion is demonstrably wrong, as it conflicts with the court’s repeated articulation of its holding.

The court of appeals did not, and clearly could not, base its legal holding on the premise that the settling court had considered “the very issues Petitioners’ [sic] sought to raise” in this collateral challenge. Wyeth BIO 18. The settlement court was not presented with, and did not decide, *either* of the principal claims of these petitioners: (i) that the subclasses should have been defined by reference to medical conditions; and (ii) that the subclasses should have accounted for the many variations in state law. See Pet. 2-5; *infra* note 2. To the contrary, the closest the settlement court came to

considering anything like these assertions was its acceptance of the trial lawyers' general assertion that "under the settlement process that was employed, there was no intra-class trading off of benefits. That is, one benefit of the settlement did not have to be reduced in exchange for the creation or increase of another benefit." Wyeth App. 20a. But that conclusion says nothing about whether the classes were so "sprawling" as to create an inherent conflict of interests between members with materially different medical conditions and substantially different rights under the applicable law of their home states. The argument that such conflicts render the class representation inadequate as a matter of law was not considered by the settlement court. See Pet. 10-11.²

Thus, the Third Circuit held that the settlement court had sufficiently considered the same "issue" not because it found that the settling court addressed petitioners' specific medical condition and state-law arguments, but rather because the court deemed it sufficient that the settling court had decided *other* adequacy objections relating to "intra-class conflicts" that were "analogous to those in" *Amchem Products v. Windsor*, 521 U.S. 591, 625-28 (1997). Pet. App. 8a-9a. Thus, the court noted that the settling court found no "'futures' problem" in the case, and that it had inquired into

² Respondents' claim that "[t]he supposed 'sprawling' nature of the class is *not* something that was raised in the district court in these collateral attacks" (Wyeth BIO 26 (emphasis added)) is outrageous. Petitioners in the district court described this as the "heart" and the "fundamental point" of the collateral attack. See App., *infra*. Petitioners made the same arguments on appeal. *E.g.*, *Petrs' C.A. Br. 36* ("During the negotiations and at the time of certification, there was a vast disparity among the members of the [settlement] subclasses, producing conflicting interests. One aspect of the disparity arises from the different medical conditions, and differing applicable legal regimes."); *id.* at 36-38 (elaborating on the conflict).

whether “downstream opt out rights were subject to an improper trade-off.” Pet. App. 9a. But the court of appeals did not suggest that petitioners’ particular claim was considered by the settlement court, no doubt because it was not.³

2. The Third Circuit’s holding is contrary to the rule adopted by many other courts.⁴ Importantly, these decisions

³ Respondents’ further representation that the petitioners now before this Court brought a motion under Rule 60(b) and therein “made virtually the same claims they present here” (CC BIO 16) is also false. The clients of the Fleming firm did not participate in that motion, which in turn did not raise any of the claims discussed in the text. Nor did the Third Circuit rule that collateral attacks should be brought in a Motion under Fed. R. Civ. P. 60(b). Contra CC BIO 16. Wyeth correctly recognizes that the court of appeals merely “noted that Rule 60(b) * * * provided a proper vehicle for raising the latency question [*i.e.*, the claim that fen-phen related diseases emerge well after ceasing use of the drugs] if there were newly discovered evidence which would justify relief from the judgment.” Wyeth BIO 16. A collateral attack, by contrast, does not seek to invalidate the judgment; rather, it seeks a determination that the particular party now raising the objection is not bound.

⁴ See cases cited at Pet. 15-16; see also *VMS Ltd. P’ship Sec. Litig.*, 976 F.2d 362, 369 (CA7 1992) (foreclosing direct appeal for unnamed class members on adequacy of representation while noting that “collateral avenues of relief remain open”); *McNeil v. Guthrie*, 945 F.2d 1163, 1167 (CA10 1991) (class members may pursue a “collateral suit” to challenge the adequacy of representation); *Garcia v. Bd. of Educ.*, 573 F.2d 676, 679 (CA10 1978) (same); *Guthrie v. Evans*, 815 F.2d 626, 628 (CA11 1987) (denying unnamed class member’s direct appeal, while holding that class members can pursue relief in a collateral proceeding when the class representative inadequately represents the class); *EEOC v. Fed. Reserve Bank*, 698 F.2d 633, 674 (CA4 1983) (“[I]f the individual class member or his sub-class were not adequately represented, due process is violated and res judicata will not attach.”), rev’d on other grounds, 467 U.S. 867 (1984); *Taylor v. Liberty Nat. Life Ins. Co.*, 462 So. 2d 907, 910 (Ala. 1994)

conflict even with the rule respondents wrongly assert the Third Circuit applied in this case, for none imposes *any* restriction on an absent class member's right to collaterally challenge the adequacy of representation in a prior suit.

Respondents limit their argument to an unavailing attempt to demonstrate that, contrary to the court of appeals' own conclusions below, Pet. App. 6a, the Third Circuit's rule is consistent with the law of the Second Circuit. Respondents quote *Wolfert v. Transamerica Home First, Inc.*, 439 F.3d 165 (CA2 2006), as supposedly holding that a collateral attack is barred if in the settlement proceedings "an objector to the settlement had made a serious argument that

(rejecting claim that prior consent decree not subject to collateral due process challenge, noting that "the court conducting the [class action] cannot predetermine the 'res judicata' effect of the judgment; this can only be tested in a subsequent action") (quoting Fed. R. Civ. P. 23, Advisory Committee's Note); *Ferguson v. State Dep't of Corr.*, 816 P.2d 134, 138 (Alaska 1991) ("It has generally been held that a collateral attack on a class action judgment by unnamed members of the class is impermissible when the class members were adequately represented.") (citation omitted); *Haberman v. Lisle*, 884 S.W.2d 262, 263 (Ark. 1994) ("an unsatisfied class member is not without alternatives" and may "collaterally attack the settlement approval by filing a separate suit challenging the adequacy of the class representation"); *Stone v. Pirelli Armstrong Tire Corp.*, 497 N.W.2d 843, 847 (Iowa 1993) (in the absence of adequate representation, "any settlement or judgment is vulnerable to collateral attack"); *City of Excelsior Springs v. Elms Redevelopment Corp.*, 18 S.W.3d 53, 61 (Mo. Ct. App. 2000) (permitting a collateral attack for inadequate representation on the ground that "[v]iolating litigants' due process rights results in a void judgment"); *Hutchins v. Smith*, 538 P.2d 610, 614 (Okla. Ct. App. 1975) (holding that "the interests of absent members were inadequately represented and the judgment entered in that purported class action is void"); *San Juan 1990-A, L.P. v. Meridian Oil Inc.*, 951 S.W.2d 159, 163 (Tex. App. 1997) (class members can "file their own collateral suit to establish that their interests were not adequately represented").

[representation of class interests had been inadequate], and that argument had been considered and rejected by the class action court.” CC BIO 26 (quoting 439 F.3d at 172) (alteration in BIO). Cf. Wyeth BIO 21 (quoting *Wolfert* with still other significant alterations). That is not an accurate characterization, as the bracketed insert and accompanying omission by respondents reverse the court’s actual holding. The Second Circuit did not hold that so long as a settlement court considers whether “representation of class interests had been inadequate” the right to institute a collateral attack was extinguished (contra CC BIO 26); it held the opposite, permitting a collateral attack because the precise issue raised by the plaintiff had not been considered by the settlement court.⁵ *Wolfert* thus conflicts directly with the Third Circuit’s

⁵ The quoted passage provides, in full:

In the class action context, if the class action court ruled only in general terms that representation was adequate, without any adversarial consideration of *the claim now advanced by Mrs. Wolfert that New York law affords her substantial rights beyond those afforded by California law*, it would be manifestly unfair to preclude her collateral attack. On the other hand, if, in the class action, a defendant opposing class certification or an objector to the settlement had made a serious argument *that a sub-class was required because of claims substantially similar to hers*, and that argument had been considered and rejected by the class action court, it would not be unfair to preclude collateral review of that ruling and relegate Mrs. Wolfert to her direct review remedies. It would not be a denial of due process to give full faith and credit to the class action court’s ruling on adequacy of representation unless that ruling was made in the absence of an adversarial presentation of the claim that interests substantially similar to those of Mrs. Wolfert’s required the designation of a sub-class. *However, no such adversarial presentation occurred with respect to her claim that New York law affords her materially more rights than those available under California law. Although the class action court*

decision in this case, which held by contrast that collateral attacks are forbidden with the sole exception of cases in which the settlement court did not consider the general “issue” of adequacy of representation.⁶

In any event, even under respondents’ reading of Second Circuit precedent, the circuits are badly divided, with some holding that no substantive collateral challenges are permitted, others holding that *some* collateral challenges are permitted, and still others holding that *all* collateral challenges are reviewable. See *supra* at 4 n.4. The conflict and uncertainty that led this Court to grant certiorari in *Stephenson* has only expanded in the years since, making certiorari all the more pressing in this case.

3. Respondents’ remaining arguments against certiorari are either legally erroneous or rest on false representations of fact. More important, they are all entirely beside the point of the question presented in the petition. They assert alternative grounds for affirmance that may be litigated before the lower

considered and rejected, at the class certification stage, Transamerica’s contention that the contract’s choice of law provision specifying New York law should be followed, no one made any claim concerning the content of New York law.

439 F.3d at 172 (emphases added).

⁶ Respondents assert that *Stephenson* would bar a collateral challenge if the specific objection had been decided by the settlement court. But that misreads *Stephenson*, whose holding went far beyond challenges involving objections not considered by the settlement court, 273 F.3d at 258, as the question on which this Court granted certiorari in *Stephenson* recognized. See Pet. in No. 02-271 at i. In any event, even if respondents’ reading of *Stephenson* were correct, the Third Circuit applied a different rule in this case, finding petitioners’ collateral challenge barred even though the settlement court did not consider petitioners’ specific objections.

courts after this Court resolves the important question upon which the Third Circuit based its decision.

(a) Respondents err in contending that “these Petitioners do not have live claims.” CC BIO 1. To be sure, certain petitioners have withdrawn from the petition. There are no longer parties before this Court who argued below that the settlement negotiations should have included a party suffering from “PH” or who claim that they are not bound by the settlement on the sole ground that they did not develop any injuries until after the settlement was entered. But those claims were incidental to the petition, which did not even address their merits.⁷

But the remaining petitioners are the individuals who raised the petition’s principal claims: those of intra-class conflicts discussed *supra* at 2-4. It is undisputed that two named petitioners, Clara Clark and Linda Smart, previously took fen phen and contend that they were not adequately represented by the settlement. Neither of the lower courts doubted their right to bring such a claim.⁸ Equally important,

⁷ Petitioners pause to note as well that respondents misdescribe the circumstances of the withdrawal in order to cast false doubt on the petition’s merits. After the petition was filed, all of the clients of the Napoli and Hariton firms *settled* their claims against Wyeth, and they manifestly did receive substantial “financial consideration” (CC BIO 17) for doing so. The withdrawal of the petition was an important part of the much larger process of settling those cases. The only “recognition” of “weakness” of the petition is that it would be *moot* as to those plaintiffs. *Contra ibid.*

⁸ Respondents’ assertion that these petitioners do not maintain “that they were not at all times represented by individual counsel who in turn and on their behalf challenged the terms of the settlement from day one” (CC BIO 20) is again false. Petitioners were not objectors at the time of the settlement. Further, as a matter of law, the resolution of claims against third parties does not bind them. This Court has already rejected the claim that *res judicata* attached because of the facts that the plaintiffs were “aware of the earlier * * * litigation and that one of the * * * lawyers [in the previous case]

the parties are not merely petitioners Clark and Smart, but all of the clients of the Fleming law firm, who were parties in both of the lower courts (Wyeth BIO ii) and remain “parties in this Court” (Pet. ii).⁹

(b) Respondents next dispute that there were, in fact, intra-class conflicts in the negotiation of this settlement. See CC BIO 7-8. That question, of course, goes to the merits of petitioners’ substantive claims, which the court of appeals did not reach. In any event, respondents’ assertions rest on the conclusions made by the settlement court without the basis of the adversarial presentation by counsel appointed for the necessary subclasses. As discussed previously, the intra-class

also represented the [current] plaintiffs.” *South Central Bell Tel. Co. v. Alabama*, 526 U.S. 160, 168 (1999). See also *Baker by Thomas v. GMC*, 522 U.S. 222, 238 & n.11 (1998); *Ramey v. Rockefeller*, 348 F. Supp. 780, 785 (E.D.N.Y. 1972) (Friendly, J.).

⁹ Respondents claim that petitioners “intimate” that they are “class representatives” (CC BIO 18) or that the law firms appear “as the real parties in interest” (*ibid.*). In fact, the petition simply uses the pleading convention used throughout the fen phen litigation and uniformly accepted by the district court and court of appeals, both of which fully understood that the firm’s clients, not its lawyers, were the parties in interest. See, *e.g.*, Pet. App. 1a; cf. also, *e.g.*, *Michigan High School Athl. Ass’n, Inc. on Behalf of Itself and Its Members v. Communities for Equity*, 125 S. Ct. 1973 (2005). This approach is essential because the Fleming firm has thousands of clients in the same position as the named petitioners, all of whom seek the benefit of a ruling in this proceeding and conversely who must be bound in order to ensure finality on the question. Respondents’ new contention (which, again, has never been accepted in the fen phen litigation) would have required endless captions, notices of appeal, and briefs identifying all of the clients. If respondents had any genuine confusion about the parties involved, they could and would have requested that the district court require greater specificity, but they did not.

conflicts in the negotiation of this settlement were extensive. See also Pet. 3-5.¹⁰

4. Class counsel's only defense of the merits of the court of appeals' decision is to contend that the case is controlled by *Devlin v. Scardelletti*, 536 U.S. 1 (2002), which they chastise petitioners' counsel for not citing. CC BIO 22-23. Petitioners did not cite *Devlin* for presumably the same reason it was not cited by the court of appeals or Wyeth either – it is not relevant to the question presented. *Devlin* holds that class action objectors may appeal from the denial of their objections, a holding that does not illuminate this case. *Devlin* does not purport to hold, contrary to *Hansberry v. Lee*, 311 U.S. 32 (1940), that class members are bound by a settlement even if they were inadequately represented, as is alleged to have occurred here.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

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¹⁰ Respondents contend that “the class of FenPhen users uniformly had the same interest in obtaining a prompt medical evaluation.” CC BIO 5. That ignores that the evaluations revealed that individuals had diverse medical conditions calling for conflicting allocation of the funds available for a settlement, yet the subclasses inexplicably were not defined by reference to those conditions. See Pet. 3-5.

