

## NEWS & INSIGHTS

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### CAN THE PLAINTIFF ADEQUATELY REPRESENT THE INTERESTS OF ALL THE ABSENT CLASS MEMBERS?

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The adequacy requirement imposed by Rule 23(a)(4) is often among the easiest for a representative plaintiff to meet (along with numerosity). Absent a serious credibility problem or a defense that is unique to the proposed representative, as long as class counsel appears reasonably competent, the adequacy requirement sets a low bar. Adequacy can be an insurmountable obstacle to certification, however, when members of the putative class have different interests or are in different positions.

In *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), the United States Supreme Court addressed the requirement in the context of a proposed global settlement of asbestos-related claims. The complaint identified nine lead plaintiffs, along with their families, as representatives of a class comprised of all persons who had not yet filed suit against the asbestos manufacturer defendants, but who had either been exposed to or had a family member who had been exposed to their asbestos products. No subclasses were proposed even though some of the named plaintiffs or their family members had suffered physical injuries from their exposure to asbestos, while others had not.

The Supreme Court agreed with the Third Circuit that “serious intra-class conflicts preclude[d] th[e] class from meeting the adequacy of representation requirement.” Of most concern, the class representatives could not protect the discrete interests of both currently-afflicted and exposure-only class members. For the former group, “the critical goal is generous immediate payments,” while the latter group’s interest would focus on “ensuring an ample, inflation-protected fund for the future.” Further, the proposed settlement allocated the recovery among different kinds of plaintiffs, decisions that, as the Third Circuit observed, “necessarily favor some claimants over others.” In short, while the members of the class are “united in seeking the maximum possible recovery for their asbestos-related claims,” the class representatives could not possibly adequately represent the interests of this “enormous class.”

Based on *Amchem*, in evaluating the adequacy requirement, product manufacturers should be on the lookout for issues as to which the interests of the putative class members may not be aligned.