

Fall 2004

## Missing the Mark: The Search for an Effective Class Certification Process

Jeremy Bertsch

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### Recommended Citation

Jeremy Bertsch, *Missing the Mark: The Search for an Effective Class Certification Process*, 39 Val. U. L. Rev. 95 (2004).

Available at: <https://scholar.valpo.edu/vulr/vol39/iss1/5>

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## Notes

### MISSING THE MARK: THE SEARCH FOR AN EFFECTIVE CLASS CERTIFICATION PROCESS

#### I. INTRODUCTION

Class certification is one of the most hotly contested issues in class action litigation today due to the fact that virtually all certified classes settle their claims.<sup>1</sup> In class actions brought under Federal Rule of Civil Procedure 23(b)(3) (“Rule 23(b)(3)”), the general rule is that after a federal court finds a class untenable, members of the alleged class that were not named in the original proceedings are free to certify the class in a different jurisdiction.<sup>2</sup> Defendants cannot argue collateral estoppel against these absent class members because the absent class members did not have a chance to litigate the certification issue in the original proceeding.<sup>3</sup> In fact, the Third Circuit Court of Appeals, in *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*,<sup>4</sup> held that it had no power over putative class members<sup>5</sup> in a Rule 23(b)(3) action because it had not afforded the class due process.<sup>6</sup> However, the Seventh Circuit Court of Appeals, in *In re Bridgestone/Firestone, Inc., Tires*

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<sup>1</sup> See Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 143 (1996) (noting that in the federal districts surveyed, between 62% and 100% of the certified class actions settled, while in other cases, between 20% and 30% settled); see also Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 289 (2003) (stating that class actions do not usually go to trial but end in settlements that are really an elaborate set of new rights for the class members in relation to the defendants).

<sup>2</sup> See FED. R. CIV. P. 23(b)(3); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod.*, 134 F.3d 133, 141 (3d Cir. 1998) [hereinafter *GM Trucks II*]. This Note deals exclusively with attempts to certify classes under Rule 23(b)(3) and does not discuss Rule 23(b)(1) or Rule 23(b)(2) class actions, although much of the reasoning may apply to those classes. See generally FED. R. CIV. P. 23(b). Further, this Note recognizes that plaintiffs’ pleadings may contain allegations that a class fits into more than one category, or the class may be denied for failure to meet the requirements of Rule 23(a). See *infra* notes 70-72 and accompanying text for a discussion of the general requirements for certification under Rule 23(a). However, this Note addresses any situation in which it is pled that the class is certifiable under Rule 23(b)(3).

<sup>3</sup> See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 (1979).

<sup>4</sup> 134 F.3d 133 (3d Cir. 1998).

<sup>5</sup> A “putative class member” is a member of an alleged or supposed class for which the plaintiff is seeking certification. See generally BLACK’S LAW DICTIONARY 574 (2d Pocket Ed. 2001).

<sup>6</sup> *GM Trucks II*, 134 F.3d at 141.

*Products Liability Litigation*,<sup>7</sup> recently held that it could exercise power over the entire putative class.<sup>8</sup> This finding allowed the court to use its power under the All Writs Act<sup>9</sup> to enjoin the entire putative class from additional certification attempts.<sup>10</sup> The court also held that this situation fell within an exception to the Anti-Injunction Act, which generally prevents federal courts from staying pending state court litigation.<sup>11</sup>

The Seventh Circuit's ruling solved some of the problems associated with allowing numerous certification attempts by putative class members.<sup>12</sup> However, it did not afford due process to the putative class before enjoining it.<sup>13</sup> Traditionally, in order to bind someone in a Rule 23(b)(3) class action, due process requires adequate representation, notice, an opportunity to be heard, and the right to request exclusion from the class.<sup>14</sup> However, the Seventh Circuit found power to bind an entire putative class based only on adequate representation.<sup>15</sup>

The tension between the divergent approaches taken by the Third Circuit and Seventh Circuit is illustrated by the following hypothetical.<sup>16</sup> Assume that StarBrothers, Inc. has marketed a defective table saw that injures users in all fifty states. Albert, one of the injured users of the product, attempts to have a nationwide class certified against StarBrothers in federal court, but his motion to certify is denied because the nationwide class was not proper. Although StarBrothers used many resources litigating this issue and was successful in doing so, its battle would not be over. Other product users that were not involved in the first action could bring subsequent actions in different jurisdictions to try to get the class certified, and StarBrothers would have no basis to argue collateral estoppel because these new plaintiffs were absent from the original proceedings.<sup>17</sup> Therefore, StarBrothers would be forced to litigate the class certification issue again. Certification attempts could

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<sup>7</sup> 333 F.3d 763 (7th Cir. 2003) [hereinafter *Bridgestone/Firestone*].

<sup>8</sup> *Id.* at 769.

<sup>9</sup> 28 U.S.C. § 1651(a) (2000); see *infra* note 169 and accompanying text for a discussion of the Act.

<sup>10</sup> *Bridgestone/Firestone*, 333 F.3d at 769.

<sup>11</sup> 28 U.S.C. § 2283 (2000); see *infra* notes 189-94, 216-18 and accompanying text for a discussion of the Act.

<sup>12</sup> See *infra* Parts III.B, IV.A.

<sup>13</sup> See *infra* Part III.B, IV.B.2.

<sup>14</sup> *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

<sup>15</sup> *Bridgestone/Firestone*, 333 F.3d at 769.

<sup>16</sup> This hypothetical is fictional and was created by the author for the purpose of illustration.

<sup>17</sup> See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 (1979).

continue as long as there were willing plaintiffs and proper forums. Further, if another court certifies the same class rejected by the federal court, the federal court's decision to deny class certification is rendered meaningless.<sup>18</sup>

Alternatively, StarBrothers could ask the federal court to enjoin the other injured consumers from attempting to certify the class using its power under the All Writs Act.<sup>19</sup> Using the Third Circuit's approach, an exercise of power over those not previously before the court would be improper.<sup>20</sup> However, under the Seventh Circuit's approach, the court could prevent all the injured persons from attempting to certify the class in another forum based merely on finding that their interests were adequately represented by the named plaintiffs.<sup>21</sup> Under this approach, the court could even withhold notice and the opportunity to be heard from those being enjoined.<sup>22</sup>

Typically when a class is certified under Rule 23(b)(3), due process requires that absent class members be given adequate representation, notice, an opportunity to be heard, and the right to request exclusion from the class in order to bind the absent members by the judgment.<sup>23</sup> When applying this standard to members of putative classes after certification has been *denied*, both the Third Circuit and the Seventh Circuit failed to come to an appropriate result.<sup>24</sup> By examining the history of binding out-of-state defendants and absent class members, this Note will demonstrate that there is power to bind putative class members only when notice, an opportunity to be heard, *and* adequate representation are given.<sup>25</sup>

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<sup>18</sup> See *infra* Part IV.A, which discusses this issue and other problems associated with repeated certification attempts.

<sup>19</sup> 28 U.S.C. § 1651(a) (2000); see *infra* note 169 and accompanying text for a discussion of this Act.

<sup>20</sup> See *GM Trucks II*, 134 F.3d 133, 141 (3d Cir. 1998).

<sup>21</sup> See *Bridgestone/Firestone*, 333 F.3d 763, 768-769 (7th Cir. 2003). In this hypothetical, the absent class members filed their actions after the federal court had decided the certification issue. However, if the actions were concurrent with the federal court action, the Anti-Injunction Act would prevent the federal court from enjoining the state court proceedings. See *infra* notes 189-94, 216-18 and accompanying text for a discussion of the circuit split regarding whether this situation fits into one of the exceptions to the Anti-Injunction Act.

<sup>22</sup> See *infra* Part IV.B for a discussion of the due process implications of this method.

<sup>23</sup> *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

<sup>24</sup> See *infra* Part IV.

<sup>25</sup> See *infra* Part III.B.2.

Part II of this Note first discusses traditional personal jurisdiction, followed by the bases for gaining power over absent class members in the absence of personal jurisdiction, with an emphasis on what due process protections are required.<sup>26</sup> Part III describes the current circuit split regarding whether there is power to bind members of putative classes after a court denies certification.<sup>27</sup> The Third Circuit effectively refused to exercise power over the putative class by requiring the right to opt out to be given.<sup>28</sup> However, the Seventh Circuit exercised its injunctive power based solely on a showing of adequate representation.<sup>29</sup> Part IV describes the problems associated with both of these approaches and attempts to find an appropriate balance of the competing interests.<sup>30</sup> Part V proposes an amendment to Rule 23(c) which would allow federal courts to enjoin the putative class members from further attempts to certify the same class found untenable by a federal court.<sup>31</sup> However, the basis for this power must come by providing putative class members notice, an opportunity to be heard, *and* adequate representation.<sup>32</sup> The proposed change to Rule 23(c) would require merely the best notice practicable and not individual notice.<sup>33</sup> Additionally, because the defendant is put into the plaintiff's position when seeking an injunction, courts should have the power to require the defendant to reimburse the plaintiff for the costs of notice if an injunction is issued.<sup>34</sup>

## II. POWER TO BIND ABSENT MEMBERS OF CERTIFIED RULE 23(B)(3) CLASSES

Generally, in order to be bound by a judgment, one must be subject to personal jurisdiction and served with process.<sup>35</sup> However, both Rule 23 and Supreme Court jurisprudence create an exception to this rule for absent class members in class actions.<sup>36</sup> This exception is applicable to members of Rule 23(b)(3) classes when notice, an opportunity to be heard, the right to request exclusion from the class ("opt out"), and adequate representation are afforded.<sup>37</sup> However, even in the absence of

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<sup>26</sup> See *infra* Part II.

<sup>27</sup> See *infra* Part III.

<sup>28</sup> GM Trucks II, 134 F.3d 133, 141 (3d Cir. 1998).

<sup>29</sup> See *Bridgestone/Firestone*, 333 F.3d 763, 768-69 (7th Cir. 2003).

<sup>30</sup> See *infra* Part IV.

<sup>31</sup> See *infra* Part V.

<sup>32</sup> See *infra* Part V.

<sup>33</sup> See *infra* Part V.

<sup>34</sup> See *infra* Part V.

<sup>35</sup> See *infra* notes 39, 44 and accompanying text.

<sup>36</sup> See *infra* Part II.B.1-2.

<sup>37</sup> *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

these due process protections, absent class members may still be treated as parties for some procedural events.<sup>38</sup>

#### A. *Traditional Personal Jurisdiction*

Generally, due process requires that a court have personal jurisdiction over a person in order to bind him to a decision.<sup>39</sup> The Supreme Court created an elaborate set of rules for determining when personal jurisdiction exists.<sup>40</sup> Additionally, in order for a state court to exercise personal jurisdiction over an out-of-state defendant, there must be power to do so conferred by statute, typically referred to as a long-arm statute.<sup>41</sup> Long-arm statutes either enumerate acts that give courts jurisdiction or allow any exercise of jurisdiction consistent with due process.<sup>42</sup> A federal court's ability to exercise personal jurisdiction is determined by the same inquiry as that of the state courts in which the federal court sits.<sup>43</sup> Finally, due process requires that notice be given to the party over whom the court will exercise power in order to perfect the jurisdiction.<sup>44</sup>

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<sup>38</sup> See *infra* Part II.C.

<sup>39</sup> See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) (citing *Pennoyer v. Neff*, 95 U.S. 714, 732-33 (1877) for the proposition that “[a] judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere”). The requirement of personal jurisdiction is a liberty interest derived from the Due Process Clause, and thus, it can be waived. *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 (1982).

<sup>40</sup> See, e.g., *Pennoyer*, 95 U.S. at 732.

<sup>41</sup> See, e.g., Eric D. Anderson, *The Long Reach of Illinois' Long-Arm Statute: The Catch-All Provision*, 84 ILL. B.J. 504, 504 (Oct. 1996) (comparing the long-arm statutes of several states).

<sup>42</sup> Compare Joshua S. Bauchner, *New York's Long Arm Statute Contains Provisions Suitable for Jurisdiction over Web Sites*, 72 N.Y. ST B.A.J. (Mar.-Apr. 2000) (citing *Beacon Enters. Inc. v. Menzies*, 715 F.2d 757, 764 n.6 (2d Cir. 1983) for the proposition that New York's long-arm statute does not extend to the limits of due process) with *Connie M. Ericson, Casenote CMMC v. Salinas: The Texas Long-Arm Statute Does Not Reach French Equipment Manufacturer (But Maybe It Should)*, 20 HOUS. J. INT'L L. 493, 496 n.22 (1998) (citing *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 412-13 (1984) for the proposition that the Texas long-arm statute confers jurisdiction to the limits of due process).

<sup>43</sup> See FED. R. CIV. P. 4(k)(1)(A) (“Service of a summons . . . is effective to establish jurisdiction over the person of a defendant (A) who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located.”). *But see* FED. R. CIV. P. 4(k)(1)(B), (C), and (D) (providing exceptions to the general rule for those joined under Rule 14 or Rule 19 and served in the United States within one hundred miles of where the summons was issued, those subject to federal interpleader jurisdiction, or when authorized by a federal statute).

<sup>44</sup> *World-Wide Volkswagen*, 444 U.S. at 291 (citing *Mullane v. Cent. Hanover Trust Co.*, 339 U.S. 306, 313-14 (1950)). Ineffective service will prevent a court from gaining personal

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Originally, in *Pennoyer v. Neff*,<sup>45</sup> the Supreme Court held that due process required a party to be present within the borders of a state in order for a court to have personal jurisdiction over the party.<sup>46</sup> This notion of territoriality was driven by ideas of state sovereignty, and it dominated the personal jurisdiction doctrine for almost seventy-five years, forcing courts to engage in intellectual gymnastics in order to reach equitable results.<sup>47</sup> Many exceptions to the territoriality-based *Pennoyer* rules existed, including some recognized by the *Pennoyer* Court itself.<sup>48</sup> Other courts created exceptions, including the implied consent fiction.<sup>49</sup> A classic example of courts using the implied consent fiction

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jurisdiction. See Debra Lyn Bassett, *U.S. Class Actions Go Global: Transactional Class Actions and Personal Jurisdiction*, 72 *FORDHAM L. REV.* 41, 47 (2003); cf. *FED. R. CIV. P.* 4 (listing the notice requirements to be used in federal court proceedings).

<sup>45</sup> 95 U.S. at 714.

<sup>46</sup> *Id.* at 733 (stating that in order to have a valid judgment in personam, power must be exerted over the defendant by service of process in the state or by voluntary appearance).

<sup>47</sup> See *Shaffer v. Heitner*, 433 U.S. 186, 202 (1977) (discussing the rigidity of the territoriality-based *Pennoyer* approach).

<sup>48</sup> One exception recognized in *Pennoyer* was that of in rem jurisdiction. 95 U.S. at 724. (stating that if someone had property within a state, and the property was attached in accordance with local law, he could be bound by a judgment only to the extent of the property involved). However, the Supreme Court later came to rethink its in rem analysis. *Shaffer*, 433 U.S. at 212 (reasoning that it can no longer accept the fiction that in rem jurisdiction is merely an assertion of power over the property, and not over the person, and thus “all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny”). A second exception recognized in *Pennoyer* is that a state has the power to adjudicate the status of a resident, such as in a divorce case, in which the defendant is a non-resident. 95 U.S. at 734-35; see Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 *TEX. L. REV.* 689, 696 (1987) (arguing that this meant a state’s courts always had power over residents, even when they were not present). A third exception was that a state may require non-residents that enter into partnerships or contracts within the state to appoint an agent within the state for service of process or a place in which service may be left, and if they do not, the state may designate a public officer for that purpose. *Pennoyer*, 95 U.S. at 735. The final exception recognized in *Pennoyer* was that a corporation, by doing business in a state, consented to suit in that state. *Id.*; see *Shaffer*, 433 U.S. at 202 (citing *Int’l Harvester Co. v. Kentucky*, 234 U.S. 579 (1914) for the proposition that this exception was expanded by the idea that corporations doing business in a state were considered “present” in the state). It became clear, however, that courts were really attempting to determine if it was fair to exercise jurisdiction over these corporations. See, e.g., *Hutchinson v. Chase & Gilbert*, 45 F.2d 139, 141 (2d Cir. 1930).

<sup>49</sup> See *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 (1982) (stating that personal jurisdiction is a waivable due process right each individual possesses, and thus, “[a] variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the court”). The Court went on to list a number of instances in which consent to jurisdiction was found. *Id.* at 704; see *Nat’l Equip. Rental v. Szukhent*, 375 U.S. 311, 316 (1964) (stating that a contract may, by its terms, bind parties to jurisdiction); *Adam v. Saenger*, 303 U.S. 59, 67-68 (1938) (finding plaintiffs consented to cross-claims by bringing action); *St. Clair v. Cox*, 106 U.S. 350, 356 (1882)

involved an out-of-state motorist who the Supreme Court held consented to the appointment of a state official as his agent for service of process in civil actions merely because he operated his car on the state's roads.<sup>50</sup>

In 1945, the Supreme Court in *International Shoe Co. v. Washington*<sup>51</sup> released itself from the territoriality-based *Pennoyer* approach and moved to a standard based on reasonableness.<sup>52</sup> In *International Shoe*, the Court declared that in order to gain personal jurisdiction over a defendant not present in the forum state, "due process requires only that . . . he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"<sup>53</sup> This standard protects defendants from the burden of litigating in a distant forum and ensures that states do not infringe on the sovereignty of other states.<sup>54</sup>

The Supreme Court subsequently elaborated on the minimum contacts test.<sup>55</sup> In the minimum contacts test, the initial inquiry is whether there has been some act by which the defendant purposely availed himself of "the benefits and protections of the forum's laws."<sup>56</sup> In conducting this inquiry, the court must consider whether the

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(holding that a state could infer consent from a business that registers to conduct business in the state); *Victory Transp. Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 363 (2d Cir. 1964) (finding consent in an arbitration agreement). *But see* *Olberding v. Ill. Cent. R.R. Co.*, 346 U.S. 338, 340-41 (1953) (stating that jurisdiction gained in this way is not based on consent at all, for the party could protest to all ends and still be subject to jurisdiction); Stein, *supra* note 48, at 696 ("No one really believed this fiction—clearly the defendant's 'consent' was either coerced or unintended—but the fiction was essential to the maintenance of the *Pennoyer* framework.").

<sup>50</sup> See *Hess v. Pawloski*, 274 U.S. 352, 355 (1927).

<sup>51</sup> 326 U.S. 310 (1945).

<sup>52</sup> *Id.* at 317; see *Hanson v. Denkla*, 357 U.S. 235, 250-51 (1985) (noting that technological progress has allowed for increased interstate commerce and better communications and transportation, which make it easier for defendants to defend in foreign states and have forced the requirements for personal jurisdiction to move from the rigid *Pennoyer* paradigm to the minimum contacts standard of *International Shoe*).

<sup>53</sup> *Int'l Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). Due process does not allow for a binding judgment in personam against a defendant with no contacts, ties, or relations to the state. *Id.* at 319.

<sup>54</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

<sup>55</sup> *Bassett*, *supra* note 44, at 52 (stating that there is no consistent, comprehensive way to determine if minimum contacts exist and that the Supreme Court has essentially decided the issue case by case).

<sup>56</sup> *Hanson*, 357 U.S. at 253; see *Asahi Metal Indus., Co. v. Sup. Ct. of California*, 480 U.S. 102, 108-09 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957).



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defendant can reasonably foresee being sued in the forum state.<sup>57</sup> Once a court has established that there has been purposeful availment, it must determine whether it is reasonable to exercise jurisdiction, or in other words, if it would be consistent with traditional notions of “fair play and substantial justice.”<sup>58</sup> This reasonableness inquiry entails considering many factors, including the burden placed on the defendant, the state’s interest in adjudicating the claim and providing its citizens with relief, the plaintiff’s interests, and judicial efficiency.<sup>59</sup>

Additionally, notice of a pending action is necessary to perfect personal jurisdiction and inform those who will be deprived of their life, liberty, or property by that action.<sup>60</sup> The Supreme Court, in *Mullane v. Central Hanover Bank & Trust Co.*,<sup>61</sup> held that notice reasonably calculated under the circumstances to alert the interested parties and give them an opportunity to present objections is an “elementary and fundamental requirement of due process.”<sup>62</sup> Thus, in order to exercise personal jurisdiction over a defendant, he must receive service of process that is reasonably calculated to reach him.<sup>63</sup> This means that defendants may

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<sup>57</sup> *World-Wide Volkswagen*, 444 U.S. at 295-96 (rejecting the argument that a consumer unilaterally acting to bring a product produced by the defendant into the forum state is sufficient to create personal jurisdiction). Although the Court has stated that a defendant placing a product into the stream of commerce and foreseeing that it will reach the forum will not create purposeful availment, that part of the decision was a 4-4 split with no precedential value. See *Asahi Metal Indus.*, 480 U.S. at 112 (plurality opinion). Therefore, the many decisions taking an opposing view still are good law. See, e.g., *Bean Dredging Corp. v. Dredge Technology Corp.*, 744 F.2d 1081 (5th Cir. 1984).

<sup>58</sup> *Burger King*, 471 U.S. at 476; see *Asahi Metal Indus.*, 480 U.S. at 114 (finding jurisdiction unreasonable based on the burden it would have placed on the defendant).

<sup>59</sup> *Asahi Metal Indus.*, 480 U.S. at 113; see *Burger King*, 471 U.S. at 473-74 (stating that if there is purposeful availment, “it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities”); *Kulko v. Sup. Ct. of Cal.*, 436 U.S. 84, 92, 98 (1978) (stating that the plaintiff’s interest in gaining effective relief and the interest in judicial economy must also be considered); *McGee*, 355 U.S. at 223 (noting that the forum state’s interest in adjudicating the dispute must be considered in determining whether there are minimum contacts).

<sup>60</sup> *Hansberry v. Lee*, 311 U.S. 32, 41 (1940); see U.S. CONST. amend. V.

<sup>61</sup> 339 U.S. 306, 314 (1950).

<sup>62</sup> *Id.* Whether or not a type of notice is constitutional may depend on if it is “reasonably certain to inform those affected . . . or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.” *Id.* at 315.

<sup>63</sup> See *Bassett*, *supra* note 44, at 82 n.31 (citing *Omni Capital Int’l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987); *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 444-45 (1946)).

be bound by a judgment without actually receiving notice if it was reasonably calculated to reach them.<sup>64</sup>

Absent class members in class actions usually lack minimum contacts with the forum state, and thus courts do not have personal jurisdiction over them.<sup>65</sup> However, class actions can still go forward because there is no need for a court to have personal jurisdiction over an absent class member in order to bind him to a judgment.<sup>66</sup> Rule 23 and Supreme Court jurisprudence offer the basis for this exercise of power in the absence of traditional personal jurisdiction.<sup>67</sup>

*B. Gaining Power over Absent Class Members in Rule 23(b)(3) Class Actions*

1. Rule 23 Expressly Grants Power to Bind Absent Class Members

Rule 23 provides the basic procedure for litigating class actions in federal courts, and it explicitly provides for power over absent class members.<sup>68</sup> The Rule was amended in December 2003, but the changes only codified existing practice regarding notice, settlement, and appointment of class counsel.<sup>69</sup> Every class action certified in federal

<sup>64</sup> See, e.g., *Miedreich v. Lauenstein*, 232 U.S. 236, 246-47 (1914) (holding that due process was afforded even though defendant was not served and return of service was falsely made).

<sup>65</sup> *Nagareda*, *supra* note 1, at 293.

<sup>66</sup> See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985).

<sup>67</sup> See *infra* Part II.B.1-2.

<sup>68</sup> See FED. R. CIV. P. 23(c)(2).

<sup>69</sup> See Linda S. Mullenix, *No Exit: Mandatory Class Actions in the New Millennium and the Blurring of Categorical Imperatives*, 2003 U. CHI. LEGAL F. 177, 246 n.3 [hereinafter Mullenix, *No Exit*] (stating that the proposed additions of Rule 23(g) and (h) were simply the codification of existing practice in federal courts). The amendments provide no resolution to the problems addressed by this Note concerning whether there is a basis for power over putative class members after certification is denied. See *infra* Part IV.A-B. Rule 23(c)(2) was amended to provide a more efficient notice process. See FED. R. CIV. P. 23(c)(2)(B). There was also a revision explicitly giving courts discretion to require notice in (b)(1) and (b)(2) class actions. See *id.* 23(c)(2)(A). The language of (c)(1) was slightly altered to change the time when the certification decision should be made. See *id.* 23(c)(1). Prior to December 1, 2003, this rule required a decision as soon as practicable after the action started. See FED. R. CIV. P. 23 cmt.(c)(1) (2003 Amendment). The drafters believed that the “as soon as practicable” standard was not fitting with the practices of courts or the reasons for delaying the certification decision. *Id.* Rule 23(e) was amended to more clearly define the procedures for approving a class action settlement, now explicitly allowing for a fairness hearing, objections by class members, and refusal of a settlement by the court if another opportunity to opt out is not given. See FED. R. CIV. P. 23(e)(1) – (4). Finally, Rule 23(g) was added, stating the procedure for choosing class counsel and requiring that class counsel adequately represent the class, and Rule 23(h) sets out the guidelines for awarding attorney fees. FED. R. CIV. P. 23(g), (h).

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court still must meet the requirements of “numerosity, commonality, and typicality.”<sup>70</sup> In other words, there must be so many potential class members that joinder is not feasible, there must be questions of fact or law common to the class, and the class representative must have claims that are “typical of the claims or defenses of the class.”<sup>71</sup> Additionally, Rule 23(a) requires that the named class representative provide adequate representation at all times.<sup>72</sup>

Rule 23(b) creates three distinct types of class actions.<sup>73</sup> The Rule 23(b)(1) class exists when individual suits would risk inconsistent judgments, creating incompatible standards for the other party or if the individual actions would substantially affect the interests of non-parties.<sup>74</sup> The Rule 23(b)(2) class action is used when the opposing party has acted in a way that is applicable generally to the class, making injunctive or declaratory relief proper.<sup>75</sup> The Rule 23(b)(3) class action is used if “questions of law or fact common to the members of the class

<sup>70</sup> See, e.g., John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1423 (2003).

<sup>71</sup> FED. R. CIV. P. 23(a); see *Lukenas v. Bryce’s Mountain Resort, Inc.*, 538 F.2d 594, 596 (4th Cir. 1976) (noting that all federal class actions must satisfy the requirements of Rule 23(a)).

<sup>72</sup> FED. R. CIV. P. 23(a). Also, Rule 23(g) provides that “[a]n attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.” FED. R. CIV. P. 23(g)(1)(B). See *infra* note 96 and accompanying text for a discussion of the requirement of adequate representation.

<sup>73</sup> FED. R. CIV. P. 23(b). It is generally accepted that the remedy sought is the main determinate in deciding whether to certify a class under Rule 23(b)(1), (2), or (3). Graham C. Lilly, *Modeling Class Actions: The Representative Suit as an Analytical Tool*, 81 NEB. L. REV. 1008, 1031 (2003).

<sup>74</sup> FED. R. CIV. P. 23(b)(1). See, e.g., *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1193 (9th Cir. 2001) (discussing certification under Rule 23(b)(1)(A)); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833-38 (1999) (discussing certification under Rule 23(b)(1)(B) and noting that there is no right to notice or to opt out of class actions certified under (b)(1)).

<sup>75</sup> FED. R. CIV. P. 23(b)(2). See, e.g., *In re Monumental Life Ins. Co.*, 343 F.3d 331, 338-39 (2003) (describing certification under Rule 23 (b)(2)). In (b)(2) class actions, notice is not required. See, e.g., *Sosna v. Iowa*, 419 U.S. 393, 397 (1975). Notice is discretionary both in class actions certified under Rule 23(b)(1) and (b)(2). See FED. R. CIV. P. 23(c)(2)(A) (“For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.”) (2003 Amendment). Before the 2003 Amendment, Rule 23(d)(2) was used by courts to require notice in Rule 23(b)(1) and (b)(2) actions at their discretion. See FED. R. CIV. P. 23(d)(2) (“The court may make appropriate orders: . . . (2) requiring, for the protection of the members of the class . . . that notice be given in such manner as the court may direct to some or all of the members of any step in the action.”); *Molski v. Gleich*, 318 F.3d 937, 952 (2003) (stating that a right to opt out may be required by the court under Rule 23(d)(2) for classes certified under Rule 23(b)(2)).

predominate over any questions affecting only individual members”<sup>76</sup> and a class action is the best method available to adjudicate the controversy.<sup>77</sup> The following list is the six requirements for bringing a class action under Rule 23(b)(3): predominance, superiority, numerosity, commonality, typicality, and adequacy of representation.<sup>78</sup>

Once a class is certified under Rule 23(b)(3), due process requires that absent class members also receive notice, an opportunity to be heard, and the right to opt out of the litigation in order to be bound by a class action judgment.<sup>79</sup> The notice must be “the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.”<sup>80</sup> In addition, the notice

<sup>76</sup> FED. R. CIV. P. 23(b)(3). The precursor to the Rule 23(b)(3) class action was the “spurious” class action, which was not binding on absent class members. JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* 739 (1999); see Lilly, *supra* note 73, at 1015 (noting that the spurious class action was often considered little more than a liberal joinder device).

<sup>77</sup> FED. R. CIV. P. 23(b)(3). The Rule also gives factors to use when determining if a class action is the most effective way to adjudicate the claim, which include:

- (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

*Id.* The official comment to this section states that this list is not exhaustive. FED. R. CIV. P. 23 cmt. (b)(3) (1966 Amendment). Though actions that meet the requirements of Rule 23(b)(3) are not as convincingly fit for class treatment as those that meet the requirements of Rule 23(b)(1) or (b)(2), they do serve the purpose of saving time, effort, and expense, as well as promoting uniform decisions for class members and opposing parties. *Id.*, cmt. (b)(3) (1966 Amendment).

<sup>78</sup> Bronsteen & Fiss, *supra* note 70, at 1423; cf. Mullenix, *No Exit*, *supra* note 69, at 215 (stating that classes certified under Rule 23(b)(1) and (b)(2) do not need to meet the predominance and superiority requirements for certification under Rule 23 (b)(3)).

<sup>79</sup> See FED. R. CIV. P. 23(a)(4), (c)(2)(B).

<sup>80</sup> FED. R. CIV. P. 23(c)(2)(B). This rule was amended in 2003 and now states:

- The notice must concisely and clearly state in plain, easily understood language: the nature of the action, the definition of the class certified, the class claims, issues, or defenses, that a class member may enter an appearance through counsel if the member so desires, that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and the binding effect of a class judgment on class members under Rule 23(c)(3).

*Id.* The Rule previously stated:

- The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members

must state that the absent class members will be bound if they do not opt out of the class action.<sup>81</sup>

## 2. The Supreme Court Sets the Due Process Standard for Binding Absent Class Members

The Supreme Court addressed the issue of power over absent class members in *Phillips Petroleum v. Shutts*.<sup>82</sup> This case involved a nationwide “damages” class action brought in a Kansas state court.<sup>83</sup> Although the case dealt with Kansas class action law, the decision interpreted the Due Process Clause and is applicable to Rule 23(b)(3) class actions in federal court.<sup>84</sup> Specifically in *Shutts*, the defendant leased land in several different states in order to extract and produce natural gas.<sup>85</sup> Over 28,000 people were owed interest on delayed royalty payments from the defendant because they possessed rights to these land leases, and many did not have minimum contacts with Kansas.<sup>86</sup> A class was certified under Kansas law, and a judgment was issued in favor of the class, which was affirmed by the Kansas Supreme Court.<sup>87</sup>

The defendant appealed to the United States Supreme Court, contending that due process prevented the Kansas court from

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who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

*Id.* 23(c)(2) (1966 Amendment); see *infra* Part II.B.3 for an analysis of the standards and procedures of notice in class actions. There are additional provisions in Rule 23 that require notice to members of any certified class in certain situations. See, e.g., FED. R. CIV. P. 23(e)(1)(B) (mandating that before a case can be dismissed or settled, reasonable notice be given to all class members that would be bound by a judgment). Another example is that Rule 23(h) mandates that before awarding attorney’s fees, a motion must be made and reasonable notice must be given to all class members so that they have an opportunity to object. *Id.* 23(h)(1) (2003 Amendment).

<sup>81</sup> See *Id.* 23(c)(2)(B); see also *supra* notes 81, 99-104 and accompanying text for a discussion of the right to opt out of a class.

<sup>82</sup> 472 U.S. 797 (1985) (holding that absent, nonresident class members can be bound to a class judgment if due process is afforded). Three years earlier, the Court had a chance to answer the question of whether it could bind an absent class member without traditional personal jurisdiction in *Gillette Co. v. Miner*. 456 U.S. 914 (1982). After granting certiorari, the Court dismissed the case because the lower court’s decision was not final, and the case settled on remand. Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1, 6-7 (1986).

<sup>83</sup> *Shutts v. Phillips Petroleum Co.*, 679 P.2d 1159, 1165 (Kan. 1984).

<sup>84</sup> *Shutts*, 472 U.S. at 799.

<sup>85</sup> *Shutts*, 679 P.2d at 1165.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

adjudicating the claims of the absent class members because the absent class members did not have minimum contacts with Kansas.<sup>88</sup> However, the Court stated that the minimum contacts test does not apply to absent class members and proceeded to define the due process requirements for gaining power over absent class members.<sup>89</sup> These requirements were notice, an opportunity to be heard, an ability to opt out of the class, and adequate representation.<sup>90</sup> However, the Court limited its holding to class actions dealing only with “claims wholly or predominately for money judgments.”<sup>91</sup>

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<sup>88</sup> *Shutts*, 472 U.S. at 799.

<sup>89</sup> *Id.* at 811-12. This decision was made on appeal from the Kansas Supreme Court; thus, the *Shutts* Court was interpreting the Fourteenth Amendment. *Id.* (citing U.S. CONST. amend. XIV). Nevertheless, the holding of *Shutts* has been applied to the Fifth Amendment. See, e.g., *In re Teletronics Pacing Sys., Inc.*, 221 F.3d 870, 881 (6th Cir. 2000) (citing U.S. CONST. amend. V).

<sup>90</sup> *Shutts*, 472 U.S. at 812.

<sup>91</sup> *Id.* at 811-12. Footnote 3 states:

Our holding today is limited to those class actions which seek to bind [class members] concerning claims wholly or predominately for money judgments. We intimate no view concerning other types of class actions, such as those seeking equitable relief. Nor, of course, does our discussion of personal jurisdiction address class actions where the jurisdiction is asserted against a *defendant* class.

*Id.* This limitation created the “*Shutts*” problem, which involves whether mandatory classes that include claims for both equitable relief and damages, such as some classes certified under Rule 23(b)(2) in federal courts, should be afforded the same protections as classes predominately for damages. Linda S. Mullenix, *Getting to Shutts*, 46 U. KAN. L. REV. 727, 730 (1998) [hereinafter Mullenix, *Getting to Shutts*]. See generally Eubanks v. Billington, 110 F.3d 87, 92 (D.C. Cir. 1997) (stating that courts have allowed monetary damages with declaratory or injunctive relief in Rule 23(b)(2) class actions if the monetary relief does not predominate). The majority rule in deciding whether to afford the right to opt out is to consider the predominate relief sought. Mullenix, *Getting to Shutts*, *supra*, at 737. The actual standard courts use is very hard to determine. Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1068 (2002). The Supreme Court had a chance to resolve whether class members of classes certified under Rule 23(b)(2) that include any claims for monetary damages fall within the purview of *Shutts* and should be given the right to opt out. See *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994). In that case, the district court held that an opt-out right was not proper, and the Third Circuit affirmed the holding without issuing a written opinion. *In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 815 F.2d 695 (3d Cir. 1987). Essentially the same action was filed in another district court and on appeal of the dismissal, the Ninth Circuit held that the case was controlled by *Shutts* and that due process required a right to opt out if monetary claims are involved. *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992). This decision essentially stated that claimants must separate the damage claims from equitable claims and certify the damage claims under Rule 23(b)(3). Mullenix, *Getting to Shutts*, *supra*, at 737-38 (citing *Ticor Title*, 982 F.2d at 392). The Supreme Court granted certiorari, but then dismissed the case as having granted it improvidently. *Ticor Title*, 511 U.S. at 118.

In declaring that the minimum contacts test was inapplicable to absent class members, the Court stated that the test was designed to protect *defendants* from distant forum abuse when their lack of contacts with the forum made it unfair to force them to defend there.<sup>92</sup> Absent class plaintiffs are rarely subject to counterclaims, cross-claims, fees, litigation costs, or liability for damages.<sup>93</sup> Therefore, the burden defendants face is greater than the burden faced by absent class members, which justifies application of the minimum contacts test to defendants only.<sup>94</sup>

Although the Court refused to provide absent class plaintiffs with the same protection as out-of-state defendants, it did require some safeguards to protect the chose in action, which is a recognized property right.<sup>95</sup> It held that in order to be bound by a judgment in a class action wholly or predominately for a money judgment, the class representative must provide adequate representation at all times.<sup>96</sup> In addition, the best

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<sup>92</sup> *Shutts*, 472 U.S. at 807; *cf.* *Carlough v. Amchem Prod., Inc.*, 10 F.3d 189, 199 (3d Cir. 1993) (citing *In re Real Estate Title*, 869 F.2d 760, 766 (3d Cir. 1989)) (“The procedural protections of [Rule 23] replace the rigid rules of personal jurisdiction in this context and are all that is needed to meet the requirements of due process.”).

<sup>93</sup> *Shutts*, 472 U.S. at 810.

<sup>94</sup> *Id.* at 811; *cf.* *Bassett*, *supra* note 44, at 59 (reasoning that because applying the minimum contacts test to absent class members would have virtually eliminated multistate classes, this decision was necessary to maintain an efficient judicial system).

<sup>95</sup> *Shutts*, 472 U.S. at 811-12. A “chose in action” is a “right to receive or recover a debt, demand, or damages on a cause of action ex contractu or for a tort or omission of a duty.” Kevin Pennell, Note, *On the Assignment of Legal Malpractice Claims: A Contractual Solution to a Contractual Problem*, 82 TEX. L. REV. 481, 483 (2003) (quoting *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338, 339 n.1 (Ind. 1991)). There are also protections built into the federal class action rules that help justify not applying the minimum contacts test to absent class plaintiffs. See *Bassett*, *supra* note 44, at 67; see *supra* Part II.B.1 for a discussion of Rule 23.

<sup>96</sup> *Shutts*, 472 U.S. at 812 (citing *Hansberry v. Lee*, 311 U.S. 32, 42-43, 45 (1940)); see FED. R. CIV. P. 23(a)(4) (requiring a judicial finding that the class representative will fairly and adequately represent the interests of the class in order for certification to be proper); FED. R. CIV. P. 23(g)(1)(B) (requiring that the class counsel also fairly and adequately represent the class). It has been suggested that the requirement of adequate representation be applied less stringently when there is an opportunity to opt out of the class. John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 438 (2000). Nevertheless, under Rule 23(b)(3), absent class members that do not opt out may be able to challenge the adequacy of representation either in a subsequent proceeding or by intervening in the original action. *Lilly*, *supra* note 73, at 1035. The majority view is that the original forum is the appropriate court to hear attacks on the adequacy of representation. Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1150 (1998) (citing *In re “Agent Orange” Prod. Liab. Litig.*, 996 F.2d 1425, 1432-33 (2d Cir. 1993) for the proposition that there is a constitutional obligation to hear collateral attacks regarding the adequacy of representation). However, Professor Monaghan argues that because class representatives

notice practicable under the circumstances must be given to the class members, including individual notice if the absent class members can be located through reasonable effort.<sup>97</sup> The notice must apprise absent class members of their right to be heard in the action,<sup>98</sup> and inform them of their right to opt out of the proceedings.<sup>99</sup>

The Court did not require class members to affirmatively opt in to the class.<sup>100</sup> Instead, it inferred their consent based on their failure to opt out of the class.<sup>101</sup> The Court assumed consent was required and stated that the real question was what showing of consent was needed.<sup>102</sup>

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need to provide adequate representation until the judgment is made and because the chance to opt out ends before the judgment is made, there is a period of time in between the two which causes problems for the absent class member who may want to opt out based on something the representative does toward the end of the proceedings. *Id.* at 1169. Because the class members do not impliedly consent to inadequate representation, there should be an opportunity to challenge the adequacy of representation in another forum. *Id.* at 1169. However, the counter to this argument is that it is not adequacy in fact that is required, but an adequate structure for determining adequacy of representation in the original forum, making it the appropriate place to determine adequacy. Nagareda, *supra* note 1, at 313.

<sup>97</sup> *Shutts*, 472 U.S. at 812 (quoting *Mullane v. Cent. Hanover Trust Co.*, 339 U.S. 306, 314-15 (1950)) (“The notice must be the best practicable, ‘reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’”). See *infra* Part II.B.3 for a discussion of the notice requirements in certified class actions.

<sup>98</sup> *Shutts*, 472 U.S. at 812; see FED. R. CIV. P. 23(c)(2)(B) (requiring that the notice in Rule 23(b)(3) class actions inform the class members of their right to be excluded from the class).

<sup>99</sup> *Shutts*, 472 U.S. at 812. This generally would be accomplished by sending an “opt out” form to the absent class members that would be executed and returned to the court. *Id.* For a discussion of the split of authority regarding the necessity of a chance to opt out of Rule 23 (b)(2) that seek some money damages, see *supra* note 91.

<sup>100</sup> *Shutts*, 472 U.S. at 812. An opt-in requirement would cause class actions to lose their effectiveness in litigating multistate small claims cases. Issacharoff, *supra* note 91, at 1064. To prevent the dramatic increase in transaction costs that this would have, and anticipating the lack of response from most class members with small claims, *Shutts* and subsequent cases hold that consent is assumed originally, and absent plaintiffs need only be given the opportunity to show a lack of consent. *Id.*; see *Miller & Crump*, *supra* note 82, at 11-13 (asserting that small claims would not survive an opt-in requirement, and parties with large claims are well-protected by the right to opt out of the class).

<sup>101</sup> *Shutts*, 472 U.S. at 812; see *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779-81 (1984) (stating that anyone can consent to personal jurisdiction in any forum); *Yeldell v. Tutt*, 913 F.2d 533, 539 (8th Cir. 1990) (holding that under FED. R. CIV. P. 12(h) a party waives any objection to personal jurisdiction if it is not raised in the first responsive pleading with the court, but this merely sets the lower limit and does not preclude a court from inferring consent); see also *Lilly*, *supra* note 73, at 1031 (noting that because absent class members are impliedly consenting to jurisdiction for what is written in the notice, they are free to challenge issues and claims not listed in the notice).

<sup>102</sup> *Shutts*, 472 U.S. at 812. This is similar to the legal gymnastics courts used before *International Shoe*, when implied consent was often necessary to reach an equitable result



Inferring consent was necessary to protect the class members' chose in action.<sup>103</sup>

Implied consent, made possible through notice and the right to opt out, adequate representation, and the right to be heard, is required to afford due process and allow for constitutional power to bind absent class members.<sup>104</sup> The linchpin to providing these due process protections is notice.<sup>105</sup> As discussed above, in Rule 23(b)(3) class actions, notice acts as a conduit for inferring consent through refusal to opt out of the class.<sup>106</sup> It is also "the single greatest safeguard against inadequate representation,"<sup>107</sup> and the only way to provide a meaningful opportunity to be heard.<sup>108</sup>

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while staying within the bounds of the territoriality-based *Pennoyer* rules. See *supra* notes 49-50 and accompanying text for a discussion of the implied consent fiction used by courts after *Pennoyer*. Nevertheless, in 1977 the Supreme Court held that all assertions of personal jurisdiction need to be evaluated under the minimum contacts test, which could lead one to believe that *Shutts* was decided more based on fundamental fairness than on implied consent. See *Shaffer v. Heitner*, 433 U.S. 186, 207 (1977). Additionally, inferring consent from the refusal to opt out seems improper because normally there is personal jurisdiction followed by notice to perfect it, but in *Shutts*, notice was used to gain power to bind. See Sarajane K. Walker, Note, *Personal Jurisdiction and Multistate Plaintiff Class Actions: The Impact of World-Wide Volkswagen Corp. v. Woodson*, 32 DRAKE L. REV. 441, 459 (1983) (arguing that a court lacking power to compel appearance arguably has no authority to compel a putative class member to opt in or opt out); Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 IND. L.J. 597, 620 (1987) (stating that the *Shutts* implied consent theory violates the general theory of consent because "a court with no power over an individual should have no power to attach adverse legal consequences to the individual's refusal or neglect to answer a communication from that court").

<sup>103</sup> *Shutts*, 472 U.S. at 812 (citing *Mullane*, 339 U.S. at 313); see Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571, 585-89 (1997) (describing the history of considering a cause of action to be a constitutionally protected property interest).

<sup>104</sup> See, e.g., *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992); Bassett, *supra* note 44, at 58-60; Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L. REV. 765, 766 n.3 (1998); cf. *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 200 (3d Cir. 1993) (interpreting *Shutts* to mean that there is no jurisdiction over absent class members that do not otherwise consent until after the opt out period has ended). After a class is certified, there would still be no power over the putative class members until the opt out period has ended. See *In re Sulzer Hip Prosthesis and Knee Prosthesis Liab. Litig.* No. 101CV9000, MDL 1401, 2001 WL 1842158, at \*2 n.3 (N.D. Ohio Dec. 20, 2001) (noting that at most this would be "a harmless initial jurisdictional overreach" that could be remedied).

<sup>105</sup> See *infra* Part II.B.3.

<sup>106</sup> See *Shutts*, 472 U.S. at 811-12.

<sup>107</sup> *Shutts v. Phillips Petroleum Co.*, 679 P.2d 1159, 1171 (Kan. 1984) (citing *Mullane*, 339 U.S. at 314).

<sup>108</sup> See *infra* Part II.B.3

## 3. Notice Is the Key to Gaining Power over Absent Class Members

Rule 23(c)(2) sets the notice requirements for class actions in federal courts.<sup>109</sup> The official comments to this rule cite to *Mullane*,<sup>110</sup> and the rule itself requires that in all class actions certified under Rule 23(b)(3), the absent class members must receive the “best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.”<sup>111</sup> The Supreme Court in *Eisen v. Carlisle & Jacquelin*<sup>112</sup> upheld this standard for providing notice to absent class members and held that for the class members identifiable through reasonable efforts, first class mail afforded due process.<sup>113</sup> In so

<sup>109</sup> FED. R. CIV. P. 23(c)(2). See *supra* note 80 for the text of Rule 23(c)(2). The requirements for service on defendants are more rigorous than those imposed on notice to absent class members. See FED. R. CIV. P. 23 cmt. (d)(2) (1966 Amendment) (stating that class notice need not meet the formalities of service of process on defendants). “Although service by first-class mail is an option under Rule 4(c)(2)(C)(ii), if no acknowledgement of service is returned, personal service or service at the individual’s dwelling house is then required.” Wood, *supra* note 102, at 621 (“This initial safeguard of the absentee’s interest is precisely what justifies a finding of waiver with respect to personal jurisdiction objections when the defendant appears and is silent, and it is lacking in Rule 23(c)(2).”).

<sup>110</sup> FED. R. CIV. P. 23, cmt. (d)(2) (1966 Amendment). The official commentary noted that the mandatory notice under Rule 23(c)(2), when combined with the discretionary notice of Rule 23(d)(2), fulfills the due process requirements. *Id.* (citing *Mullane*, 339 U.S. at 314-15; *Gart v. Cole*, 263 F.2d 244, 248-49 (2d Cir. 1959); *Dickinson v. Burnham*, 197 F.2d 973, 979 (2d Cir. 1952)).

<sup>111</sup> FED. R. CIV. P. 23(c)(2); see *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1105 (5th Cir. 1977) (stating that notice given under (c)(2) must be that which “a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out”). However, the procedural safeguards offered by Rule 23(a) provide support for the idea that notice is not required when the class is certified under Rule 23(b)(1) or (b)(2). See Arthur R. Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 299, 314-15 (1973) (stating that the due process concerns that are addressed by notice are adequately addressed by these requirements for certification in mandatory class actions). Professor Miller also notes that this reasoning is not persuasive in class actions certified under Rule 23(b)(3) because the groups lack the cohesiveness possessed by a class with similar interests or a class seeking an injunction or declaratory judgment common to all class members. *Id.* at 315. Further, class members of Rule 23(b)(3) class actions seek different damages, and have little cohesiveness, which the drafters took into account when determining that there needed to be mandatory notice to class members in Rule 23(b)(3) class actions. *Id.* at 315-16. In addition, notice costs in any context could easily cripple class actions not seeking damages. See FED. R. CIV. P. 23 cmt (c)(2) (2003 Amendment).

<sup>112</sup> 417 U.S. 156 (1974).

<sup>113</sup> *Id.* at 175. The *Eisen* Court held that all 2,250,000 class members whose names and addresses could be identified through reasonable effort should receive notice via first-class mail even though to do so would be prohibitively expensive for the class representatives. *Id.* at 176. It has been argued that this requirement should not be read literally, and notice should be more flexible to account for the enormous cost involved. Miller, *supra* note 111, at 319-20.

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holding, the Court was faithful to the wording of Rule 23(c)(2) and required best notice practicable with no express requirement of individual notice through reasonable efforts.<sup>114</sup>

The Court's decision in *Shutts* stretched the *Eisen* holding, which was based on an interpretation of Rule 23, into a broader due process requirement.<sup>115</sup> Like the *Eisen* Court, the *Shutts* Court held that notice by first class mail not returned as undeliverable affords due process in Rule 23(b)(3) class actions.<sup>116</sup> However, these decisions set the minimum notice requirements, and Rule 23(d) can be used to set higher standards, such as certified mail or opting-in to the class.<sup>117</sup> Even though certified mail would provide certainty of receipt and bolster the theory of implied consent, it is rarely required because it is usually prohibitively expensive.<sup>118</sup>

Plaintiffs' attorneys and courts face a daunting task when determining what constitutes the best notice practicable in class actions.<sup>119</sup> The tremendous costs involved, especially when individual

<sup>114</sup> Bronsteen & Fiss, *supra* note 70, at 1437.

<sup>115</sup> Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) (citing *Mullane*, 339 U.S. at 314-15). There were attempts by groups such as the litigation section of the American Bar Association to make notice in all class actions discretionary before *Shutts*. Miller & Crump, *supra* note 82, at 31 n.217 (noting that a literal reading of *Shutts* suggests that a requirement of discretionary notice would be unconstitutional).

<sup>116</sup> *Shutts*, 472 U.S. at 812. Settlements of class actions raise additional concerns and call for added protections to be given to class members. See *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 778 (3d Cir. 1995). If there is a proposed settlement in *any* class action certified under Rule 23, there must be notice given to the class members. FED. R. CIV. P. 23(e)(1)(B) ("The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise."). Notice of proposed settlement is necessary either when there is a settlement after certification or when a class is certified for settlement purposes. FED. R. CIV. P. 23 cmt. (e)(1) (2003 Amendment). This allows for an opportunity to be heard regarding the fairness of the terms of a proposed settlement. *Lilly*, *supra* note 73, at 1032. In addition, the court may require a renewed opportunity to opt out as a prerequisite for certifying a settlement of the class claims. FED. R. CIV. P. 23(e)(C)(3).

<sup>117</sup> David Crump, *What Really Happens During Class Certification? A Primer for the First-Time Defense Attorney*, 10 REV. LITIG. 1, 19 (1990) (citing FED. R. CIV. P. 23(d); *Eisen*, 417 U.S. at 175-77); see *Klemow v. Time, Inc.*, 352 A.2d 12, 16-17 (Pa. 1976) (holding that Pennsylvania law required an opt-in for the absent class members to be bound). These options may be beneficial to defendants in certain situations. Cf. *Greenhaw v. Lubbock County Beverage Ass'n*, 721 F.2d 1019, 1024 (5th Cir. 1983) (noting that in one case, there was a recovery fund of \$2 million, but the class members were paid only \$17,482).

<sup>118</sup> Miller & Crump, *supra* note 82, at 20.

<sup>119</sup> Willging, *supra* note 1, at 129. In a survey of four federal district courts, it was found that in Rule 23(b)(3) class actions, individual notice is almost always used, supplemented by publication in two-thirds of the cases, and rare use of the broadcast media. *Id.*

notice is required, is an important issue to consider in Rule 23(b)(3) actions.<sup>120</sup> Courts can add the cost of notice onto a judgment against the defendant.<sup>121</sup> However, the *Eisen* Court struck down a procedure utilizing a preliminary determination on the merits to determine whether the defendant should have to pay some of the notice costs at the beginning of the suit.<sup>122</sup> Therefore, class representatives still pay for notice.<sup>123</sup> Nevertheless, there is often a clause in settlement agreements forcing defendants to pay for all or part of the notice costs. This clause is especially effective if a class is certified for settlement purposes because the plaintiffs will not have to pay any of the notice costs at the beginning of the suit.<sup>124</sup>

Many have argued that notice to class members is generally ineffective.<sup>125</sup> Notice is generally sent to non-lawyers and is laden with legalese, which often causes it to be discarded.<sup>126</sup> When an absent class member does not fully appreciate the significance of the notice, or even receive notice, the consent inferred is fictional.<sup>127</sup> These concerns prompted the recent revision to Rule 23(c)(2), which gives specific notice requirements designed to make notice more effective.<sup>128</sup> However, the drafters of the amendment noted that given the complex nature of class actions and the audience to which the notice is sent, there will inevitably be problems.<sup>129</sup>

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<sup>120</sup> Crump, *supra* note 117, at 19. The cost of notice is often used by defendants to persuade plaintiffs not to bring class actions. *Id.* Most attorneys use class action notice companies in order to give notice to absent class members. See Notice.com, <http://www.notice.com> (last visited Oct. 31, 2004) (supporting website for The Notice Company, which is based in Hingham, MA).

<sup>121</sup> Crump, *supra* note 117, at 19.

<sup>122</sup> *Eisen*, 417 U.S. at 178. The Court reasoned that this procedure would have prejudiced to the defendant because the rules and procedures of civil trials would not be present, which may have affected the subsequent proceedings and placed a difficult burden on the defendant. *Id.*

<sup>123</sup> *Id.* at 179.

<sup>124</sup> Willging, *supra* note 1, at 126-27 (noting that sometimes the named parties attempt to delay class notice until a settlement or decision on the merits is made, thus allowing the defendant to pay the notice costs).

<sup>125</sup> *Id.*

<sup>126</sup> See Miller & Crump, *supra* note 82, at 17.

<sup>127</sup> *Id.* at 17-18.

<sup>128</sup> See *supra* note 80 for a comparison of the new Rule 23(c)(2) and the one in place before December 1, 2003.

<sup>129</sup> FED. R. CIV. P. 23 cmt. (c)(2) (2003 Amendment).

The direction that class-certification notice be couched in plain, easily understood language is a reminder of the need to work unremittingly at the difficult task of communicating with class members. It is

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Notice also acts as a conduit for providing an opportunity to be heard.<sup>130</sup> Once an absent class member receives notice, he can “enter an appearance through counsel.”<sup>131</sup> This has been interpreted to mean that he can receive the motions, pleadings, and other filings in the litigation, as well as notice of hearings, in order to determine if he should intervene.<sup>132</sup> If a class member chooses to intervene, he can present evidence, make arguments and motions, conduct discovery, and request an appeal of the class certification decision.<sup>133</sup>

Clearly, the Court has stated that the presence of adequate representation, notice, an opportunity to be heard, and a right to opt out will be enough to create the constitutional power necessary to bind absent class members to a judgment in Rule 23(b)(3) class actions.<sup>134</sup>

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difficult to provide information about most class actions that is both accurate and easily understood by class members who are not themselves lawyers. Factual uncertainty, legal complexity, and the complication of class-action procedure raise the barriers high. The Federal Judicial Center has created illustrative clear-notice forms that provide a helpful starting point for actions similar to those described in the forms.

*Id.*

<sup>130</sup> See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (holding that due process required a right to be heard); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979) (stating that there is a constitutional right to notice and to an opportunity to be heard).

<sup>131</sup> FED. R. CIV. P. 23(c)(2)(B).

<sup>132</sup> See, e.g., Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 392 (1967) (interpreting former Rule 23(c)(2)(C)).

<sup>133</sup> Woolley, *supra* note 103, at 580, 604 (noting that the successful intervenor does not have to be bound by the decisions the representative makes and should be treated as a full party). If a timely motion to intervene is made, an absent class member will have the right to intervene under Rule 24(a) if he can show inadequate representation. See FED. R. CIV. P. 24(a). Additionally, there can be permissive intervention under Rule 24(b) even if the representation is adequate. See FED. R. CIV. P. 24(b). It has been argued that there should be an absolute right to intervene in class actions. See Woolley, *supra* note 103, at 607 (arguing that there should only be an exception for manageability, such as if far too many people intervene); Sherman L. Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1223-24 (1966) (stating there should be a right to intervention, but that courts can limit the activities of intervenors). Although some argue this will lead to manageability problems, it is unlikely that too many people would seek to intervene. Woolley, *supra* note 103, at 608 (arguing that there would be substantial attorney’s fees, and that even if there is a contingent fee arrangement available, fees generally will not be recoverable by the intervenor because he must contribute substantially to the litigation to share in the fees). In fact, in one study of four federal district courts, there were attempts to intervene in only 11%, 9%, 5%, and 0% of the cases in each district. Willging, *supra* note 1, at 140. Allowing a right to intervene in class actions would strengthen the watchdog effect intervenors have on the class representation, decreasing protection for the absent class members. See *id.*

<sup>134</sup> See *Shutts*, 472 U.S. at 812.

However, there is a competing doctrine that treats absent class members as parties for certain procedural purposes, sometimes even in the absence of the required due process protections.<sup>135</sup> The Seventh Circuit in *Bridgestone/Firestone* used this doctrine to justify gaining power over putative class members without offering notice or an opportunity to be heard.<sup>136</sup>

*C. Treating Absent Class Members as Parties to Procedural Events*

Absent class members are sometimes treated as parties for procedural events, but it can be difficult to determine when this is proper.<sup>137</sup> The Federal Rules of Civil Procedure do not formally define “party.”<sup>138</sup> Nevertheless, Rule 23 envisions active participation in the class action proceedings for party status to attach.<sup>139</sup> For example, courts have held that absent class members were not parties for the purpose of

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<sup>135</sup> See *infra* Part II.C.

<sup>136</sup> See *infra* Part III.B.

<sup>137</sup> See *Devlin v. Scardelletti*, 536 U.S. 1, 9-10 (2002). Absent class members may be considered parties or nonparties based on the situation and the judge’s opinion of the status of absent class members. HERBERT NEWBERG & ALBERT CONTE, *NEWBERG ON CLASS ACTIONS* § 16.01, 16.02 (3d ed. 1992). Putative class members have been notoriously difficult for courts to categorize, and there have been many labels attached to this group. *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 343 n.3 (1980) (Stevens, J., concurring); *cf.* *Hansberry v. Lee*, 311 U.S. 32, 41 (1940) (absent parties); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 366 (1921) (interested parties). They may also be considered parties while analyzing the status of the case before certification. *Roper*, 445 U.S. at 343 n.3 (Stevens, J., concurring).

<sup>138</sup> Ian Gallacher, *Representative Litigation in Maryland: The Past, Present, and Future of the Class Action Rule in State Court*, 58 MD. L. REV. 1510, 1545 (1999). If the Rules are looked at in conjunction, a “party” appears to be “one who has sued or is being sued in current litigation, or one who has intervened in the action, and is therefore an active, not passive, litigant.” *Id.* (citing FED. R. CIV. P. 11, 17(a)).

<sup>139</sup> *Id.* However, some courts have used Rule 23(d) to require affirmative action on the part of absent class members in order to reap the benefits of class membership. NEWBERG & CONTE, *supra* note 137, § 16.01, 16.02. In *Iowa v. Union Asphalt & Roadoils, Inc.*, the State of Iowa, on behalf of all its subdivisions, sued an asphalt manufacturer. 281 F. Supp. 391, 400-01 (S.D. Iowa 1968). The court stated that Rule 23(c)(2) did not prevent, and that Rule 23(d)(2) allowed for, the class notice to require absent class members to indicate if they intended to submit damage claims in order to be a part of the class, essentially creating an opt in class. *Id.* at 403-04. In *Harris v. Jones*, the court stated that within a reasonable time after determining who opted out after the first notice, another notice should be given to the absent class members “requiring them to file simple statements of their claims . . . with reference to the types and sources of representation, if any, upon which they relied in purchasing their securities and the time they first learned any representations were false.” 41 F.R.D. 70, 74 (D. Utah 1966). If this information was not submitted, the action could be dismissed with prejudice. *Id.* at 74-75. This information would allow the court to better assess the adequacy of the class representatives and the potential effectiveness of subclasses. *Id.*

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gaining the consent required to have a case transferred to a magistrate.<sup>140</sup> Despite this holding, intervention by absent class members, which is certainly active participation that gives class members party status, does not violate the complete diversity rule because only named class members are considered parties for determining whether there is complete diversity.<sup>141</sup>

The Supreme Court in *Devlin v. Scardelletti*<sup>142</sup> stated that the status of absent class members as parties or non-parties should be determined based on the context of the procedural rule in which the question arises.<sup>143</sup> The decision must be made by looking at the “goals of class action litigation,” especially judicial economy and efficiency of administration.<sup>144</sup> In *Devlin*, after the district court preliminarily certified a settlement class in a Rule 23(b)(1) class action, an absent class member failed to timely intervene and instead objected at the settlement fairness

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<sup>140</sup> *Williams v. Gen. Elec. Capital Auto Lease, Inc.*, 159 F.3d 266, 269 (7th Cir. 1998). The question raised by this case was whether unnamed class members needed to consent to having the case transferred to a federal magistrate judge in order to be bound to the magistrate’s decision. *Id.* The court held that the absent class members were not parties for this purpose because requiring their consent would virtually eliminate cases being referred to magistrates in class actions, essentially creating opt-in classes. *Id.* The court went on to reason that if absent class members “are more accurately regarded as having something less than full party status, the need for their express consent also changes.” *Id.* If an absent class member wants to contest the cause being given to a magistrate, he can intervene under Rule 24(a), which would make him a party, and then he could refuse to consent to the transfer. *Id.* The absent class member could also make a collateral challenge to the adequacy of representation based on the representative’s decision to consent to transferring the case to the magistrate. *Id.* (noting that in both intervention and collateral attacks, there would need to be a showing of inadequate representation).

<sup>141</sup> *Cauble*, 255 U.S. at 363, 366-67. This rule allowing for the consideration of only named class members when deciding if there is complete diversity is appropriate because to hold otherwise would have the effect of invalidating most multistate classes in federal court. *Devlin*, 536 U.S. at 9-10. In *Stewart v. Dunham*, class plaintiffs were allowed to intervene after removal of the case, and they destroyed complete diversity. 115 U.S. 61, 64 (1885).

<sup>142</sup> 536 U.S. 1.

<sup>143</sup> *Id.* at 9-10. “The label ‘party’ does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context.” *Id.* However, the dissent in *Devlin* and some commentators have noted the uncertainty that has been created by this reasoning. *Id.* at 19-20 (Scalia, J., dissenting) (“Today’s opinion . . . abandons the bright-line rule that only those persons named as such are parties to a judgment, in favor of a vague inquiry ‘based on context.’”); see *Federal Jurisdiction and Procedure*, 116 HARV. L. REV. 332, 332 (2002) (criticizing this decision for creating too much uncertainty).

<sup>144</sup> *Federal Jurisdiction and Procedure*, *supra* note 143, at 339 (quoting *Devlin*, 536 U.S. at 10). The Court’s interpretation of the term “party” created uncertainty about whether an absent class member may be considered a party for other events in class action litigation. *Id.* at 336.

hearing.<sup>145</sup> The district court overruled his objection and did not allow him to appeal.<sup>146</sup> The Supreme Court later held that any absent class member objecting to a proposed settlement at the fairness hearing is treated as a party and can appeal without formally intervening.<sup>147</sup> However, the issues that can be raised on appeal are limited to those objected to at the fairness hearing.<sup>148</sup> The dissent noted that “[n]ot even petitioner . . . [was] willing to advance the novel and surely erroneous argument that a nonnamed class member is a party to the class-action litigation *before the class is certified.*”<sup>149</sup>

In determining whether the objector should be given party status, the Court focused on two factors.<sup>150</sup> One was whether his interests diverged from the class representative, which would be evidenced by his objection at the settlement fairness hearing.<sup>151</sup> The other was the binding effect of the judgment on the objector.<sup>152</sup> The objector in *Devlin* was not given the opportunity to opt out of the class because it was certified under Rule 23(b)(1).<sup>153</sup> The extension of the *Devlin* reasoning to Rule 23(b)(3) class actions has been questioned because there is another remedy available to potential objectors – opting out of the case.<sup>154</sup> In fact,

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<sup>145</sup> *Devlin*, 536 U.S. at 5-6; cf. FED. R. CIV. P. 23(e)(4)(A) (“Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval.”). Several courts have found participation in the fairness hearing to be a due process requirement. See, e.g., *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1153 (8th Cir. 1999).

<sup>146</sup> *Devlin*, 536 U.S. at 3-4.

<sup>147</sup> *Id.* Generally, only parties to a suit can appeal an adverse judgment. *Marino v. Ortiz*, 484 U.S. 301, 304 (1988). Previously, some courts held that absent class members had no right to appeal without formally intervening. See *In re Navigant Consulting, Inc.*, Sec. Litig., 275 F.3d 616, 619 (7th Cir. 2001) (arguing that because the absent class members were not considered parties for determining complete diversity, they cannot be treated as parties for the purpose of having a right to appeal); *In re Brand Name Prescription Drugs Antitrust Litig.*, 115 F.3d 456, 457 (7th Cir. 1997) (stating that absent class members can only gain power to appeal by intervening); *Guthrie v. Evans*, 815 F.2d 626, 629 (11th Cir. 1987) (arguing that if absent class members were given a right to appeal it would inhibit the manageability of the litigation, which is one of the primary goals of class actions).

<sup>148</sup> *Devlin*, 536 U.S. at 10.

<sup>149</sup> *Id.* at 16 n.1 (Scalia, J., dissenting) (emphasis added).

<sup>150</sup> *Id.* at 10.

<sup>151</sup> *Id.* at 9. The dissent stated that under the Restatement’s reasoning, the objector was not a party but was bound by the judgment as though he were. *Id.* at 19-20 (Scalia, J., dissenting).

<sup>152</sup> *Id.* at 10.

<sup>153</sup> *Id.*

<sup>154</sup> See *In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 302 F.3d 799, 800 (8th Cir. 2002) (“Because the Court relied upon the mandatory character of the class action, we question whether the *Devlin*’s holding applies to opt out class actions certified under Rule 23(b)(3)”); *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 69-70 (S.D.N.Y. 2003) (“The scope of *Devlin* remains uncertain at this time.”). Although one could argue that because absent class



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the Arkansas Supreme Court expressly refused to extend *Devlin* to an opt-out class action, although its decision was based on state certification law rather than on Federal Rule 23.<sup>155</sup>

Absent class members are also treated as parties for the purpose of tolling the statute of limitations.<sup>156</sup> This tolling rule allows the statute of limitations on each class member's individual claims to be tolled from the time a class suit is filed until certification is denied.<sup>157</sup> The Supreme Court has never answered the question of whether this tolling rule applies if a putative class member in the first action attempts to become a class representative in a subsequent action.<sup>158</sup> Additionally, most courts have not allowed tolling when the potential class plaintiffs have previously been denied certification and then attempt to "stack" one class action onto another in order to relitigate the certification question in different courts.<sup>159</sup>

Treating class members as parties for procedural events is a very limited way to gain power over absent class members.<sup>160</sup> Thus, in the

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members in Rule 23(b)(3) class actions have the opportunity to opt out, they are not truly bound by the decision; the *Devlin* Court drew no such distinction. *Federal Jurisdiction and Procedure*, *supra* note 143, at 344 n.48. In fact, it may be good policy to allow appeals in opt out class cases because it would reduce the incentive to opt out and further the class action goal of concentrated litigation. *Id.*; see *infra* Part IV.B.3 for a discussion of how this reasoning is not appropriately extended to class certification proceedings.

<sup>155</sup> *Ballard v. Advanced Am. Cash Advance Ctr. of Ark.*, 79 S.W.3d 835, 837 (Ark. 2002). The Arkansas court attempted to distinguish the case from *Devlin* by stating that there were differences in the Arkansas class action rule, the opportunity to opt out was present, and Arkansas case law required the absent class member to intervene before he could appeal. *Id.* It has been argued that the only significant difference between the two decision was the ability of the objector in *Ballard* to opt out of the case. Chip Leibovich, *Civil Procedure*, 25 U. ARK. LITTLE ROCK L. REV. 887, 891 (2003) (noting that the rules of procedure that governed class actions in the two cases were nearly identical and that the absent class members in both cases moved to intervene at virtually the same time). This difference is significant, though, in the sense that the *Devlin* decision gave much weight to the fact that the appeal was the petitioner's only protection from being bound by the settlement. *Id.* at 892.

<sup>156</sup> *Ballard*, 79 S.W.3d at 553.

<sup>157</sup> *Id.*; see *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54 (1983) (holding that the tolling rule applied to putative class members that brought individual actions after the class certification was denied).

<sup>158</sup> *Vinson v. Seven Seventeen HB Phil. Corp.*, No. Civ. A00-6334, 2001 WL 1774073 at \*6 (E.D. Pa. Oct. 31, 2001).

<sup>159</sup> *Id.*; see, e.g., *Andrews v. Orr*, 851 F.2d 146, 149 (6th Cir. 1988) (stating that tolling rule only applies if the subsequent action is separate, not for similar class claims); *Robbin v. Fluor Corp.*, 835 F.2d 213, 214 (9th Cir. 1987); *Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987); *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985).

<sup>160</sup> See *supra* notes 137-49.

context of Rule 23(b)(3) class actions, courts generally must provide notice, an opportunity to be heard, and the right to opt out in order to gain power over absent class members.<sup>161</sup> A trickier question arises when courts attempt to gain power over putative class members in order to bind them to the class certification decision.<sup>162</sup> There is currently a split of authority over whether this power is proper and what due process requires to make this exercise of power constitutional.<sup>163</sup>

### III. THE CURRENT CIRCUIT SPLIT REGARDING WHETHER THERE IS CONSTITUTIONAL POWER TO BIND PUTATIVE CLASS MEMBERS WHEN CLASS CERTIFICATION IS DENIED

Only two federal circuit courts have ruled on the constitutionality of exercising power over putative class members after class certification is denied in a Rule 23(b)(3) class action.<sup>164</sup> The Third Circuit in *GM Trucks II* held that such power was not present because a chance to opt out was not given, and thus, there was no way to infer consent from the putative class members.<sup>165</sup> Additionally, the court stated that putative class members were not parties for the procedural event of class certification.<sup>166</sup> On the other hand, the Seventh Circuit recently held in *Bridgestone/Firestone* that there *was* power to bind putative class members to a certification denial if they were adequately represented.<sup>167</sup> The court buttressed this holding by finding that putative class members are parties for class certification.<sup>168</sup> In the court's opinion, it had power under the All Writs Act<sup>169</sup> to enjoin the entire putative class and their

<sup>161</sup> Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985); see *supra* Part II.B.2.

<sup>162</sup> See generally *infra* Part III.

<sup>163</sup> See *infra* Part III.

<sup>164</sup> Compare *GM Trucks II*, 134 F.3d 133, 141 (3d Cir. 1998), with *Bridgestone/Firestone*, 333 F.3d 763, 768-69 (7th Cir. 2003).

<sup>165</sup> *GM Trucks II*, 134 F.3d at 141.

<sup>166</sup> *Id.*

<sup>167</sup> *Bridgestone/Firestone*, 333 F.3d at 769.

<sup>168</sup> *Id.*

<sup>169</sup> 28 U.S.C. § 1651(a) (2000). Federal courts have power under the All Writs Act to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Id.*; see *In re Paine Webber Ltd. P'ship Litig.*, No. 94 Civ. 8547SHS, 1996 WL 374162 at \*1 (S.D.N.Y. July 1, 1996) (granting an injunction against class members from filing actions in state court during the federal settlement approval process). See generally Joan Steinman, *Managing Punitive Damages: A Role for Mandatory "Limited Generosity" Classes and Anti-Suit Injunctions?*, 36 WAKE FOREST L. REV. 1043, 1105-06 (2001) (discussing the applicability of the Act generally).

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attorneys from attempting to certify the same nationwide class in another forum.<sup>170</sup>

A. *The Third Circuit Holds There Is No Power over the Putative Class*

In 1998, the Third Circuit decided *GM Trucks II*, a case involving a claim for damages stemming from General Motor's manufacture of an allegedly defective gas tank on a certain model of pickup truck.<sup>171</sup> Many federal actions were filed in different jurisdictions, but they were all transferred to the Eastern District of Pennsylvania for discovery and pre-trial proceedings pursuant to the Multi-District Litigation statute.<sup>172</sup> When the parties had reached a settlement agreement, the district court preliminarily approved it and certified the class under Rule 23(b)(3).<sup>173</sup> After notice of the proposed settlement was given to the class, the district court gave final approval to the settlement.<sup>174</sup> The defendant appealed, and the Third Circuit reversed, holding that the requirements of Rule 23 were not met by this class.<sup>175</sup>

During the federal court proceedings, the same parties were engaged in a parallel class action in a Louisiana state court.<sup>176</sup> The state court preliminarily certified the same class, approved the same settlement, and ordered individual notice be sent to the class members.<sup>177</sup> Several class members that were absent from the federal action moved the federal court for intervention and for an injunction against the Louisiana state court proceedings.<sup>178</sup> However, the district court denied the motion to intervene and also refused to grant the injunction, forcing the parties to appeal.<sup>179</sup> While the appeal was in progress, the Louisiana court entered final judgment and approved the settlement.<sup>180</sup>

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<sup>170</sup> *Bridgestone/Firestone*, 333 F.3d at 769.

<sup>171</sup> *GM Trucks II*, 134 F.3d at 138.

<sup>172</sup> *Id.* (citing 28 U.S.C. § 1407 (2000)). If there are multiple class actions in federal court, there is power under the Multi-District Litigation statute to consolidate them for the purpose of pre-trial procedures, which would include class certification. Brian D. Boyle, *Parallel State and Federal Court Class Actions*, 31 THE BRIEF 32, 34 (2002).

<sup>173</sup> *GM Trucks II*, 134 F.3d at 138 (citing FED. R. CIV. P. 23(b)(3)).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 139.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* (noting that the class certified in state court contained both named and absent parties from the federal action).

<sup>178</sup> *Id.* at 140.

<sup>179</sup> *Id.* The Third Circuit stated that it was proper to deny the motion to intervene because it was made four months after the claim was filed and two months after the proposed settlement was presented without a showing of good cause except an attempt to

The Third Circuit held that it did not have power to bind the 5.7 million people in the Louisiana class in order to enjoin the Louisiana proceedings.<sup>181</sup> Absent personal jurisdiction over the putative class members, the due process protections mandated by *Shutts* would need to be given.<sup>182</sup> However, since there was no class pending, no right to opt out had been given, and thus there was no way to infer consent from the putative class members.<sup>183</sup> In other words, because the members of the Louisiana settlement class were not parties to the Third Circuit's proceedings, there was no way to infer consent, and they did not have minimum contacts with the forum state; as a result there were no grounds to bind them to the class certification decision and enjoin them from repeated certification attempts.<sup>184</sup>

In dicta, the Third Circuit stated that enjoining the named parties, even those who have minimum contacts with the forum state, may be appropriate.<sup>185</sup> However, such an injunction would be of little value

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argue that there was no reason to intervene until the class representatives attempted to certify the class in the Louisiana court. *Id.* at 140 n.1.

<sup>180</sup> *Id.* at 140.

<sup>181</sup> *Id.* at 141. The court also held that it could not enjoin the Louisiana class members because the Louisiana court had entered a final judgment, and review was barred by the Full Faith and Credit Act and the Rooker-Feldman doctrine. *Id.* at 141-43 (citing 28 U.S.C. § 1738 (2000); *Blake v. Papadakos*, 953 F.2d 68, 71 (3d Cir. 1992)).

<sup>182</sup> *GM Trucks II*, 134 F.3d at 141; see *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

<sup>183</sup> *GM Trucks II*, 134 F.3d at 141.

<sup>184</sup> *Id.*; see Joan Steinman, *The Newest Frontier of Judicial Activism: Removal Under the All Writs Act*, 80 B.U. L. REV. 773, 862 (2000) (stating that in the absence of traditional personal jurisdiction or conduct in the litigation sufficient to infer consent, there would be no power over absent class members to enjoin them from attempting to certify the class in parallel state litigation).

<sup>185</sup> *GM Trucks II*, 134 F.3d at 141 n.2.

We note that enjoining the few Louisiana class members that the MDL court does have personal jurisdiction over . . . would serve no purpose. Barring the other procedural barriers discussed *infra*, it is conceivable that we could direct the district court to enjoin those 200 plaintiffs from pursuing their state damage remedies in Louisiana. As the district court properly pointed out, however, since the appellants' stated goal here is to prevent the Louisiana court from further consideration of the settlement in toto, little would be accomplished by enjoining only those 200 plaintiffs . . . and we have not been asked to do so. At all events, the limited injunction would not halt the Louisiana proceedings because the original Louisiana plaintiffs (over whom we have no jurisdiction) could simply continue with the settlement.

*Id.*; see Monaghan, *supra* note 96, at 1185 n.171 (arguing that the *GM Trucks II* court refused to consider that it had power to enjoin the class representatives in the Louisiana state court

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because any absent class member without minimum contacts could certify the class in another forum.<sup>186</sup> The defendant could not even argue collateral estoppel against these absent class members because they did not have a chance to litigate the issue in the original proceeding.<sup>187</sup> Other courts have noted that there may be power over absent class members if there is a separate basis for personal jurisdiction over them and notice is given.<sup>188</sup>

The Third Circuit also held that the Anti-Injunction Act prevented enjoining the putative class members in this case because the state court proceedings had already begun.<sup>189</sup> The Anti-Injunction Act bars a federal district court from enjoining pending state court litigation unless “expressly authorized by Act of Congress, or where necessary in aid of [the federal court’s] jurisdiction, or to protect or effectuate its judgments.”<sup>190</sup> The third exception, commonly referred to as the relitigation exception, is based on the concepts of res judicata and collateral estoppel.<sup>191</sup> Some courts, including the Third Circuit in *GM Trucks II*, have held that a class certification decision is not a final judgment that satisfies the relitigation exception.<sup>192</sup>

Consequently, the Third Circuit refused to enjoin the Louisiana class members, in part, because it lacked power to do so and because the Anti-Injunction Act prevented interference with the ongoing state litigation.<sup>193</sup>

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class action because they joined in the federal action and because they had common legal representation with the federal class action representatives).

<sup>186</sup> *GM Trucks II*, 134 F.3d at 141.

<sup>187</sup> See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 (1979).

<sup>188</sup> See *In re Lease Oil Antitrust Litig.*, 48 F. Supp. 2d 699, 705 (S.D. Tex. 1998) (noting that dicta in *GM Trucks II* provides that the federal court can enjoin parties over which it has personal jurisdiction from bringing parallel litigation in state courts); see also *Hillman v. Webley*, 115 F.3d 1461, 1469 (10th Cir. 1997) (stating that the district court had power “under the All Writs Act to enjoin parties before it from pursuing conflicting litigation in the state court, but unfortunately it did not pursue that route”); John C. Coffee, Jr., *Class Actions: Interjurisdictional Warfare*, 218 N.Y. L.J. 5, 35 (1997) (noting that federal district courts have power to enjoin the parties before them, including enjoining defendants from settling with other class plaintiffs in another court).

<sup>189</sup> *GM Trucks II*, 134 F.3d at 144.

<sup>190</sup> 28 U.S.C. § 2283 (2000); see *Atl. Coast Line R.R. v. Bhd. of Locomotive Eng’rs*, 398 U.S. 281, 286 (1970).

<sup>191</sup> See *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988).

<sup>192</sup> See *GM Trucks II*, 134 F.3d at 146; *J.R. Clearwater Inc. v. Ashland Chem. Co.*, 93 F.3d 176, 179 (5th Cir. 1996). However, the Seventh Circuit’s decision in *Bridgestone/Firestone* created a circuit split on this issue. See *infra* notes 216-18 and accompanying text for a discussion of the Seventh Circuit’s analysis of the Anti-Injunction Act.

<sup>193</sup> *GM Trucks II*, 134 F.3d at 146.

This view remained unchallenged until the Seventh Circuit's decision in *Bridgestone/Firestone* in June 2003.<sup>194</sup>

*B. The Seventh Circuit Holds That There Is Power over the Putative Class if It Is Adequately Represented*

In *Bridgestone/Firestone*, the Seventh Circuit held that there was constitutional power to bind putative class members of an alleged Rule 23(b)(3) class to a class certification denial if they were adequately represented.<sup>195</sup> Once it established it had power over the putative class, the court used its power under the All Writs Act to enjoin the class members from attempting to certify the same nationwide class in a different forum.<sup>196</sup>

The plaintiffs in this case were consumers of recalled Ford vehicles and Firestone tires.<sup>197</sup> The district court originally granted their motion to certify a class under Rule 23(b)(3).<sup>198</sup> However, the Seventh Circuit decertified the class on appeal because choice of law problems prevented the class from meeting the predominance requirement.<sup>199</sup> The named plaintiffs, and also some absent class members, then attempted to have

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<sup>194</sup> 333 F.3d 763, 765 (7th Cir. 2003).

<sup>195</sup> *Id.* at 769. Although not in the context of class actions, a Texas federal court used the reasoning of *Bridgestone/Firestone* to buttress its argument that an injunction was proper to prevent the filing of a suit by the parties and privies of the original suit so as to uphold the doctrines of res judicata and collateral estoppel. *Dow Agrosciences v. Bates*, No. Civ.A. 5:01-CV-331-C, 2003 WL 22660741, at \*20 (N.D. Tex. Oct. 14, 2003). The plaintiffs had "intentionally stacked the deck against [the defendant] by simultaneous pursuit of so many different parallel state court actions." *Id.* "The law cannot tolerate the risk that even one state court might carve out some exception to res judicata and collateral estoppel and allow the action before it to proceed." *Id.*

<sup>196</sup> *Bridgestone/Firestone*, 333 F.3d at 765 (citing 28 U.S.C. § 1651(a) (2000) (the All Writs Act)). Parallel cases were pending in state courts, so the Seventh Circuit held that denials of class certification fall within the relitigation exception to the Anti-Injunction Act, which bars federal courts from enjoining pending state court proceedings. *Id.* at 766; see 28 U.S.C. § 2283 (2000); see also *supra* notes 189-94 and accompanying text discussing the Third Circuit's analysis. However, recently, a Texas state court has certified a settlement class of the same character as the one denied by the Seventh Circuit. See *Shields v. Bridgestone/Firestone, Inc.*, No. B-170, 462, 2004 WL 546883, at \*43 (Tex. Dist. Mar. 12, 2004). That court held that because it was a settlement class, the problems of commonality and manageability that had derailed the certification process in the federal court were not at issue. *Id.* Thus, the court distinguished its decision from the Seventh Circuit's based on the notion that the Seventh Circuit had left the door open for settlement classes to be certified in this action. *Id.*

<sup>197</sup> *In re Bridgestone/Firestone, Inc., Tires Products Liab. Litig.*, 288 F.3d 1012, 1015 (7th Cir. 2002).

<sup>198</sup> *Id.* at 1017.

<sup>199</sup> *Id.*

the same nationwide class certified in several other jurisdictions.<sup>200</sup> In reaction to these repeated certification attempts, the defendants moved the federal court for an injunction barring the entire putative class and class counsel from attempting to certify a class with the same or substantially similar characteristics in any other jurisdiction.<sup>201</sup> The trial court denied the motion, but the Seventh Circuit reversed and granted the injunction.<sup>202</sup>

Mainly, the court granted the injunction to prevent putative class members from repeatedly attempting to certify the same class it had already held was untenable.<sup>203</sup> The court envisioned a situation in which nine judges refuse to certify a class, but a tenth judge certifies it, rendering each of the previous nine decisions meaningless.<sup>204</sup> The court also discussed how the probability that a class will be certified increases as the number of certification attempts increases.<sup>205</sup> It concluded that even if only one judge in ten would certify a particular class and an attempt for certification were made in ten different states, there would be a sixty-five percent chance of class certification, with the percent increasing to eighty-eight if the attempt were made in twenty states.<sup>206</sup>

In what appeared to be an attempt to take the case out of the purview of *Shutts*, the *Bridgestone/Firestone* plaintiffs argued that the putative class members could not be bound by the decision because the federal court did not have the power to issue nationwide service of process in class actions.<sup>207</sup> However, the court stated that this rule is qualified by the fact that a federal court can issue nationwide service of process if there is a federal law relied on in the complaint that authorizes such service.<sup>208</sup> In this case, the plaintiff relied on the Racketeer Influenced and Corrupt Organizations Act ("RICO"), which does

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<sup>200</sup> *Bridgestone/Firestone*, 333 F.3d at 765; see *Shields*, 2004 WL 546883, at \*25 (noting that in addition to the certification attempt in this Texas court, putative class action lawsuits were filed in various states, including Arkansas, California, Connecticut, Florida, and Wisconsin).

<sup>201</sup> *Bridgestone/Firestone*, 333 F.3d at 765.

<sup>202</sup> *Id.* at 766.

<sup>203</sup> *Id.* at 767.

<sup>204</sup> *Id.* at 766-67.

<sup>205</sup> *Id.* at 767.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 768.

<sup>208</sup> *Id.*

authorize nationwide service.<sup>209</sup> Nevertheless, service was not given to the putative class members, making the point merely dicta.<sup>210</sup>

The court then declared that because absent class members have been treated as parties for many procedural events, they should be treated as parties for the purpose of class certification.<sup>211</sup> The court then attempted to analogize this case to *Devlin*, in which the Supreme Court had allowed absent class members to appeal a judgment, even though they did not intervene, because they had objected at a settlement fairness hearing.<sup>212</sup> The Seventh Circuit stated that because the putative class members could have sought certiorari after its decision, they were parties and were bound by the decision as long as they were adequately represented, an issue which was not contested in this case.<sup>213</sup> The reason the Seventh Circuit attempted to analogize *Bridgestone/Firestone* to *Devlin* was to support its decision to bind the putative class members without giving them notice and an opportunity to be heard.<sup>214</sup> Finally, the court rejected the contention that putative class members have a right to opt out because the purpose of that protection is to allow class members to proceed with individual actions, a right they still have after class certification is denied.<sup>215</sup>

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<sup>209</sup> *Id.* The Seventh Circuit stated in dicta that one of the underlying claims was based on RICO, which authorizes nationwide service of process even over those who were not defendants. *Id.* (citing 18 U.S.C. § 1965 (b) (2000)). Congressional grant allowing for nationwide service of process may be one way to get jurisdiction over putative class members after the denial of class certification in federal court. See Miller & Crump, *supra* note 82, at 30 (citing United States v. Union Pac. R.R., 98 U.S. 569, 603-04 (1878)) (stating that nothing in the Constitution prevents Congress from passing laws giving federal district courts the power to issue nationwide service of process). Rule 4 generally sets the limit on the jurisdictional reach of federal district courts. FED. R. CIV. P. 4(k)(1)(A). However, there is an exception when there is a congressional enactment authorizing nationwide service of process. FED. R. CIV. P. 4(k)(1)(D). This enactment would create the potential for personal jurisdiction over the putative class members, eliminating the need to rely on the *Shutts* doctrine because there would be no need to imply consent. See *supra* Part II.B.2 for a discussion of the *Shutts* doctrine.

<sup>210</sup> See *Bridgestone/Firestone*, 333 F.3d at 768.

<sup>211</sup> *Id.* (citing Phillips Petroleum v. Shutts, 472 U.S. 797 (1985)).

<sup>212</sup> *Id.* (citing *Devlin v. Scardelletti*, 536 U.S. 1 (2002)); see *infra* Part IV.B.3, which argues that class certification proceedings are not sufficiently analogous to any instance in which absent class members have been treated as parties to justify binding them to a denial of class certification in the absence of notice and an opportunity to be heard; see also *supra* notes 142-55 and accompanying text discussing the *Devlin* decision.

<sup>213</sup> *Bridgestone/Firestone*, 333 F.3d at 768-69.

<sup>214</sup> See *id.* For a discussion of how this reasoning is flawed, see *infra* Part IV.B.3.

<sup>215</sup> *Bridgestone/Firestone*, 333 F.3d at 769. The court noted:



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The *Bridgestone/Firestone* court also created a circuit split by holding that this situation fits within the relitigation exception to the Anti-Injunction Act.<sup>216</sup> The court stated that a final judgment, for the purpose of collateral estoppel, need only be an adjudication of an issue that is "sufficiently firm."<sup>217</sup> The decision to deny the certification of a nationwide class was then considered sufficiently firm for the purpose of fitting within the exception because it received full attention in both the district court and appellate court, and certiorari was sought.<sup>218</sup>

The reasoning employed by the Seventh Circuit differs sharply from that of the Third Circuit.<sup>219</sup> Although there are advantages to both lines of thinking, neither creates an efficient class certification system while affording putative class members due process.<sup>220</sup> As will be shown in Part IV, enjoining the putative class is an appropriate way to deal with the problems associated with repeated certification attempts, but due process requires that the putative class members be afforded notice, an opportunity to be heard, and adequate representation.<sup>221</sup>

#### IV. CREATING AN EFFICIENT CLASS CERTIFICATION SYSTEM WHILE AFFORDING DUE PROCESS

The Third Circuit was rigid in its adherence to *Shutts* when it required that there be a right to opt out in order to gain power over putative class members.<sup>222</sup> The court ruled that because no class was pending, there would be no chance to opt out and no way for the court to infer consent.<sup>223</sup> Further, it declared that the putative class members could not be considered parties to the action because they were not

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[N]o statute or Rule requires notice, and an opportunity to opt out, before the certification decision is made; it is a post-certification step. No one is entitled to opt out of the certification, a decision necessarily made on a classwide, all-or-none basis; one opts out of a certified class. And a person who opts out receives the right to go it alone, not to launch a competing class action.

*Id.*; see *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 363-67 (7th Cir. 1987).

<sup>216</sup> *Bridgestone/Firestone*, 333 F.3d at 767 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 13 (1980)).

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Compare GM Trucks II*, 134 F.3d 133, 141 (3d Cir. 1998), with *Bridgestone/Firestone*, 333 F.3d at 766-67.

<sup>220</sup> See *infra* Part IV.A-B.

<sup>221</sup> See *infra* Part IV.B.

<sup>222</sup> *GM Trucks II*, 134 F.3d at 141.

<sup>223</sup> *Id.*

before the court.<sup>224</sup> Therefore, the court held that there was no basis for power over the putative class in order to bind them to the class certification decision and enjoin them from repeated certification attempts.<sup>225</sup>

On the other hand, the Seventh Circuit melded two doctrines together to find constitutional power to bind the putative class.<sup>226</sup> The court held that due process required only adequate representation in order for there to be power over the putative class members.<sup>227</sup> It buttressed this reasoning by stating that absent class members were considered parties for the purpose of class certification.<sup>228</sup> Although effective in eliminating repeated certification attempts, this holding did not offer appropriate due process protection to putative class members.<sup>229</sup>

This Part will first discuss the problems surrounding class certification in Rule 23(b)(3) class actions.<sup>230</sup> It will then delineate how neither the approach taken by the Third Circuit nor the Seventh Circuit has adequately addressed these problems while affording due process.<sup>231</sup> Indeed, this Part will show that in order to gain constitutional power to bind putative class members, there must be pre-certification notice, an opportunity to be heard, *and* adequate representation.<sup>232</sup> Finally, this Part will demonstrate how it is inappropriate to analogize the class certification process to other procedural events for which absent class members were treated as parties in order to justify failing to give notice to the putative class.<sup>233</sup>

#### A. *The Problems Associated with Numerous Certification Attempts*

Although multistate Rule 23(b)(3) class actions are essential to an efficient judicial system, they create many problems at the certification

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<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Bridgestone/Firestone*, 333 F.3d 763, 768-69 (7th Cir. 2003).

<sup>227</sup> *Id.* at 769 (“Holding the absent class members to the outcome is no more an exercise in virtual representation than it is to hold them to a decision on the merits.”).

<sup>228</sup> *Id.* at 768.

<sup>229</sup> *See infra* Part IV.B.2.

<sup>230</sup> *See infra* Part IV.A.

<sup>231</sup> *See infra* Part IV.B.

<sup>232</sup> *See infra* Part IV.B.2.

<sup>233</sup> *See infra* Part IV.B.3.

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stage.<sup>234</sup> The most striking is that putative class members that are not present in an original federal proceeding in which certification is denied can attempt to certify the class in another jurisdiction.<sup>235</sup> The defendant cannot argue collateral estoppel against these absent class members because the members would never have a chance to litigate the certification issue in the first proceeding.<sup>236</sup> Consequently, there can be as many attempts to certify the same class under Rule 23(b)(3) as there are willing plaintiffs and proper forums.<sup>237</sup> By allowing potential class representatives endless “bites at the apple,” the probability that classes will be certified increases greatly.<sup>238</sup> The Seventh Circuit envisioned nine out of ten judges denying class certification, with the tenth judge rendering the other nine decisions meaningless.<sup>239</sup>

Repeated attempts to certify Rule 23(b)(3) classes also waste the resources of defendants by forcing them to spend money on attorney’s fees and costs for litigating the same issue repeatedly.<sup>240</sup> Finality is mythical in such a system, and the decisions of federal courts are often

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<sup>234</sup> See, e.g., *Shutts v. Phillips Petroleum Co.*, 679 P.2d 1159, 1165 (Kan. 1984). Although some have argued against multistate class actions generally, these actions allow for an economical use of judicial resources. *Id.* Further, it can be problematic to find plaintiffs willing to bring statewide actions in all appropriate states before the statute of limitations period has ended. *Id.*

<sup>235</sup> See *GM Trucks II*, 134 F.3d 133, 141 (3d Cir. 1998) (finding no power to bind the putative class members to the federal court’s declaration that the class was untenable, thus allowing for attempts to certify the same class in any state court with proper jurisdiction); *In re Glenn W. Turner Enters. Litig.*, 521 F.2d 775, 781 (3d Cir. 1975) (stating that there is nothing in Rule 23 that prevents the relitigation of the class certification issue in another forum).

<sup>236</sup> See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 (1979). However, if it is the same plaintiff in both actions, then collateral estoppel may be pled. See *id.* However, there still would be the inconvenience and expense of having to go to multiple courts to litigate.

<sup>237</sup> See *Bridgestone/Firestone*, 333 F.3d 763, 766 (7th Cir. 2003).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 767

Even if just one judge in ten believes that a nationwide class is lawful, then if the plaintiffs file in ten different states the probability that at least one will certify a nationwide class is 65% ( $0.910 = 0.349$ ). Filing in 20 states produces an 88% probability of national class certification ( $0.920 = 0.122$ ).

*Id.*

<sup>240</sup> *Boyle*, *supra* note 172, at 38. It may be fair to require these defendants to litigate in multiple courts because there would be traditional personal jurisdiction over the defendants in each forum so as not to “offend traditional notions of fair play and substantial justice.” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

rendered meaningless.<sup>241</sup> Plaintiffs are able to coerce settlements from defendants, even in the presence of only weak claims, because defendants fear that a class will be certified given enough attempts.<sup>242</sup>

Although eliminating multiple attempts to certify Rule 23(b)(3) classes would put the fate of an entire class into the hands of a single judge, that is the basis for our legal system—a single judge decides a case and the parties have a chance to appeal.<sup>243</sup> The Seventh Circuit believed that one federal judge was competent to decide whether a class was tenable.<sup>244</sup> It also believed that allowing only one certification attempt in Rule 23(b)(3) actions would still provide an opportunity for full litigation of the issue, which was assured by the chance to appeal a denial of certification all the way to the Supreme Court.<sup>245</sup>

The Seventh Circuit attempted to streamline the certification process when it used its power under the All Writs Act to enjoin the putative class members and their attorneys from attempting to certify the same class it found untenable in a different forum.<sup>246</sup> However, in doing so the Seventh Circuit did not afford due process.<sup>247</sup>

*B. Creating a More Effective Class Certification System While Affording Due Process*

The Third Circuit failed to address the problems related to multiple certification attempts due in part to its rigid application of the *Shutts* implied consent doctrine.<sup>248</sup> Later, the Seventh Circuit exercised power

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<sup>241</sup> This Note argues in Part IV.B.2 and Part V that giving notice and the opportunity to be heard to putative class members during the certification process would increase the effectiveness with which such proceedings are conducted.

<sup>242</sup> See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299-1300 (7th Cir. 1995). Judge Posner states that the threat of class certification can act as blackmail, causing defendants to settle. *Id.* It has also been noted that the amendment to Rule 23, creating a right to appeal class certification decisions was due in part to concern over this excessive pressure. Charles Silver, “We’re Scared to Death”: *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1358 (2003). However, there is also evidence that settlements in class actions are generally “below even the level of compensatory damages alleged by the plaintiffs.” John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 225-26 (1983).

<sup>243</sup> Rule 23 now allows the federal appeals courts to grant an interlocutory appeal of a class certification decision. FED. R. CIV. P. 23(f) (enacted in 1998, the year the Third Circuit decided *GM Trucks II*); see *supra* Part III.A for a discussion of the Third Circuit’s opinion.

<sup>244</sup> See *Bridgestone/Firestone*, 333 F.3d at 768-69.

<sup>245</sup> See *id.*

<sup>246</sup> See *id.* at 769.

<sup>247</sup> See *infra* Part IV.B.2.

<sup>248</sup> See *GM Trucks II*, 134 F.3d 133, 141 (3d Cir. 1998); see also *infra* Part IV.B.1.

over a putative class in an attempt to provide a more workable class certification format.<sup>249</sup> In doing so, it based its power over the putative class members on a combination of the two following doctrines: the requirement of adequate representation and treating absent class members as parties for procedural events.<sup>250</sup> This reasoning was inappropriate because notice, an opportunity to be heard, and adequate representation must be present in order to gain constitutional power to bind putative class members.<sup>251</sup>

#### 1. Setting the Bar Too High—The Right to Opt Out Should Not Be Required

Clearly, in the absence of minimum contacts with the forum state, there is no traditional personal jurisdiction over putative class members such that binding them to the class certification decision would be consistent with “traditional notions of fair play and substantial justice.”<sup>252</sup> However, the *Shutts* Court held that absent members of certified classes can be bound to a decision in the absence of minimum contacts.<sup>253</sup> By affording the opportunity to opt out of a class, a protection that was first given to absent class members in federal courts in Rule 23(b)(3) class actions pursuant to Rule 23(c)(2),<sup>254</sup> the *Shutts* Court was able to infer the consent of the absent classmembers to be bound by the judgment.<sup>255</sup>

The Third Circuit held that because the putative class members were not parties to the proceedings, their consent must be inferred in order for a court to have power to bind them to the certification decision.<sup>256</sup> This consent, in the absence of a voluntary appearance in court, could only be inferred from the refusal to opt out of the class after notice and the

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<sup>249</sup> See *Bridgestone/Firestone*, 333 F.3d at 765-69.

<sup>250</sup> See *infra* Part IV.B.2-3.

<sup>251</sup> See *infra* Part IV.B.2.

<sup>252</sup> See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)); see also *supra* notes 74-84 and accompanying text for a brief discussion of the decisions that have shaped the minimum contacts test.

<sup>253</sup> *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985).

<sup>254</sup> FED. R. CIV. P. 23(c)(2). For a discussion of the provisions and recent Amendment of Rule 23, see *supra* Part II.B.1.

<sup>255</sup> *Shutts*, 472 U.S. at 812; see *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779-81 (1984) (noting that anyone can consent to jurisdiction in any forum).

<sup>256</sup> *GM Trucks II*, 134 F.3d 133, 141 (3d Cir. 1998).

chance to opt out had been given.<sup>257</sup> However, in so holding, the court misinterpreted the rationale behind inferring consent.<sup>258</sup>

This Note is not suggesting that the Supreme Court rethink its implied consent doctrine. After certification, consent must be inferred; thus, a right to opt out must be given.<sup>259</sup> However, *Shutts* required consent because it was depriving the absent class members of their “chose in action,” which is a constitutionally protected property right.<sup>260</sup> When a motion for class certification is denied, the putative class members still have the right to bring an individual action.<sup>261</sup> Although one could argue that the ability to be a class representative is analogous to having a chose in action, if a federal court determines that a class is untenable, this right to be a representative becomes meaningless because there is no certifiable class to represent.<sup>262</sup> However, there is no similar justification for failing to provide the other due process protections mandated by *Shutts*.<sup>263</sup>

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<sup>257</sup> *Id.* (“[T]here is no class pending . . . and thus, virtually none of the 5.7 million [absent, potential] class members . . . are before this Court in any respect, and there is no basis upon which we can infer their consent.”); *cf.* Coffee, *supra* note 188, at 35.

<sup>258</sup> Notably, the Third Circuit stated in dicta that it would likely have power to bind those over whom it had traditional personal jurisdiction, including the named parties and those with minimum contacts with the forum state. *GM Trucks II*, 134 F.3d at 141 n.2.; see *supra* notes 185-88.

<sup>259</sup> See *Shutts*, 472 U.S. at 811-12.

<sup>260</sup> *Id.* at 807; see *Mullane v. Cent. Hanover Trust Co.*, 339 U.S. 306, 314 (1950); Pennell, *supra* note 95, at 483 (defining “chose in action”).

<sup>261</sup> *Bridgestone/Firestone*, 333 F.3d 763, 769 (7th Cir. 2003); see *Shutts*, 472 U.S. at 807 (citing *Mullane*, 339 U.S., at 306 for the proposition that “a chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs”).

<sup>262</sup> The Supreme Court may hold that there is a need to infer consent to gain power over putative class members and bind them to a certification denial. However, until such a holding is put forth, which appears unlikely, courts must use the standard given in *Shutts*. See *Shutts*, 472 U.S. at 807, 811-12 (stating that an opt out right is needed to infer consent when one is going to lose a chose in action). Because a chose in action is by definition a right to recover damages, and putative class members still have this right after a denial of class certification, *Shutts* is distinguishable from the case at hand regarding the issue of implied consent. See *id.* One plausible argument for extending the opt out right is that if the claims of the class members are small enough, they will never have their day in court. However, this is unpersuasive because it is not the best way to balance the due process rights of the putative class with the judiciary’s interest in an effective and efficient certification process. Instead, this Note suggests that offering notice, an opportunity to be heard, and adequate representation during the certification proceedings, followed by binding the putative class to the decision of the court, is a better solution. See *infra* Part V.

<sup>263</sup> See *Shutts*, 472 U.S. at 812; see also *infra* Part IV.B.2.

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## 2. Finding the Appropriate Balance—Adequate Representation, Notice, and a Right to Be Heard Must Be Provided

An examination of both *Shutts* and Rule 23 lead to the same conclusion: In order to have constitutional power to bind the putative class, there must be adequate representation, notice, and an opportunity to be heard.<sup>264</sup> The Third Circuit realized this but went too far in requiring the right to opt out of the class.<sup>265</sup> The Seventh Circuit dispatched with the need for a right to opt out but only required adequate representation.<sup>266</sup> Both courts missed the mark. There is no justification for failing to give notice and an opportunity to be heard before binding putative class members to a decision.<sup>267</sup>

Adequate representation is essential to gaining power over putative class members; it is the most important due process protection involved in class action proceedings.<sup>268</sup> However, without notice the protection of adequate representation is diminished greatly because the class cannot effectively monitor the proceedings.<sup>269</sup> One commentator eloquently stated that those in the best position to determine the adequacy of representation are those being represented.<sup>270</sup>

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<sup>264</sup> See *supra* Part II.B.1-2 for a discussion of Rule 23 and the *Shutts* doctrine.

<sup>265</sup> See *supra* Part IV.B.1.

<sup>266</sup> *Bridgestone/Firestone*, 333 F.3d at 769 (“Yet no statute or rule requires notice, and an opportunity to opt out, before the certification decision is made; it is a post-certification step.”); see Joseph M. McLaughlin, *Directors’ and Officers’ Liability*, 230 N.Y. L.J. 5, 6 (2003) (noting that if defense attorneys want to use this reasoning, it may be wise not to challenge the adequacy of representation during the initial certification proceedings).

<sup>267</sup> See *infra* notes 268-81 and accompanying text.

<sup>268</sup> See *State v. Homeside Lending, Inc.*, 826 A.2d 997, 1012 (Vt. 2003) (“It is often labeled the most important of due process requirements.”); Bassett, *supra* note 44, at 49 (“[A]dequate representation remains the absolute baseline of due process in class actions.”). Even the Seventh Circuit required a showing of adequate representation before finding power over putative class members. See *Bridgestone/Firestone*, 333 F.3d at 769 (noting that no one had challenged adequacy in the trial court or on appeal, and thus it was assuming there was adequate representation). However, the traditional conception of adequate representation does not apply directly to certification proceedings because courts generally determine whether the class representative and the class counsel will be adequate to represent the interests of the class *after certification*. See FED. R. CIV. P. 23(a)(4) (requiring that, in order to certify a class, the class representative must be able to adequately represent the interests of the class throughout the course of the litigation); FED. R. CIV. P. 23(g)(1)(B) (requiring that if an attorney is appointed class counsel, he must at all times adequately represent the class).

<sup>269</sup> See Miller & Crump, *supra* note 82, at 11-12.

<sup>270</sup> See Bronsteen & Fiss, *supra* note 70, at 1435 (noting that those in the best position to determine the adequacy of the representation are the class members themselves).

Functionally, if notice were given to putative class members, adequacy of representation would be monitored as follows. After receiving notice, members of Rule 23(b)(3) classes would first have the right to enter an appearance in the litigation.<sup>271</sup> After entering an appearance, they could receive copies of all the pleadings and notice of all hearings.<sup>272</sup> This would allow members to determine if intervention is warranted.<sup>273</sup> If they could successfully challenge the adequacy of representation right away, either the class would not be certified, the putative class member challenging the representation would become the new representative, or the challenger would be able to intervene as of right.<sup>274</sup> If there were an unsuccessful attempt to contest the representation immediately, the class member could seek permissive intervention in order to represent his own interests.<sup>275</sup> However, just by being involved in the class certification process, the class member would be able to influence the determination of whether the other factors for class certification are met and what decisions are made by the

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<sup>271</sup> See FED. R. CIV. P. 23(c)(2)(B) (providing that absent class members must be given notice and informed “that a class member may enter an appearance through counsel if the member so desires”); Kaplan, *supra* note 132, at 392 (stating that courts have interpreted this rule, formerly Rule 23(c)(2)(C), to allow for this type of limited participation in order to provide a basis on which to decide whether or not to intervene).

<sup>272</sup> See, e.g., Ramsey v. Arata, 406 F. Supp. 435, 442 (N.D. Tex. 1975) (interpreting Rule 23(c)(2)(C), which is now Rule 23(c)(2)(B) after the 2003 Amendment).

<sup>273</sup> See *id.*

<sup>274</sup> Bronsteen & Fiss, *supra* note 70, at 1439. Rule 24(a) allows for intervention as of right if there is inadequate representation. *Id.* (citing FED. R. CIV. P. 24(a)). Some have argued that there should be an absolute right to intervene in class actions without a showing of inadequate representation, which is currently required under Rule 24(a). See Woolley, *supra* note 103, at 580, 607 (arguing that this right should only be tempered by an exception in extreme cases where manageability becomes a problem); Cohn, *supra* note 133, at 1223-24 (arguing for a right to intervene with limitations on the activities of intervenors); see also *supra* notes 130-33 for a discussion of intervention and the right to be heard in class actions. Because the purpose of intervention is partly to monitor representation, there should not be a need to show that the representation needs to be replaced in order to intervene. Woolley, *supra* note 103, at 607. Although creating a right to intervene could lead to problems of manageability, it is unlikely to do so because of the cost of intervention. See Willging, *supra* note 1, at 139 (noting that in one study of four federal district courts, there were attempts to intervene in only 11%, 9%, 5%, and 0% of the cases in each district, respectively). Substantial attorney fees, which will not normally be recoverable from the class funds in the absence of inadequate representation, and other hardships will keep class members from intervening. Woolley, *supra* note 103, at 608-609.

<sup>275</sup> Woolley, *supra* note 103, at 605-06; see FED. R. CIV. P. 24(b) (allowing for permissive intervention even in the absence of inadequate representation). Fiss and Bronsteen argue that intervention should be a qualified right in class actions. Bronsteen & Fiss, *supra* note 70, at 1441. For example, if there are hundreds of intervention requests, some could be rejected without diminishing the watchdog nature of intervention and thus would not cause the litigation to get out of control. *Id.*



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representative.<sup>276</sup> Additionally, an intervening class member would be considered a party who is able to petition a court of appeals for review of the certification decision under Rule 23(f).<sup>277</sup> If notice were not required before certification, those who would otherwise be involved in the litigation would not know about it.

In class actions certified under Rule 23(b)(3), absent class members must generally be afforded “the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.”<sup>278</sup> The requirement of individual notice is based on the idea that courts must infer consent in order for there to be power to bind absent class members to a judgment.<sup>279</sup> However, if the need to infer consent is not necessary before certification, there is no need to require individual notice.<sup>280</sup> Rather, a discretionary scheme, allowing the best notice practicable at all times, could be used for pre-certification notice.<sup>281</sup>

### 3. Treating Putative Class Members as Parties to Procedural Events to Justify Withholding Notice Is Not Appropriate

The Third Circuit held that putative class members were not parties.<sup>282</sup> Four years later, the Supreme Court decided *Devlin*, which posited a flexible approach, based on the goals of class action litigation,

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<sup>276</sup> See Bronsteen & Fiss, *supra* note 70, at 1441; see also FED. R. CIV. P. 23 cmt. (d)(2) (“[N]otice may encourage interventions to improve the representation of the class.”); *Oppenheimer v. F. J. Young & Co.*, 144 F.2d 387 (2d Cir. 1944).

<sup>277</sup> Rule 23(f) took effect in 1998, the same year as the Third Circuit decided *GM Trucks II*. See FED. R. CIV. P. 23(f); *GM Trucks II*, 134 F.3d 133, 141 (3d Cir. 1998).

<sup>278</sup> FED. R. CIV. P. 23(c)(2)(B).

<sup>279</sup> *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

<sup>280</sup> See *supra* Part IV.B.1 for a discussion of how implied consent is irrelevant before certification of a class.

<sup>281</sup> Courts should consider various factors in determining what notice is proper, including cost of notice, which will vary depending on the size of class and the means available. Bronsteen & Fiss, *supra* note 70, at 1438. Another factor is the importance of reaching every member; small claims without a realistic chance of an individual action being brought create the situation in which it is not that important that individual notice be given, whereas if there were large claims with great differences in the amount of damages, individual notice would probably be the best notice practicable. *Id.* An additional factor would be the interest in the private enforcement of public laws. *Id.*

<sup>282</sup> *GM Trucks II*, 134 F.3d at 141. In discussing whether there was power to enjoin putative class members from trying to certify the same nationwide class in a Louisiana state court, the court stated: “To be more precise, the Louisiana class members are not parties before us; they have not constructively or affirmatively consented to personal jurisdiction; and they do not, as far as has been demonstrated, have minimum contacts with Pennsylvania.” *Id.* (emphasis added).

to determine whether absent class members should be considered parties to a procedural event.<sup>283</sup> The Seventh Circuit used the *Devlin* decision as support for treating putative class members as parties to the certification proceedings and binding them to a certification decision without notice or an opportunity to be heard.<sup>284</sup>

Normally in Rule 23(b)(3) class actions, class members are not considered parties and are not bound by a judgment unless they receive notice and refuse to exercise a right to opt out of the class.<sup>285</sup> However, in light of *Devlin*, the inquiry becomes whether the goals of class action litigation support finding that putative class members are parties to the certification proceedings.<sup>286</sup> Here it is instructive to look at past instances in which absent class members were treated as parties.<sup>287</sup>

The Seventh Circuit tried to equate certification proceedings to the facts of *Devlin* by stating that the putative class members had the right to seek certiorari after its decision.<sup>288</sup> In *Devlin*, the Court held that absent class members were parties to the litigation for the purpose of appealing an overruled objection made at a settlement fairness hearing.<sup>289</sup> The Court considered two factors in its determination: (1) the fact that the objector had interests divergent from the class representative, as shown through objecting at the settlement fairness hearing, and (2) the binding effect of the judgment on the objector.<sup>290</sup>

The Seventh Circuit's analogy to *Devlin* was inappropriate for a number of reasons. First and most striking, *Devlin* involved a certified class in which the class members had received notice of the proposed

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<sup>283</sup> See *Federal Jurisdiction and Procedure*, *supra* note 143, at 336 (quoting *Devlin v. Scardelletti*, 536 U.S. 1, 19-20 (2002)).

<sup>284</sup> See *Bridgestone/Firestone, Inc.*, 333 F.3d 763, 768-69 (7th Cir. 2003). Although the court was careful to use the phrase "class member" throughout its opinion when referring to putative class members, it did slip once when it stated that "any would-be member of the class could have sought certiorari from our adverse decision." *Id.* at 768.

<sup>285</sup> See FED. R. CIV. P. 23(c)(2) (stating that Rule 23(b)(3) class members are bound by the judgment if notice and an opportunity to opt out are given); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985).

<sup>286</sup> See *Devlin*, 536 U.S. at 5-6.

<sup>287</sup> See *supra* Part II.C for a discussion of the history of treating absent class members as parties for procedural events.

<sup>288</sup> *Bridgestone/Firestone*, 333 F.3d at 768 (citing *Devlin*, 531 U.S. at 14). Rule 23(f) allows the appeals court power to grant an appeal of the class certification decision if the request is made within ten days of the decision. FED. R. CIV. P. 23(f).

<sup>289</sup> *Devlin*, 536 U.S. at 14; *cf. Federal Jurisdiction and Procedure*, *supra* note 143, at 332.

<sup>290</sup> *Devlin*, 536 U.S. at 10.

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settlement.<sup>291</sup> The dissent in *Devlin* aptly stated that “[n]ot even petitioner . . . [was] willing to advance the novel and surely erroneous argument that a nonnamed class member is a party to the class-action litigation *before the class is certified.*”<sup>292</sup> Second, the class members in *Devlin* had to object at the fairness hearing, so they had initiated some action to bring themselves before the court.<sup>293</sup> The Seventh Circuit was dealing with putative class members that had not taken any affirmative steps to bring themselves before the court.<sup>294</sup> Third, the *Devlin* Court was attempting to keep class members in the class action litigation, and the Seventh Circuit was attempting to keep class members out of the litigation.<sup>295</sup> Finally, *Devlin* required a binding effect on a class member in order to be considered a party.<sup>296</sup> However, the Seventh Circuit considered the putative class members parties that could be bound by a judgment.<sup>297</sup> Thus, in order to make *Devlin* applicable to certification attempts, the Seventh Circuit would have to use its holding retroactively.<sup>298</sup>

The only time putative class members have been bound as parties for purposes similar to the class certification issue is for purposes of the tolling rule.<sup>299</sup> If any member of the putative class files an action seeking class treatment, putative class members receive the benefit of a tolled statute of limitations from the time the action is filed until the denial of certification.<sup>300</sup> Tolling the statute of limitations does not itself involve litigating anything per se; it just allows the putative class members to receive the benefit.<sup>301</sup> However, the denial of class certification, by definition, involves litigation. Thus, notice would not help to more effectively toll the statute of limitations, but notice would definitely provide for better litigation of the certification issue and proper monitoring of the representation.<sup>302</sup>

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<sup>291</sup> Compare *Devlin*, 536 U.S. at 5-6, with *Bridgestone/Firestone*, 333 F.3d at 768-69.

<sup>292</sup> *Devlin*, 536 U.S. at 16 n.1 (Scalia, J., dissenting).

<sup>293</sup> *Id.* at 5; see *supra* notes 138-40 for a discussion of how the federal rules contemplate active participation to receive party status.

<sup>294</sup> *Bridgestone/Firestone*, 333 F.3d at 768.

<sup>295</sup> Compare *Devlin*, 536 U.S. at 5-6, with *Bridgestone/Firestone*, 333 F.3d at 768-69.

<sup>296</sup> *Devlin*, 536 U.S. at 10.

<sup>297</sup> *Bridgestone/Firestone*, 333 F.3d at 768.

<sup>298</sup> See *id.*

<sup>299</sup> See *supra* Part II.C.

<sup>300</sup> See *supra* notes 156-57 and accompanying text.

<sup>301</sup> See *supra* notes 158-59 and accompanying text.

<sup>302</sup> See *supra* Part II.B.3.

As the foregoing discussion demonstrates, there are no procedural events in which absent class members have been treated as parties that are sufficiently analogous to class certification proceedings to justify treating putative class members as parties to such proceedings. Therefore, the Seventh Circuit's use of this doctrine to justify its refusal to give notice was improper.<sup>303</sup> Consequently, there is no justification for binding putative class members without providing notice.<sup>304</sup> Courts can only gain power to bind putative class members by offering notice, an opportunity to be heard, and adequate representation.<sup>305</sup>

#### V. PROPOSED AMENDMENT TO RULE 23

As was discussed in Part IV, allowing numerous certification attempts by absent class members often renders federal decisions meaningless because any state court judge can certify a nationwide class similar to one rejected by a federal court.<sup>306</sup> Defendants are left uncertain about the validity of a federal decision and rush into settlements needlessly.<sup>307</sup> In addition, repeated litigation of the same issue wastes a tremendous amount of judicial resources.<sup>308</sup>

Part IV also showed how no court has provided an adequate solution to these problems while affording due process.<sup>309</sup> Further, the recent amendment to Rule 23 also did not address these issues, even though it was amended in December 2003.<sup>310</sup> Consequently, this Note suggests another amendment to Rule 23, one which incorporates the right to injunctive relief against relitigation of the certification issue in other jurisdictions and affords the due process protections of notice, an opportunity to be heard, and adequate representation to the putative class. This scheme will allow federal courts to prevent undue repetition of the certification issue while having constitutional power over the putative class.

Courts should be given wide discretion to fashion the best notice practicable under the circumstances before certification, without being required to give individual notice. Individual notice should only be

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<sup>303</sup> See *supra* Part IV.B.3.

<sup>304</sup> See *supra* Part IV.B.2.

<sup>305</sup> See *supra* Part IV.B.2.

<sup>306</sup> See *supra* Part IV.A.

<sup>307</sup> See *supra* notes 235-40 and accompanying text.

<sup>308</sup> See *supra* notes 241-42 and accompanying text.

<sup>309</sup> See *supra* Part IV.

<sup>310</sup> See *supra* note 69 for a discussion of the 2003 Amendment to Rule 23.

required after certification because its purpose is to allow for consent to be inferred from the absent members of certified classes. Pre-certification notice has the purpose of allowing an opportunity to be heard as a way to monitor the class representation. This goal can be accomplished without requiring individual notice. Additionally, because seeking an injunction puts the defendant in the position of a plaintiff seeking relief, the court should have discretion to force a defendant to reimburse the plaintiff for the notice costs if an injunction is granted.

This proposed amendment to Rule 23(c) effectively balances the interests involved. It protects the putative class members' due process rights and their interests in effectively monitoring the class representation. It also satisfies the defendants' interests in finality and cost reduction. Finally, it allows for judicial economy and attempts to ensure that no federal court decisions will be rendered meaningless.

*Proposed Amendment to Rule 23(c)*<sup>311</sup>

(c) Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.

(1)(A) When a person sues or is sued as a representative of a class, the court must--at an early practicable time--determine by order whether to certify the action as a class action.

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) An order under Rule 23(c)(1) may be altered or amended before final judgment.

(2)(A) For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.

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<sup>311</sup> The proposed amendments are italicized and are the contribution of the author. See generally FED. R. CIV. P. 23(c) (amended December 1, 2003); Part II.B.1 (discussing provisions of the current Rule 23).

(B) *Upon a motion to certify a class under Rule 23(b)(3), the court must direct to the putative class members the best notice practicable under the circumstances, and if the class is certified there must be individual notice to all members who can be identified through reasonable effort. Notice, whether given before or after certification, must concisely and clearly state in plain, easily understood language:*

- the nature of the action,
- the definition of the *purported* class or certified class,
- the class claims, issues, or defenses,
- that a class member of a certified or putative class may enter an appearance through counsel if the member so desires
- that the court will exclude from the *certified* class any member who requests exclusion, stating when and how members may elect to be excluded, and
- the binding effect of a class judgment on class members under Rule 23(c)(3) or in the event that the court grants an injunction under Rule 23(c)(2)(C).

(C) Once pre-certification notice has been given, and a motion to certify a class under Rule 23 (b)(3) has been denied, the court may enjoin the entire putative class from attempting to certify the same or a substantially similar multistate class in a different forum upon motion of any party.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and

who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

*Proposed Official Comments:*<sup>312</sup>

Note to Subdivision (c)(2)(B)

Pre-Certification Notice

Courts are now required to give notice to the members of putative classes before the certification decision is made when the plaintiff is seeking certification under Rule 23(b)(3). This notice will allow for all putative class members to have the opportunity to enter an appearance and intervene if appropriate.

The “best notice practicable under the circumstances” standard is retained, but there is no requirement of individual notice prior to certification even if it would be reasonable under the circumstances. Courts must be given wide latitude to fashion notice to meet the best practicable standard, which could include individual notice. In determining what constitutes the best notice practicable, courts must look to a number of factors including, but not limited to, the following: the cost of notice, the size of the claims, and the possibility of individual actions being pursued.

The rule that plaintiffs pay the cost of notice has not been changed by this Amendment. However, if a defendant seeks an injunction under Rule 23(c)(2)(C), they are in essence a plaintiff seeking relief from the court. Thus, courts may condition granting an

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<sup>312</sup> These comments are the contribution of the author.

injunction on the defendant reimbursing the class plaintiff for the costs of notice paid.

#### Right to Request Exclusion

This rule does not require the right to request exclusion from the class certification proceeding in order to be bound to the certification decision because there is no need to infer consent, as no chose in action will be lost. By definition, the putative class members retain their right to bring individual actions after certification of a class is denied.

However, if a class is certified under Rule 23(b)(3), the court must afford the right to opt out of the class in order to bind class members to a judgment. As such, courts must require reasonable individual notice after certification. It is contemplated that the aggregate cost of notice given before and after certification will be comparable to notice given only after certification under the previous rule.

Additionally, the problems created for putative class members in the absence of a right to opt out of the class certification proceedings are de minimus. In three of the four possible scenarios, the putative class member would experience no problem when faced with no right to opt out of the class certification proceeding. First, if the class is certified, the right to opt out will still be given. Second, someone who would choose not to opt out of the certification proceedings would not be adversely affected by the lack of a right to opt out of the class. Third, if someone wanted to opt out and pursue an individual action, he could still do so because no chose in action is lost when certification is denied. The fourth scenario raises more issues. If someone wanted to opt out of the class certification proceedings and attempt to certify the class in another forum, he would be foreclosed from doing so by an injunction authorized under Rule 23(c)(2)(C). The loss of this person's right to attempt to certify the class is one of the trade-offs of a more efficient class certification procedure. Additionally, this problem is moderated by allowing



notice, a right to enter an appearance, and potentially to intervene. This will allow those that want to be involved in the class certification proceedings an opportunity to do so.

Note to Subdivision (c)(2)(C)

Power to Enjoin

The injunctive power given to courts under this rule is in addition to that offered by the All Writs Act.<sup>313</sup> This rule allows courts to enjoin the entire putative class from attempting to certify the same or a substantially similar class in another forum after certification is denied. This injunctive power is intended to work in connection with the rights to receive notice and to intervene, which are given to the class members in order to provide the most effective litigation of the class certification issue. This rule creates an exception to the general rule that the subsequent forum determines the preclusive effect of a judgment.<sup>314</sup> This is due in large part to the problems associated with multistate class actions, in which there is the realistic possibility of repeated litigation on the same issue in numerous courts.

These proposed amendments to Rule 23(c) would allow for a fully litigated class certification decision made by a federal court to be given effect while still affording due process to all concerned. It would also solve many of the problems raised in the hypothetical described in Part I. As described in the Introduction, StarBrothers, Inc. was sued by Albert in a products liability action in federal court based on his injuries caused by a defective table saw. Albert attempted to certify the class under Rule 23(b)(3), but the class was found untenable. Subsequently, an absent class member attempted to certify the same class in a state court in a different jurisdiction. StarBrothers was unable to argue collateral estoppel because the absent class member was not a party to the original federal court proceedings. Consequently, StarBrothers was faced with litigating the certification issue again. Further, the absent class member

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<sup>313</sup> See 28 U.S.C. § 1651(a) (2000).

<sup>314</sup> See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 (1979).

could not have participated in the original federal proceeding, even if he wanted to, because he did not receive notice.

If the proposed rule were in effect and notice, the opportunity to be heard, and adequate representation were given before the certification decision was made in the federal court, the court would have had power to bind the putative class to the certification decision. StarBrothers could then move the federal court to enjoin further certification attempts by anyone in the putative class. This injunction would prevent StarBrothers' from having to litigate the same issue multiple times and would further the goal of judicial economy. In addition, although the cost of notice would have been paid by Albert, the original class plaintiff, the court could require StarBrothers to reimburse Albert for the notice costs before issuing the injunction.

If the proposed rule were in effect, Albert likely would have received pre-certification notice of the federal proceedings and would have had a right to enter an appearance and possibly intervene. Even if the federal court did not require individual notice and Albert did not actually receive notice, it is safe to say that enough absent class members would have received notice and participated in the action so that there would have been adequate monitoring of the representation to protect Albert's interests.

As with any complex problem, there are limitations to this proposed solution. The Anti-Injunction Act may bar the injunctive power granted by this proposed rule if the state court proceeding had begun prior to the federal court's certification decision, and the Third Circuit's approach to applying the relitigation exception would then be applicable.<sup>315</sup> However, in any case in which an absent class member brings a subsequent action to certify a class, the injunctive power given by this proposed rule will have full force. In addition, if the Seventh Circuit's interpretation of the Anti-Injunction Act is applied, the rule will almost always have full force.<sup>316</sup>

This proposed rule relates to attempts to certify classes under Rule 23(b)(3) and does not discuss (b)(1) or (b)(2) class actions.<sup>317</sup> However, this Note does recognize that plaintiffs' pleadings may contain

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<sup>315</sup> See *supra* notes 189-94, 216-18 and accompanying text for a discussion of the Anti-Injunction Act and the current split on whether the class certification decision should fall within the relitigation exception to the Act.

<sup>316</sup> See *supra* notes 216-18 and accompanying text.

<sup>317</sup> See *supra* notes 73-79 and accompanying text for a discussion of Rule 23(b).

allegations that a putative class fits into more than one class or that the class may be denied for failure to meet the requirements of Rule 23(a).<sup>318</sup> This proposed rule is intended to address situations in which it is pled that the class is certifiable under Rule 23(b)(3). It properly balances the interests of putative class members, potential defendants, and the judiciary. It gives credence to potential federal court decisions where the Third Circuit's approach would not, while affording putative class members due process where the Seventh Circuit's approach would not.<sup>319</sup>

## VI. CONCLUSION

Certification under Rule 23(b)(3) is a complex issue that raises difficult problems, especially regarding the rights of absent class members. The issue becomes even fuzzier when dealing with the rights of putative class members after certification is denied. Clearly, allowing members of a putative class numerous attempts to litigate the class certification issue after a federal court has found the class untenable is problematic. It unduly taxes defendants and the judicial system.

This Note proposes a more workable certification procedure that would allow federal courts to grant injunctions that prevent putative class members from attempting to certify the same or a substantially similar class in a different forum after the federal court has denied certification. The Seventh Circuit used this approach, but it did not afford due process to the people it was enjoining. It relied merely on the adequacy of representation to gain power over the putative class.

Traditionally, in order to bind absent class members of a Rule 23(b)(3) class, a court must afford the class due process by giving them notice, an opportunity to be heard, adequate representation, and the right to opt out of the class. When the Third Circuit applied this test to putative class members, it unnecessarily required the right to opt out because, in its rigid adherence to the *Shutts* doctrine, it reasoned that it needed to infer consent from the putative class members. However, this was not necessary because their chose in action remains intact after certification is denied.

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<sup>318</sup> See *supra* notes 70-72 and accompanying text for a discussion of Rule 23(a).

<sup>319</sup> See *supra* Part III for a description of the different approaches taken by these circuit courts to the problems surrounding numerous certification attempts.

The approach suggested by this Note is that Rule 23(c) should be amended to allow federal courts power to enjoin the putative class after they are given the best notice practicable, an opportunity to be heard, and adequate representation. Because the purpose of pre-certification notice is not to infer consent, but rather to provide a check on the adequacy of representation, individual notice need not be *required*. Additionally, because the defendant steps into the shoes of the plaintiff when asking for the equitable remedy of an injunction, courts must have discretion to force defendants to reimburse class plaintiffs for the costs of notice paid if an injunction is issued. These changes to Rule 23(c) provide a workable solution to the problems presented in the context of class certification under Rule 23(b)(3). The putative class members are afforded due process, the burdens on defendants are reduced, and the judiciary's interests in economy and finality are satisfied.

**Jeremy Bertsch\***

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\* Candidate for J.D., Valparaiso University School of Law, 2005; B.A., Sociology and Psychology, University of South Dakota. The Author would like to thank his spouse Beth for her love and support.