

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT

3  
4 August Term 2006

5  
6 (Argued: March 7, 2007 Decided: August 17, 2011)

7  
8 Docket Nos. 05-5943-cv(L); 06-0223(CON)

9 -----x  
10 IN RE: LITERARY WORKS IN ELECTRONIC DATABASES  
11 COPYRIGHT LITIGATION

12  
13 -----  
14  
15 IRVIN MUCHNICK, ABRAHAM ZALEZNIK, CHARLES SCHWARTZ,  
16 JACK SANDS, TODD PITOCK, JUDITH STACEY, JUDITH  
17 TROTSKY, CHRISTOPHER GOODRICH, KATHY GLICKEN AND  
18 ANITA BARTHOLOMEW,

19  
20 Objectors-Appellants,

21  
22 -- v. --

23  
24 THOMSON CORPORATION, DIALOG CORPORATION, GALE GROUP,  
25 INC., WEST PUBLISHING COMPANY, INC., DOW JONES &  
26 COMPANY, INC., DOW JONES REUTERS BUSINESS  
27 INTERACTIVE, LLC, KNIGHT RIDDER INC., KNIGHT RIDDER  
28 DIGITAL, MEDIASTREAM, INC., NEWSBANK, INC., PROQUEST  
29 COMPANY, REED ELSEVIER INC., UNION-TRIBUNE PUBLISHING  
30 COMPANY, NEW YORK TIMES COMPANY, COPLEY PRESS, INC.,  
31 EBSCO INDUSTRIES, INC. AND PARTICIPATING PUBLISHER  
32 TRIBUNE COMPANY,

33  
34 Defendants-Appellees,

35  
36 MICHAEL CASTLEMAN INC., E.L. DOCTOROW, TOM DUNKEL,  
37 ANDREA DWORKIN, JAY FELDMAN, JAMES GLEICK, RONALD  
38 HAYMAN, ROBERT LACEY, RUTH LANEY, PAULA MCDONALD, P/K  
39 ASSOCIATES, INC., LETTY COTTIN POGREBIN, GERALD  
40 POSNER, MIRIAM RAFTERY, RONALD M. SCHWARTZ, MARY  
41 SHERMAN, DONALD SPOTO, ROBERT E. TREUHAFT AND JESSICA  
42 L. TREUHAFT TRUST, ROBIN VAUGHAN, ROBLEY WILSON,  
43 MARIE WINN, NATIONAL WRITERS UNION, THE AUTHORS  
44 GUILD, INC. AND AMERICAN SOCIETY OF JOURNALISTS AND

1     AUTHORS,

2  
3             Plaintiffs-Appellees,

4  
5     EDWARD ROEDER,

6  
7             Appellant.

8  
9     -----x

10  
11    B e f o r e :   WINTER, WALKER, and STRAUB, Circuit Judges.

12             Plaintiffs in this consolidated class action allege  
13     copyright infringements arising from defendant publishers'  
14     unauthorized electronic reproduction of plaintiff authors'  
15     written works. The United States District Court for the Southern  
16     District of New York (George B. Daniels, Judge) certified a class  
17     for settlement purposes and approved a settlement agreement  
18     ("Settlement") over the objection of ten class members  
19     ("objectors"). In this appeal, objectors challenge the propriety  
20     of the Settlement's release provision, the certification of the  
21     class, and the process by which the district court reached its  
22     decisions. Although we reject objectors' arguments regarding the  
23     release, we conclude that the district court abused its  
24     discretion in certifying the class and approving the Settlement,  
25     because the named plaintiffs failed to adequately represent the  
26     interests of all class members. We do not reach the procedural  
27     challenges, which are moot in light of our class certification  
28     holding. We therefore VACATE the district court's order and  
29     judgment and REMAND for further proceedings consistent with this  
30     opinion.

1 Judge STRAUB dissents in part and concurs in part in a  
2 separate opinion.

3 CHARLES D. CHALMERS, Fairfax,  
4 CA, for Objectors-Appellants.

5  
6 CHARLES S. SIMS, Proskauer  
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10 LLP; Kenneth Richieri, George  
11 Freeman, The New York Times  
12 Company, New York, NY; Henry  
13 B. Gutman, Simpson Thatcher &  
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17 York, NY; Jack Weiss, Gibson  
18 Dunn & Crutcher LLP, New York,  
19 NY; Juli Wilson Marshall,  
20 Latham & Watkins, Chicago, IL;  
21 Ian Ballon, Greenberg Traurig  
22 LLP, Santa Monica, CA; Michael  
23 Denniston, Bradley, Arant,  
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25 AL; Christopher M. Graham,  
26 Levett Rockwood P.C.,  
27 Westport, CT; Raymond  
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30 brief), for Defendants-  
31 Appellees.

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33 MICHAEL J. BONI, Kohn Swift &  
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36 & Graf, P.C.; Diane S. Rice,  
37 Hosie McArthur LLP, San  
38 Francisco, CA; A.J. De  
39 Bartolomeo, Girard Gibbs & De  
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41 CA; Gary Fergus, Fergus, A Law  
42 Firm, San Francisco, CA, on  
43 the brief), for Plaintiffs-  
44 Appellees.

1 JOHN M. WALKER, JR., Circuit Judge:

2 Plaintiffs in this consolidated class action allege  
3 copyright infringements arising from defendant publishers'  
4 unauthorized electronic reproductions of plaintiff authors'  
5 written works. The United States District Court for the Southern  
6 District of New York (George B. Daniels, Judge) certified the  
7 class for settlement purposes and approved a settlement agreement  
8 ("Settlement") over the objection of ten class members  
9 ("objectors"). In this appeal, objectors contend that  
10 (1) approval of the Settlement was impermissible because it  
11 released claims beyond the factual predicate of the case,  
12 (2) class certification was improper because subgroups within the  
13 class have conflicting interests, and (3) the district court  
14 committed procedural errors in certifying the class and approving  
15 the Settlement. Although we reject objectors' arguments  
16 regarding the release, we conclude that the district court abused  
17 its discretion in certifying the class and approving the  
18 Settlement, because the named plaintiffs failed to adequately  
19 represent the interests of all class members. We do not reach  
20 the procedural challenges, which are moot in light of our class  
21 certification holding.

22 We therefore vacate the district court's order certifying  
23 the class and approving the Settlement, and remand for further  
24 proceedings consistent with this opinion.

1 **BACKGROUND**

2 **I. Factual Background**

3 Plaintiffs are freelance authors ("authors") who sold  
4 written works to print publishers for publication in newspapers,  
5 magazines, and other periodicals. With the rise of the Internet,  
6 print publishers like The New York Times began to reproduce  
7 authors' works electronically by placing them in their own online  
8 databases and licensing them to appear in electronic databases  
9 such as LexisNexis. In response, authors sued the original print  
10 and subsequent electronic publishers, alleging in three  
11 independent class actions that the unauthorized electronic  
12 publication of their works infringed upon their copyrights.

13 In June 2001, the Supreme Court endorsed authors' theory of  
14 liability, holding in another case that publishers violate the  
15 Copyright Act when they reproduce freelance works electronically  
16 without first securing the copyright owners' permission. N.Y.  
17 Times Co. v. Tasini, 533 U.S. 483, 488 (2001). Authors' three  
18 lawsuits, which had been suspended pending Tasini, were  
19 consolidated and coordinated with a fourth action in the Southern  
20 District of New York. The consolidated class action is brought  
21 by 21 named plaintiffs - each of whom owns at least one copyright  
22 in a freelance article - and three associational plaintiffs: the  
23 National Writers Union, The Authors Guild, Inc., and the American  
24 Society of Journalists and Authors. Defendants include  
25 electronic database operators such as Reed Elsevier Inc. (owner

1 of LexisNexis) and Thomas Corporation (owner of Westlaw), as well  
2 as newspaper publishers that maintain their own archival  
3 databases, such as The New York Times Company and Dow Jones Inc.  
4 (collectively "publishers"). The district court referred the  
5 parties to mediation, which began in January 2002. In March  
6 2005, with the assistance of mediators Kenneth Feinberg and Peter  
7 Woodin, authors and publishers reached a comprehensive settlement  
8 agreement.<sup>1</sup>

9 The Settlement divides the works at issue ("Subject Works")  
10 into three categories: A, B, and C. Category A covers works  
11 that authors registered with the U.S. Copyright Office in time to  
12 be eligible for statutory damages and attorney's fees under the  
13 Copyright Act. See 17 U.S.C. § 412. At the time of the  
14 Settlement, registration cost \$30 per work or \$30 per group  
15 registration covering multiple periodical contributions by one  
16 individual over a 12-month period.<sup>2</sup> Category B includes works  
17 that authors registered before December 31, 2002, but too late to  
18 be eligible for statutory damages. These claims are eligible to  
19 recover only actual damages suffered by the author and any

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<sup>1</sup> In addition to the named defendants, non-party newspaper and magazine publishers like the Tribune Company and Time Inc. participated in the mediation, because they had provided content to - and promised to indemnify - electronic publisher defendants. Thirty-six such non-party publishers ultimately signed onto the Settlement.

<sup>2</sup> Fees at this level were in place from 1999 through 2006. See 64 Fed. Reg. 29,518, 29,520 (June 1, 1999) (setting fees); 71 Fed. Reg. 31,089, 31,091 (June 1, 2006) (raising fees).

1 profits of the infringer that are not duplicative of the actual  
2 damages. 17 U.S.C. § 504(b). All other claims fall into  
3 Category C and cannot be litigated for damages purposes unless  
4 they are registered with the Copyright Office. 17 U.S.C.  
5 § 411(a). If registered, however, these claims - like those in  
6 Category B - would be eligible for awards based on authors'  
7 actual damages and infringers' profits. Category C claims  
8 comprise more than 99% of authors' total claims. Many authors  
9 hold claims in more than one category, each claim based on a  
10 separate freelance article they sold for publication.

11 The Settlement creates a damages formula for each category.  
12 Authors holding Category A claims are paid "\$1,500 for the first  
13 fifteen Subject Works written for any one publisher; \$1,200 for  
14 the second fifteen Subject Works written for that publisher; and  
15 \$875 for all Subject Works written for that publisher after the  
16 first thirty Subject Works." Authors of Category B works are  
17 paid "the greater of \$150 or 12.5% of the original sale price of  
18 the Subject Work." For each Category C claim, authors are paid  
19 "[t]he greater of \$5 or 10% of the original price of the Subject  
20 Work," except for works sold for amounts over \$249. Compensation  
21 for any Category C work sold for more than \$249 depends on the  
22 amount for which it was originally sold: \$25 per Subject Work  
23 sold for \$250 to \$999; \$40 per Subject Work sold for \$1,000 to  
24 \$1,999; \$50 per Subject Work sold for \$2,000 to \$2,999; and \$60  
25 per Subject Work sold for \$3,000 or more.

1           The Settlement caps publishers' total liability through a  
2 provision that the parties refer to as the "C reduction." If the  
3 total of all claims - plus the cost of notice, administration,  
4 and attorney's fees - exceeds \$18 million, then the Settlement  
5 reduces compensation for Category C claims pro rata until the  
6 total compensation is \$18 million. If compensation for Category  
7 C claims reaches zero but the claims and fees still exceed \$18  
8 million, then the Settlement reduces compensation for Category A  
9 and B claims pro rata until the claims and fees total hits the  
10 \$18 million limit.

11           The Settlement releases publishers from further litigation.  
12 The release prohibits authors from barring publishers' future use  
13 of the Subject Works, including the selling or licensing of the  
14 works to third-party sublicensees. A class member may choose to  
15 opt out of the release for future use and only grant a release  
16 for past use; however, any authors who fail to affirmatively opt  
17 out of the future-use release will be deemed to have granted it.  
18 Authors who only grant a past-use release receive 65% of the  
19 compensation that those who grant past and future releases  
20 receive.

## 21

## 22 **II. Procedural Posture**

23           In March 2005, upon reaching the Settlement, authors and

1 publishers moved the district court to certify the class<sup>3</sup> for  
2 settlement purposes and approve the Settlement. Objectors  
3 opposed the motion. In September 2005, after rejecting  
4 objectors' arguments, the district court certified the class and  
5 approved the Settlement as fair, reasonable, and adequate.

6 In October 2005, objectors appealed that order and judgment  
7 on numerous grounds. Over a dissenting opinion, In re Literary  
8 Works in Electr. Databases Copyright Litig., 509 F.3d 116, 128  
9 (2d Cir. 2007) (Walker, J., dissenting), a majority of this panel  
10 concluded sua sponte that the registration requirement imposed by  
11 Section 411(a) of the Copyright Act is jurisdictional, and that  
12 the district court lacked subject-matter jurisdiction to approve  
13 the settlement of claims for the infringement of unregistered  
14 copyrights. Id. at 121-22. Authors and publishers joined in  
15 asking the Supreme Court to review that decision.

16 The Supreme Court issued a writ of certiorari and, in March  
17 2010, reversed the judgment of this court, holding that the  
18 district court had jurisdiction over the Settlement because

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<sup>3</sup> The class is defined as "All persons who, individually or jointly, own a copyright under the United States copyright laws in an English language literary work that has been reproduced, displayed, adapted, licensed, sold and/or distributed in any electronic or digital format, without the person's express authorization by a member of the Defense Group or any member's subsidiaries, affiliates, or licensees (a) at any time on or after August 15, 1997 (regardless of when the work first appeared in an electronic database) or (b) that remained in circulation after August 15, 1997, even if licensed prior thereto, including English language works qualifying for U.S. copyright protection under an international treaty (hereinafter 'Subject Work')."

1 Section 411(a) imposes only a nonjurisdictional precondition to  
2 filing a claim. Reed Elsevier, Inc. v. Muchnick, 130 S. Ct.  
3 1237, 1247 (2010). On remand, we ordered the parties to file  
4 letter briefs addressing any supplemental authority relevant to  
5 the merits, to which we now turn.

## 6 DISCUSSION

7 Objectors appeal several aspects of the district court's  
8 decision. They argue (1) that the Settlement impermissibly  
9 releases claims beyond the factual predicate of the case;  
10 (2) that class certification was improper because subgroups  
11 within the class have conflicting interests; and (3) that the  
12 district court erred procedurally in reaching its decision.  
13 Although we reject the objections to the release provision, we  
14 agree with objectors that not all class members were adequately  
15 represented. We decline to reach the procedural issues, which  
16 are moot in light of our class certification holding.

### 17 I. Release of Claims

18 The Settlement prohibits claimants from barring future use  
19 of the Subject Works, including the selling and licensing of the  
20 works to third parties, unless the class member either opts out  
21 of the Settlement altogether or exercises his right to bar future  
22 use. Objectors assert that this "'irrevocable, worldwide, and  
23 continuing' license" impermissibly releases claims that are not  
24 based on the same factual predicate underlying the claims in this  
25 class action.

1           "Plaintiffs in a class action may release claims that were  
2 or could have been pled in exchange for settlement relief." Wal-  
3 Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 106 (2d Cir.  
4 2005). Parties often reach broad settlement agreements  
5 encompassing claims not presented in the complaint in order to  
6 achieve comprehensive settlement of class actions, particularly  
7 when a defendant's ability to limit his future liability is an  
8 important factor in his willingness to settle. See id.; see also  
9 TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456, 460 (2d  
10 Cir. 1982). Any released claims not presented directly in the  
11 complaint, however, must be "based on the identical factual  
12 predicate as that underlying the claims in the settled class  
13 action." TBK Partners, 675 F.2d at 460.

14           Objectors argue that releasing future claims arising from  
15 licensing the Subject Works to third-party sublicensees is  
16 impermissible in two ways. First, future infringements are  
17 distinct harms giving rise to independent claims of relief, with  
18 factual predicates that are different from authors' past  
19 infringement claims. Second, future claims may be against a  
20 sublicensee who is not a party to the Settlement, which means  
21 that infringement could not be grounded in the factual predicate  
22 of this case. We find both of these arguments unavailing because  
23 future use of the Subject Works, whether by publishers or by  
24 sublicensees, falls squarely within the factual predicate

1 underlying authors' claims.<sup>4</sup>

2 Objectors' first argument fails to recognize that the  
3 consolidated complaint seeks injunctive relief for future uses,  
4 and therefore contemplates these alleged future injuries. Put  
5 another way, a trial of this case would determine whether it is  
6 permissible for publishers to continue to sell and license the  
7 works. See Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch., 660  
8 F.2d 9, 17-18 (2d Cir. 1981) (assessing permissibility of release  
9 by looking to possible remedies if that case had proceeded to  
10 trial). Accordingly, regardless of whether future infringements  
11 would be considered independent injuries, the Settlement's  
12 release of claims regarding future infringements is not  
13 improper.<sup>5</sup> See, e.g., Uhl v. Thoroughbred Tech. & Telecomms.,  
14 Inc., 309 F.3d 978, 982, 984-85 (7th Cir. 2002) (permitting  
15 settlement that required all class members to provide an easement  
16 in resolving trespass action).

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<sup>4</sup> In their post-argument letter briefs, the parties raise new arguments regarding a 25-year-old Supreme Court case, Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986). Because these arguments were not raised in a timely fashion, we deem them waived. In re Nortel Networks Corp. Sec. Litig., 539 F.3d 129, 132-34 (2d Cir. 2008).

<sup>5</sup> We find Davis v. Blige, 505 F.3d 90 (2d Cir. 2007), cited by objectors, inapposite. That case presents an altogether different issue: "whether one joint owner of a copyright can retroactively transfer his ownership by a written instrument, and thereby cut off the accrued rights of the other owner to sue for infringement," id. at 97. As this case does not involve co-owners who are not parties to the settlement agreement, Davis does not address the issue before the court.

1           Objectors' second argument - that the Settlement  
2 impermissibly releases claims against persons and entities not  
3 involved in this case - takes an overly narrow view of the  
4 factual predicate of authors' claims. The consolidated complaint  
5 alleges that publishers electronically displayed, sold, and  
6 distributed the Subject Works. In response, publishers have  
7 maintained that the rights that the print publishers purchased  
8 from authors include the rights to maintain their issues online  
9 and to sublicense those issues to third-party databases. Apart  
10 from their argument, rejected in Tasini, that this right exists  
11 pursuant to Section 201(c) of the Copyright Act, publishers  
12 argued throughout the settlement process that freelance  
13 contributors - who knew that the print publications for which  
14 they wrote published their content online and delivered it to  
15 database publishers - granted implied licenses for such  
16 electronic distribution. Trial of this case would thus determine  
17 the rights of third parties to obtain sublicenses. We therefore  
18 conclude that the Settlement's release pertaining to future uses  
19 by publishers and their sublicensees was permissible.

## 20   **II. Adequacy of Representation**

21           The party seeking to certify a class bears the burden of  
22 satisfying Rule 23(a)'s four threshold requirements:

23       (1) numerosity ("the class is so numerous that joinder of all  
24 members is impracticable"), (2) commonality ("there are questions

1 of law or fact common to the class"), (3) typicality ("the claims  
2 or defenses of the representative parties are typical of the  
3 claims or defenses of the class"), and (4) adequacy of  
4 representation ("the representative parties will fairly and  
5 adequately protect the interests of the class"). Fed. R. Civ. P.  
6 23(a). The district court must also find that the action can be  
7 maintained under Rule 23(b)(1), (2), or (3). Before approving a  
8 class action settlement, the district court must assess its  
9 substance and conclude that it is "fair, reasonable, and  
10 adequate." Fed. R. Civ. P. 23(e)(2). The district court did so  
11 here, approving a settlement-only class under Rule 23(b)(3) after  
12 concluding that common questions predominate over individual ones  
13 and that a class action is superior to other methods of  
14 adjudicating the matter.

15 We review a district court's decision to certify a class for  
16 abuse of discretion. Joel A. v. Giuliani, 218 F.3d 132, 139 (2d  
17 Cir. 2000). A district court "'abuses' or 'exceeds' its  
18 discretion when (1) its decision rests on an error of law (such  
19 as application of the wrong legal principle) or a clearly  
20 erroneous factual finding, or (2) its decision - though not  
21 necessarily the product of a legal error or a clearly erroneous  
22 factual finding - cannot be located within the range of  
23 permissible decisions." In re Holocaust Victim Assets Litig.,  
24 424 F.3d 158, 165 (2d Cir. 2005) (quoting Zervos v. Verizon N.Y.,

1 Inc., 252 F.3d 163, 169 (2d Cir. 2001)). When a court is asked  
2 to certify a class and approve its settlement in one proceeding,  
3 the Rule 23(a) requirements designed to protect absent class  
4 members "demand undiluted, even heightened, attention." Amchem  
5 Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997).

6 Objectors argue that the Settlement contravenes Rule  
7 23(a)(4) because the named plaintiffs failed to adequately  
8 represent the interests of class members who hold only Category C  
9 claims ("Category C-only plaintiffs"). "The adequacy inquiry  
10 under Rule 23(a)(4) serves to uncover conflicts of interest  
11 between named parties and the class they seek to represent."  
12 Amchem, 521 U.S. at 625. To satisfy Rule 23(a)(4), the named  
13 plaintiffs must "possess the same interest[s] and suffer the same  
14 injur[ies] as the class members." Id. at 625-26 (quoting E. Tex.  
15 Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977))  
16 (internal quotation marks omitted). "Adequacy is twofold: the  
17 proposed class representative must have an interest in vigorously  
18 pursuing the claims of the class, and must have no interests  
19 antagonistic to the interests of other class members." Denney v.  
20 Deutsche Bank AG, 443 F.3d 253, 268 (2d Cir. 2006). Not every  
21 conflict among subgroups of a class will prevent class  
22 certification - the conflict must be "fundamental" to violate  
23 Rule 23(a)(4). See In re Flag Telecom Holdings, Ltd. Sec.  
24 Litig., 574 F.3d 29, 35 (2d Cir. 2009). Where such a conflict

1 does exist, it can be cured by dividing the class into separate  
2 "homogeneous subclasses . . . with separate representation to  
3 eliminate conflicting interests of counsel." Ortiz v. Fibreboard  
4 Corp., 527 U.S. 815, 856 (1999); see also Fed. R. Civ. P.  
5 23(c)(5) ("When appropriate, a class may be divided into  
6 subclasses that are each treated as a class under this rule.").

7 According to objectors, there was such a conflict here: the  
8 named plaintiffs, who hold combinations of all three categories  
9 of claims, favored the fewer and more lucrative Category A and B  
10 claims over the Category C claims. A subclass of plaintiffs  
11 owning unregistered claims should therefore have been carved out  
12 of the class, objectors argue. Publishers and authors vigorously  
13 defend the Settlement and the adequacy of named plaintiffs'  
14 representation.

15 A.

16 We begin our analysis by turning to a pair of Supreme Court  
17 decisions that set the contours of the adequacy of representation  
18 inquiry in the settlement-class context. In Amchem Products,  
19 Inc. v. Windsor, 521 U.S. 591 (1997), the Supreme Court affirmed  
20 the Third Circuit's decision to vacate a class certification  
21 intended "to achieve global settlement of current and future  
22 asbestos-related claims." Id. at 597. The proposed settlement-  
23 only class encompassed hundreds of thousands, and possibly even  
24 millions, of individuals who had been exposed to asbestos

1 products manufactured by any of 20 companies. Id. Objectors to  
2 the settlement opposed the aggregation into a single class of  
3 both class members who had already manifested asbestos-related  
4 injuries and those who had been exposed to asbestos but had not  
5 yet shown signs of injury. Id. at 607-08. The Court agreed that  
6 "the interests of those within the single class" were "not  
7 aligned": holders of present claims were interested in "generous  
8 immediate payments," whereas holders of future claims sought to  
9 ensure "an ample, inflation-protected fund for the future." Id.  
10 at 626.

11 The two subgroups in Amchem had competing interests in the  
12 distribution of a settlement whose terms reflected "essential  
13 allocation decisions designed to confine compensation and to  
14 limit defendants' liability." Id. at 627. Some of those  
15 allocation decisions - for example, to cap the annual number of  
16 opt-outs, and not to adjust for inflation - disadvantaged  
17 exposure-only plaintiffs. Although the named parties all  
18 "alleged a range of complaints," none exclusively advanced the  
19 particular interests of either subgroup; "each served generally  
20 as representative for the whole, not for a separate  
21 constituency." Id. That flaw, in light of the conflict, was  
22 fatal to class certification. Even if the class representatives  
23 "thought that the Settlement serves the aggregate interests of  
24 the entire class[,] . . . the adversity among subgroups requires

1 that the members of each subgroup cannot be bound to a settlement  
2 except by consents given by those who understand that their role  
3 is to represent solely the members of their respective  
4 subgroups." Id. (quoting In re Joint E. & S. Dist. Asbestos  
5 Litig., 982 F.3d 721, 742-43 (2d Cir. 1992), modified on reh'g,  
6 993 F.2d 7 (2d Cir. 1993)). In the absence of any "structural  
7 assurance of fair and adequate representation for the diverse  
8 groups and individuals affected," the class could not satisfy  
9 Rule 23(a)(4)'s standard for fair and adequate representation.  
10 Id.

11 Two years later, in Ortiz v. Fibreboard Corp., 527 U.S. 815  
12 (1999), the Supreme Court rejected a proposed settlement class  
13 that was divided along two fault lines: first, as in Amchem,  
14 "between holders of present and future claims," and second,  
15 between holders of "more valuable" and less valuable claims. Id.  
16 at 856-57. As in Amchem, those divisions were not recognized by  
17 the formation of subclasses. Ortiz addressed the propriety of  
18 manufacturer Fibreboard Corporation's global settlement of  
19 asbestos claims against it, a deal that included indemnification  
20 by two insurance companies. Claims based on asbestos exposure  
21 that occurred when Fibreboard was insured had a "much higher"  
22 settlement value than those for exposure after its insurance had  
23 expired, because only the former group could recover from the  
24 insurer. Id. at 823 n.2. That conflict fell "well within the

1 requirement of structural protection recognized in Amchem," the  
2 Supreme Court held, and should have been redressed by way of  
3 "reclassification with separate counsel." Id. at 857. That the  
4 settlement failed to differentiate the claims only confirmed the  
5 existence of a conflict: "[t]he very decision to treat them all  
6 the same is itself an allocation decision with results almost  
7 certainly different from the results that those with . . . claims  
8 of indemnified liability would have chosen." Id.

9 B.

10 The ingredients of conflict identified in Amchem and Ortiz  
11 are present here. The Settlement before us "confine[s]  
12 compensation and . . . limit[s] defendants' liability" by setting  
13 an \$18 million recovery and cost ceiling, and distributes that  
14 recovery by making "essential allocation decisions" among  
15 categories of claims. See Amchem, 521 U.S. at 627. Although  
16 named plaintiffs collectively hold all three categories of claim,  
17 "each served generally as representative for the whole, not for a  
18 separate constituency." Id. In addition, individual Category A  
19 and B claims are "more valuable" than Category C claims,<sup>6</sup>  
20 producing "disparate interests" within the class. Ortiz, 527  
21 U.S. at 857.

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<sup>6</sup> Category A claims are eligible for statutory damages and therefore the most valuable. Category B claims, although registered too late for statutory damages, still qualify for actual damages and attorney's fees. Category C claims, which were unregistered as of December 31, 2002, are ineligible for actual damages and attorney's fees until registered.

1           There are, however, clear differences between the case  
2 before us and Amchem and Ortiz. The conflict in Amchem could  
3 hardly have been more stark: class members fell into one of two  
4 mutually exclusive camps, those injured by asbestos and those  
5 with only potential future injuries. Here, by contrast, class  
6 members can and do hold claims in all three categories. Although  
7 the record does not establish the precise distribution of claims  
8 among named plaintiffs, that they hold a combination of  
9 registered and unregistered claims is undisputed. The conflict  
10 alleged by objectors is therefore between class members who hold  
11 Category C claims alone, and those who hold Category A and B  
12 claims in addition to Category C claims. Such overlap with  
13 respect to some claimants suggests, at least superficially, the  
14 absence of a fundamental conflict.

15           Despite the intuitive appeal of that conclusion, we cannot  
16 endorse it. Owning Category C claims in addition to other claims  
17 does not make named plaintiffs adequate representatives for those  
18 who hold only Category C claims. Although all affected members  
19 of the plaintiff class are interested in maximizing their  
20 individual compensation, severally they accomplish that goal in  
21 different ways. To authors who own works in all three  
22 categories, how their compensation is allotted among their claims  
23 is irrelevant; what matters is the bottom line. Class members  
24 who hold only Category C claims, on the other hand, are  
25 interested exclusively in maximizing the compensation for that

1 one category of claim. Whereas the former group could choose to  
2 sacrifice their Category C claims in exchange for more favorable  
3 compensation on their Category A and B claims, no such option is  
4 available to the latter.

5 The selling out of one category of claim for another is not  
6 improbable here. Because the Settlement capped recovery and  
7 administrative costs at \$18 million, named plaintiffs owning  
8 claims in all three categories cannot have had an interest in  
9 maximizing compensation for every category. Any improvement in  
10 the compensation of, for example, Category C claims would result  
11 in a commensurate decrease in the recovery available for Category  
12 A and B claims. Further, given that Categories A and B amount to  
13 approximately 1% of the total number of claims, named plaintiffs  
14 would receive a greater share of a given amount of compensation  
15 allocated to Categories A and B, compared to what they would  
16 receive if that compensation were spread over the far greater  
17 quantity of Category C claims. Named plaintiffs' natural  
18 inclination would therefore be to favor their more lucrative  
19 Category A and B claims. That named plaintiffs hold claims in  
20 all categories does not, as the dissent asserts, eliminate the  
21 risk of fundamental conflict among subgroups.

22 Even if some named plaintiffs have only Category C claims,  
23 that is not enough to protect the Category C-only plaintiffs,  
24 because each named plaintiff represented the entire class. See  
25 Amchem, 521 U.S. at 627. Without subclasses, named plaintiffs

1 with only Category C claims were obligated to advance the  
2 collective interests of the class, rather than those of the  
3 subset of class members whose claims mirrored their own. Only  
4 the creation of subclasses, and the advocacy of an attorney  
5 representing each subclass, can ensure that the interests of that  
6 particular subgroup are in fact adequately represented. "[W]here  
7 differences among members of a class are such that subclasses  
8 must be established, we know of no authority that permits a court  
9 to approve a settlement . . . on the basis of consents by members  
10 of a unitary class, some of whom happen to be members of . . .  
11 distinct subgroups," without creating subclasses. In re Joint E.  
12 & S. Dist. Asbestos Litig., 982 F.2d 721, 743 (2d Cir. 1992),  
13 modified on reh'g, 993 F.2d 7 (2d Cir. 1993).

14 To be sure, the negotiation of this Settlement featured  
15 protections that were lacking in Amchem. The Settlement was the  
16 product of an intense, protracted, adversarial mediation,  
17 involving multiple parties and complex issues. The mediators  
18 were highly respected and capable, and their participation  
19 provided some assurance that "the proceedings were free of  
20 collusion and undue pressure." D'Amato v. Deutsche Bank, 236  
21 F.3d 78, 85 (2d Cir. 2001). Furthermore, associational  
22 plaintiffs advanced the interests of all authors, the largest  
23 contingent of which we can reasonably assume - given that 99% of  
24 the total claims fall into Category C - are Category C-only  
25 plaintiffs. While we recognize that these features offered some

1 "structural assurance of fair and adequate representation,"  
2 Amchem, 521 U.S. at 627, we cannot conclude that they did enough  
3 to satisfy Rule 23(a)(4).

4 The Supreme Court's decision in Amchem was motivated in part  
5 by its conclusion that the settlement's terms disfavored the  
6 exposure-only plaintiffs. Amchem therefore allows courts, in  
7 assessing the adequacy of representation, to examine a  
8 settlement's substance for evidence of prejudice to the interests  
9 of a subset of plaintiffs. Objectors, pointing to Category C's  
10 inferior recovery, urge that we do so here. Category C works  
11 receive significantly less than those in Category B. For  
12 example, an article sold for \$200 and registered by December 31,  
13 2002 - but too late to receive statutory damages - falls into  
14 Category B and secures \$150 under the Settlement; an unregistered  
15 but otherwise identical article warrants only \$20 in Category C.  
16 The compensation structure for Category C is also, to use  
17 objectors' term, "regressive" in that recovery as a percentage of  
18 a work's original sale price decreases as the sale price  
19 increases; Category B compensation, by contrast, is a flat  
20 percentage of the sale price.

21 That Category C claims recover less than Category A and B  
22 claims tells us little about adequacy of representation, however,  
23 because the Category C claims individually are indisputably worth  
24 less than Category B claims. Given that registration of a  
25 copyright is a prerequisite to suit, unregistered Category C

1 claims would face a substantial litigation risk if the case went  
2 forward. Indeed, had the Settlement failed to account for this  
3 weakness, the “very decision to treat [claims] all the same  
4 [would] itself [have been] an allocation decision” unfair to the  
5 interests of those who had authored registered works. See Ortiz,  
6 527 U.S. at 857. It was not only appropriate but also necessary  
7 for Category C claims to recover less than Category A and B  
8 claims. We therefore disagree with objectors to the extent that  
9 they cite Category C’s inferior recovery as determinative  
10 evidence of inadequate representation.

11 The problem, of course, is that we have no basis for  
12 assessing whether the discount applied to Category C’s recovery  
13 appropriately reflects that weakness. We know that Category C  
14 claims are worth less than the registered claims, but not by how  
15 much. Nor can we know this, in the absence of independent  
16 representation. The Supreme Court counseled in Ortiz that  
17 subclasses may be necessary when categories of claims have  
18 different settlement values. The rationale is simple: how can  
19 the value of any subgroup of claims be properly assessed without  
20 independent counsel pressing its most compelling case? It is for  
21 this reason that the participation of impartial mediators and  
22 institutional plaintiffs does not compensate for the absence of  
23 independent representation. Although the mediators safeguarded  
24 the negotiation process, and the institutional plaintiffs watched  
25 out for the interests of the class as a whole, no one advanced

1 the strongest arguments in favor of Category C's recovery. Even  
2 in the absence of any evidence that the Settlement disfavors  
3 Category C-only plaintiffs, this structural flaw would raise  
4 serious questions as to the adequacy of representation here.

5 In addition to the structural flaw discussed above, the  
6 Settlement itself contains terms that illustrate a lack of  
7 adequate representation of Category C-only plaintiffs. The "C  
8 reduction" places the risk that total claims and fees exceed the  
9 \$18 million cap exclusively on Category C. Although we disagree  
10 with objectors as to the import of Category C's inferior  
11 compensation, we regard the "C reduction" in a different light.  
12 The "C reduction" cannot be justified as a reflection of Category  
13 C's lower value, because the Settlement's recovery formulae  
14 already account for that difference. The "C reduction" is not  
15 designed to reflect the claims' value at all, but rather is a  
16 safety valve meant to preserve the integrity of the Settlement in  
17 the event the cap is exceeded.

18 The settling parties argue that the "C reduction," as a  
19 contingent provision they reasonably believed was unlikely to be  
20 triggered, cannot reflect on the adequacy of representation. We  
21 disagree. Those negotiating the Settlement identified a risk and  
22 placed that risk on a single category of claims.<sup>7</sup> If triggered,

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<sup>7</sup> This risk was not fanciful. In their June 23, 2010 letter briefs, publishers and authors stated that - now that all of the claims have been submitted to the claims administrator - the total face value of claims, plus fees and costs, is known to

1 the "C reduction" would deplete the recovery of Category C-only  
2 plaintiffs in their entirety before the Category A or B recovery  
3 would be affected. We can discern no reason, and authors and  
4 publishers offer none, why this burden should have been placed  
5 exclusively on Category C, rather than shared equitably among all  
6 three categories of claim. That only one category was targeted  
7 for this penalty without credible justification strongly suggests  
8 a lack of adequate representation for those class members who  
9 hold only claims in this category.

10 Even if we were to conclude that, as a matter of deferential  
11 review, the Settlement fairly compensates Category C claims, we  
12 cannot rely on that fact to affirm class certification, because  
13 doing so would conflate Rule 23(a)(4)'s adequacy of  
14 representation analysis with Rule 23(e)(2)'s fairness, adequacy,  
15 and reasonableness analysis. "Rule 23 requires protections under  
16 subdivisions (a) and (b) against inequity and potential inequity

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be \$2.9 million below the \$18 million ceiling that triggers the reduction. However, in a January 11, 2011 letter, publishers and authors informed us that they had erroneously understated the total claims value by more than \$2.6 million. The claim value is now estimated at \$11.56 million, which - when added to fees and costs - comes within \$300,000 of the "C reduction" threshold. This casts serious doubt on the assertion that the "C reduction" was unlikely to be triggered. However, because this information was not before the district court, we will not consider it in our analysis. Even if we were to consider it, we would find it immaterial because it was not available at the time of negotiation, which is the relevant time frame when determining whether the actions of the parties indicate a conflict of interests. Samuel Issacharoff & Richard A. Nagareda, Class Settlements Under Attack, 156 U. Pa. L. Rev. 1649, 1689-90 (2008).

1 at the precertification stage, quite independently of the  
2 required determination at postcertification fairness review under  
3 subdivision (e) that any settlement is fair in an overriding  
4 sense." Ortiz, 527 U.S. at 858; accord Amchem, 521 U.S. at 621.  
5 The possible fairness of a settlement cannot eclipse the Rule  
6 23(a) and (b) precertification requirements. Ortiz, 527 U.S. at  
7 858-59. Thus, the adequacy of representation cannot be  
8 determined solely by finding that the settlement meets the  
9 aggregate interests of the class or "fairly" compensates the  
10 different types of claims at issue. See In re Joint E. & S.  
11 Dist. Asbestos Litig., 982 F.2d at 743. In the Rule 23(a)(4)  
12 context, we must ask independently whether the interests of all  
13 class members were adequately represented.

14 We find that they were not. We agree with objectors that  
15 the interests of class members who hold only Category C claims  
16 fundamentally conflict with those of class members who hold  
17 Category A and B claims. Although all class members share an  
18 interest in maximizing the collective recovery, their interests  
19 diverge as to the distribution of that recovery because each  
20 category of claim is of different strength and therefore commands  
21 a different settlement value. Named plaintiffs who hold other  
22 combinations of claims had no incentive to maximize the recovery  
23 for Category C-only plaintiffs, whose claims were lowest in  
24 settlement value but eclipsed all others in quantity. The  
25 interests of Category C-only plaintiffs could be protected only

1 by the formation of a subclass and the advocacy of independent  
2 counsel. We therefore hold that the district court abused its  
3 discretion in certifying the class based on its finding that  
4 class representation was adequate.<sup>8</sup>

5 C.

6 The decision to require subclassing here is consistent with  
7 our precedent. In Central States Southeast & Southwest Areas  
8 Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C., 504  
9 F.3d 229, 246 (2d Cir. 2007), a plaintiff class of trustees and  
10 beneficiaries of employee welfare benefit plans sued their  
11 pharmaceutical benefits manager, Medco Health Solutions, Inc.  
12 ("Medco"), alleging that it breached its fiduciary duties under  
13 the Employee Retirement Income Security Act of 1974 ("ERISA") by  
14 favoring the products of its parent company, Merck & Co. The  
15 district court approved a settlement agreement and class

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<sup>8</sup> Objectors additionally argue that a fundamental conflict materialized in the Settlement's treatment of foreign works and scientific and research-based medical works. We decline to address objectors' arguments regarding the treatment of foreign works because they were not raised before the district court and are therefore waived. See In re Nortel Networks Corp. Sec. Litig., 539 F.3d 129, 133-34 (2d Cir. 2008). With regard to the treatment of scientific and research-based medical works, objectors argue that the Settlement permits future uses of these works without providing any compensation for the past uses of the works to their authors. The record is plain, however, that the scientific and research-based medical claims were not released by the Settlement. The Settlement instead excluded these works altogether. Accordingly, authors of these works remain free to pursue independent actions against any or all publishers in this case for alleged infringements.

1 certification over the self-funded plans' objection that a  
2 conflict of interest necessitated the certification of a  
3 subclass. The objectors argued that the self-funded plans needed  
4 independent representation because they "were more damaged by  
5 Medco's conduct by virtue of paying Medco the entire cost of  
6 their beneficiaries' drugs," as compared to insured plans, which  
7 paid set premiums to Medco and were therefore more insulated from  
8 the effects of Medco's conduct. Id. at 245. The district court  
9 rejected this argument, observing that the settlement properly  
10 accounted for this disparity by applying a 55% discount to the  
11 claims of the insured plans, a figure determined by counsel with  
12 the assistance of expert opinion and a special master. Id. at  
13 237, 245.

14 Although all class members "advanced similar theories of  
15 liability against Medco predicated on the same or similar facts"  
16 and all wished to "obtain the highest possible recovery," the  
17 Second Circuit sided with the objectors. Id. at 245-46. Without  
18 deciding "whether the self-funded Plans in fact suffered greater  
19 injury," we thought it "proper to allow them to raise their  
20 claims as part of a separate subclass." Id. at 246. Finding  
21 that "the antagonistic interests apparent in the class should be  
22 adequately and independently represented," we remanded to the  
23 district court "for certification of a subclass encompassing the  
24 self-funded plans in order to better protect their claims in this  
25 litigation." Id.

1           Central States is parallel to the instant case in several  
2 key respects. First, the settlement agreement established a fund  
3 (\$42.5 million) that would "allocate[] an amount to the settling  
4 class members" based on "the nature of [each] Plan's relationship  
5 with Medco." Id. at 236. Second, the settlement recognized and  
6 accounted for a disparity in the strengths of two discrete  
7 categories of claims: the recovery for insured plans was  
8 discounted by 55% to reflect that they were more insulated from  
9 Medco's improper conduct. Third, class counsel had the benefit  
10 of an impartial special master in determining that allocation.  
11 There is also a key difference: Central States cited no direct  
12 evidence of inadequate representation in the settlement terms.  
13 Even in the absence of such evidence, we found that the district  
14 court's certification of the class was an abuse of discretion  
15 because the self-funded plans required independent  
16 representation. The case for subclassing is, if anything, more  
17 compelling in this case. As in Central States, a capped  
18 settlement fund was allocated differently among categories of  
19 claims of different strength without separate counsel to protect  
20 each category's interests.<sup>9</sup> Unlike in Central States, the

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<sup>9</sup> We observed that the conflict in Central States went beyond a "simple disagreement over potential differences in the computation of damages," since the "relationship of the Plans to Medco . . . [went] to the very heart of the litigation." 504 F.3d at 246. The dissent, highlighting this language, argues that the conflict before us cannot be "fundamental" because the claim categories differ only in their relative strength, and all class members otherwise "had the same basic relationship with the

1 instant Settlement not only suffers from a clear structural  
2 defect, but also provides strong evidence - in the "C reduction"  
3 - of inadequate representation.<sup>10</sup>

4 D.

5 Having concluded that a fundamental conflict exists, we turn  
6 now to the question of subclassing. Objectors demand that the  
7 unregistered copyright holders be defined as a subclass to  
8 provide structural assurance of fair and adequate representation.  
9 Remediating this conflict may not be so simple, however. Will the  
10 subclass be limited to the Category C-only plaintiffs, or should  
11 it also include those class members who own registered

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defendants." Dissent at [5-6]. That argument fails to account for Ortiz. The difference underlying the conflict in Ortiz was whether or not Fibreboard had insurance at the time of plaintiffs' asbestos exposure, which - as in the present case - affected the claims' strength and settlement value but not the parties' "basic relationship."

<sup>10</sup> The Third Circuit approved a class action settlement that allocated the recovery among three distinct classes of plaintiffs without creating subclasses. In re Insurance Brokerage Antitrust Litig., 579 F.3d 241 (3d Cir. 2009). The court affirmed certification of the single class despite unequal allocations between the groups because the settlement agreement was "simply a reflection of the extent of the injury that certain class members incurred and does not clearly suggest that the class members had antagonistic interests." Id. at 272. The court recognized that "some potential benefits may have been realized from utilizing subclasses," but ruled that the district court's failure to take that step was not an abuse of discretion. Id. at 273. We, to the contrary, hesitate to conclude here that the Settlement's allocation is "simply a reflection of" the claims' differing settlement values in the absence of separate counsel advancing each category's interests. Furthermore, the "C reduction" offers specific evidence of inadequate representation, which was not present in Insurance Brokerage.

1 (Categories A and B) in addition to unregistered (Category C)  
2 copyrights? However the subclass is defined, who will advance  
3 the interests of the remaining class members? Can Category C  
4 counsel sit across the negotiating table from counsel  
5 representing "everyone else," or will everyone else's interests  
6 be sufficiently divergent to require further subclassing? These  
7 questions greet us as soon as we open the door to subclassing,  
8 and we must at least acknowledge them before we can enter.

9 We would ordinarily allow the district court to work out the  
10 details of subclassing and leave these questions to be resolved  
11 in that process. We recognize, however, that "at some point  
12 there must be an end to reclassification with separate counsel."  
13 Ortiz, 527 U.S. at 857. It would be imprudent to require  
14 subclassing if subclasses were administratively impracticable.  
15 We now, therefore, assess whether subclasses can be devised to  
16 remedy the conflict we have identified.

17 The simplest and most logical approach may be to create a  
18 subclass for every category of claim, with separate counsel  
19 representing the interests of Categories A, B, and C. The  
20 different claim categories are, after all, the fault lines along  
21 which the conflict runs. These categories, each of different  
22 strength, must compete with one another over the allocation of  
23 the capped Settlement fund. Designating each a subclass, and  
24 assigning counsel to represent their interests, would protect  
25 each category's interests.

1           This case is more complicated than most, however.  
2           Plaintiffs cannot all be neatly segregated into one of three  
3           categories, because some class members hold claims in more than  
4           one category. Although many plaintiffs only authored Category C  
5           works, and some plaintiffs may assert claims only in Category A  
6           or B, the remaining class members have claims in two or three  
7           categories. Structuring the subclasses so that no class member  
8           falls into more than one subclass could require as many as seven  
9           subclasses: plaintiffs holding (1) only A claims, (2) only B  
10          claims, or (3) only C claims, or a combination of (4) A and B,  
11          (5) A and C, (6) B and C, or (7) A, B, and C claims. That is  
12          surely beyond the point at which "reclassification with separate  
13          counsel" must end.

14          Creating only three subclasses - one for each category of  
15          claim - would, by contrast, be efficient and straightforward.  
16          This approach satisfies objectors' concerns, as the Category C-  
17          only plaintiffs will all fall within the Category C subclass and  
18          have their own counsel. Separate counsel will also advance the  
19          interests of Categories A and B, respectively, giving each  
20          category a voice advocating for a share of the Settlement  
21          commensurate with their value. This structural protection will  
22          provide a substantial guarantee that the values assigned to each  
23          category of claim resulted from merits-based negotiation, greatly  
24          reducing the risk that a deficiency in representation for one or  
25          more subgroups will affect the outcome.

1           Although some class members would fall into more than one  
2 subclass, we can see no reason why that would be fatal to such a  
3 structure. It is certainly not precluded by the language of Rule  
4 23(c)(5), which allows a class to "be divided into subclasses  
5 that are each treated as a class under this rule." Fed. R. Civ.  
6 P. 23(c)(5). And it makes sense from a practical perspective.  
7 All class members are interested in receiving the maximum  
8 possible recovery for their claims. Having a separate subclass  
9 representative advocate exclusively for each of those claims is  
10 the most effective means of achieving that result. A plaintiff  
11 who holds claims in Categories B and C would, for example, be  
12 represented by different subclass representatives and counsel  
13 with respect to each category. Each subclass representative  
14 would, in turn, represent plaintiffs' interests with respect to  
15 only that category of claim.

16           We intend by no means to bind the district court or the  
17 parties to the subclass structure we have outlined. We address  
18 this issue only to ensure that we are not asking the district  
19 court to carry out instructions that are impracticable to  
20 implement. Satisfied that the conflict here can be remedied  
21 within the practical limits of "reclassification with separate  
22 counsel," Ortiz, 527 U.S. at 857, we remand to the district  
23 court for subclassing while recognizing that another solution may  
24 be more appropriate than the one we have proffered.



1 STRAUB, *Circuit Judge*, dissenting in part, concurring in part:

2 The majority observes that the Settlement in this case “was the product of an intense,  
3 protracted, adversarial mediation” with “highly respected and capable” mediators that provided  
4 assurance that the “proceedings were free of collusion and undue pressure.” Maj. Op. at [22-  
5 23] (quoting *D’Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001)). While conceding this  
6 point, however, as well as that the Settlement offered “some ‘structural assurance of fair and  
7 adequate representation,’” Maj. Op. at [23] (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S.  
8 591, 627 (1997)), the majority holds that the District Court abused its discretion in certifying the  
9 class because not “enough” was done to “satisfy [Federal] Rule [of Civil Procedure] 23(a)(4),”  
10 Maj. Op. at [23]. I disagree. I respectfully dissent because it is my view that the named  
11 plaintiffs adequately represent the interests of all class members as required by Rule 23(a)(4) and  
12 that the District Court was well within its discretion to certify the class and approve the  
13 Settlement. I do concur with the majority that the Settlement’s release provision is permissible.

14 **I. Class Certification**

15 **A. Standard of Review**

16 We review a district court’s decisions to certify a class and approve a settlement for  
17 abuse of discretion. *In re Nassau County Strip Search Cases*, 461 F.3d 219, 224 (2d Cir. 2006)  
18 (applying standard to class certification); *Joel A. v. Giuliani*, 218 F.3d 132, 139 (2d Cir. 2000)  
19 (applying standard to settlement approval). In assessing the reasonableness of a proposed  
20 settlement of a class action, “[t]he trial judge’s views are accorded great weight because he is  
21 exposed to the litigants, and their strategies, positions and proofs. Simply stated, he is on the  
22 firing line and can evaluate the action accordingly.” *Joel A.*, 218 F.3d at 139 (internal quotation

1 marks and ellipses omitted); *see also TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 463  
2 (2d Cir. 1982) (“It is well settled that great weight must be accorded the views of the trial judge  
3 because exposure to the litigants and their strategies makes him uniquely aware of the strengths  
4 and weaknesses of the case and the risks of continued litigation.”). As the Supreme Court has  
5 observed, however, “a court asked to certify a settlement class will lack the opportunity, present  
6 when a case is litigated, to adjust the class, informed by the proceedings as they unfold.”  
7 *Amchem*, 521 U.S. at 620. Therefore, “where, as here, the district court simultaneously certifies  
8 a class and approves a settlement of the action, we will more rigorously scrutinize the district  
9 court’s analysis of the fairness, reasonableness and adequacy of both the negotiation process and  
10 the proposed settlement.” *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d  
11 Cir. 1992).<sup>1</sup>

## 12 **B. Adequacy of Representation**

13 The party seeking to certify a class bears the burden of satisfying Rule 23(a)’s four  
14 threshold requirements: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of  
15 representation. *See* Fed. R. Civ. P. 23(a). As the objectors to the Settlement do not contest that  
16 the first three prerequisites are met here I, like the majority, confine my discussion to the fourth:  
17 adequacy of representation. In determining whether Rule 23(a)(4)’s adequacy requirement is

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<sup>1</sup> The objectors to the Settlement argue that “deference to the district court should be reduced [further] in this case” because “deference is premised on the judge’s familiarity with the case” and “the [D]istrict [C]ourt had no occasion to become familiar with the issues.” I find this argument meritless and agree with the majority that we employ our normal “abuse of discretion” analysis, albeit with some “heightened [ ] attention,” *Amchem*, 521 U.S. at 620, to the certification decision because it was made for settlement purposes only. Maj. Op. at [15]. The District Court’s involvement with this case was intensive and it “comprehensively explored all relevant factors,” *Malchman v. Davis*, 706 F.2d 426, 434 (2d Cir. 1983), in analyzing the Settlement. *See infra* Section II.A.

1 satisfied, the most important factors are whether the class representatives have any “interests  
2 antagonistic to the interests of other class members,” and relatedly, whether the representatives  
3 “have an interest in vigorously pursuing the claims of the class,” *Denney v. Deutsche Bank AG*,  
4 443 F.3d 253, 268 (2d Cir. 2006). *See Amchem*, 521 U.S. at 625 (“The adequacy inquiry under  
5 Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they  
6 seek to represent.”). In answering these questions, the “terms of the settlement” and “the  
7 structure of negotiations” are relevant factors, but the focus must always remain on whether “the  
8 interests of those within the single class are . . . aligned.” *Amchem*, 521 U.S. at 626-27. Even if  
9 a conflict is discovered, it will not “necessarily defeat class certification—the conflict must be  
10 ‘fundamental.’” *Denney*, 443 F.3d at 268 (quoting *In re Visa Check/MasterMoney Antitrust*  
11 *Litig.*, 280 F.3d 124, 145 (2d Cir. 2001)). While we have yet to explicitly define a  
12 “fundamental” conflict, such a conflict must go to the “very heart of the litigation,” *Cent. States*  
13 *Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229,  
14 246 (2d Cir. 2007). *See* 6 ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS §  
15 18:14 (4th ed. 2002) (discussing antitrust class actions); *see also Gunnells v. Healthplan Servs.*,  
16 *Inc.*, 348 F.3d 417, 430-31 (4th Cir. 2003). It exists when “the interests of the class  
17 representative can be pursued only at the expense of the interests of all the class members.” 1  
18 CONTE & NEWBERG, *supra*, § 3:26. A “fundamental” conflict may not be “merely speculative or  
19 hypothetical.” 5 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 23.25[2][b][ii] (3d  
20 ed. 2011); *accord In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d at 145.

21 The majority finds that the District Court exceeded its discretion in certifying the class  
22 because the “interests of class members who hold Category C claims fundamentally conflict with

1 those of class members who hold Category A and B claims,” Maj. Op. at [28], and therefore  
2 concludes that the class members holding Category C claims are not adequately represented in  
3 the Settlement. Relying principally on *Amchem* and *Central States*, the majority contends that  
4 “[o]nly the creation of subclasses, and the advocacy of an attorney representing each subclass,  
5 can ensure that the interests of that particular subgroup are in fact adequately represented.” Maj.  
6 Op. at [22]. Looking to these cases and the record before us, I find this conclusion unavailing.

7 In *Amchem*, the class representatives, some of whom had medical conditions as a result  
8 of asbestos exposure and some of whom had not yet manifested any asbestos-related condition,  
9 “sought to act on behalf of a single giant class rather than on behalf of discrete subclasses.”  
10 *Amchem*, 521 U.S. at 626. In finding their representation inadequate, the Supreme Court looked  
11 to whether the interests of the class members conflicted in any respects, and concluded that they  
12 did. Namely, the “currently injured” sought “generous immediate payments,” while the  
13 “exposure-only” claimants sought to ensure “an ample, inflation-protected fund for the future.”  
14 *Id.* at 626. The Court also found that the terms of the settlement prejudiced the interests of a  
15 subset of plaintiffs because the “essential allocation decisions designed to confine compensation  
16 and to limit defendants’ liability”—including caps on the number of claims payable for each type  
17 of disease per year and limits on the number of claimants who could opt out—disadvantaged  
18 exposure-only plaintiffs. *Id.* at 627. Moreover, the Court held that the process of negotiation did  
19 not provide “structural assurance of fair and adequate representation for the diverse groups and  
20 individuals affected” because there existed adversity among subgroups, yet those subgroups  
21 were not represented individually so that they could aggressively pursue their own distinct  
22 interests. *Id.*

1           In *Central States*, a case in which “a capped settlement fund was allocated differently  
2 among categories of claims of different strength without separate counsel to protect each  
3 category’s interests,” Maj. Op. at [31], we held that it was an abuse of discretion for the district  
4 court to certify the class without subclasses. *Cent. States*, 504 F.3d at 246. The class members  
5 in *Central States* maintained employee benefit plans, though some were self-funded and others  
6 were insured with set premiums. *See id.* at 245. We found that “[s]elf-funded Plans differ[ed]  
7 significantly from insured or capitated Plans because only self-funded Plans assumed the direct  
8 risk of absorbing any increases in prescription drug costs that were caused by [the defendant’s]  
9 conduct.” *Id.* at 246. We explained that the conflict among the different types of “Plans [did]  
10 not represent a simple disagreement over potential differences in the computation of damages,  
11 since the relationship of the Plans to [the defendant] and its effect on each Plan [went] to the  
12 very heart of the litigation.” *Id.*

13           The concerns that drove *Amchem* and *Central States* are not present in this case. First  
14 and foremost, there is no fundamental conflict between class members here, as there was in  
15 *Amchem* and *Central States*. The named plaintiffs, like all class members in this case, had the  
16 same basic relationship with the defendants. They are all freelance authors who sold written  
17 works to print publishers for publication in newspapers, magazines, and other periodicals. They  
18 also each suffered similar injuries in that their works were reproduced in electronic and Internet  
19 databases without the plaintiffs receiving additional compensation. The only differences  
20 between A-, B-, and C-class plaintiffs—and the resulting allocation of the Settlement funds—are  
21 found squarely in the comparative strengths and weaknesses of the asserted claims. *In re*  
22 *Holocaust Victim Asset Litig.*, 413 F.3d 183, 186 (2d Cir. 2005) (per curiam) (holding that the

1 district court did not exceed its discretion in allocating the bulk of class action settlement funds  
2 to one group of claimants because “allocation of a settlement of this magnitude and comprising  
3 such different types of claims must be based, at least in part, on the comparative strengths and  
4 weaknesses of the asserted legal claims”). And, even if a conflict exists due to the comparative  
5 strengths of the claims in this case, the District Court’s decision to certify the class was not an  
6 abuse of discretion because the conflict does not rise to such a level as to be “fundamental,”  
7 *Denney*, 443 F.3d at 268; *see In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 347 (3rd Cir.  
8 2010) (“The fact that the settlement fund allocates a larger percentage of the settlement to class  
9 members with [higher value claims] does not demonstrate a conflict between groups. Instead,  
10 the different allocations reflect the relative value of the different claims.”).

11 Second, the named plaintiffs in this case “have an interest in vigorously pursuing the  
12 claims of the class,” *Denney*, 443 F.3d at 268, as many of them hold a variety of A-, B-, and/or  
13 C-class claims. To the extent that the existence of some class representatives holding only  
14 registered copyrights creates a conflict, such conflict is significantly mitigated by the presence of  
15 other named plaintiffs holding unregistered copyrights and is not “fundamental,” *id.* Named  
16 plaintiffs Letty Pogrebin, James Gleick, and Marie Winn each hold at least some unregistered  
17 copyrights and had an incentive to secure the best settlement for all three classes of claims and  
18 the highest possible compensation in each category. Moreover, the associational plaintiffs that  
19 participated in the negotiations certainly have members who hold unregistered copyrights and  
20 they had an incentive to “advance[ ] the interests of all authors.” Maj. Op. at [23]. The fact that  
21 class representatives here hold a variety of claims across the spectrum eliminates the risk of  
22 fundamental conflict among subgroups within the class, precisely because there are no easily

1 defined subgroups. *See, e.g., In re Pet Food Prods. Liab. Litig.*, 629 F.3d at 347 (observing that  
2 “the fact that the fund was allocated so that a greater percentage of the settlement value was  
3 designated for certain class members [need not] demonstrate[ ] a conflict between groups,”  
4 especially when “many class members were members of both . . . groups”). This is underlined  
5 by the majority’s discussion of the difficulty in creating subclasses in this case. *See* Maj. Op. at  
6 **[32-35]**.

7 Despite the lack of fundamental conflicts between the named plaintiffs and the class as a  
8 whole, the majority attempts to craft “simple[ ],” “logical,” and “efficient and straightforward”  
9 subclasses to guide the District Court on remand. Maj. Op. at **[33,34]**. It suggests creating three  
10 subclasses, each representing the unique interests of Category A, B, and C plaintiffs. While it  
11 recognizes that “some class members would fall into more than one subclass, [the majority] can  
12 see no reason why that would be fatal.” Maj. Op. at **[34]**. Of course I agree, should the parties  
13 and the District Court follow this suggestion, that such a structure would not be fatal because, at  
14 bottom, plaintiffs holding Category A-, B-, and C-class claims all want the same thing: as much  
15 compensation as possible for the same injury. It may be that the current scheme allows for some  
16 competition among the subgroups, but our cases do not hold that all competition must be  
17 eliminated, and, moreover, the majority concedes that even its suggested alternative would  
18 present conflict amongst subclass members because many of the plaintiffs possess more than one  
19 type of claim. In noting its suggested subclasses’ deficiencies as well as admitting that it is not  
20 normally the province of our court to offer these types of suggestions in the first instance, the  
21 majority exposes why the District Court’s approval of the Settlement was the correct course of  
22 action: The District Court was “uniquely aware of the strengths and weaknesses of the case and

1 the risks of continued litigation,” *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 463 (2d  
2 Cir. 1982), and properly concluded that the plaintiffs need not be segregated into subclasses  
3 because any conflicts that could be eased by division into subclasses were not “fundamental,”  
4 *Denney*, 443 F.3d at 268.

5 Third, unlike the settlement terms in *Amchem* and *Central States*, this Settlement does  
6 not unfairly disadvantage one portion of the class. No claims unique to a portion of the class are  
7 forfeited without compensation, no hard claim or opt-out limits exist, and no awards are  
8 postponed without adjustments for inflation. The majority finds that the “C-reduction” provides  
9 strong evidence that the named plaintiffs inadequately represented class members with C-class  
10 claims because “only one category was targeted for this penalty without credible justification.”  
11 Maj. Op. at [27]. While it is true that the “C-reduction” disadvantages C-class claims, this  
12 disadvantage does not suggest an intra-class conflict because it is only a result of the inherent  
13 lower value of the C-class claims. See *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333 at 347.

14 The “C-reduction” and the different award structures for registered and unregistered  
15 copyright holders reflect the relative strengths and weaknesses of the respective claims as well as  
16 the practical fact that the overwhelming majority of claims at issue in this case—99%—are C-  
17 class claims. Unregistered copyright holders may not maintain a suit for copyright  
18 infringement.<sup>2</sup> 17 U.S.C. § 411(a) (providing that, with some exceptions, “no civil action for

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<sup>2</sup> In *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010), the Supreme Court held that § 411(a)’s registration requirement was “a precondition to filing a claim that does not restrict a federal court’s subject-matter jurisdiction,” *id.* at 1241, and did not address whether § 411(a) “is a mandatory precondition to suit that . . . district courts may or should enforce *sua sponte* by dismissing copyright infringement claims involving unregistered works,” *id.* at 1249. It is clear, however, that § 411(a) imposes some substantial obstacle to the success of suits for infringement of unregistered copyright claims.

1 infringement of the copyright in any United States work shall be instituted until preregistration  
2 or registration of the copyright claim has been made”). This precondition weakens the claims of  
3 unregistered copyright holders because the authors would have to expend energy to complete the  
4 registration process as well as pay \$30 to properly register each of their unregistered works. *Cf.*  
5 *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974) (“The proposed settlement  
6 cannot be judged without reference to the strength of plaintiffs’ claims. The most important  
7 factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered  
8 in settlement.”). Likewise, if unregistered copyright holders ultimately were to register in order  
9 to bring suit, they would not be entitled to judicial presumptions that benefit copyright holders  
10 who had registered within five years of their work’s creation. *See* 17 U.S.C. § 410(c); *Boisson v.*  
11 *Banian, Ltd.*, 273 F.3d 262, 267-68 (2d Cir. 2001). Accordingly, at trial, claimants holding  
12 unregistered works would have to prove originality, copyrightability, and compliance with  
13 statutory formalities—a costly, and perhaps losing, exercise that other claimants could forego.

14 Finally, “the structure of negotiations” in this case provided assurance that the named  
15 plaintiffs adequately represented the interests of A-, B-, and C-class claimants. Unlike the  
16 attorneys in *Amchem*, who lacked any ongoing attorney-client relationship with exposure-only  
17 claimants, *see Amchem*, 521 U.S. at 601-02, and in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 857  
18 n.31 (1999), where the named plaintiffs were not even “named [until] after the agreement in  
19 principle was reached,” the attorneys conducting the negotiations here represented holders of all  
20 three species of claims from the outset. Further, unlike *Amchem*, which was never intended to be  
21 litigated, *see Amchem*, 521 U.S. at 601, there is no indication that this suit was brought  
22 exclusively for the purposes of settlement. On the contrary, litigation apparently was a realistic

1 possibility, and mediator Kenneth R. Feinberg, Esq., noted that “[a]t various times, it appeared  
2 likely that the mediation process and negotiations would break down[,] resulting in a return to  
3 the courtroom.” In addition, there is no indication here that settlement of any single type of  
4 claim (A, B, or C) was the immediate focus of the parties, nor that settlement of another type of  
5 claim was tacked on belatedly and thus potentially leveraged to ensure the successful completion  
6 of the original settlement talks. This is unlike *Amchem*, where one defendant refused to settle  
7 present claims until future claims were included. In *Amchem*, plaintiffs’ representatives had an  
8 incentive to bargain away exposure-only claimants’ rights in order to ensure a generous  
9 settlement for their original, currently-injured clients. No such incentive existed here. Also,  
10 these negotiations, unlike those in *Amchem*, occurred under the direction of an impartial  
11 mediator who could search out each party’s respective strengths and weaknesses, advise them to  
12 adjust their positions accordingly, and vouch that each side fully represented its clients to the  
13 best of its ability. Indeed, mediator Feinberg stated in a sworn declaration that “[a]ll members of  
14 the defined class . . . were adequately represented during the lengthy course of the mediation”  
15 and that “[a]ll sides exhibited great skill and determination . . . resulting in a comprehensive  
16 settlement of a very complex matter which [he] believe[s] is the fairest resolution which could be  
17 obtained.” The participation of mediator Feinberg in this case, while by no means ensuring fully  
18 adequate representation, does make it more likely that the parties reached the limits of  
19 compromise. *See generally D’Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (“This  
20 Court has noted that a court-appointed mediator’s involvement in pre-certification settlement  
21 negotiations helps to ensure that the proceedings were free of collusion and undue pressure.”).

1           In sum, *Amchem* and *Central States* both turned on the existence of a fundamental  
2 conflict between class members that was never mitigated.<sup>3</sup> In this case, on the other hand, C-  
3 class claimants merely have less valuable claims than other class members, and the resulting  
4 Settlement, and specifically the “C-reduction,” only reflects the C-claims’ inherent lower value.<sup>4</sup>  
5 The valid distinctions among A-, B-, and C-class claims simply did not exist between the present  
6 and future claims at issue in *Amchem* or between the different benefit plans in *Central States*.  
7 Furthermore, the Settlement in this case had strong structural protections not found in *Amchem*.  
8 Accordingly, the “fundamental” intra-class conflict so evident in *Amchem* is not present here.  
9 The District Court exercised sound discretion in finding that the adequacy of representation  
10 requirement was met.

## 11           **II.     The Objectors’ Other Challenges to the Settlement**

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<sup>3</sup> The majority contends that, in distinguishing *Central States*, I fail to account for *Ortiz*. *Ortiz* does not control here. While *Ortiz* notes that the presence of some class members with “more valuable claims” may be “a second instance of disparate interests within the certified class,” *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 857 (1999), the Court found the class inadequate because “it is obvious after *Amchem* that a class divided between holders of present and future claims . . . requires division into homogeneous subclasses under Rule 23(c)(4)(B),” and “[n]o such procedure was employed,” *id.* at 856. In this case, the class is not divided between holders of present and future claims and “the requirements of structural protection applicable to all class actions under Rule 23(a)(4)” were firmly in place. *Id.* at 857.

<sup>4</sup> As I agree with the majority that the C-class claims’ inferior recovery under the Settlement is not determinative evidence of inadequate representation, I need not belabor this point by opining on it further. I must note, however, that objectors further attempt to fold this case under *Amchem* by arguing that C-class claimants are just like the exposure-only claimants because they are “holders of . . . future claims” that mature at a later date (here, upon registration). This argument fails because C-class claimants possess a present injury insofar as their copyrights have already been infringed. Also, C-class claims do not concern only unregistered copyrights; they also concern copyrights registered after December 31, 2002. Moreover, the C-class compensation scheme proceeds in rational, linear fashion: as the original price of the work increases, the author’s compensation increases. The flat fees account for the \$30 registration fee discussed above.

1 Beyond their challenge to the District Court’s certification of the class, the objectors to  
2 the Settlement also contend that (1) approval of the Settlement was impermissible because it  
3 released claims beyond the factual predicate of the case and (2) the approval process denied  
4 them procedural due process. As I find that the Settlement’s release pertaining to future uses by  
5 publishers and their sublicensees was permissible, I join the majority’s opinion in that respect.  
6 Because I would affirm the District Court’s decision to certify the class, I now turn to the  
7 objectors’ procedural challenges to the Settlement.

8 First, the objectors claim that the District Court lacked sufficient information to evaluate  
9 the Settlement at the preliminary approval stage. Second, they claim that because the parties did  
10 not produce their damages study until six days before the final approval hearing, after the  
11 deadlines for objecting and opting out, the objectors were denied the opportunity to properly  
12 frame their objections and to opt out in a timely fashion. Third, they claim that the District Court  
13 improperly required objectors to appear in person at the fairness hearings. These arguments are  
14 all meritless.

15 **A. The Absence of the Damages Report at the Preliminary Approval Stage Did**  
16 **Not Deny Due Process**

17  
18 The objectors assert that the District Court had before it “no evidence of the Settlement’s  
19 adequacy presented with the motion for preliminary approval.” In particular, they claim that  
20 because the District Court lacked a damages report, it could not evaluate, as required by *City of*  
21 *Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), whether the Settlement was  
22 reasonable in light of (1) the best possible recovery and (2) all the attendant risks of litigation.

23 It is true that the District Court had scant information at the preliminary approval phase.  
24 In connection with the original motion for preliminary approval, the parties only cursorily

1 briefed the issue of how the risks of litigation impacted the Settlement. Although the parties  
2 submitted twenty-two declarations with their motion, none addressed the issue of the  
3 Settlement’s fairness; instead, they all concerned efforts by defendants to locate records as to the  
4 identity of class members. The hearing itself was quick and fairly non-inquisitive.

5           However, our standard of review does not focus on whether a specific piece of  
6 information was present at any single stage of proceedings. Instead, we focus more generally on  
7 whether, at the end of the process, the District Court had before it sufficient information to grant  
8 final approval. In a nutshell, “[t]he question becomes whether or not the District Court had  
9 before it sufficient facts intelligently to approve the settlement offer.” *Grinnell*, 495 F.2d at 462-  
10 63; *see also In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 170 (2d Cir. 1987) (rejecting  
11 claim that failure to hold preliminary approval hearing was error because, regardless of whether  
12 hearing was held, the district court “was thoroughly informed of the strengths and weaknesses of  
13 the parties’ positions”), *cert. denied*, 484 U.S. 1004 (1988).

14           In this case, it is clear that by the time the District Court approved the Settlement, it had  
15 before it sufficient materials to evaluate the Settlement thoroughly and intelligently. Over the  
16 course of the litigation, it held three hearings and reviewed exhaustive briefing, much of which  
17 was authored by the objectors’ counsel and thus raised the very issues presented on appeal. The  
18 District Court had ample materials to evaluate both the class certification decision and the  
19 Settlement, and the record includes numerous declarations by the parties and their experts  
20 describing the strengths and weaknesses of the claims and potential amounts of recovery, as well  
21 as two declarations by mediator Feinberg describing the settlement process. The objectors  
22 themselves concede that the parties “filed a veritable avalanche of pleadings to support the

1 settlement, including arguments, declarations, and exhibits.”

2 In response to the objectors’ motion to vacate the preliminary approval, the parties  
3 submitted a declaration from mediator Feinberg in which he asserted that “\$18 million is  
4 absolutely the most that good-faith negotiators acting at arms length could agree upon,” and that  
5 the sum was “substantially in excess” of what “defendant companies were willing to pay at the  
6 outset of the mediation.” The District Court then held a substantial hearing on the motion to  
7 vacate the preliminary approval, during which counsel for the objectors was heard at length on  
8 the substance of their objections, including those going to the fairness of the Settlement. *See,*  
9 *e.g., TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 463 (2d Cir. 1982) (affirming district  
10 court order approving Settlement when “[t]he District Court approved the Settlement only after  
11 giving comprehensive consideration to all relevant factors and listening carefully to each  
12 contention of the objectors”).

13 Following the hearing, the Court received several written objections in declaratory form,  
14 including objections as to the fairness of the Settlement. Thereafter, when it was discovered that  
15 new infringements had occurred during the pendency of the suit, the District Court held a second  
16 round of preliminary approval briefing and a second preliminary approval hearing. At that  
17 hearing, which was lengthy, counsel for the objectors again discussed the objections to the  
18 Settlement’s fairness.

19 In addition, on the motion for final settlement approval, the parties submitted extensive  
20 briefing on the issues of whether the Settlement was fair in light of the total possible recovery  
21 and the risks of litigation. They also submitted another twelve declarations. Included within  
22 these submissions was defendants’ original mediation brief, in which they specifically cataloged

1 their view of the legal weaknesses of plaintiffs’ claims and their view of actual damages. In  
2 addition, mediator Feinberg submitted another declaration describing the adversarial negotiating  
3 process. Further, before it granted final approval, the District Court received the damages study  
4 that the objectors reference, in which bulk damages were measured using three different  
5 methodologies.<sup>5</sup> Last, before granting final approval, the District Court held yet another lengthy  
6 hearing, at which counsel for the objectors again spoke at length.

7 Given the extensive process and copious submissions below, it is of no moment that the  
8 District Court had few materials before it at the first preliminary approval hearing. Prior to final  
9 approval, the Court received and reviewed “sufficient materials to evaluate the Settlement” and  
10 to determine, among other things, that the Settlement was reasonable in light of possible  
11 recoveries and the risks of litigation. *Malchman v. Davis*, 706 F.2d 426, 434 (2d Cir. 1983).

12 **B. Objectors Had Adequate Opportunity to Lodge Objections**  
13 **Based On the Damages Study**  
14

15 The objectors assert that because the damages study was submitted to the District Court  
16 after the deadline for objecting to the Settlement, class members were deprived of the  
17 opportunity to base their objections on the study. However, the objectors did file objections  
18 based on the damages study, which the District Court accepted, even though they were untimely.  
19 Accordingly, class members had the opportunity to base objections on the study, and any  
20 argument to the contrary fails.

21 **C. No Due Process Violation Occurred By Requiring Objectors to**  
22 **Appear at the Fairness Hearing**  
23

24 In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985), the Supreme Court held

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<sup>5</sup> This information was identical to that presented by the plaintiffs at mediation.

1 that “minimal procedural due process protection” within the context of class actions required that  
2 plaintiffs receive “notice plus an opportunity to be heard and participate in the litigation, whether  
3 in person or through counsel,” and the opportunity to opt out of the settlement. Here, the District  
4 Court attempted to satisfy that standard by allowing class members the opportunity to appear, in  
5 person or through counsel, and to object to the Settlement, as well as to opt out. The District  
6 Court’s requirement that objectors appear in person or through counsel at the fairness hearing  
7 does not rise to the level of a due process violation. *See, e.g., Spark v. MBNA*, 48 F. App’x 385,  
8 391 (3d Cir. 2002) (unpublished opinion) (holding that personal appearance requirement did not  
9 violate due process).

## 10 CONCLUSION

11 In sum, the District Court was well within its discretion, even when reviewed at a  
12 heightened level, to certify the class and approve the Settlement. As the majority notes, “at some  
13 point there must be an end to reclassification with separate counsel,” Maj. Op. at [33] (citing  
14 *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 819 (1999)), and it is especially unnecessary to require  
15 such reclassification and subclasses where, as in this case, any conflict that exists is not  
16 “fundamental,” *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006). Today’s  
17 opinion may seriously hamper settlement negotiations in complex class action lawsuits, as  
18 parties that participate in “intense, protracted, adversarial mediation” with proceedings “free of  
19 collusion and undue pressure,” Maj. Op at [23] (internal quotation marks omitted), will fear  
20 being told by our Court at the conclusion of their work that they have not done “enough,” Maj.  
21 Op. at [23], to satisfy Rule 23(a)(4)’s requirement that the “representative parties . . . fairly and  
22 adequately protect the interests of the class,” Fed. R. Civ. P. 23(a). After today’s opinion,

1 plaintiffs may proceed by breaking into numerous and unnecessary subclasses that could stall  
2 mediation proceedings and lead to protracted litigation. Thus, and for the reasons stated above, I  
3 respectfully dissent in part and would affirm the District Court's order in its entirety certifying  
4 the class and approving the Settlement.