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Loneliness in the Crowd: Why Nobody Wants Opt-out Class Members to Assert Offensive Issue Preclusion against Class Defendants

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LONELINESS IN THE CROWD: WHY NOBODY WANTS OPT-OUT CLASS MEMBERS TO ASSERT OFFENSIVE ISSUE PRECLUSION AGAINST CLASS DEFENDANTS

*Antonio Gidi**

ABSTRACT

This Article addresses the ability of members who have opted out of a class action to assert offensive nonmutual issue preclusion in their individual lawsuits against the class defendant. It discusses the reasons why the use of this device, widely available to any nonparty, has been systematically denied to opt-out class members. Specifically, their interests are not protected by the traditional actors in class action litigation: neither the court, the defendant, nor the class counsel represent their concerns and interests. Against the prevailing case law, scholarship, and the American Law Institute's Principles of the Law of Aggregate Litigation, Professor Gidi concludes that opt-out class members should be allowed to assert offensive nonmutual issue preclusion against the class defendant as any nonparty.

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I. INTRODUCTION

PRECLUSION and class actions are an explosive mix. Class actions are a politically charged and controversial topic because their judgments dispose of the rights of a large number of people who are not present in the litigation. Most of the problems of issue preclusion in class action litigation do not differ from those encountered in individual litigation. Two salient preclusion issues, however, are peculiar to the class action setting. The first is whether an order denying class certification precludes future class action certification; i.e., whether a class action that was not certified by one court can later be certified by another, or whether the second court is bound by the previous noncertification decision.[1] The second is whether absent class members who have opted out from the class can assert offensive nonmutual issue preclusion in their individual lawsuits against the class defendant as any nonparty could. I discussed the first problem in a recent publication, as any nonparty could.[2] This Article focuses on the second.

After this brief introduction, Part II concisely presents the subject of issue preclusion in individual lawsuits and, more specifically, its offensive

1. After decades of controversy and litigation, the issue was finally resolved by the United States Supreme Court. *See* Smith v. Bayer Corp., 131 S. Ct. 2368, 2382 (2011) (holding that an order denying class certification does not preclude the class from obtaining class certification in a different court); *see also* AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.11 (2010).

2. *See generally* Antonio Gidi, *Issue Preclusion Effect of Class Certification Orders*, 63 HASTINGS L.J. 1023 (2012) (discussing the multiple reasons why orders denying class certification have no preclusive effect in future class action certification).

nonmutual use by nonparties. Part III briefly discusses the peculiarities of issue preclusion in the class action context, completing the introduction.

In Part IV, this Article analyzes the question central to the interrelation between class actions and issue preclusion: the availability of offensive nonmutual issue preclusion for opt-out class members. Although highly controversial, this matter has not been adequately addressed by the courts or scholars. Indeed, most have expressed disapproval at allowing opt-out class members to assert offensive issue preclusion against the class defendant. Such an approach results from an ill-supported and erroneous legal interpretation. In addition, by opting out, class members become outsiders in the class action litigation scene and become alone in a crowd with no way to express their voice.[3]

Although most courts and commentators have demonstrated a certain discomfort in allowing preclusion in such a situation, there is no reason to depart from the general rule. Opt-out class members, therefore, should be able to assert issue preclusion whenever the traditional requirements of offensive nonmutual issue preclusion are present.

II. ISSUE PRECLUSION IN INDIVIDUAL ACTIONS

A. Issue Preclusion Requirements

Although this Article focuses on the application of issue preclusion in the class action context, it is important to understand how the doctrine is generally applied in individual lawsuits. This Part will focus on the basic aspects most relevant to the topic at hand. We invite the initiated to skip this introductory part and move to Part IV, which directly addresses the subject matter.

Issue preclusion, previously known as collateral estoppel, prevents relitigating in a separate lawsuit an "issue" decided in an earlier proceeding.[4] Although its primary focus is to avoid relitigating issues of fact,[5] issues of law may also be subject to issue preclusion, particularly in its

3. *See infra* Part IV.I (discussing the lonely position of absent class members who opt out of a class action).

4. *See* Restatement (Second) of Judgments §§ 17(3), 27 (1982); Robert C. Casad & Kevin M. Clermont, Res Judicata: A Handbook on Its Theory, Doctrine, and Practice 11–12 (2001); Jack H. Friedenthal et al., Civil Procedure § 14.9, at 695–98 (4th ed. 2005); Geoffrey C. Hazard, Jr. et al., Civil Procedure § 14.17, at 635–36 (6th ed. 2011); 18 Charles Alan Wright et al., Federal Practice & Procedure § 4416 (2d ed. 2002).

5. *Compare* United States v. Moser, 266 U.S. 236, 242 (1924) ("Where . . . a court . . . has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. But a *fact*, *question* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law."), *with* Montana v. United States, 440 U.S. 147, 162–64 (1979), *and* United States v. Stauffer Chem. Co., 464 U.S. 165, 170–71 (1984) ("[T]he doctrine of collateral estoppel can apply to preclude relitigation of both issues of law and issues of fact if those issues were conclusively determined in a prior action.").

application to facts.[6]

For issue preclusion to apply, the law imposes these basic requirements: (1) the issues in both proceedings are identical; (2) the issue was actually litigated and decided in the prior proceeding; (3) the prior proceeding afforded a full and fair opportunity for the litigation of the issue; (4) the issue was necessary to support the outcome of the action; (5) there was a valid and final judgment on the merits;[7] and (6) it was foreseeable that the issue would later be used against the defendant in a different proceeding.[8]

B. THE MUTUALITY DOCTRINE AND ITS EROSION

Historically, the mutuality of estoppel doctrine limited the application of issue preclusion exclusively to the parties who were bound by the original judgment (and their privies).[9] It was traditionally believed that the rules of preclusion must be symmetric, akin to a two-way street. As such, a third party should not benefit from a favorable judgment unless that party could also be prejudiced by an unfavorable result.[10]

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6. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 28(2) & cmt. b (stating that issue preclusion applies to issues of law, except when "the two actions involve claims that are substantially unrelated, or . . . a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws"). For a broad discussion, see CASAD & CLERMONT, *supra* note 4, at 130–34; FRIEDENTHAL ET AL., *supra* note 4, § 14.10, at 704–08; HAZARD, JR. ET AL., *supra* note 4, § 14.21, at 642–44 (6th ed. 2011); WRIGHT ET AL., *supra* note 4, § 4425. *See also* 20 AM. JUR. 2D *Courts* § 129 (2005); 47 AM. JUR. 2D *Judgments* § 464 (2006); Geoffrey C. Hazard, Jr., *Preclusion as to Issues of Law: The Legal System's Interest*, 70 IOWA L. REV. 81 (1984).

7. *See* Adams Parking Garage, Inc. v. City of Scranton, 33 F. App'x 28, 31 (3d Cir. 2002); Cent. Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A., 56 F.3d 359, 368 (2d Cir. 1995); RESTATEMENT (SECOND) OF JUDGMENTS §§ 17(3), 27; CASAD & CLERMONT, *supra* note 4, at 13–48; WRIGHT ET AL., *supra* note 4, § 4416.

8. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330 (1979) (stating that collaterally estopping a party from litigating an issue may violate that party's due process rights if it was unforeseeable that the issue would later be used collaterally against the party). *See generally In re* Microsoft Corp. Antitrust Litig., 355 F.3d 322 (4th Cir. 2004); Hunter v. City of Des Moines, 300 N.W.2d 121, 124 & n.4 (Iowa 1981); Goodson v. McDonough Power Equip., Inc., 443 N.E.2d 978, 985–86 (Ohio 1983); RESTATEMENT (SECOND) OF JUDGMENTS § 28(5)(b). This is especially true when, in the first action, a party lacked the motivation or incentive to litigate the issue fully and vigorously. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 27 cmt. j, 28 cmt. i (1982).

9. *See* Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 127 (1912) ("It is a principle of general elementary law that the estoppel of a judgment must be mutual."); Triplett v. Lowell, 297 U.S. 638, 642 (1936); RESTATEMENT (FIRST) OF JUDGMENTS § 93(b) (1942) ("[A] person who is not a party or privy to a party to an action in which a valid judgment other than a judgment in rem is rendered . . . is not bound by or entitled to claim the benefits of an adjudication upon any matter decided in the action.").

10. *See* Bernhard v. Bank of Am. Nat'l Trust & Sav. Ass'n, 122 P.2d 892, 894 (Cal. 1942) ("The estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him."); Comment, *Privity and Mutuality in the Doctrine of Res Judicata*, 35 YALE L.J. 607, 608 (1926) ("The estoppel or bar of the judgment operates mutually if the one taking advantage of it would have been bound by it, had it gone the other way."). *See generally* James Wm. Moore & Thomas S. Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301 (1961).

Nevertheless, the mutuality doctrine was never uniformly accepted.[11] Slowly, courts began to erode the mutuality doctrine until its explicit abrogation in the trailblazing case of *Bernhard v. Bank of America*, in which Justice Traynor allowed a third party to assert issue preclusion.[12]

With the abandonment of the mutuality doctrine, any person may assert issue preclusion against the losing party in an adjudicated proceeding against another person, contingent on all requirements being present: identity of issues actually litigated and necessarily decided in a previous proceeding with a full and fair opportunity to participate.[13] But the rule is asymmetric: issue preclusion cannot be asserted *against* a nonparty—as opposed to *by* a nonparty—because the nonparty in the first instance did not have an opportunity to participate in the previous litigation.[14] Because the practice allows a third person to assert issue preclusion against a party in a previous proceeding, but not vice versa, it is commonly called "one-way issue preclusion." This information will prove relevant in the discussion below examining the similarities between "one-way intervention" and "one-way preclusion."[15]

C. Defensive and Offensive Nonmutual Issue Preclusion

Nonmutual issue preclusion can be applied in two ways: one defensive and another offensive.[16]

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11. For earlier criticisms, see 3 Jeremy Bentham, Rationale of Judicial Evidence 579 (1827), *reprinted in* 7 Works of Jeremy Bentham 171 (John Bowring ed., 1843), considering mutuality without a "semblance of reason" and stating that "[t]here is reason for saying that a man shall not lose his cause in consequence of the verdict given in a former proceeding to which he was not a party; but there is no reason whatever for saying that he shall not lose his cause in consequence of the verdict in a proceeding to which he *was* a party, merely because his adversary was not." *See also* Comment, *supra* note 10, at 608–09 ("No satisfactory explanation for [mutuality's] use has been discovered other than some supposed and unprovable principle of 'natural' fairness.").

12. *Bernhard*, 122 P.2d at 895 ("No satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was not bound by a previous action should be precluded from asserting it as res judicata against a party who was bound by it is difficult to comprehend."). It is worth noting that *Bernhard* was decided in 1942, the same year the first A.L.I. Restatement of Judgments was published. *Bernhard* opened a new path, while the first A.L.I. Restatement of Judgments embraced the old tradition of mutuality. *See* Fleming James, Jr., Civil Procedure § 11.31, at 597 (1st ed. 1965) (stating that the first Restatement of Judgments was "out of step with the times").

13. Restatement (Second) of Judgments § 17(3) (1982); *see supra* Part II.A (discussing the requirements for the application of issue preclusion).

14. *See* Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 329 (1971) ("Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position."); *see also* Hansberry v. Lee, 311 U.S. 32, 40 (1940).

15. *See infra* Part IV.C.

16. For discussion of the offensive–defensive distinction, see Allan D. Vestal, *Law of the Case: Single-Suit Preclusion*, 12 Utah L. Rev. 1, 1–4 (1967) (differentiating "judgment claim preclusion" from "judgment issue preclusion"); Allan D. Vestal, *Preclusion/Res Judicata Variables: Nature of the Controversy*, 1965 Wash. U. L. Rev. 158, 162 (1965); Allan D. Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 Iowa L. Rev. 27, 43–76 (1964); Allan D. Vestal, *Rationale of Preclusion*, 9 St. Louis U. L.J. 29 (1964); Allan D. Vestal, *Res*

Defensive nonmutual issue preclusion allows a defendant to prevent a plaintiff from relitigating an issue that the plaintiff previously litigated unsuccessfully against another defendant.[17] In 1971, the Supreme Court in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation* endorsed the use of defensive nonmutual issue preclusion in federal courts.[18] In that case, the University of Illinois sued several alleged patent infringers.[19] Although the patent at issue was declared invalid in one court, it was later found valid and infringed in another.[20] The Supreme Court decided that it was unreasonable "to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue," and held that the University of Illinois was bound by the prior unfavorable decision invalidating the patent.[21]

Defensive nonmutual issue preclusion is uncontroversial because it is unfair to permit a plaintiff "who has had his day in court to reopen identical issues by merely switching adversaries."[22] Its use promotes judicial economy and efficiency by encouraging plaintiffs to join all potential defendants into one lawsuit, thus reducing the overall amount of litigation.[23]

In contrast, offensive nonmutual issue preclusion is present when a plaintiff in a later case attempts to prevent a defendant from relitigating an issue that the defendant had litigated unsuccessfully in a prior case against another plaintiff.[24] It is more controversial than its defensive

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Judicata/Preclusion: Expansion, 47 S. CAL. L. REV. 357, 359 (1974) (discussing the difference between issue and claim preclusion ultimately adopted in the Restatements); Allan D. Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts*, 66 MICH. L. REV. 1723, 1724 (1968).

17. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.4 (1979) ("Defensive use [of nonmutual collateral estoppel] occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant."); Mann v. Old Republic Nat'l Title Ins. Co., 975 S.W.2d 347, 351 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

18. *Blonder-Tongue*, 402 U.S. at 324. For an earlier decision allowing defensive nonmutual collateral estoppel in federal courts, see *Bruszewski v. United States*, 181 F.2d 419, 421 (3d Cir. 1950) (holding that "a party who has had one fair and full opportunity to prove a claim and has failed in that effort, should not be permitted to go to trial on the merits of that claim a second time [against another defendant] .... unless some overriding consideration of fairness to a litigant dictates a different result in the circumstances of a particular case" and stating that "the achievement of substantial justice rather than symmetry is the measure of the fairness of the rules of res judicata").

19. *Blonder-Tongue*, 402 U.S. at 315.

20. *Id.* at 314–15.

21. *Id.* at 328–29 ("In any lawsuit where a defendant, because of the mutuality principle, is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources.").

22. Bernhard v. Bank of Am. Nat'l Trust & Sav. Ass'n, 122 P.2d 892, 895 (Cal. 1942); *see also* Comment, *supra* note 11, at 610 ("These cases appear to establish the rule, that one who has had his day in court and has lost, cannot reopen identical issues by merely switching adversaries, and that he cannot take advantage of a judgment in his favor against an adversary who has had no day in court.").

23. Parklane Hosiery Co. v. Shore. 439 U.S. 322, 329–30 (1979).

24. *Id.* at 326 n.4 ("[O]ffensive use of [nonmutual] collateral estoppel occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party."); *see also* Appling v. State Farm Mut. Auto. Ins. Co., 340 F.3d 769, 775 (9th Cir. 2003).

counterpart because: (1) it does not necessarily promote judicial economy, and (2) it may be unfair to the defendant in certain situations.[25]

Because offensive issue preclusion allows a plaintiff to benefit from a previous judgment against a defendant without the risk of being prejudiced by it, offensive use may undermine judicial economy by encouraging plaintiffs to "sit on the sidelines" and "wait and see" whether the judgment in the prior case will be favorable.[26] Since the plaintiff is encouraged not to participate in the first action, the result may be more litigation.[27]

The indiscriminate application of offensive nonmutual issue preclusion may also be unfair to the defendant. This unfairness was plainly illustrated in the mass litigation context by Professor Brainerd Currie in the following popular hypothetical.[28] A railroad collision injures fifty passengers, all of whom bring individual lawsuits against the railroad.[29] Although the defendant prevails in the first twenty-five suits, a plaintiff obtains an anomalous victory in the twenty-sixth lawsuit.[30] Professor Currie contends that it would be unfair to allow offensive use of the anomalous judgment to permit the remaining of the plaintiffs to automatically recover against the railroad.[31] The U.S. Supreme Court in *Parklane Hosiery Co. v. Shore* dealt with this issue by suggesting the denial of issue preclusion whenever there have been prior inconsistent verdicts.[32]

The above criticism would be intensified had the outlier victory occurred in the first lawsuit to reach judgment.[33] In that situation, application of across-the-board nonmutual issue preclusion by the remaining forty-nine passengers would preclude adjudicating the remaining twenty-five suits in which the railroad would have won, thereby sealing the fate of the defendant railroad with an unfair judgment. This is particularly grave in the context of mass tort litigation where the number of potential plaintiffs could number hundreds of thousands or even millions.

Although the risk of unfairness to defendants is very real, there is no reason to litigate an issue indefinitely. At a certain point, once matters are convincingly settled, enough is enough. Defendants cannot use this potential for unfairness to shield themselves from issue preclusion, forcing a multitude of victims to face unnecessary expense, time, and effort in

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25. *Parklane*, 439 U.S. at 330–31.

26. *Id.*

27. *Id.*

28. Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine*, 9 STAN. L. REV. 281, 281 (1957).

29. *Id.*

30. *Id.* at 285–86.

31. *Id.* at 286. It is rarely acknowledged that Currie's famous criticism and hypothetical was prompted by a similar example found in a student comment published more than two decades earlier. *See* Currie, *supra* note 28, at 285–89 & nn.13–14; Comment, *supra* note 10, at 611–12.

32. *Parklane*, 439 U.S. at 330.

33. *See* Byron G. Stier, *Another Jackpot (In)justice: Verdict Variability and Issue Preclusion in Mass Torts*, 36 PEPP. L. REV. 715, 755–56 (2009).

repeatedly proving the same set of facts.[34] Therefore, the best opportunity to apply nonmutual issue preclusion in the mass tort setting is only when a substantial amount of litigation has been consistently resolved against the defendant, rendering the controversy mature.[35]

D. Offensive Nonmutual Issue Preclusion

Not everyone agrees, however, that there is a fundamental difference between the offensive and defensive use of nonmutual issue preclusion.[36] Once the U.S. Supreme Court allowed the defensive use of nonmutual issue preclusion in federal courts, it was inevitable that the Court would permit its offensive use as well.[37] Indeed, less than a decade later, in *Parklane Hosiery Co. v. Shore*, the Supreme Court set forth the general test for the application of offensive nonmutual issue preclusion.[38] *Parklane* made it possible for any litigant who was not a party to the original litigation to later assert offensive issue preclusion against any nonprevailing party in a prior suit.[39]

Parklane involved a shareholder class action against Parklane Company, alleging that it issued a false and misleading proxy statement related to a merger.[40] After the filing of the class action, but before it reached a final decision, the SEC filed and obtained a favorable judgment in an injunctive suit against Parklane alleging the same defects.[41] The class action plaintiffs then moved for partial summary judgment against Parklane, asserting that Parklane was precluded from relitigating the is-

34. *But see In re* Bendectin Prods. Liab. Litig., 749 F.2d 300, 305 n.11 (6th Cir. 1984) (citing *Parklane*, 439 U.S. at 330 & n.14 (wrongly stating that "[i]n *Parklane Hosiery*, the Supreme Court explicitly stated that offensive collateral estoppel could not be used in mass tort litigation").

35. *See generally* Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. Rev. 659 (1989) (discussing the concept of mature mass tort litigation).

36. *See, e.g.*, Shaid v. Consol. Edison Co. of N.Y., 467 N.Y.S.2d 843, 849 (App. Div. 1983) ("[T]he practical consequences of the distinction between offensive and defensive use of collateral estoppel are more seeming than real. . . . There is . . . no inherent unfairness or inefficiency in permitting both offensive and defensive use of collateral estoppel."); Restatement (Second) of Judgments § 29 reporter's note (1982) ("[T]he distinct trend if not the clear weight of recent authority is to the effect that there is no intrinsic difference between 'offensive' and 'defensive' issue preclusion.").

37. *See* Kenneth W. Dam, *Class Action Notice: Who Needs It?*, 1974 Sup. Ct. Rev. 97, 124 ("Although *Blonder-Tongue* . . . involved use of collateral estoppel as a shield against liability rather than as a sword for recovery, the decision will probably come to be regarded as a milestone in the steady demise of the doctrine of mutuality.") (footnote omitted).

38. *Parklane*, 439 U.S. at 331. It is seldom noted that the *Parklane* court was openly influenced by an earlier draft of the *Restatement (Second) of Judgments* that proposed abandoning the mutuality doctrine, allowing defensive and offensive issue preclusion. *Parklane* at 330 & n.13 (citing Restatement (Second) of Judgments § 88(3) (Tentative Draft No. 2, 1975)).

39. *See* Allen v. McCurry, 449 U.S. 90, 94–95 (1980); Restatement (Second) of Judgments § 29; 18A Wright et al., *supra* note 4, § 4464 (2d ed. 2004). *But see* Jack Ratliff, *Offensive Collateral Estoppel and the Option Effect*, 67 Tex. L. Rev. 63, 81–96 (1988) (criticizing offensive use and suggesting class actions as a more fair and efficient way of dealing with duplicative litigation in the mass tort scenario).

40. *Parklane*, 439 U.S. at 324.

41. *Id.* at 324–25.

sues already resolved against it in the SEC action.[42] Instead of prohibiting the use of offensive nonmutual issue preclusion, the Supreme Court held that trial courts should have broad discretion to determine when to allow it.[43] Among the elements that courts must consider in exercising their discretion are the promotion of judicial economy and fairness to the defendant.[44]

To promote judicial economy, courts should discourage plaintiffs from taking a wait and see attitude and idly sitting on the sidelines while the first case is being litigated. Therefore, offensive nonmutual issue preclusion should not be allowed in cases where the plaintiff could have easily joined the earlier action.[45]

However, offensive nonmutual issue preclusion does not necessarily promote judicial economy. The *Parklane* court was aware of this, acknowledging that:

> [O]ffensive use of collateral estoppel does not promote judicial economy in the same manner as defensive use does. . . . Offensive use of collateral estoppel . . . creates precisely the opposite incentive. . . . Thus, offensive use of collateral estoppel will likely increase rather than decrease the total amount of litigation, since potential plaintiffs will have everything to gain and nothing to lose by not intervening in the first action.[46]

It is reasonable to infer, therefore, that judicial economy was not the main factor, if it was a factor at all, in the Supreme Court's reasoning.[47]

Parklane recognized that competing considerations are involved in the application of offensive nonmutual issue preclusion and stated that courts should consider a number of factors.[48] First, the defendant must be able to foresee that the issue argued in the first lawsuit could potentially arise again in future litigation and, therefore, have an incentive to litigate it with appropriate vigor.[49] There is no such incentive, in principle, when the first lawsuit involved a claim of a few thousand dollars while the second involved several million. As previously discussed, this requirement is valid to any application of issue preclusion, even against the same

42. *Id.* at 325.

43. *Id.* at 331 ("We have concluded that the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied.").

44. *Id.* at 322–23 ("[T]he general rule should be that in cases where a plaintiff *could easily have joined in the earlier action* or where the application of offensive estoppel would be unfair to a defendant, a trial judge . . . should not allow the use of offensive collateral estoppel." (emphasis added)).

45. The "easily joined" factor originated in the RESTATEMENT (SECOND) OF JUDGMENTS § 88(3) (Tentative Draft No. 2, 1975), which provided that that application of collateral estoppel may be denied, if the party asserting it "could have effected joinder in the first action between himself and his present adversary." *See Parklane*, 439 U.S. at 330 n.13.

46. *Parklane*, 439 U.S. at 329–30 (footnote omitted) (citations omitted).

47. *See id.*

48. *Id.* at 330–32. Several exceptions to the application of one-way issue preclusion were codified in RESTATEMENT (SECOND) OF JUDGMENTS § 29(1)–(8) (1982).

49. *Parklane*, 439 U.S. at 330.

parties.[50]

Second, the *Parklane* Court was concerned with the risk that an anomalous result in a previous lawsuit would unfairly burden the defendant. The Court noted the famous Currie hypothetical described above, where despite several victories, one anomalous loss could forever preclude that issue in future litigation.[51] As a result, the Court held that it would be unfair to allow offensive nonmutual issue preclusion if previous judgments existed in favor of the defendant.[52] The Court did not address the fact that the very first judgment could be the anomalous one.[53]

A third concern arises when "the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result."[54] The Court gave the example of a case in which the first action was filed in a forum that was so inconvenient that it impaired the party's ability to appropriately litigate the case.[55] This factor, however, could easily be incorporated into the requirement that the prior proceeding must have afforded a full and fair opportunity to litigate the issues.[56]

The three factors discussed above are not exhaustive, as the Court explained that offensive nonmutual issue preclusion must be denied whenever it would be unfair "either for the reasons discussed above *or for other reasons*."[57] Moreover, these factors are not mandatory elements, but merely considerations in determining fairness to a defendant when courts exercise its broad discretion to allow issue preclusion.[58]

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50. *See supra* Part II.A (discussing the factors a court must consider in the application of issue preclusion).

51. *See supra* Part II.C (discussing the Currie hypothetical).

52. *Parklane*, 439 U.S. at 330 n.14. This factor also plays a role in the application of defensive nonmutual issue preclusion. *See supra* Part II.A (discussing the factors a court must consider in the application of issue preclusion).

53. *See supra* Part II.C, notes 28–35, and accompanying text (proposing application of offensive nonmutual issue preclusion in the mass tort setting "only when a substantial amount of litigation has been consistently resolved against the defendant, rendering the controversy nature"); *see also McGovern*, *supra* note 35, at 659.

54. *Parklane*, 439 U.S. at 330–31.

55. *Id.* at 331 n.15 ("If, for example, the defendant in the first action was forced to defend in an inconvenient forum and therefore was unable to engage in full scale discovery or call witnesses, application of offensive collateral estoppel may be unwarranted."); *see* RESTATEMENT (SECOND) OF JUDGMENTS § 28(3)–(4) (1982) (stating that "[a] new determination of the issue [may be] warranted by differences in the quality . . . of the procedures" or in the burden of proof).

56. *See* Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 333 (1971) (holding that the party is bound by an earlier judicial determination of an issue, unless that party can demonstrate that the previous proceeding "did not [provide] 'a fair opportunity procedurally, substantively and evidentially to pursue his claim the first time'" (quoting Eisel v. Columbia Packing Co., 181 F. Supp. 298, 301 (Mass. 1960))); *supra* Part II.A (discussing the factors a court must consider in the application of issue preclusion).

57. *Parklane*, 439 U.S. at 331 (emphasis added).

58. *Id.*

E. Closing Remarks

Whatever one may think of the fairness or the convenience of offensive nonmutual issue preclusion, it is now commonplace that a third party may benefit from—without being bound by—issue preclusion.[59] The burden is on the party challenging preclusion to convince the court that it should not be allowed in the particular case.[60] But, it is generally accepted that "courts must be more cautious in allowing [issue preclusion] to be used offensively than in allowing it to be used defensively."[61]

Because issue preclusion against a repeat plaintiff is an affirmative defense, it must be pleaded by the party asserting it, or else it is waived.[62] Although the burden is ultimately on the party wishing to assert issue preclusion to bring it to the court's attention, courts sometimes apply issue preclusion sua sponte.[63]

III. ISSUE PRECLUSION IN CLASS ACTIONS

Class action judgments have issue-preclusive effects in much the same way as judgments in traditional individual actions.[64] Class members are bound by the class action judgment in the same manner as parties in an

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59. *See* Smith v. Bayer Corp., 131 S. Ct. 2368, 2379 n.10 (2010) (considering it "a commonplace of preclusion law . . . that nonparties may benefit from . . . former litigation"). *But see* Casad & Clermont, *supra* note 4, at 184–88 (discussing criticisms of nonmutuality).

60. *See* Friedenthal et al., *supra* note 4, § 14.14, at 727; Hazard et al., *supra* note 4, § 14.26, at 651.

61. *See In re* Owens, 532 N.E.2d 248, 252 (Ill. 1988); *see also Parklane*, 439 U.S. at 331 n.16 (quoting Restatement (Second) of Judgments § 88 reporter's note, at 99 (Tentative Draft No. 2, 1975); *Blonder-Tongue*, 402 U.S. at 329–30 ("[T]he authorities have been more willing to permit a defendant in a second suit to invoke an estoppel [defensively] against a plaintiff who lost on the same claim in an earlier suit than they have been to allow a plaintiff in the second suit to use offensively a judgment obtained by a different plaintiff in a prior suit against the same defendant."); Cobin v. Rice, 823 F. Supp. 1419, 1431 (N.D. Ind. 1993) ("A party asserting offensive collateral estoppel bears a heavier burden than a party who asserts defensive collateral estoppel."); Fischer v. City of Sioux City, 654 N.W.2d 544, 548 (Iowa 2002) ("If a party fails to assert offensive issue preclusion at the earliest practicable time, the unfairness already inherent in offensive issue preclusion will only be exacerbated."); Restatement (Second) of Judgments § 29 reporter's note (1982) ("[A] stronger showing that the prior opportunity to litigate was adequate may be required in [offensive use] than [in defensive use.]"); 50 C.J.S. *Judgments* § 1098 (2009).

62. Fed. R. Civ. P. 8(c); *see also* United States v. Shanbaum, 10 F.3d 305, 311–12 (5th Cir. 1994) (holding that where a party had the "the opportunity and the obligation" to raise the defense of res judicata and they failed to do so, the defense is waived); Kern Oil & Ref. Co. v. Tenneco Oil Co., 840 F.2d 730, 735 (9th Cir. 1988) ("Tenneco's principal obstacle is Fed. R. Civ. P. 8(c), which includes res judicata as an affirmative defense that must be raised in the pleadings. Tenneco admits that it did not do so. Therefore, the defense is waived.").

63. *See* Salahuddin v. Jones, 992 F.2d 447, 449 (2d Cir. 1993) ("The failure of a defendant to raise res judicata in answer does not deprive a court of the power to dismiss a claim on that ground."); *In re* Medomak Canning, 922 F.2d 895, 904 (1st Cir. 1990) ("Even if appellees waived res judicata as an affirmative defense, a court on notice that it has previously decided an issue may dismiss the action sua sponte, consistent with the res judicata policy of avoiding judicial waste."); Friedenthal et al., *supra* note 4, § 14.9, at 698 (citing LaRocca v. Gold, 662 F.2d 144 (2d Cir. 1981)).

64. *See* 7AA Wright et al., *supra*, note 4, § 1789 (3d ed. 2005).

individual lawsuit.[65] Indeed, the same issue preclusion requirements discussed in the previous part regarding individual litigation must be met for the doctrine to apply to class action judgments.[66]

A class action contains two types of causes of action against the defendant: one is asserted by the class as a whole (the class cause of action) and the other is asserted by each class member individually (the class members' individual causes of action). This leads to what can be called the "two facets of class action preclusion," because a class judgment binds the class as a whole (collectively) as well as the class members (individually). Accordingly, the class as a whole, the individual class members, and the defendants are bound by the decisions of issues that are essential to the judgment as long as [all requirements are met.][67]

In a straightforward application of traditional preclusion rules following a class action judgment, a non-class member can assert offensive nonmutual issue preclusion against the class action defendant.[68] As long as the issues are the same and all other requirements are present, the defendant will be bound by adjudicated issues in the class action, but unable to enforce it against nonmembers.[69]

The issue preclusion doctrine is also applicable conversely.[70] If all the requirements are present, in principle, a holding in an individual lawsuit may have issue-preclusive effect against the defendant in a subsequent class action.[71] Specifically, a class representative may be allowed to assert nonmutual issue preclusion offensively against a class action defendant, based on a judgment in a previous individual lawsuit brought by a class member against that same defendant.[72] The main obstacles to preclusion in these circumstances are fairness and foreseeability.[73] The defendant may argue that it did not employ all of its efforts in the individual action's defense because the stakes were substantially lower than in a major class action.[74] Additionally, there is concern that a single anomalous verdict in

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65. *See id.*

66. *See* Cooper v. Fed. Reserve Bank, 467 U.S. 867, 874 (1984) ("A judgment in favor of either side is conclusive in a subsequent action between them on any issue actually litigated and determined, if its determination was essential to that judgment."); *see also* Lee v. Criterion Ins. Co., 659 F. Supp. 813, 818 (S.D. Ga. 1987); McCormack v. Abbott Labs., 617 F. Supp. 1521, 1524 (D. Mass. 1985); 7AA WRIGHT ET AL., *supra* note 4, § 1789 & n.23 (3d ed. 2005) (citing Laskey v. UAW, 638 F.2d 954 (6th Cir. 1981)); *supra* Part II.A (discussing the requirements for the application of issue preclusion).

67. Gidi, *supra* note 2, at 1027.

68. *See* Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effects of Class Suits*, 146 U. PA. L. REV. 1849, 1850 (1998); *see also infra* Part IV.G (discussing the assertion of offensive nonmutual issue preclusion by non-class members).

69. Hazard et al., *supra* note 68, at 1850. The issue is fully addressed below. *See infra* Part IV.G (discussing the assertion of issue preclusion by non-class members).

70. *See* Brown v. Colegio de Abogados de P.R., 613 F.3d 44, 47–48, 54 (1st Cir. 2010).

71. *See id.*

72. *See id.*

73. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330–31 (1979); Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 346–47 (5th Cir. 1982); Stier, *supra* note 33, at 742–43.

74. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 28(5)(b) cmt. j (1982).

an individual lawsuit would seal the fate of an entire industry.[75] This problem, however, would not exist if a large number of individual judgments had reached the same result rendering the controversy mature.[76]

IV. ISSUE PRECLUSION AND OPT-OUT CLASS MEMBERS

A. The Problem

Nowhere will we find a more vibrant example of the peculiarities of preclusion and class actions than in the assertion of offensive nonmutual issue preclusion by opt-out class members against the class defendant.[77] Although that debate has been raging since the 1966 amendment of Rule 23, it continues to be one of the most intractable and controversial issues from both a doctrinal and policy perspective. The resolution of this problem goes to the essence of issue preclusion and is fundamental to understanding the interests at play in a class action.

From a purely practical standpoint, however, this problem has lost part of its practical importance. First, few class actions are ever certified.[78] Of those that are, most settle,[79] and settlements, naturally, do not produce issue preclusion because the issues have not been fully litigated.[80] Second, individual cases brought in federal courts are often consolidated or coordinated with their respective class actions.[81]

Once absent class members opt out of a class action, they exit the litigation, become nonparties, and cannot be bound by the class judgment.[82] The opt-out class members are then free to waive their individual rights,

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75. *See* Stier, *supra* note 33, at 742–43.

76. *See supra* Part II.C, notes 28–35, and accompanying text (proposing application of offensive nonmutual issue preclusion in the mass tort setting "only when a substantial amount of litigation has been consistently resolved against the defendant, rendering the controversy mature"); *see also* McGovern, *supra* note 35, at 659.

77. *See* Fed. R. Civ. P. 23(c)(2)(B)(v), (3)(B) (providing that class members who do not want to be included in the judgment may opt out of a Rule 23(b)(3) class action).

78. See Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. Empirical Legal Stud. 248, 280 (2010) (reporting that, according to a 2007 RAND Institute for Civil Justice Study, less than 15% of class actions were certified); 1 William B. Rubenstein, Newberg on Class Actions § 1:17 (5th ed. 2011) (reporting the figure above and concluding that "the class probably got certified as a result of a settlement agreement.")

79. *See* Thomas E. Willging et al., Fed. Judicial Ctr., Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 10, 60 (1996) (finding that, of the four districts studied, "a substantial majority of certified class actions were terminated by class-wide settlements"); Bryant G. Garth, *Studying Civil Litigation Through the Class Action*, 62 Ind. L.J. 497, 501 (1987) (noting that, after certification, "most class actions, like most litigation, settle prior to trial").

80. *See* Arizona v. California, 530 U.S. 392, 414 (2000) ("[S]ettlements ordinarily occasion no *issue preclusion* . . . unless it is clear . . . that the parties intend their agreement to have such an effect."); 5 William B. Rubenstein et al., Newberg on Class Actions § 16:28 (4th ed. 2002) ("The likelihood of settlement may also eliminate collateral estoppel rights."); *see also supra* Part II.A (discussing the requirements for the application of issue preclusion.)

81. *See* Willging et al., *supra* note 79, at 14–15.

82. *See* Becherer v. Merrill Lynch, 193 F.3d 415, 418 (6th Cir. 1999) (holding that class members are bound by the class judgment but those who opt-out are not); *id.* at 425–26

bring their individual lawsuits, or participate in a different class action,[83] even if the class claim received an unfavorable judgment on the merits. No one can be bound by a judgment unless they are a party, a privy, or an adequately represented class member.[84]

Such was the issue in *In re Corrugated Container Antitrust Litigation*, where the court held that an opt-out plaintiff is not precluded from litigating an issue decided in favor of the defendant in a prior class action.[85] The Fifth Circuit reasoned that because an opt-out plaintiff is not a party to the class action, and thus, not bound by its judgment, "[a] class action judgment [unfavorable to the class on the merits] cannot be used to collaterally estop an opt-out plaintiffs' [sic] action against a defendant in a separate action."[86]

The issues resolved in *Corrugated Container* were simple because preclusion was being asserted against an opt-out class member who was not a party to the previous class action lawsuit.[87] This matter is not controversial, and it would have been surprising had the Fifth Circuit decided differently and bound the opt-out class member to the unfavorable class judgment.

Controversy arises, however, when absent members who opted out of the class assert offensive nonmutual issue preclusion in their individual litigation against the defendant after a favorable class judgment.[88] In this scenario, the person against whom preclusion is asserted—the class defendant—was a party in the previous case and had a full and fair opportunity to litigate the issue. The person seeking the benefit of preclusion—the opt-out class member—was excluded from the previous case and not bound by it.

(stating that binding opt-out class members would "defeat the purposes, if not the letter of Rule 23" and render meaningless their "due process-based right to timely opt out").

83. *See, e.g.*, Morgan v. Deere Credit, Inc., 889 S.W.2d 360, 366 (Tex. App.—Houston [14th Dist.] 1994, no writ) (holding that members who opt out of a federal class action may bring their own class action in state court), *abrogated on other grounds by* Tracker Marine, L.P. v. Ogre, 108 S.W.3d 349 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

84. *See supra* Part II (discussing the general rules of issue preclusion in individual actions).

85. *In re* Corrugated Container, 756 F.2d 411, 418–19 (5th Cir. 1985).

86. *Id.* at 418; *see also* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who . . . has never had an opportunity to be heard."); Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 321, 322 n.8 (1977) (explaining the "elementary" legal principle that a person who was not a party to a prior lawsuit cannot be bound by its result); Hansberry v. Lee, 311 U.S. 32, 40 (1940) ("[O]ne is not bound by a judgment . . . in a litigation in which he is not designated as a party . . . .").

87. *See Corrugated Container*, 756 F.2d at 413, 418–19.

88. A completely different matter, which will not be discussed here, is whether opt-out class members are precluded from pursuing a punitive damage claim in their individual lawsuits. *See* C. Delos Putz, Jr. & Peter M. Astiz, *Punitive Damage Claims of Class Members Who Opt Out: Should They Survive?*, 16 U.S.F. L. Rev. 1, 40 (1981) (arguing that punitive damage claims belong to society as a whole, not to individual class members, and suggesting that class members who opt out of a class action be precluded from obtaining punitive damages in their individual lawsuits).

Although *Parklane* involved a class action lawsuit, it did not address the issue of whether an opt-out class member can assert the preclusive effect of the class judgment in an individual case against the same defendant.[89] As previously discussed, *Parklane* encourages offensive use of nonmutual issue preclusion whenever the requirements are present, except when it does not promote judicial economy or may be unfair to the defendant.[90] The questions remain, however, whether issue preclusion for opt-out class members promotes judicial waste or judicial economy, and whether it is unfair to the defendant. Interpreting these two exceptions specifically in the unique circumstance of opt-out class members presents a difficult problem that is still theoretically and practically unsettled.[91]

The predominant view holds that a class member who opts out of a class action should not be allowed to assert offensive nonmutual issue preclusion against the defendant.[92] Only a few voices speak in favor of allowing opt-out class members to assert offensive nonmutual issue preclusion against the defendant, but none in over thirty years.[93] Against the predominant view, however, this Article argues that application of the general rules of issue preclusion dictate that opt-out class members must be able to assert offensive nonmutual issue preclusion against the class defendant and that there is no compelling reason to depart from the general rule.[94]

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89. *See Parklane*, 439 U.S. at 324, 325.

90. *See supra* Part II (discussing the general rules of issue preclusion in individual actions).

91. *See* 7AA WRIGHT ET AL., *supra* note 4, § 1789 (3d ed. 2005).

92. *See, e.g.*, EEOC v. U.S. Steel Corp., 921 F.2d 489, 495 (3d Cir. 1990) (stating that absent members who fail to opt out are "deemed parties for res judicata purposes," and those who do opt out are not "bound by or entitled to the benefits of the judgment"); AM. LAW INST., *supra* note 1, § 2.07 cmt. g; Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, 814 F.2d 358, 362–66 (7th Cir. 1987); FRIEDENTHAL ET AL., *supra* note 4, § 16.8, at 796; WRIGHT ET AL., *supra* note 4, § 1789 (3d ed. 2005); 20 CHARLES ALAN WRIGHT & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE & FEDERAL PRACTICE DESKBOOK § 77 (2d 2011); Comment, *The Importance of Being Adequate: Due Process Requirements in Class Actions Under Federal Rule 23*, 123 U. PA. L. REV. 1217, 1245 n.119 (1975) ("An absentee deciding whether to opt out knows that he cannot use collateral estoppel if the class wins.").

93. See most recently *In re* TransOcean Tender Offer Sec. Litig., 455 F. Supp. 999, 1006 (N.D. Ill. 1978), holding that "plaintiffs who excluded themselves from the Delaware class are not prohibited by the rule of mutuality from claiming the benefit of the judgment won by that class." *See also* Saunders v. Naval Air Rework Facility, Alameda, Cal., 608 F.2d 1308, 1312 (9th Cir. 1979) ("The opt-out practice . . . does not assume the relitigation of that which has been settled by class-wide injunctive or declaratory relief.").

94. The issue of whether an opt-out class member may assert nonmutual issue preclusion is particularly pressing in defendant class actions. If such class defendants were allowed to opt out from a class action brought against them and therefore to escape the binding effect of the class judgment and, in addition, were allowed to assert nonmutual issue preclusion against the plaintiff, this would create a huge incentive for them to opt out, divesting the defendant class action of any utility. One solution is to allow such defendants to opt out of the class but not to assert nonmutual issue preclusion. *See* Note, *Defendant Class Actions*, 91 HARV. L. REV. 630, 635 (1978). The best rule, however, is that defendant class members should not have opt-out rights. After all, although class plaintiffs may exercise their right not to sue, defendants cannot "opt" not to be sued. *See* NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIFORM CLASS ACTIONS [ACT] [RULE] § 8(d) (1976) (providing that "[a] member of a defendant class may not elect to be excluded"); Vince

B. Promotion of Economy and Fairness

One of the "compelling reasons" raised by some to justify a departure from the rule allowing nonparties to assert offensive nonmutual issue preclusion relates to the promotion of economy and fairness.

The *Restatement (Second) of Judgments* equates opting out of a class action with divesting the class representative of the authority to represent the class member's interests in court.[95] The result is that the opt-out class member is neither bound by a negative class judgment nor benefited by a favorable one.[96]

Some courts and commentators believe that allowing opt-out class members to assert offensive nonmutual issue preclusion against the class defendant would undermine the *Parklane* policies of economy and fairness because it would permit them to sit on the sidelines and enjoy the benefits of a favorable judgment in the class suit without running the risk of being bound by it.[97] Indeed, courts fear that this "free rider" problem[98] theoretically could encourage class members to opt out en masse and bring a multitude of individual lawsuits against the defendant.[99] Therefore, in addition to undermining the policies of economy and fairness, it might also undermine the advantages of class action litigation.[100]

There is substantial disagreement over whether allowing opt-out class members to assert offensive nonmutual issue preclusion promotes or undermines judicial economy.[101] On the one hand, allowing it avoids judicial waste by precluding the relitigation of issues previously decided in the class action.[102] On the other hand, it may encourage class members to

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Morabito, *Defendant Class Actions and the Right to Opt Out: Lessons for Canada from the United States*, 14 Duke J. Comp. & Int'l L. 197, 213 (2004) ("While opt out regimes are vastly superior to opt in regimes, it is submitted that they should not be applied with respect to defendant representative proceedings.").

95. *See* Restatement (Second) of Judgments § 42 cmt. d, illus. 6 (1982).

96. *Id.* § 42(1)(c) ("A person is not bound by a judgment for or against a party who purports to represent him if . . . [b]efore rendition of the judgment the party was divested of representative authority with respect to the matters as to which the judgment is subsequently invoked . . . ."); *see also id.* § 42 cmt. d, illus. 6.

97. *See* Polk v. Montgomery Cnty., 782 F.2d 1196, 1202 (4th Cir. 1986) ("To permit a plaintiff who declines to join a class action . . . to later apply [offensive nonmutual] collateral estoppel to a prior favorable judgment rendered in the class suit could burden the defendants with multiple suits and may be contrary to the notion of promoting judicial efficiency.") (footnotes omitted).

98. *See, e.g.*, Mancur Olson, The Logic of Collective Action 2 (1965); Ratliff, *supra* note 39, at 65 ("Each subsequent plaintiff has a 'heads-I-win, tails-you-lose' advantage.") (quoting Parklane Hosiery Co. v. Shore, 439 U.S. 322, 338 (1979) (Rehnquist, J., dissenting)).

99. *See* Ratliff, *supra* note 39, at 68–70.

100. *See* Mark W. Friedman, Note, *Constrained Individualism in Group Litigation: Requiring Class Members to Make a Good Cause Showing Before Opting Out of a Federal Class Action*, 100 Yale L.J. 745, 753 (1990) ("Scholars have noted this free rider problem and its consequent unfairness, both to the members of the class and to their attorneys, who disproportionately bear all of the risks and most of the costs of the litigation.").

101. *See* Premier Elec. Constr. Co. v. Int'l Bhd. of Elec. Workers, 627 F. Supp. 957, 962 (N.D. Ill. 1985), *rev'd sub nom.* Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, 814 F.2d 358 (7th Cir. 1987).

102. *See id.*

opt out and pursue their own individual litigation, thereby multiplying unnecessary lawsuits.[103] Another quite different issue is whether the debate on judicial economy is relevant at all for purposes of offensive nonmutual issue preclusion. As previously discussed, *Parklane* recognized that offensive nonmutual issue preclusion does not necessarily promote judicial economy and yet approved its use.[104]

A few courts have allowed opt-out class members to assert offensive nonmutual issue preclusion to avoid relitigation of the same issues in subsequent individual litigation against the class defendant.[105] This was the reasoning behind the trial court decisions in both *Premier*[106] and *TransOcean*.[107]

The *Premier* court of appeals, however, reversed the trial court, concluding that the trial court's economic argument was fallacious because it was based on an "ex post perspective on judicial economy."[108] Judge Easterbrook expressed concern with allowing opt-out class members to use offensive nonmutual issue preclusion because this practice would invite class members to opt out and bring individual lawsuits.[109] As a commentator observed—with a large dose of exaggeration—"[T]here would be no reason not to opt out."[110] Further, if defendants predict that numerous class members will opt out, they will reduce the amount offered for settlements, in turn encouraging more dissatisfied class members to opt out.[111] Judge Easterbrook wrote:

> The more attractive it is to opt out—and giving the parties who opt out the benefit of preclusion makes it very attractive—the fewer settlements there will be, the less the settlements will produce for the class, and the more cases courts must adjudicate. This is not judicial economy at work![112]

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103. *See id.*

104. See *supra* Part II.D (discussing offensive nonmutual issue preclusion).

105. *See Premier*, 627 F. Supp. at 962–63; *In re* TransOcean Tender Sec. Litig., 455 F. Supp. 999, 1008 (N.D. Ill. 1978).

106. *Premier*, 627 F. Supp. at 962–63.

107. *TransOcean*, 455 F. Supp. at 1008.

108. Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, 814 F.2d 358, 366 (7th Cir. 1987).

109. *Id.* ("A decision to make preclusion available to those who opt out of a class influences *whether* there will be multiple suits. The more class members who opt out may benefit from preclusion, the more class members will opt out. Preclusion thus may increase the number of suits, undermining the economy the district court hoped to achieve. The effect of the legal rule may be the opposite of the effect of applying preclusion to a given case. To determine whether a rule is beneficial, a court must examine how that rule influences future behavior . . . . [T]he application of issue preclusion would multiply the number of suits and undermine the benefit of class actions in centralizing litigation.").

110. FRIEDENTHAL ET AL., *supra* note 4, § 16.8, at 796; *see infra* Part IV.K (discussing the difficult financial and technical hurdles opt-out class members face to bring an individual lawsuit against the class defendant).

111. *Premier*, 814 F.2d at 366.

112. *Id.* Moreover, at least theoretically, if class members were to opt out en masse from the class, the reduction in class size could preclude class certification by putting in peril a Rule 23 prerequisite: class numerosity. *See* FED. R. CIV. P. 23(a)(1) ("One or more members of a class may sue or be sued as representative parties on behalf of all members only if . . . the class is so numerous that joinder of all members is impracticable. . . .");

The argument, naturally, cuts both ways. Allowing opt-out class members to later assert issue preclusion in their individual lawsuits may encourage class settlement because defendants would have a strong interest in avoiding the establishment of issue preclusion.[113] In addition, even if judicial economy were a relevant argument against offensive nonmutual issue preclusion, it is easily countered. If a class member wants to opt out, there is no reason to restrain the class member from exercising that right just because remaining in the class would be more economical. One might ask the question: Economical for whom? Certainly not for the class member who decided opted out.

As Judge Easterbrook noted in *Premier*, by precluding the opt-out plaintiff from taking advantage of the favorable class action judgment, fewer class members would have incentive to opt out.[114] A reduction in opt-outs would, in effect, reduce the number of individual lawsuits brought regarding the same cause of action and, thus, conserve judicial resources.[115] Issue preclusion's goal of judicial economy is ultimately furthered even if the price is allowing relitigation of previously decided issues.[116] The Seventh Circuit accordingly reversed the trial court and held that an opt-out plaintiff could not assert offensive nonmutual issue preclusion against the class defendant in a subsequent individual suit.[117]

However sound the argument raised by the *Premier* court may be in principle, it may not survive careful practical analysis. As the *TransOcean* court noted, in practice, only a small percentage of class members actually opt out, and an even smaller number bring individual lawsuits.[118] Several decades later, the court's intuition was substantiated by empirical research.[119] Only in cases where the class member's claim is valuable enough to justify individual litigation would a class member even consider opting out of a class action.[120] In these economically viable cases, class actions are not necessarily the most efficient procedural tool and the

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FRIEDENTHAL ET AL., *supra* note 4, § 16.8, at 796; RUBENSTEIN ET AL., *supra* note 80, § 16:28.

113. *See supra* Part II.A (discussing that for an issue to be precluded it must have been actually litigated and decided in the prior proceeding).

114. *Premier*, 814 F.2d at 365–66.

115. *Id.*

116. *Id.* at 365.

117. *Id.* at 367.

118. *In re* TransOcean Tender Offer Sec. Litig., 455 F. Supp. 999, 1008 (N.D. Ill. 1978).

119. *See* JAY TIDMARSH, FED. JUDICIAL CTR., MASS TORT SETTLEMENT CLASS ACTIONS: FIVE CASE STUDIES 2–3, 10–12 (1998) (providing the number of class members who opted out of mass tort settlement class actions); WILLGING ET AL., *supra* note 79, at 52 ("In all four districts, the median percentage of members who opted out was either 0.1% or 0.2% of the total membership of the class and 75% of the opt-out cases had 1.2% or fewer class members opt out."); Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1566 (2004).

120. *See* WILLGING ET AL., *supra* note 79, at 53 ("For the type of awards in this study—none of which seem high enough to support individual lawsuits on a contingent fee basis—one might expect that class members would have more incentive in the larger cases to remain in the class and recover an award in the thousands of dollars. As the size of the net average settlement decreases, members have less incentive to file a claim. If totally dissatis-

class member may recover more pursuing an individual claim, even without the economies of scale.[121] Class members are economic actors and should not be punished for wanting to maximize their benefit.

The argument of unfairness to the class defendant is equally unconvincing. It is undeniable that a class action defendant could potentially be subjected to additional individual lawsuits from opt-out class members.[122] While some may perceive this as unfair, it is no more unfair than subjecting a defendant in an individual lawsuit to offensive nonmutual issue preclusion in a later lawsuit by a third party, who would not be bound by the prior judgment.[123] The number of claims in a class action is a direct consequence of the defendant's alleged conduct and the conflict's size and type. Whatever the difference between the two situations, it is one of degree, not substance. There is no unfairness in being sued by several people: a defendant with a market presence that only allows it to hurt ten people is potentially subject to only ten lawsuits, but a defendant with a market presence that allows it to hurt thousands of people is potentially subject to thousands of lawsuits. This is just how things are. In addition, considering that, by definition, there is a class-action judgment against the defendant, the defendant did indeed act wrongfully. A defendant in these circumstances can hardly allege that being sued several times is unfair.

People often lose sight that the promotion of procedural economy is but one aspect a court must consider in allowing assertion of offensive nonmutual issue preclusion. If it is relevant at all—which is doubtful—allowing opt-out class members to assert issue preclusion against class defendants would actually promote economy rather than undermine it. The argument against fairness is equally flawed: as discussed in the next Part, the objections to the use of offensive nonmutual issue preclusion by opt-out class members are the same recycled arguments raised in opposition to offensive nonmutual issue preclusion in individual lawsuits. But that ship sailed a long time ago.[124]

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fied with the amount of the recovery, some members may choose to protest by opting out.") (citations omitted).

121. *See id.* ("For very large awards . . . one would expect the opt-out rate to increase as the size of the expected award increases because individuals with more serious than average injuries would be able to obtain representation and pursue a larger individual award.").

122. *See* Polk v. Montgomery Cnty., 782 F.2d 1196, 1202 (4th Cir. 1986) ("To permit a plaintiff who declines to join a class action brought under Rule 23(b)(3) . . . to later apply collateral estoppel to a prior favorable judgment rendered in the class suit could burden the defendants with multiple suits . . . ."); Roger Furman, Note, *Offensive Assertion of Collateral Estoppel by Persons Opting Out of a Class Action*, 31 HASTINGS L.J. 1189, 1195 (1980) ("[W]idespread offensive use [of collateral estoppel] could subject the party estopped to multiple and often vexatious liabilities.").

123. *See supra* Part II.D (discussing the general rules of offensive nonmutual issue preclusion in individual actions).

124. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979) (allowing the offensive use of nonmutual issue preclusion); *see also supra* Part II.B (discussing the erosion of the mutuality doctrine).

C. One-Way Issue Preclusion? A Historical Perspective

Allowing an opt-out class member to assert offensive nonmutual issue preclusion in an individual lawsuit against a class defendant has been characterized as a return to the old practice of "one-way intervention," a practice that the 1966 amendment to Rule 23 was designed to abolish.[125] The old spurious class action that existed between the enactment of the 1938 version of Rule 23 until its 1966 amendment was different from the current Rule 23(b)(3) class actions. Most significantly, the old spurious class actions did not work as an opt-out procedure, in which dissatisfied class members had to exclude themselves from the class to avoid being bound by the class judgment. Instead, class members in the original version had to "opt in" to an existing class action proceeding to be able to participate in the judgment. Several commentators even said that it was not really a class action, but merely a joinder device.

Because very few class members would opt into a class, a few courts, frustrated with the unrealized potential of class actions, allowed a practice that became known as "one-way intervention." According to the practice, class members were able to intervene in the proceeding after the class action was adjudicated in favor of the class. This allowed them to benefit from but not be prejudiced by preclusion. The defendants, however, were in the opposite situation: a loss would potentially bind them towards the whole class, whereas a victory would bind only the class representative and the few class members who had carelessly opted in before the judgment.[126] The practice was controversial at the time: Some scholars and judges looked askance at this asymmetry of positions, while others welcomed it as an efficient mechanism to resolve mass disputes.

The criticism equating opt-out members asserting issue preclusion and the practice of one-way intervention was popular in the early years following the 1966 amendment to Rule 23.[127] For example, one commenta-

125. *See* 7AA Wright et al., *supra* note 4, § 1789 (3d ed. 2005). Fed. R. Civ. P. 23 advisory committee's note to the 1966 amendment on subdivision (a)(3), *reprinted in* 39 F.R.D. 69 (1966).

126. *See* Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 589 (10th Cir. 1961) (one of the last cases before the 1966 amendment to Rule 23 where one-way intervention was allowed); York v. Guaranty Trust Co. of New York, 143 F.2d 503, 529 (2d Cir. 1944), *rev'd on other grounds*, 326 U.S. 99 (1945) ("Since, in a [spurious] class suit, . . . a judgment will not be res judicata for or against those of the class who do not intervene, we suggest that if, after trial, the court finds against the defendant, appropriate steps be taken to notify all such noteholders to intervene (if they have not theretofore done so), judgment to be entered in favor only of those who do so within a reasonable time."). *See generally* Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. Chi. L. Rev. 684, 691 (1940); Comment, *The Spurious Class Suit: Procedural and Practical Problems Confronting Court and Counsel*, 53 Nw. U. L. Rev. 627, 632–33 (1959). *See also* Dam, *supra* note 37, at 125 (for a more recent discussion proposing the "elimination of the notice requirement and the return to one-way intervention").

127. *See* Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n., 814 F.2d 358, 362–64 (7th Cir. 1987); *In re* TransOcean Tender Offer Sec. Litig., 455 F. Supp. 999, 1006 (N.D. Ill. 1978); Richard O. Cunningham, et al., ABA, Sec. of Litig., Report and Recommendations of the Special Committee on Class Action Improvements (1986), *reprinted in* 110 F.R.D. 195, 206–07 (1986).

tor said that "[t]here is little practical difference between intervening post-judgment to benefit from a favorable judgment [as with one-way intervention] and bringing suit on one's own, armed with the favorable judgment as collateral estoppel [as with offensive nonmutual issue preclusion]."[128]

This reasoning was sanctioned by Professor Benjamin Kaplan, the reporter of the Advisory Committee who drafted the 1966 amendment to Rule 23 and Professor Charles Allan Wright.[129] Professor Kaplan observed that "it would be anomalous to give one who opts out collateral estoppel benefits of the action from which he deliberately removed himself."[130] Charles Allan Wright and Arthur Miller said famously that this practice would "make a mockery of the notice and opting-out procedure" that specifically provide that a class member who opts out is excluded from the class and from the judgment.[131] The support from such preeminent figures proved extremely influential and the echoes of the hypothetical opt-out class member asserting offensive nonmutual issue preclusion and making a mockery of Rule 23 was repeated for decades.[132] To this day, this approach commands the misguided support of courts and scholars.[133]

There is no doubt that the 1966 amendment to Rule 23 ended the then-budding practice of one-way intervention by switching from an opt-in into an opt-out model.[134] Although the advisory committee note expressly recognized its demise by overhauling the whole structure of the

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128. Comment, *supra* note 92, at 1244–45 ("An absentee, after having requested exclusion, may not benefit from a favorable judgment by arguing that the representation turned out to be unexpectedly good. This would be a true return to one-way intervention. Neither can an absentee who has excluded himself 'invoke a judgment in favor of the class as collateral estoppel in a jurisdiction that does not require mutuality as a condition on the application of collateral estoppel.' Rule 23 does not say whether such a practice would be permissible, but it seems clear that the purpose of amending the rule to preclude one-way intervention would prohibit such a practice.") (footnotes omitted).

129. *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 391 n.136 (1967) (citing 2 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 572, at 96–97 (C. Wright ed., Supp. 1966)).

130. *Id.*; *see also* 7AA WRIGHT ET AL., *supra* note 4, § 1789 (3d ed. 2005) ("Notions of collateral estoppel are not so inexorable that a party who has affirmatively sought exclusion from a judgment later must be allowed to rely on it. The better view thus is that one who opts out of a class action cannot claim collateral-estoppel benefits from the judgment.") (footnote omitted).

131. 7A CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 1789, at 183–84 (1972).

132. *See* Comment, *supra* note 92, at 1245–46 (1975) (quoting the "mockery" remark and referring also to "the specter of one-way intervention"); 7AA WRIGHT ET AL., *supra* note 4, § 1789 (3d ed. 2005); WRIGHT & KANE, *supra* note 92, § 77 (2012).

133. *See, e.g.*, *Premier*, 814 F.2d at 362–66; AM. LAW INST., *supra* note 1, § 2.07 cmt. g ("Denial of both the preclusive benefit and the preclusive detriment of the class judgment is consistent with the longstanding goal to prevent one-way intervention in class actions when absent class members have the opportunity to opt out."); CASAD & CLERMONT, *supra* note 4, at 179–80; FRIEDENTHAL ET AL., *supra* note 4, § 16.8, at 796.

134. *See* FED. R. CIV. P. 23(e)(3) advisory committee's note to 1966 amendment, *reprinted in* 39 F.R.D. 69, 106 (1966) ("Under proposed subdivision (c)(3), one-way intervention is excluded.").

class action system, the text of the rule did not expressly prohibit the practice (mainly because it did not need to do so) nor did it express any antagonism to the practice.[135]

But one cannot understand the above controversy in a vacuum; it is important to contextualize it in historical perspective. The 1966 amendment to Rule 23 originated at a time when the doctrine of "mutuality of estoppel" was still strong and had disciples in academia and in the courts.[136] Consequently, the only reason why some were outraged by the practice of one-way intervention was because of the doctrine of mutuality's popularity at the time. Indeed, the reasoning raised against one has always been the same reasoning raised against the other.[137]

But when the old practice of one-way intervention is viewed with modern eyes, not blurred by blind adherence to the mutuality doctrine, one can see that it was merely a pretext to circumvent the then-already obsolete doctrine of mutuality[138] in dealing with the practical reality of an inefficient opt-in class action.[139] This was the perspective that moved the proponents of one-way intervention, who wanted to realize the potential of class actions to resolve mass conflicts.[140] So, if it is true that the 1966 amendment to Rule 23 repealed the old practice of one-way intervention, it did so not by rejecting it, but by modernizing the outdated opt-in class action into an opt-out class action and in essence creating the modern class action for damages.

The connection between the old practice of one-way intervention and

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135. *See id.*; *see also* Kaplan, *supra* note 129, at 385–86; James Wm. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 570–72 (1937) (explaining the proposed changes to class action rules from old Equity Rule 38 to the new Federal Rules of Civil Procedure).

136. *See* Katz v. Carte Blanche Corp., 496 F.2d 747, 759 (3d Cir. 1974).

137. *See, e.g.*, James Wm. Moore & Marcus Cohn, *Federal Class Actions*, 32 ILL. L. REV. 307, 318–21 (1937) (detailing the historical development of the spurious class action as a vehicle for intervention when a common question of law or fact predominates); Moore, *supra* note 136, at 574–75 (explaining that through intervention into spurious class actions, parties and their privies would be bound by litigation results while those who did not opt in would not); *see also* Friedman, *supra* note 102, at 752 (explaining that the Advisory Committee "largely occupied itself with preventing individual litigants . . . from intervening after a favorable judgment" because "[s]uch 'post-judgment one way intervention' was criticized for lacking 'mutuality'"); Kaplan, *supra* note 129, at 385–86 (referring to critics who consider that the practice was "heretical" or "distasteful" because it was "one-way" and "lacking mutuality" and that "only by a perverse anomaly could there be such a thing as a class action that did not run fully for or against the class") (footnote omitted); Comment, *supra* note 94 at 1242–46 (1975).

138. As previously discussed, some considered the doctrine of mutuality to be outdated even at the time it was adopted by the Restatement (First) of Judgments in 1942. *See* JAMES, *supra* note 12, § 11.31, at 597 (considering the Restatement (First) of Judgments "out of step with the times"). In the following decades, the doctrine of mutuality slowly fell in disfavor, first with *Bernhard v. Bank of America National Trust & Savings Ass'n*, 122 P.2d 892, 895 (Cal. 1942) (defensive use), then with *Blonder-Tongue Labs., Inc. v. University of Illinois Foundation*, 402 U.S. 313, 349–50 (1971) (defensive use), and finally *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 332–33 (1979) (offensive use). *See supra* Part II.B (discussing the erosion of the mutuality doctrine).

139. *See* JAMES, *supra* note 12, § 10.18, at 500 (considering the practice of one-way intervention as a way to give more effectiveness to the old spurious opt-in class action).

140. See Kalven & Rosenfield, *supra* note 126, at 718 n.98 (1940).

the much older doctrine of mutuality is undeniable.[141] It did not help that the expression "one-way intervention" was very similar to "one-way preclusion," which was a common expression used at the time to designate offensive nonmutual issue preclusion.[142] Therefore, the association of one-way intervention with all the criticisms of one-way preclusion was simply impossible to resist. Inevitably, those who favored or opposed the old practice of one-way intervention did so using the same arguments traditionally used to favor or oppose one-way preclusion.[143]

Not until 1979, more than a decade after the enactment of the 1966 amendment to Rule 23, did the Supreme Court completely abandon the mutuality doctrine in federal courts.[144] In essence, by allowing the application of offensive nonmutual issue preclusion in *Parklane*, the Court retroactively sanctioned the practice of one-way preclusion.[145] From *Parklane* accepting one-way preclusion, one could infer that the Supreme Court had evolved to the point that it did not show a significant aversion to the old practice of one-way intervention. Nowhere did the Supreme Court make its new position clearer than in the 2011 opinion of *Smith v. Bayer Corp.*, where it considered "a commonplace of preclusion law—

141. *See, e.g.*, Dam, *supra* note 37, at 124 ("This criticism of one-way intervention is simply a criticism of the abolition of the mutuality limitation on the doctrine of collateral estoppel."); Kaplan, *supra* note 129, at 391; Friedman, *supra* note 100, at 752; JAMES, *supra* note 12, § 10.18, at 501 (equating one-way intervention to one-way issue preclusion by stating that "[a] similar result [to one-way intervention] would be produced by collateral estoppel . . . if the doctrine of mutuality were abandoned").

142. *See supra* note 15 and accompanying text.

143. *Compare* Kalven & Rosenfield, *supra* note 126, at 713 ("[T]here is by no means complete symmetry between binding the defendant to a favorable decree and binding the absentee to an unfavorable decree. Clearly, the defendant has been afforded his day in court; he has had the opportunity to present his case fully in his own right, and he has lost. He has no more reason to relitigate the entire controversy against the absentee members than he has to do so against the immediate plaintiff."), *and* JAMES, *supra* note 13, § 10.18, at 501 (stating that one-way intervention "may do violence to the sportsman's code" but considering it justified in the case of mass claims), *and* Mendez v. Radec Corp., 260 F.R.D. 38, 45 (W.D.N.Y. 2009) ("Just as the rule against one-way intervention 'bars potential class members from waiting on the sidelines to see how the lawsuit turns out and, if a judgment for the class is entered, intervening to take advantage of the judgment,' so too defendants should not be permitted to wait and see how the [district] [c]ourt will rule on plaintiff's summary judgment and Rule 23 class certification motions. . . .") (internal citation omitted), *with* ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 280 (1950) ("Going back to the idea that the outsiders can participate in a victory without bearing the burdens of defeat, I shall simply point out its total inconsistency with the long-settled rule that *res judicata* always cuts both ways. A person is either all in or all out. As with William James' cocktail, he must take the bitter with the sweet—or else not drink any of it.") (internal footnote omitted).

144. *See Parklane*, 439 U.S. at 326–31; *supra* Part II.B (discussing the erosion of the mutuality doctrine). The conflict between the Supreme Court repudiation of one way intervention and later abandonment of mutuality led Kenneth Dam to ask whether the Supreme Court knew what it was doing when it approved the 1966 amendment to Rule 23. Dam, *supra* note 37, at 125; *see also* John E. Kennedy, *The Supreme Court Meets the Bride of Frankenstein:* Phillips Petroleum Co. v. Shutts *and the State Multistate Class Action*, 34 U. KAN. L. REV. 255, 257 (1985) (noting the contradiction in the Supreme Court rejecting one-way intervention in the 1966 amendment to Rule 23 and abandoning the mutuality rule in the 1979 *Parklane* decision).

145. *See Parklane*, 439 U.S. at 329–31.

that nonparties sometimes may benefit from, even though they cannot be bound by, former litigation."[146] Therefore, any opposition to allowing opt-out class members to assert one-way preclusion based exclusively on the 1966 amendment's repudiation of the old practice of one-way intervention is misplaced, and it has been for quite some time.[147]

It is true that these two situations are different. On the one hand, in the context of individual litigation, a person who had chosen not to be a part of, did not know about, or had no possibility of intervening in the lawsuit, later wants to benefit from a favorable result. On the other hand, in the context of class action litigation, an absent class member who purposefully excludes himself from the class, deliberately choosing not to participate in an ongoing class action, later wants to benefit from the class judgment. Although one can argue that principles of fairness might not favor the second situation, the principles so far discussed outweigh any difference between these two situations.

The Seventh Circuit in *Premier* drew a conclusion opposite to the one proposed in this Article.[148] The court held that:

> The revision of Rule 23 in 1966 does away with one-way intervention in class actions. It should stay done-away-with until the Supreme Court adopts a *new version*. Whether class members should get the benefit of a favorable judgment, despite not being bound by an unfavorable judgment, was considered and decided in 1966. That decision binds us still.[149]

146. Smith v. Bayer Corp., 131 S. Ct. 2368, 2379 n.10 (2011) (relying on both *Parklane* and *Blonder-Tongue*).

147. *See* Sherman L. Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204 (1966) ("If the court applies collateral estoppel without the mutuality requirement, a member of a (b)(3) class who chooses to be excluded from the action may in a subsequent action still take advantage of a judgment favorable to the class, although he would not be bound in any way if the class judgment were unfavorable."). Cohn's article was written more than a decade before *Parklane* and a few years before *Blonder-Tongue*. *See also* Dam, *supra* note 37, at 124 ("If the courts are willing to abolish mutuality of estoppel for the benefit of a single party on the ground of efficiency, which was the rationale in *Blonder-Tongue*, then surely the case for retaining the mutuality principle in class actions where hundreds of thousands of claims are involved is tenuous.") (footnote omitted); Adolf Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 647 (1971) ("[I]s hostility to 'one-way intervention' justifiable in a jurisdiction that has departed from the doctrine of mutuality of estoppel?"); Note, *Proposed Rule 23: Class Actions Reclassified*, 51 VA. L. REV. 629, 53 n.69 (1965) (questioning whether, in jurisdictions that abandoned mutuality, opt-out class members would be able to assert issue preclusion against the class defendant in a subsequent individual lawsuit).

148. Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, 814 F.2d 358, 364 (7th Cir. 1987).

149. *Id.* (emphasis added). The specific facts in *Premier*, however, are not congruent with the old practice of one-way intervention because Premier was not interested in intervening in the original class action that it had opted out of in order to take advantage of the settlement or award: it had brought its own lawsuit and merely wanted to benefit from preclusion. *Id.* at 360–61, 366–67. The following case better exemplifies the impermissible one-way intervention. In *Sarasota Oil Co. v. Greyhound Leasing & Finance Corp.*, 483 F.2d 450 (10th Cir. 1973), two class members who originally opted out of a class later moved to participate in the proceeds generated by the class judgment, but were not allowed to benefit from the fund. *Id.* at 451–52 ("The right to intervene after judgment is precisely what the 1966 amendments to Rule 23 were intended to prevent . . . . This action is an ingenious

It is difficult to grasp exactly what "new version" of Rule 23 the *Premier* court expected to see enacted. By the time *Premier* was decided in 1987, the U.S. Supreme Court had already adopted a new paradigm in *Blonder-Tongue* and *Parklane*, completely abandoning the mutuality doctrine and instituting a new rule for nonparty preclusion that differed from the one that existed at the time of the 1966 Amendment.[150] How much more clearly should the Supreme Court have spoken to convince the *Premier* court that a new version of Rule 23 was already in place?[151]

The fact remains that *Parklane* completely changed the equation. Once the Supreme Court approved one-way preclusion, it is doubtful that it would have opposed the old practice of one-way intervention. Besides, such a "new version" of Rule 23 existed long before *Parklane* was decided. As a commentator noted over thirty years ago, the 1966 abandonment of one-way intervention based on the principle of mutuality was anachronistic even at the time.[152]

The *Premier* court briefly hesitated, recognizing that a development on the legal tradition must have an impact on the interpretation of a rule.[153] Judge Easterbrook admitted that "[t]he drafters of new Rule 23 assumed that only parties could take advantage of a favorable judgment"[154] and that they "did not anticipate that courts would give preclusive effect to judgments in the absence of mutuality."[155] By "severely curtail[ing] the mutuality doctrine in federal litigation," Judge Easterbrook recognized that *Blonder-Tongue* and *Parklane* "washed away the foundation on which the edifice of Rule 23 had been built."[156] He then admitted that

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attempt to get back into a class action lawsuit and take advantage of a judgment after electing not to participate."). *Sarasota* is a textbook example of inadmissible one-way intervention.

150. *See supra* Part II.B (discussing the erosion of mutuality of estoppel).

151. *See infra* Part IV.D (further discussing the emergence of a "new version" of Rule 23 that could satisfy the Premier court).

152. *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1395–96 (1976) ("Defense of the 1966 rule in terms of the principle of mutuality—that it is unfair to bind one party to an adverse judgment if the other party would not also have been bound in the event of defeat—would, of course, be anachronistic."); *see also* Furman, *supra* note 122, at 1212–13 (stating that "[d]isapproval of one-way intervention for its lack of mutuality promotes a doctrine that has been abandoned by the federal courts and is particularly inappropriate in the class context" and that "a court considering whether to allow opting out parties collateral estoppel rights should not deny those rights merely on the grounds that one-way intervention would result. It should deny collateral estoppel where one-way intervention would encourage unnecessary claims filed by persons entertaining a wait-and-see attitude") (footnotes omitted).

153. Premier, 814 F.2d at 361–65.

154. *Id.* at 362.

155. *Id.* This assertion is only partially correct. The trend towards abandonment of mutuality, at least of the defensive type, began several decades earlier and intensified in 1942, about twenty five years before the 1966 amendment. *See* Bernhard v. Bank of Am. Nat'l Trust & Sav. Ass'n, 122 P.2d 892, 895 (Cal. 1942). The project of the *Restatement (Second) of Judgments*, which started in early 1970, also abandoned mutuality in its earlier drafts, including allowing offensive nonmutual issue preclusion. Some federal courts had abandoned mutuality as early as 1950. *See, e.g.*, Bruszewski v. United States, 181 F.2d 419, 421–23 (3d Cir. 1950); *see also supra* Part II.B (discussing the erosion of mutuality of estoppel).

156. *Premier*, 814 F.2d at 362.

"[o]ne could reply that the effect of the 1966 revision on one-way intervention was just a supposition of the drafters. They enacted the rule, not its effects, and the translation from rule to effects depended on mutuality of estoppel. When the mutuality requirement died, the effects of Rule 23 changed."[157]

Judge Easterbrook would have reached a correct interpretation had he stopped his analysis there, but he continued. The initial hesitation, therefore, was short-lived simply because, according to the court, the issue had been "anticipated and resolved" by the Advisory Committee: "Even if a court sometimes may allow the effects of the 1966 revision of Rule 23 to diverge from the course planned by the Advisory Committee, such a modification would not be appropriate when the very problem at hand was anticipated and resolved."[158]

It is an exaggeration to say that the Advisory Committee "anticipated and resolved" the issue discussed in *Premier*. First, although the Advisory Committee expressly abolished the practice of one-way intervention, it did not elaborate: it merely stated that there were conflicting decisions on the matter and concluded tersely that "one-way intervention is excluded."[159] Nothing was said for or against the practice and no reasons for the change were given.

The debate leading to a rejection of one-way intervention is not found in the advisory committee notes, but in contemporaneous law review articles and cases. One would expect therefore to see in *Premier* an extensive discussion of the legislative history that allowed Judge Easterbrook to conclude that "[a] principal purpose of the 1966 revision of Rule 23 was to end 'one-way intervention.'"[160] Throughout the opinion, Judge Easterbrook conjectures what the drafters "assumed,"[161] "anticipat[ed],"[162] or "suppos[ed]."[163] Yet nowhere did he discuss any authority that justifies the theory he built about the intent of the drafters of amended Rule 23.

Second, technically, the 1966 Amendment did not prohibit the practice of one-way intervention; it merely made it inapplicable by switching the class action from an opt-in to an opt-out model. It is impossible to determine whether the Advisory Committee would have prohibited one-way intervention had the opt-in model been maintained. One thing is to abolish one-way intervention and adopt a modern opt-out class action, something quite different is to abolish the practice while retaining an inefficient opt-in class action system.

157. *Id.* at 365.

158. *Id.* It seems that Judge Easterbrook opposes the use of legislative history, unless "the very problem at hand" was "anticipated and resolved." One is left without guidance about when to use legislative history in statutory interpretation.

159. *See* FED. R. CIV. P. 23(e)(3) advisory committee's note to 1966 amendment, *reprinted in* 39 F.R.D. 69, 106 (1966).

160. *Premier*, 814 F.2d at 362.

161. *Id.* at 362.

162. *Id.* at 362–63.

163. *Id.* at 364.

Third, it is wrong to say that the Advisory Committee "anticipated and resolved" the issue discussed in Premier because the notes said nothing about opt-out class members asserting offensive nonmutual issue preclusion against the class defendant.[164] Such a possibility did not exist in federal courts at the time and would not exist until 1974—almost a decade after the 1966 amendment—when *Parklane* allowed it. The Advisory Committee only referred to the practice of "one-way intervention."

The *Premier* court also held that:

> *Parklane* is not a sufficient reason to upset the balance struck in Rule 23. Under the Rules Enabling Act, the Rules of Civil Procedure have the effect of statutes. A development in the common law of judgments is not a reason to undo a statute, to treat a thorough rethinking of the law as so much fluff.[165]

This analysis, however, is hardly a convincing reason to persist with abandoned practices based on anachronistic ideals of justice or dogmas on statutory interpretation. Quite the contrary, it represents a misguided use of legislative history that trumps both the meaning and the logic behind a legal rule that must be interpreted within its broader procedural context.

Judge Easterbrook has published several law review articles and judicial opinions about the use of legislative history in statutory interpretation. Despite having demonstrated to be more receptive than other textualists to the use of legislative history as a persuasive source,[166] he has always strongly advocated against such practice.[167] According to Judge Easterbrook, the subjective intent of the legislature cannot be determined.[168] Even if it could, it does not represent the law, for law is only

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164. It is, therefore, incorrect for Judge Easterbrook to state: "Whether class members should get the benefit of a favorable judgment, despite not being bound by an unfavorable judgment, was considered and decided in 1966." *Premier*, 814 F.2d at 364. Such a conclusion can only be made by conflating one-way intervention and one-way preclusion.

165. *Id.* at 364 (citation omitted).

166. *See In re* Sinclair, 870 F.2d 1340, 1342 (7th Cir. 1989) (Easterbrook, J.) ("Legislative history may be invaluable in revealing the setting of the enactment and the assumptions its authors entertained about how their words would be understood."); Frank. H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. PUB. POL'Y 61, 62 (1994) [hereinafter Text History] ("We use our knowledge of the times in which the texts were written to deduce the purposes, goals, objectives, and values of the drafters."); Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 443 (1990) [hereinafter Legislative History].

167. *See* Text History, *supra* note 166, at 62 (considering himself "a notorious opponent of legislative history"); *see also* Frank Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1 (2004); Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. PUB. POL'Y 87 (1984); Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119 (1998); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006) (discussing extensively Judge Easterbrook's "new textualism" philosophy and how it departs from the use of legislative history).

168. *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) ("Because legislatures comprise many members, they do not have 'intents' or 'designs,' hidden yet discoverable. Each member may or may not have a design. The body as a

the enacted text.[169] It seems that, by giving such prominence to an uncommitted, meaningless, passing sentence in the advisory committee notes, Judge Easterbrook in *Premier* may have violated his own canons of interpretation.[170]

In any event, it remains remarkable that the *TransOcean* court allowed the assertion of offensive nonmutual issue preclusion *before* the Supreme Court decided *Parklane*, and the *Premier* court denied it *after* the Court decided *Parklane*.[171]

In conclusion, any opposition to opt-out class members asserting offensive nonmutual issue preclusion is grounded on an outdated fetish for the mutuality doctrine and disregards current civil procedure developments. The next Part will continue the historical analysis by discussing whether the rejection of one-way intervention half a century ago, at a time when the mutuality doctrine was still accepted, still rules from the grave. It will show that, contrary to the assumptions *Premier*, a new class action model has already emerged, one that must be interpreted as an organic part of modern civil procedure.

D. The "Unique" Situation in *Premier*

Arguably, the court's outrage at the specific circumstances of the case may explain at least some of the *Premier* court's reasoning, particularly because the trial court certified the class and issued a ruling on the merits at the same time.[172] In *Premier*, the class notice was not issued until sev-

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whole, however, has only outcomes."); *id.* at 547–48 ("[It is] impossible for a court—even one that knows each legislator's complete table of preferences—to say what the whole body would have done with a proposal it did not consider in fact."); Frank H. Easterbrook, *Understanding the Law Through the Lens of Public Choice*, 12 Int'l Rev. L. & Econ. 284, 284 (1992) ("[T]he concept of 'an' intent for a person is fictive and for an institution hilarious."); *Text History*, *supra* note 166, at 68 ("Intent is elusive for a natural person, fictive for a collective body."); *Legislative History*, *supra* note 166, at 441, 446–47 (1990) ("It is misleading to speak of 'the legislature' as an entity with a mind or purpose or intent, and wrong to assume that the compromises necessary to enact laws are uniformly public-spirited.").

169. *See* Text History, *supra* note 166, at 67 ("[S]tatutory text and structure, as opposed to legislative history and intent (actual or imputed), supply the proper foundation for meaning."); *id.* at 68–69 ("[T]he structure of our Constitution . . . requires agreement on a *text* by two Houses of Congress and one President. No matter how well we can know the wishes and desires of legislators, the only way the legislature issues binding commands is to embed them in a law"); Legislative History, *supra* note 166, at 441 ("[T]he subjective intent of legislators . . . can be found and, . . . represents 'the law' if found."); *id.* at 444 ("The text of the statute—and not the intent of those who voted for or signed it—is the law."); *id.* at 445 ("What distinguishes *laws* from the results of opinion polls conducted among legislators is that the laws survived a difficult set of procedural hurdles and either passed by a two thirds vote or obtained the President's signature.").

170. The advisory committee notes may offer a more reliable standard than other sources of legislative history. *See, e.g.*, Eileen A. Scallen, *Interpreting the Federal Rules of Evidence: The Use and Abuse of the Advisory Committee Notes*, 28 Loy. L.A. L. Rev. 1283 (1995) (stating that the objections to the use of traditional types of legislative history do not apply to the advisory committee notes).

171. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 337 (1979); *Premier*, 814 F.2d at 367; *In re* TransOcean Tender Offer Sec. Litig., 455 F. Supp. 999, 1008 (N.D. Ill. 1978).

172. *Premier*, 814 F.2d at 359–60, 363.

eral years after the class was certified, the class judgment was affirmed on appeal, and the case was settled, making an earlier opt-out impossible.[173] This led the Judge Easterbrook to state that if class members can decide whether to exercise their right to opt out after they know of the judgment or terms of settlement, "it's one-way intervention all over again."[174]

The *Premier* court was fixated on the language of Rule 23, which stated that the court should certify a class action "as soon as practicable" after it was filed.[175] According to the court, such an early decision compels class members to choose whether to stay in or opt out of the class well before knowing the outcome of the litigation:

> The prompt decision on certification would . . . prevent the absent class members from waiting to see how things turned out before deciding what to do. . . . So a person's decision whether to be bound by the judgment—like the court's decision whether to certify the class—would come well in advance of the decision on the merits. Under the scheme of the revised Rule 23, a member of the class must cast his lot at the beginning of the suit and all parties are bound, for good or ill, by the results. Someone who opted out could take his chances separately, but the separate suit would proceed as if the class action had never been filed.[176]

The language that the *Premier* court used is clearly evocative of games and gambling, e.g., "cast his lot" and "take his chances."[177] This is the exact mindset the Supreme Court expressly repudiated almost a decade earlier by citing Bentham's idea that mutuality was

> a maxim which one would suppose to have found its way from the gaming-table to the bench. If a party [is] benefited by one throw of the dice, he will, if the rules of fair play are observed, be prejudiced by another: but that the consequence should hold when applied to

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173. *Id.* at 363 ("The district judge decided the merits and certified the case as a class action simultaneously, more than three years after it had been filed. The judge then did not give the Rule 23(c)(2) notice for another 2 1/2 years, by which time the judgment had been affirmed [on appeal] and the case had been settled. So by the time Premier and the other members of the class were asked to choose, they knew how the case had come out."). This information will prove relevant later, as I discuss the fact that this late opt-out notice made it impossible for Premier to opt out from the class earlier than it did. *See infra* note 219 and accompanying text.

174. *Premier*, 814 F.2d at 363.

175. *Id.* at 362. The original language was found in then Rule 23(c)(1): "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." FED. R. CIV. P. 23 advisory committee's note to 2003 amendment. In 2003, the rule was amended and the current language is found in Rule 23(c)(1)(A). FED. R. CIV. P. 23(c)(1)(A) ("At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action."). The change from "as soon as practicable" to "at an early practicable time" merely reflected the prevailing practice at the time. So the amendment was intended more to adapt the text of the rule to reality than to change it. *See* FED. R. CIV. P. 23 advisory committee's note to 2003 amendment.

176. *Premier*, 814 F.2d at 362.

177. *See id.*

justice, is not equally clear.[178]

A decision on the merits or settlement entered before class certification, notice, and an opportunity to be heard, would indeed create a situation parallel to the old one-way intervention.[179] Although it is true that the certification decision should generally be expected to come before the decision on the merits, there are numerous situations in which it may be appropriate to delay class certification.[180] For example, defendants may elect to postpone a decision on certification until after a decision on the merits has been reached.[181] And, as will be discussed further, it is now quite common for class certification (and class notice) to occur simultaneously with a preliminary approval of the settlement.[182]

But it is clear that as more time passes, the more irrelevant the *Premier* reasoning becomes. Long established developments in class action practice and even amendments to Rule 23 show that the *Premier* court's concerns are exaggerated (as they were at the time the case was decided) or irrelevant. Not only is it more common for courts to wait until a settlement is reached before certifying a class and sending notice to absent class members,[183] a not-so-recent practice has flourished where class actions are filed with a settlement already in place and the certification's sole purpose is to give binding effect to its terms (settlement class actions).[184] Notice, right to opt out, and opportunity to be heard come only after a settlement is reached.

In addition, in the almost 30 years since *Premier* was decided, Rule 23 has undergone significant changes, being amended in 1987, 1998, 2003, 2007, and 2009. The Supreme Court has also issued several opinions and Congress has enacted major statutes, considerably altering the outlook of class action litigation.

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178. *See* 3 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 579 (1827), reprinted in 7 WORKS OF JEREMY BENTHAM 171 (John Bowring ed., 1843), quoted in Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 323 (1971).

179. See *Developments in the Law—Class Actions*, *supra* note 152, at 1394 n.18 ("[T]he risk of *de facto* one-way intervention would increase if a decision on the merits were entered prior to any certification decision.").

180. *See* Mendez v. Radec Corp., 260 F.R.D. 38, 44–45 (W.D.N.Y. 2009) (explaining that practically speaking, the certification decision should ordinarily be reached before a decision on the merits).

181. *See* Postow v. OBA Fed. Sav. & Loan Ass'n, 627 F.2d 1370, 1382 (D.C. Cir. 1980) ("[A] defendant may waive the protections Rule 23(c) offers and elect to have the merits decided before the class certification question . . . ."); Ahne v. Allis-Chalmers Corp., 102 F.R.D. 147, 151 (E.D. Wis. 1984) ("[T]he courts have carved out a limited exception for those defendants willing to forego the protections attendant on early determination of the class issue.").

182. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 618–19 (1997) (stating that the certification of classes exclusively for settlement purposes has become a "stock device").

183. *See* WILLGING ET AL., *supra* note 79, at 35 (stating that in mid-1990, in "18% of all certified class actions . . . a proposed settlement was submitted to the court before or simultaneously with the first motion to certify").

184. *See Amchem*, 521 U.S. at 618–19.

For example, since a 2003 amendment, Rule 23 allows—if not mandates—a second opportunity for a back-end opt out *after* a class settlement is reached, when the class members know the outcome of the litigation.[185] Needless to say, opting out after class members know the terms of the settlement is not much different from opting in when they know the result of the judgment. The second was called "one-way intervention" while the first could well be called "one-way exclusion." So much for a rejection of one-way intervention.

Decrying the fact that the 2003 amendment did not have a substantial impact, the American Law Institute (ALI) *Principles of the Law of Aggregate Litigation (Principles)* decided to go a step further, providing a presumption in favor of a second opportunity for opting out of the class.[186] The ALI *Principles* assume, correctly, that "the likelihood of a second opt-out would have the salutary effect of forcing the parties to reach terms that are sufficiently attractive to deter massive opt-outs."[187] Moreover, it is also possible, although not yet common for class settlements to provide opt-out class members with an opportunity to opt back in to the class if they wish.[188]

The modern class action practice has evolved from a game in which absent class members could only opt out *before* knowing the final result of the litigation to this "new version" of class actions, which is no different from playing with marked cards. As a matter of fact, the past century witnessed a fundamental change in the character of litigation in general, moving it away from a gentleman's duel and into a public function. Modern civil procedure repudiates trials by ambush and harmless errors; favors decisions on the merits; encourages offensive nonmutual issue

185. FED. R. CIV. P. 23(e)(4) ("If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so."); *see also* George Rutherglen, *Better Late Than Never: Notice and Opt Out at the Settlement Stage of Class Actions*, 71 N.Y.U. L. REV. 258, 258 (1996) (proposing the back-end opt out exactly because class members would already know the outcome of the settlement); *id.* at 295 ("Class members should be allowed to opt out at the time when they are most likely to receive information about how well their interests have been protected by the class action: either after a proposed settlement or just before trial."). *But see* Eisenberg & Miller, *supra* note 119, at 1544 ("In the case of litigation classes in which the action is certified prior to a settlement, class members must elect to opt out or remain in the case at the time of certification. Once the case is settled, class members who have not opted out may object to the settlement but ordinarily may not opt out."); *id.* at 1544 n.64 ("This is not true in the unusual situation where, post settlement, the court allows a second round of opt-out rights to class members who previously did not exercise their right to exclude themselves.").

186. *See* AM. LAW INST., *supra* note 1, § 3.11, at 242 ("In any class action in which the terms of a settlement are not revealed until after the initial period for opting out has expired, class members should ordinarily have the right to opt out after the dissemination of notice of the proposed settlement. If the court refuses to grant a second opt-out right, it must make an on-the-record finding that specific reasons exist for its refusal.").

187. *Id.* § 3.11, at 243.

188. *See, e.g.*, Charron v. Pinnacle Grp. N.Y. LLC, 874 F. Supp. 2d 179, 188 (S.D.N.Y. 2012) ("Class Counsel mailed over 100 'Opt In Letters' to Class Members who had previously opted out of the Settlement, advising them of their right to opt back in to the Settlement during the Revised Notice period.").

preclusion; allows simple pleadings, flexible amendments (including relation back) and flexible joinder provides for broad discovery (the all-cards-on-the-table ideal), voluntary disclosure, and the sharing of work product; and encourages court participation and management and the resolution of disputes through alternatives to litigation.

The *Premier* court did not specify how to recognize the beginning of a new version of class action litigation. Although *Premier* did not perceive it at the time, it is certainly here now.[189]

The next Part discusses a side of *Premier* that is often overlooked: although the Seventh Circuit did not allow Premier to assert offensive nonmutual issue preclusion against the class defendant, it applied the principles of stare decisis. Depending on its interpretation, this misguided ruling may have serious consequences for opt-out class members in the future.

E. Stare Decisis

Although *Premier* is commonly cited as the main precedent for denying opt-out class members the opportunity to assert offensive nonmutual issue preclusion against the class defendant, it also stands for the application of another form of preclusion in class actions: Stare decisis.[190] The fact that the *Premier* court was not willing to apply offensive nonmutual issue preclusion did not mean that it opposed all forms of preclusion. As the court made clear, "[p]reclusion is not an all-or-nothing matter; there are degrees."[191] Therefore, the court was willing to provide a "lesser degree" of preclusion through the doctrine of stare decisis.[192] Although of a lesser degree, the court considered stare decisis sufficiently robust to vindicate the ideals of judicial economy. The Seventh Circuit stated:

> [O]nly the gravest reasons should lead the court in the opt-out suit [the individual lawsuit brought by the opt-out class member] to come to a conclusion that departs from that in the class suit. . . . We therefore approach the merits of this case [the individual lawsuit] with a strong presumption in favor of the Fourth Circuit's disposition [in the prior class action]. The presumption does not eliminate the need

189. *See supra* Part IV.C (discussing the *Premier* court's comment denying that the Supreme Court has adopted a "new version" of Rule 23).

190. *See* Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, 814 F.2d 358, 367 (7th Cir. 1987).

191. *Id.*

192. *Compare id.* ("A decision by the Supreme Court that the Agreement violates the Sherman Act would be authoritative, precluding further contention in Chicago. A decision by the Fourth Circuit is not authoritative in district courts of the Seventh Circuit, but it is entitled to respect, both for its persuasive power and because it involves the same facts. The application of stare decisis will produce most of the judicial economy the district court sought to achieve.") (citation omitted), *with* Tardiff v. Knox Cnty., 567 F. Supp. 2d 201, 214 (D. Me. 2008) ("[Plaintiff's] request for summary judgment on some kind of special stare decisis argument is misplaced. Obviously, I will give careful attention to the persuasiveness of [the judge's] reasoning and the conclusion . . . reached in [the] class action partial summary judgment ruling when I apply the law to the facts of [Plaintiff's] case here. But, in this respect, this case is no different from any other.").

for independent analysis, but it does mean that doubts should be resolved in favor of the Fourth Circuit's disposition [in the prior class action].[193]

This apparently innocuous holding may generate severe consequences that have not attracted the attention it deserves. While offensive nonmutual issue preclusion is directed at the parties, stare decisis binds—or is persuasive authority to—the court.[194] This makes a significant, albeit hidden, difference in practice because it reinstates the now-defunct doctrine of mutuality through the back door. In other words, the resolution of any issue in a class action would either bind or be persuasive authority in an individual action brought by an opt-out class member, whether it benefited or prejudiced either party. As the *Premier* court stated:

> The value of the first decision as a prediction of how other courts will act produces part of the savings. If the class wins, the opting-out plaintiff should expect to win for the same reasons that persuaded the first court. If the class loses, the opting-out plaintiff should expect to meet the same fate.[195]

It becomes clear, therefore, that the *Premier* court is at least a sympathizer of the symmetric comfort afforded by the mutuality doctrine. Without anyone noticing, *Premier* distorted everything known at the time about preclusion and class actions. While denying offensive nonmutual issue preclusion to benefit a nonparty (which *Parklane* allowed), Judge Easterbrook permitted a nonparty to be bound—and prejudiced—by a decision in a lawsuit in which the nonparty did not have a full and fair opportunity to participate (which *Parklane* did not allow).[196] Thus, the class member who opted out of the class was precluded by the class judgment under the guise of stare decisis.[197] This goes against the most basic principles of procedural fairness and makes a mockery of the opt-out provision in Rule 23. *Premier*, therefore, directly contradicts *In re Corrugated Container Antitrust Litigation*, a Fifth Circuit case decided two years earlier, which held that an opt-out plaintiff is not precluded from litigating an issue decided in favor of the defendant in a prior class action.[198]

But if one gives a narrow interpretation to *Premier*, as one must to preserve the due process of law, the problems may not be as dreadful as

193. *Premier*, 814 F.2d at 367–68 ("The second litigation may safely concentrate on [the] differences [between the prior class actions and the individual action], whether or not issue preclusion comes into play.").

194. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330 (1979); *Premier*, 814 F.2d at 367–68.

195. *Premier*, 814 F.2d at 367.

196. *Id.* at 367–68, 371.

197. *Id.* at 371.

198. *See In re* Corrugated Container Antitrust Litig., 756 F.2d 411, 418–19 (5th Cir. 1985); *supra* notes 85–87 and accompanying text; *see also* Martin v. Wilks, 490 U.S. 755, 761 (1989) (holding that with very few exceptions, an individual cannot be bound by a judgment if he was not a party to the original lawsuit); *In re* Quality Beverage Co., 181 B.R. 887, 894 (Bankr. S.D. Tex. 1995) ("The doctrine of collateral estoppel cannot bind a person who was neither a party nor privy to a prior suit.").

they appear. Stare decisis, as a principle of adherence to legal precedents, does not apply to decisions regarding issues of fact, which is the main scope of issue preclusion.[199] Of course, both stare decisis and issue preclusion apply to the application of the law to issues of fact.[200] Technically, the later court is only bound by the legal precedent contained in the holding, not by the factual findings.[201] Therefore, the later court must still hear all the evidence and factual arguments from scratch and is free to reach a different conclusion. This means that the parties in the opt-out class member's individual lawsuit will still have an opportunity to conduct discovery.

Whatever the result of the prior class action, not only is the court in the later lawsuit not strictly bound by its precedent (especially if it came from a different jurisdiction), but it may also distinguish the facts to avoid its application. But this is a difficult proposition, considering that by definition the opt-out class members have issues of law or fact in common with the class action. This double guarantee preserves the court's freedom to decide the issues anew.

Perhaps that is what the *Premier* court meant when it said that the application of stare decisis "does not eliminate the need for independent analysis."[202] Even with such a narrow interpretation, however, *Premier* failed to clarify the problem and propose an adequate solution.

The next Part will discuss how *Premier* misapplied *Parklane* in the specific facts of the case.

F. How *Premier* Misread *Parklane*

The *Premier* court mistakenly assumed that *Parklane* did not contain the tools to resolve the problem it faced.[203] *Parklane*, however, gives trial courts broad discretion to apply nonmutual issue preclusion whenever all the traditional requirements are present unless doing so undermines judicial economy or is unfair to the defendant.[204] In determining whether judicial economy is undermined, courts generally do not allow a party to take a wait and see attitude and sit idly on the sidelines while the first case is litigated.[205] Therefore, offensive nonmutual issue preclusion may not be allowed if the plaintiff could have easily joined the earlier action.[206] In evaluating unfairness to the defendant, courts look at several factors such as foreseeability, contradicting results, and differences in the

199. *See* Mendenhall v. CMI Corp., 5 F.3d 1557, 1570 (Fed. Cir. 1993); *see also* 20 Am. Jur. 2d *Courts* § 129 (2005); 47 Am. Jur. 2d *Judgments* § 464 (2006).

200. *See supra* note 6 and accompanying text.

201. *See Mendenhall*, 5 F.3d at 1570.

202. *Premier*, 814 F.2d at 368.

203. *Id.* at 363 ("We doubt, however, that *Parklane* contains the answer to our problem.").

204. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979); *see supra* Part II.D (discussing the *Parklane* factors).

205. *Parklane*, 439 U.S. at 330 & n.13.

206. *Id.*

procedural opportunities.[207]

Premier accepted that the traditional requirements for issue preclusion were present because the issues were the same, actually litigated, and necessarily decided in a previous proceeding where the defendant had a full and fair opportunity to present its case.[208] This will often be the situation in class action lawsuits because the issues are by definition common to the whole class and because the matters at stake are of such magnitude that the defendant will vigorously litigate the class action claims. In all likelihood, the potentially severe consequences of losing a class action will provide adequate motivation for a defendant to forcefully defend against the class claim. Further, as a result of the potential for large judgments in class action lawsuits, courts may engage in heightened scrutiny of the proceeding, which may increase the reliability of a class award. This in turn militates against the likelihood of an anomalous decision and increases the level of fairness in the future application of issue preclusion in individual lawsuits brought by opt-out class members.

Moreover, none of *Parklane*'s exceptions would bar application of offensive nonmutual issue preclusion in *Premier*.[209] The only possible exception in dispute was whether Premier, the absent class member, could have easily joined the earlier class action. Although Premier was a regular class member throughout the class proceeding, it sought exclusion from the class at the close of litigation after finding the terms of the class settlement insensitive to its legal claims.[210] Under the terms of the settlement, only class members who paid a certain illegal charge would be able to recover.[211] Premier, however, was in a different situation from the other class members.[212] Recognizing that the payment was illegal under antitrust laws, Premier refused to make the payments and was sued.[213] Unlike other class members, therefore, Premier's claim was not that it paid the illegal charge, but that it incurred damages in connection with the defendant's illegal collection lawsuits.[214] According to the terms of the class action settlement, Premier would not recover anything: its peculiar claim was not even considered in the negotiations.[215]

Premier remained a class member for the first six years of the litigation,[216] and opted out only after trying unsuccessfully to intervene in the class action and establish a subclass to litigate its claims.[217] Premier

207. *Id.* at 330–32.
208. *Premier*, 814 F.2d at 359–61.
209. *Parklane*, 439 U.S. at 329–32.
210. *Premier*, 814 F.2d at 359–61.
211. *Id.* at 360.
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.* at 360–61.
216. *Id.* at 363.
217. *Id.* at 360–61. *Premier* noted that the class action court had stated that the case had:

> progressed to the point that . . . it would be totally unfair to interrupt it by permitting intervention along the lines requested . . . and redefining the

brought its individual lawsuit mere days after opting out and tried unsuccessfully to consolidate its individual lawsuit with the class proceeding (over the defendant's objections).[218] Technically, Premier could not have opted out earlier because there was no opportunity to do so (although in practice it could have filed its individual lawsuit at any time). As previously discussed, the district court certified the class action and decided the merits of the case simultaneously.[219] Moreover, the class notice was issued several years after class certification, after the class judgment was affirmed and the case was settled, thus making an earlier opt out impossible.[220] The law provides no opportunity for absent class members to opt out before class action certification and class notice. So, contradictory as it might seem, not only did Premier remain a class member for as long as possible, it also opted out at the earliest practicable time. Premier, therefore, demonstrated its willingness to participate in the class proceeding—thus satisfying the "easily joined" requirement under *Parklane*—and only excluded itself from it when it was clear that there was no other alternative to protect its interests.

To expect Premier to remain in the class after its claim was ignored in settlement negotiations would be unacceptable because its individual situation was different from the other class members. If Premier had remained in the class, it would be bound by claim preclusion and would not be able to assert its claims against the defendant. Yet, it would receive no compensation for its alleged injury. Premier was held hostage to the very same class action that was presumably brought to protect its interests.

It is true that Premier knew that its interests were not adequately represented (or that typicality was absent) for almost a year before the settlement was finalized and before it moved to intervene in the class action.[221] For that reason, the court held that Premier could have easily joined the earlier action and therefore, failed one of the *Parklane* requirements.[222] The Seventh Circuit ultimately blamed Premier for not presenting its theory of damages earlier in the class litigation.[223]

> class. . . . Premier, being a member of the class in this suit, should, if it so desires, object to the settlement, either that or seek to opt out of the settlement and pursue any further claims it may have elsewhere.

Id. at 361 (quoting trial court) (internal quotation marks omitted).

218. One reason why the *Parklane* Court concluded that the class plaintiff could not easily join the previous litigation was because "consolidation of a private action with one brought by the SEC without its consent is prohibited by statute." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 332 n.17 (1979) (citing 15 U.S.C. § 78u(g) (2006)).

219. *Premier*, 814 F.2d at 359–60, 363; *see supra* Part IV.D (asserting that the simultaneous decision over certification and merits contributed to an unwarranted sense of outrage that lead the Seventh Circuit to deny Premier the opportunity to assert offensive non-mutual issue preclusion against the defendant).

220. *Premier*, 814 F.2d at 363; *see supra* Part IV.D.

221. Premier Elec. Constr. Co. v. Int'l Bhd. of Elec. Workers, 627 F. Supp. 957, 961 (N.D. Ill. 1985), *rev'd sub nom.* Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, 814 F.2d 358 (7th Cir. 1987).

222. *Id.* at 961–62.

223. *Premier*, 814 F.2d at 367.

The Premier court failed to recognize, however, that its decision was not applicable in all situations: class actions are complex structures; it is never easy to intervene and actively participate in them. Assuming *arguendo* that Premier was a sophisticated player with a substantial individual claim and could have tried to intervene, actively participate in the negotiation, and contribute to its result, the same is not true of most class members. It is not realistic or reasonable to expect that a regular class member will have the clout to affect the outcome of class action negotiations. First, objections can be very difficult and expensive to assert.[224] Most class members will need independent legal counsel to interpret both the notice and the proposed settlement to assess whether or not remaining in the class is a better alternative than opting out.[225] Furthermore, the proponents of a settlement plan usually have a significant financial stake in the matter and, as a result, may vigorously attack objectors.[226] It often would be futile to challenge the class action machinery: the only realistic option is to remain silent, opt out of the class, and go it alone.

In the class action context, therefore, it is unreasonable to interpret the *Parklane* requirement to join in the earlier action[227] as demanding that an absent class member formally intervene in the class action and become an active class representative, as Premier tried to do.[228] It is unreasonable because, in the class action setting, a class member is in unless that person exercises the privilege of getting out. Therefore, joining a class action in the *Parklane* context should simply mean not excluding oneself from the class. If interpreted literally, however, this criterion would never be present in a class action.[229] By definition, an opt-out class member excluded itself from the class. In contrast to traditional litigation, joining in a class action requires almost no affirmative steps on the part of the class member.[230] The act of opting out of a class action requires far more proactive conduct.[231] Additionally, as it is very difficult for absent class members to

224. Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 97 (2007) ("Although courts that treat the silence of class members as endorsement of the proposed settlement seem to think that a class member could easily object, objecting to any proposed settlement, in fact, entails significant costs for the would-be objector.").

225. Robert B. Gerard & Scott A. Johnson, *The Role of the Objector in Class Action Settlements—A Case Study of the General Motors Truck "Side Saddle" Fuel Tank Litigation*, 31 LOY. L.A. L. REV. 409, 417 (1998) ("Settlement fairness hearings are often heard in remote areas of the country and involve complexities and procedural requirements that usually necessitate representation by counsel.").

226. *See generally* Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1102–15 (1996) (describing the abusive tactics used in settlement hearings).

227. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979) ("The general rule should be that . . . where a plaintiff could easily have joined in the earlier action or where . . . offensive estoppel would be unfair to a defendant, a trial judge should not allow . . . offensive collateral estoppel.").

228. *Premier*, 814 F.2d at 360–61.

229. *See* Furman, *supra* note 122, at 1199.

230. *See* 59 AM. JUR. 2D *Parties* § 49 (2012).

231. *See id.* §§ 99, 100.

influence settlement conditions,[232] it is unfair to require that they remain part of a class that does not properly represent their goals and interests. If the true goal of the *Parklane* factors is to ensure a fair result for both parties,[233] joining in is much less relevant in the class action context than it is in individual lawsuits.

Another interpretation of *Parklane* may lead to the conclusion that, to avoid the wait and see attitude,[234] offensive nonmutual issue preclusion should not be allowed if the class member only opted out to enjoy the benefit of preclusion without its risks.[235] As previously discussed, however, whether the party could have easily joined the prior proceeding is not a *Parklane* requirement. This is merely one factor that a court must consider in determining whether the opt-out class member undermined judicial economy.[236] Moreover, considering that allowing offensive nonmutual issue preclusion might encourage more litigation, it is fair to say that judicial economy was a minor consideration behind the *Parklane* decision.[237]

Another aspect has eluded most commentators. Considering the conflict of interest between Premier, the class representative, and other class members, it can be argued that Premier's interest was not adequately represented by the class counsel, that the class representative was not typical, or that there was no common question. The absence of any of these elements means that Premier was not a class member in the first place.[238] Therefore, at least in principle, there was no need for Premier to formally opt out of a class that it did not belong to. Because Premier was neither adequately represented nor a class member, Premier was a true third party to the class action. Ergo, the *Premier* court was doubly wrong in denying the application of offensive nonmutual issue preclusion.[239]

A similar situation was presented in *Tardiff v. Knox County*, where the class representative herself opted out when the settlement negotiated by the class counsel turned out to be unacceptable because it did not properly account for her damages.[240] The *Tardiff* court denied application of offensive nonmutual issue preclusion to find the defendant liable and its

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232. Koniak & Cohen, *supra* note 226, at 1102–05.

233. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331–33 (1979).

234. *Id.* at 330.

235. *See infra* Part IV.L (discussing the possibility of allowing opt-out class members to assert offensive nonmutual issue preclusion whenever the class member has an independent reason that justifies an interest in opting out of a class. In those cases there is no reason to treat the class member as a person who will sit "idly on the sidelines" waiting to benefit from the class judgment without the risk of being bound by it).

236. *See supra* Part II.D (discussing the *Parklane* factors).

237. *See supra* Part II.C–D (discussing judicial economy in the context of defensive and offensive issue preclusion).

238. *See, e.g.*, Hansberry v. Lee, 311 U.S. 32, 44–46 (1940) (declining to afford preclusive effect to a class judgment because the class representative was neither typical nor adequate and because of the existence of a conflict of interest).

239. *See infra* Part IV.G (discussing the assertion of offensive nonmutual issue preclusion by non-class members).

240. Tardiff v. Knox Cnty., 567 F. Supp. 2d 201, 206–07 (D. Me. 2008).

conduct unconstitutional.[241] The court relied on *Premier* and a 2008 draft version of the *Principles of the Law of Aggregate Litigation*.[242]

The district court in *Premier* analyzed the issue differently from this Article,[243] yet it reached a similar conclusion.[244] Even though the district court noted that Premier had failed the wait and see factor, it still allowed the application of offensive nonmutual issue preclusion because the class action defendants had a full and fair opportunity to litigate the issues and because it would promote judicial economy.[245] According to the district court, these considerations outweigh the eventual inequities of allowing a free-rider to sit on the sidelines awaiting judgment in the first suit.[246] As duly noted, the district court's decision in *Premier* was reversed on appeal.[247]

The next Part addresses the situation of those who are not within the class definition and therefore are not class members. Because they are true nonparties, and need not opt out, they can freely assert offensive nonmutual issue preclusion against the class defendant if the requirements are present. By comparing the similar positions of opt-out class members and non-class members, one must question the fairness of treating them differently.

G. Assertion of Issue Preclusion by Non-Class Members

Although controversy surrounds a class member who opts out of a class and later seeks to benefit from offensive nonmutual issue preclusion, the same is not true of a person who is not within the class definition (or to whom notice was not directed) and therefore is not a class member. A non-class member can benefit from offensive nonmutual issue preclusion of a class judgment without the risk of being bound by it whenever the requirements of issue preclusion are present.[248]

Moreover, a class member who did not opt out, but was not adequately represented and later brings an individual suit is exempt from claim preclusion, and may attempt to use offensive issue preclusion against the class defendant. Arguing the opposite would mean reviving the mutuality doctrine, long abandoned by the U.S. Supreme Court.[249]

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241. *Id.* at 212–13.

242. The final version of the *ALI Principles* was published in 2010 with significant changes. *See infra* Part IV.H.

243. *See* Premier Elec. Constr. Co. v. Int'l Bhd. of Elec. Workers, 627 F. Supp. 957, 962–63 (N.D. Ill. 1985), *rev'd sub nom.* Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, 814 F.2d 358 (7th Cir. 1987).

244. *Id.* at 963.

245. *Id.*

246. *Id.*

247. *Premier*, 814 F.2d at 376.

248. *See supra* notes 68–69 and accompanying text. *Compare* Comment, *supra* note 92 at 1245–46 (1975) (arguing against allowing class members who did not receive notice to benefit from the class judgment), *with* Schrader v. Selective Serv. Sys. Local Bd. of Wis., 329 F. Supp. 966 (W.D. Wis. 1971) (allowing class members who did not receive notice to benefit from the class judgment).

249. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326–37 (1979).

This is in contrast with the situation of class members who exercise their legal right to opt out of a class action. Curiously, after opting out of a class action, class members become nonparties and non-class members for all purposes, except for asserting offensive nonmutual issue preclusion against the defendant. A complete ban on the use of offensive nonmutual issue preclusion by opt-out class members, therefore, leads to different outcomes in these similar situations.

The disparity between these two outcomes is troubling: There is no reason why the general rules of issue preclusion should apply in one situation but not in the other.[250] There is no convincing reason why opt-out class members may be systematically denied the opportunity to assert nonmutual offensive issue preclusion in the same situations where any other nonparty would be allowed to do so.

The following analysis also helps demonstrate the irrationality of not allowing Premier to assert offensive issue preclusion against the class defendant. Considering the peculiar circumstances of the real conflict of interest between Premier, the other class members, and the class representative, Premier originally wanted to create a subclass because its interests were not common, typical, or adequately represented.[251] The class in Premier consisted of class members who paid a certain illegal charge, but Premier was in a different situation because it refused to make the payments and was sued.[252] If the court had created a subclass, Premier would likely be the only class member in it. Without numerosity, this subclass would be decertified.[253] If this happened, Premier—without ever actively opting out of the class—would not be a class member anymore. As a nonparty (instead of as an opt-out class member), Premier would be allowed to assert offensive issue preclusion.[254]

It could also be argued that Premier was not a class member because its interests were not adequately represented by the class representative. Moreover, it could be argued that the class definition was overinclusive and there was no typicality. In these cases, Premier would also be a non-

250. *See* 2 JOHN F.X. PELOSO ET AL., ABA SEC. OF LITIG., BUSINESS & COMMERCIAL IN FEDERAL COURTS § 19:71 (Robert L. Haig ed., 3d ed. 2011) ("[I]t is not easy to identify a practical or theoretical basis for the view that persons opting out of a class action should be precluded thereafter from making any offensive use of the judgment entered in the class action. When a case is decided against defendants outside the class action context, a person not involved in the lawsuit can seek to use the judgment offensively in subsequent litigation against the same defendant. It is not clear why persons opting out of a class action should not have a comparable opportunity to assert offensive collateral estoppel based on the outcome of the class action.").

251. *Premier*, 814 F.2d at 360–61; *see also* notes 209–215 and accompanying text (discussing the peculiar situation of Premier).

252. *Id.* at 360.

253. *See* FED. R. CIV. P. 23(a)(1) (requiring class membership to be so numerous as to make joinder impracticable); FED. R. CIV. P. 23(c)(5) (allowing a class to be divided into subclasses, but requiring each subclass to be treated as a class for purpose of class certification).

254. *See supra* Part II.D (discussing offensive nonmutual issue preclusion).

party and could assert offensive nonmutual issue preclusion against the class defendant in its individual lawsuit.

As will be discussed below, the rationale behind this difference in outcomes is that courts want to punish the class member for exercising their opt-out rights. By opting out, the class member committed the repugnant "choice" of excluding himself from the class. If that person, however, did not fall within the class definition in the first place, everything is somehow different: maybe because that person was "inherently" a nonparty.[255]

A completely different consideration is whether issue preclusion is a valid procedural rule in the first place. To be sure, this Article is not a blind defense of the virtues of offensive nonmutual issue preclusion. In a previous publication, this Author argued against the adoption of any form of issue preclusion in foreign countries.[256] The objective of this Article is different: to promote a coherent and equitable application of existing procedural rules. Whatever the results might be of allowing opt-out class members to assert offensive nonmutual issue preclusion, they are no more unfair than the use of offensive nonmutual issue preclusion in the context of individual litigation. As long as this is the law, it is unfair to deny it for opt-out class members but allow it to other nonparties. The perpetuation of such a double standard is not acceptable and cannot be based on whether the opt-out class member is a nonparty by choice or by design.

But the double standard does not stop there. Although most courts are reluctant to allow opt-out class members to assert issue preclusion against a class defendant, at least one court had no hesitation in doing the opposite.[257] In a curious decision, the Eighth Circuit allowed a class defendant to assert issue preclusion against the class as a whole based on a previous individual lawsuit brought by some class members.[258] In *Sondel v. Northwest Airlines*, the class representatives filed a class action lawsuit in federal court against Northwest alleging disparate impact discrimination against women because of a policy requiring a minimum height of 5 feet 2 inches for flight attendants.[259] When the state law claim was dismissed from the federal class action, the same class representatives, represented

255. *See infra* Part IV.J (discussing the denial of preclusive effect as a punishment in order to deter class members from exercising their right to opt out).

256. *See* Antonio Gidi, José Tesheiner & Marília Prates, *Limites Objetivos da Coisa Julgada no Projeto de Código de Processo Civil: Reflexões Inspiradas na Experiência Norte-Americana*, 194 RePro 101, 102 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1849208 (advising against introduction of the concept of issue preclusion in civil-law countries, mostly because its application is unpredictable and unnecessarily complex, with many prerequisites and exceptions, and would waste time and energy instead of saving them); *see also* James F. Flanagan, *Offensive Collateral Estoppel: Inefficiency and Foolish Consistency*, 1982 Ariz. St. L.J. 45, 52 (1982); Michael D. Green, *The Inability of Offensive Collateral Estoppel to Fulfill Its Promise: An Examination of Estoppel in Asbestos Litigation*, 70 Iowa L. Rev. 141, 200 (1985).

257. *See* Sondel v. Nw. Airlines, 56 F.3d 934, 940–41 (8th Cir. 1995).

258. *Id.*

259. *Id.* at 936.

by the same attorneys, filed a class action in Minnesota state court to pursue the state claim.[260]

The Minnesota state court refused to certify the class action because of, inter alia, a lack of superiority and predominance.[261] Proceeding as an individual lawsuit, the case went to trial and was decided on the merits in favor of the defendants, who established a non-discriminatory reason for the height requirement.[262]

Following the state court decision, Northwest asserted offensive issue preclusion against the whole class—not only the class representatives who were the plaintiffs in the previous state individual lawsuit.[263] The district court granted Northwest's motion for summary judgment and dismissed the federal class action with prejudice because the absent class members were in privity with the plaintiffs in the individual state court lawsuit.[264] The court reasoned that because the plaintiffs in the individual lawsuit in state court were the class representatives in the federal court class action, they represented the interests of the absent class members in the state suit even though the class certification was denied and the case proceeded on an individual basis.[265] The court was also influenced by the fact that "the same attorneys who represented the state court plaintiffs [were] the class counsel in the federal class action."[266] Therefore, all absent class members were bound by issue and claim preclusion on the merits of the class claim.[267]

In reaching this awkward conclusion, the Eighth Circuit was also concerned that the class counsel would not "introduce [in the federal class action] any additional evidence beyond that presented at the state [individual] trial."[268] This decision seriously upsets the delicate due process balance that exists in binding absent class members in representative litigation. In a fantastic twist of logic, that opinion held that the absent class members could be bound by a judgment without the possibility of being benefitted by it: an inverted violation of the mutuality doctrine.

Because there is no reason to treat opt-out class members differently from any other nonparty, they should be allowed to assert nonmutual offensive issue preclusion against the class defendant whenever the requirements are present. The next Part discusses a recent development in the area: the ambiguous solution proposed by the ALI's *Principles of the Law of Aggregate Litigation.*

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260. *Id.*
261. *Id.* at 936–37.
262. *Id.* at 937.
263. *Id.*
264. *Id.*
265. *Id.* at 938–40.
266. *Id.* at 940.
267. *Id.* at 941.
268. *Id.* at 940.

H. THE ALI's *PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION*

The most recent troubling development in this area is the ALI's *Principles of the Law of Aggregate Litigation.* In language that remained substantially similar in several early drafts, the *Principles* stated peremptorily that "[c]laimants who exercise their opportunity to avoid the preclusive effect of the aggregate proceeding . . . [by opting out] should not enjoy the benefit of . . . the preclusive effect of the judgment in the aggregate proceeding."[269] The proposal was unmistakable: class members who opted out would not be bound by nor benefit from the class judgment. This clear interpretation was reinforced by the comments: "Because exit protects claimants from the detriment of any judgment in the aggregate proceeding, the same claimants likewise should not enjoy the preclusive benefit of any such judgment."[270] The language was evocative of the earlier proponents of the obsolete doctrine of mutuality.[271] It served as a threat or message to class members: opt out at your own risk!

But when the *Principles* were finally approved and published, the language had changed significantly. The final version now reads, somewhat cryptically and tautologically: "[C]laimants who exercise their opportunity to avoid the preclusive effect of the aggregate proceeding [by opting out] . . . should be treated as nonparties to that proceeding."[272] The new language accomplishes the feat of being both obvious and ambiguous.[273] If a class member is considered a party for purposes of preclusion,[274] it is obvious that a class member who opts out of the class must lose that status and be considered a nonparty—so far, so good. But that interpretation leaves the proposed rule with absolutely no meaning. What does it mean to say that the opt-out class member shall be considered a nonparty? The final version, contrary to all previous versions, does not answer whether the opt-out class member will be allowed to assert nonmutual offensive issue preclusion like any other nonparty. By attempting to assign a meaning to the rule, one opens the door for interpretation and manipulation.

At least three theories can explain this mysterious last-minute shift.

The first theory is that no substantive change was intended. After all, in the comments, the *Principles* still maintain that "individual claimants who [opt out] are nonparties vis-à-vis the aggregate proceeding. The most fa-

269. AM. LAW. INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.08(b)(1) (Tentative Draft No. 1, 2008).

270. *Id.* § 2.08(b)(1) cmt. g.

271. *See supra* Part II.B (discussing the erosion of the mutuality doctrine).

272. AM. LAW INST., *supra* note 1, § 2.07(b).

273. That the American Law Institute was not able to commit to a single unmistakable rule is a testament to the level of controversy and disagreement that surrounds the topic.

274. *See* Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, 814 F.2d 358, 362 (7th Cir. 1987) (stating that class members are "to be treated as full-fledged parties to the case, with full advantage of a favorable judgment and the full detriments of an unfavorable judgment"); AM. LAW INST., *supra* note 1, § 1.01(b)(3) (stating that a person "belong[ing] to a class of persons similarly situated" will be bound by the result of litigation if he is represented by a party).

miliar and straightforward consequence of this nonparty status is that individual claimants who exit receive neither the benefit nor the detriment of the preclusive effect exerted by the judgment in the class action."[275]

If this were the correct interpretation, the comment would be even less helpful because it would be clearly wrong, which throws even more mystery into the mix. It is simply incorrect to say, as the *Principles* do, that "[t]he most familiar and straightforward consequence of . . . nonparty status is that [nonparties] receive neither the benefit nor the detriment of the preclusive effect."[276] At least since *Blonder-Tongue* and *Parklane*, the "familiar rule" in federal courts is that nonparties may benefit from, but not be bound by, preclusion obtained in a different proceeding against the defendant.[277]

The second theory behind the mysterious shift is that by changing the language, the ALI intended to make a substantial alteration in the meaning of the rule. Since class members who exercise their prerogative to opt out of the class are treated as regular nonparties, *Parklane* must apply to these individuals.[278] As a result, opt-out class members will be treated as nonparties to the litigation and will be able to take advantage of the familiar rule in federal courts that nonparties may benefit from, but are not bound by the class judgment.[279]

There is yet a third theory to explain the mysterious last-minute shift in the language of the *Principles*. If no substantial change was intended, one is left wondering why the ALI did not retain the original language, which was direct and unmistakably clear. Why did the ALI decide to be ambiguous if in previous versions it had shown that it was possible to be clear? Likewise, if the ALI intended to change the meaning of the rule to denote the opposite result, why not do so in the same unambiguous manner as it had done before? For this reason, the third theory is more credible than the previous ones. Apparently, the problem was so intractable that the ALI decided simply to acknowledge the existence of the problem without resolving it, leaving the hard work to the courts—exactly the way it was before the enactment of the *Principles*.

The next Part, through the expression that gives title to this Article, discusses the fragile position of opt-out class members, attributing to their

275. AM. LAW INST., *supra* note 1, § 2.07 cmt. g. This is also a change from comments in the previous versions.

276. *Id.*

277. The Supreme Court reinforced its decades-long commitment to abandon mutuality in *Smith v. Bayer Corp.*, when it considered "a commonplace of preclusion law—that nonparties sometimes may benefit from, even though they cannot be bound by, former litigation." *See* 131 S. Ct. 2368, 2380 n.10 (2011) (relying on both *Parklane* and *Blonder-Tongue*). As previously discussed, long gone is the time when one could say "[i]t is a familiar rule that estoppels by judgments must be mutual, and that one party cannot be bound if the other is not." Goodnow v. Litchfield, 19 N.W. 226, 229 (Iowa 1884); *see supra* Part II.B (discussing the abandonment of the mutuality doctrine).

278. *See supra* Part IV.G (discussing the assertion of offensive nonmutual issue preclusion by non-class members).

279. *See generally* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); *Smith*, 131 S. Ct. at 2380 n.10; *see supra* Part II.C–D (discussing defensive and offensive issue preclusion).

loneliness the reason why their needs and interests are ignored in class action policy debates.

I. The Lonely Position of Opt-Out Class Members

To truly understand the position of opt-out class members in the class action context, one must appreciate the fact that their position is extremely lonely. To begin, they do not have strength in numbers.[280] Moreover, they do not have a common representative: there is no one out there to champion their cause, give them a voice, or protect their interests. Inertia works against opt-out class members in every way.

The defendant, naturally, is not on their side, but the defendant is only the most obvious enemy. Class counsel has a legal duty to protect the interests of the class.[281] Moreover, attorney's fees are generally correlated to the size of the class[282] and this generates a conflict of interest with class members: It is in the class counsel's best interest to minimize opt-outs.[283] That is one of the reasons why it is common for class counsel to prefer certification of a class action as a type that does not afford the opportunity to opt out (or to receive notice).[284] Class counsel, therefore, has no incentive to help members who need to opt out and nothing to gain by protecting the interests of those who do. Consequently, the class

280. *See* Tidmarsh, *supra* note 119, at 10–11 (providing number of class members who opted out of mass tort settlement class actions); Willging et al., *supra* note 79, at 52–53 ("In all four districts, the median percentage of members who opted out was either 0.1% or 0.2% of the total members of the class and 75% of the opt-out cases had 1.2% or fewer class members opt out."); Eisenberg & Miller, *supra* note 119, at 1546, 1548–49. *But see* Note, *The Rule 23(b)(3) Class Action: an Empirical Study*, 62 Geo. L. Rev. 1123, 1150 (1974) (citing cases in which opt outs reduced class size from 39 to 73%).

281. As a matter of fact, even the class members are alone in the class proceeding. Even fully dedicated, adequate, and idealistic class counsel are bound to be more concerned with the interest of the class as a whole, in the big picture, than with the interests of absent class members individually. *See, e.g.*, Kalven & Rosenfield, *supra* note 126, at 718 n.98 (1940) ("From one point of view the requirement of the initial client does seem anachronistic; the class is the real client and the situation does not readily adjust to orthodox notions of the lawyer-client relationship."); Comment, *Adequate Representation, Notice and the New Class Action Rule: Effectuating Remedies Provided by the Securities Laws*, 116 U. Pa. L. Rev. 889, 903 (1968) ("[T]he client is, in reality, the class itself."); David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 Notre Dame L. Rev. 913, 960 (1998) ("[T]he class itself is—or at least should be—the claimant, and the represented litigant.").

282. *See, e.g.*, Theodore Eisenberg & Geoffrey P. Miller, *Attorneys Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical Legal Stud. 27, 28, 49 (2004) (stating that in class actions, attorney's fees are generally calculated as a percentage of recovery, and "that the level of client recovery is by far the most important determinant of the attorney fee amount").

283. *See, e.g.*, *In Re* Vitamins Antitrust Class Actions, 215 F.3d 26, 29 (2000) (stating that there is an inherent conflict between the class members who want to remain in the class and those who want to opt out and that the class counsel represents only the class members who remain in the class).

284. The other reason is to avoid having to comply with the stringent prerequisites of superiority and predominance. *See generally* John E. Kennedy, *Class action: The Right to Opt Out*, 25 Ariz. L. Rev. 3, 57–58 (1983) ("Attempts to use the (b)(1) or (b)(2) categories . . . are usually premised on a desire to avoid the mandatory pre-trial notice and opt-out rights of Rule 23(c)(2), or other barriers of the (b)(3) category.").

counsel also does not adequately protect the interests of opt-out class members.

Unfortunately, opt-out class members can expect no better from the court, which has its own agenda and is more concerned with big-picture procedural economy and clearing its docket. By definition, the party before the court is the class, so the interests of opt-out members are not properly within the court's jurisdiction (unless the individual lawsuits and the class action are consolidated). The court's duty is only to protect the class members before it.[285] Concern for economy and efficiency trumps the legitimate interests of opt-out class members in the court where the individual lawsuit was brought,[286] but it is more evident in appellate courts who are naturally more concerned with the big picture.[287] Therefore, opt-out members cannot expect sympathy from the courts either.

Finally, opt-out class members should not count on the powerful lawyers who have large portfolios of similar, individual cases, because these lawyers have their own agendas and interests, and play by their own rules.

This situation has also significantly influenced the state of class action scholarship. For intellectual, ideological, or professional reasons, the most influential class action scholars are generally aligned with the interests of either the class counsel or the defense counsel. Some scholars may even identify with the interests of the class itself, the defendants, or the court system. But none reflect the perspective of non-class members or opt-out class members.

All relevant players, therefore, are substantially "aggregationists"—either by conviction or by professional interest—an expression that can be taken here as a derogatory neologism for actors committed to aggregate litigation, even at the expense of the individual interests of absent class members, opt-out class members, and non-class members. Therefore, it is no surprise that opt-out class members are often vilified as free riders: the overall attitude is hostile. And since they have no voice, the system is completely rigged against them, nobody takes their interests seriously, and there is nothing they can do about it.

The only actors whose interests are in principle aligned with the interests of opt-out class members are the small solo practitioners who do not

285. *See, e.g.*, *id.* (stating that "the district court's duty is to the class members themselves," not to opt-out class members).

286. *But see* William B. Rubenstein, *Finality in Class Action Litigation: Lessons from Habeas*, 82 N.Y.U. L. Rev. 790, 811 (2007) (stating, in the similar context of a class member collaterally attacking in individual lawsuits the adequacy of the representative in a prior class action, that the second court, the one in the individual lawsuit, would be drawn to the argument raised by the class member).

287. *Compare* Premier Elec. Constr. Co. v. Int'l Bhd. of Elec. Workers, 627 F. Supp. 957 (N.D. Ill. 1985) (trial court allowed opt-out class member to assert offensive nonmutual issue preclusion because it would represent procedural economy in the case), *with* Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, 814 F.2d 358 (7th Cir. 1987) (court of appeals did not allow opt-out class member to assert offensive nonmutual issue preclusion because it would not represent procedural economy in the long run). *See also supra* Part IV. B (discussing promotion of economy and fairness).

work with large aggregation cases and may have one or two such cases in their careers. They are not relevant players and do not have the intellectual clout, political interest, or financial means to influence law reform, ALI debates, legal scholarship, or court precedents.[288]

One curious anecdote illustrates the point well. In the 2006 ALI Annual Meeting, one practitioner addressed the Reporters of the then draft *Principles of the Law of Aggregate Litigation*:

> I am concerned with § 2.08(b). You seem to have a bias against people who want to opt out, who don't want to participate, and you have certain punishments. . . . I just think it is a heavy-handed way of saying that you can opt out, but you're going to be punished for doing so.[289]

Aggregationists have developed several other methods—legitimate or otherwise—to punish or discourage class members from opting out. One of these methods is to provide for a poison pill in the settlement offer, withdrawing it in case of an unacceptable number of opt-outs. The *Vioxx* settlement (which was not a class action) imposed several significant limitations on opting out of the settlement, including requiring the attorney to counsel the client to accept the offer and to withdraw from the case if the client did not do so.[290] Another method to discourage opt-outs is the inclusion in the settlement of the so-called "most favored nation" provision, which requires the defendant to improve the deal for all settling class members if, in the future, it makes a better deal with any class mem-

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288. Case in point: In order to prevent opt-out class members from asserting offensive nonmutual issue preclusion against the defendant, the ABA Section of Litigation proposed allowing courts "to attach conditions to a request for exclusion or to prohibit exclusion altogether." CUNNINGHAM ET AL., *supra* note 127, at 207. The court would use a number of factors to "determin[e] whether it is appropriate that members of a class may be excluded." *Id.* Because the report was drafted by a committee of eminent lawyers and judges with experience in class actions and aggregate litigation, *see id.* at 196, it could unfortunately have a profound practical impact on future class members who might need or want to opt out from a class action. If this proposal is adopted, the opt-out would no longer be a right, but a privilege granted by the court on a case-by-case basis, possibly with restrictions or under conditions. And what is worse, at the time a court makes the decision whether to allow, prohibit, or impose conditions on the right to opt out, the only voices that the court will hear are the class counsel's and the defendant's. The voice of the absent members will not be heard, unless the court provides two notices.

289. AM. LAW INST., PROCEEDING OF ALI ANNUAL MEETINGS: 83RD ANNUAL MEETING 107 (2006) (statement by Mr. Peter F. Langrock) (Debating Discussion Draft (April 21, 2006) on a point directly related to the topic herein addressed). The General Reporter Professor Issacharoff answered:

> Our intent was not to punish, but not to let [opt-out class members] benefit strategically [because] we don't want [them] to come into a subsequent lawsuit and claim issue preclusion from the defendant having lost in a case in which [they] chose not to have [their] rights be at risk. This is consistent with the 1966 amendments to Rule 23, in our view.

Id. This dialogue is evocative of the old mutuality doctrine as well as the argument that the 1966 amendment rejected one-way intervention. *See supra* Part IV.C (discussing the 1966 Amendment's purpose to abolish one-way intervention).

290. MERCK & CO., SETTLEMENT AGREEMENT 5–6, 41–43 (2007), *available at* http://www.officialvioxxsettlement.com/documents/Master%20Settlement%20Agreement%20-%20new.pdf.

ber who opts out.[291] This provision assures the class members who remained in the class that they will get the best deal possible and gives the defendant a powerful negotiating tool against opt-out class members, who usually expects to get a better deal individually than what they could obtain as class members.[292]

Because of their lonely position, it is not really surprising that the interests of opt-out class members are consistently undermined by the interests of aggregationists. The next Part discusses the real reasons why opt-out class members are systematically denied the right to assert offensive nonmutual issue preclusion as any regular nonparty could: the denial is used as a strategic weapon to punish and deter class members from exercising their constitutional right to opt out.

J. Denial of Preclusive Effect as a Punishment of and Deterrence to Opting Out

Class actions are generally complex structures. Most involve defendants charged with intricate violations of antitrust, securities, antidiscrimination, or labor laws, which are often extremely difficult to prove. Some facts are extremely complex, demanding highly sophisticated knowledge of medical, financial, or other scientific or technical subjects. The legal arguments may be equally difficult or involve complex, multifarious, or novel legal concepts. These cases require intense commitment and enormous financial investment. Therefore, to be successful, it is necessary to build a major structure with competent technical and legal expertise at a multidisciplinary level. It is both a costly and a risky venture that is only possible because aggregation leads to economies of scale.[293] Because this sophisticated structure is only cost efficient with the leverage of a large class, an opt out en masse may compromise the economic viability of the litigation built by class counsel. Hence, it is essential to preserve class cohesion as much as possible.

It is therefore important to be intellectually honest about the reasons behind disallowing opt-out class members asserting offensive nonmutual issue preclusion against the class defendant. The reason is not mutuality. The mutuality doctrine has been moribund for at least seventy years and dead for at least thirty, so that cannot be the reason.[294] The reason also

291. *See, e.g.*, *Vitamins Antitrust*, 215 F.3d at 28.

292. *See, e.g.*, *Tidmarsh*, *supra* note 119, at 39 (reporting that absent class members who opted out of a class action settlement were able to settle their individual claims for higher amounts than the one offered to class members).

293. *See generally* Fed. R. Civ. P. 23(e)(3) advisory committee's note to 1966 amendment, *reprinted in* 39 F.R.D. 69, 102–103 (1967) ("Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."); Kaplan, *supra* note 129, at 390; Rubenstein, *supra* note 78, §§ 1:7–1:10 (discussing the overlapping objectives of class action litigation, including compensation, deterrence, efficiency, and legitimacy).

294. *See supra* Part II.B (discussing the slow process of decline of the doctrine of mutuality).

cannot be a professed aversion to one-way intervention, a practically irrelevant and obscure practice that existed in only a few courts[295] (and in a few law professors' articles) before the 1966 amendment to Rule 23.[296]

If *Parklane* allows any third person to assert offensive nonmutual issue preclusion, why not allow an opt-out class member the possibility to do the same?[297] Denying such a possibility is nonsensical since the opt-out class member is by definition a nonparty connected to the class by common questions of law and fact.[298]

One can start to understand the obsession against opt-out members asserting offensive nonmutual issue preclusion against class defendants only by appreciating that the real reason is that this denial works as a punitive measure to dissuade class members from opting out of the class. By opting out, the class member committed the repugnant "choice" of excluding himself from the class. If that person, however, did not fall within the class definition in the first place, everything is somehow different: maybe because that person was "inherently" a nonparty instead of choosing to become one. It is the exercise of this constitutional right[299] to opt out that some courts and commentators think should be punished or deterred.

A reaction against this rebellious behavior is in order. By removing the possibility of benefiting from the class judgment, aggregationists hope that this will create one more artificial obstacle to an already difficult situation,[300] resulting in fewer class members exercising the right to opt out.[301]

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295. *See, e.g.*, Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 589 (10th Cir. 1961) (one of the few examples in which the one-way intervention was allowed).

296. *See supra* Part IV.C (discussing the connection between the 1966 Amendment's abolition of one-way intervention and rejection to opt-out class members asserting offensive nonmutual issue preclusion).

297. *See supra* Part IV.G (discussing the assertion of offensive nonmutual issue preclusion by non-class members).

298. *See* FED. R. CIV. P. 23(a)(2).

299. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) ("[W]e hold that due process requires at a minimum that an absent plaintiff [in a class action seeking claims wholly or predominately for money judgments] be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court."). Although *Shutts* was limited to class action for damages, it seems that the best rule is to allow class members to opt out of a class whenever doing so is possible. *See* AM. LAW INST., *supra* note 1, § 2.04 (proposing the novel concept of the indivisibility of the class action remedy or of the class substantive right as a criterion to determine the right to opt out); *see also* Antonio Gidi, *Class Actions in Brazil—A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311, 350–54 (2003) (discussing the indivisibility of class claims from a comparative perspective and suggesting that "[r]ecognition of the concept of indivisible class claims would be an important evolution in American class action law. . . . [F]or example, to decide whether there should be a right to 'opt out' of the class or not.").

300. *See infra* Part IV.K (discussing the difficult financial and technical hurdles opt-out class members face to bring an individual lawsuit against the class defendant).

301. *See* Currie, *supra* note 28, at 287 n.15 ("No claimant will [stay in a class action] if, without being bound by an unfavorable judgment, he can obtain the benefit of a favorable one."); FRIEDENTHAL ET AL., *supra* note 4, § 16.8, at 796 ("[T]here would be no reason not to opt out."); Ratliff, *supra* note 39, at 88–89 ("[N]onmutual collateral estoppel [is] a primary threat to the effectiveness of class actions.").

This utilitarian approach may be a legitimate reason to deny offensive nonmutual issue preclusion to opt-out class members, but courts and commentators must be transparent about their rationale, if they want a more well informed debate. The question remains whether the policy of giving supremacy and effectiveness to class action litigation supersedes the policies of allowing parties to control their own litigation and of promoting finality against a party who has had a full and fair opportunity to litigate an issue. But this is the clear choice before us.

It may be that courts are willing to continuously retry issues that were put to rest in previous class action suits—in effect punishing themselves—only to castigate class members who had the petulance to exercise their right to exclude themselves from a class in which they did not want to participate. Indeed, it may be that the appetite to punish opt-out class members is stronger than the desire to prevent a class defendant from taking multiple bites at the apple after final resolution of an issue in a proceeding in which the defendant had a full and fair opportunity to litigate.

Adolf Homburger, writing almost a decade before *Parklane*, did not think so:

> [W]ould it not also make a mockery of the law if, in a jurisdiction that has abandoned the doctrine of mutuality of estoppel, the court and the litigants must endure a second complex litigation on the same subject matter, merely to teach the opted-out member a lesson? And if that second litigation ends in a judgment favorable to the opted-out member, should the court have to suffer a third trial if another member of the class who likewise opted-out relies on collateral estoppel by reason of the first or second judgment?[302]

Denying opt-out members the possibility of asserting nonmutual offensive issue preclusion against the class defendant punishes the courts (who will have to retry an issue previously decided) and rewards class defendants (who will be able to retry an issue decided against it) only to dissuade class members from opting out of the class. To start an honest discussion about the topic, therefore, it is essential to avoid a vindictive and retributive reaction fueled by greed, frustration, or misguided notions of fairness and efficiency. Understanding the issues is the first step in resolving the problem.[303]

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302. Homburger, *supra* note 147, at 647 (footnote omitted); *see also* 5 RUBENSTEIN ET AL., *supra* note 80, § 16:28 ("Waiting on the sidelines is a luxury few absent class members can afford. Those who can may have extenuating and supplemental factual circumstances and should not be penalized because they may share class characteristics as well.").

303. *Compare* FRIEDENTHAL ET AL., *supra* note 4, § 16.8, at 795 (stating, in a different context, that "this approach smacks of the now discredited notion of mutuality of estoppel, which having been rejected in most jurisdictions as neither fair nor logical, should not be embraced in the class-action setting"), *with id.* at 796 ("Although this problem raises many of the same concerns as the general mutuality-of-estoppel notion, two additional factors in the opt-out setting appear to justify something in the nature of quasi-mutuality treatment.").

The final important step in understanding the issues being discussed is to recognize the practical difficulties that class members face in exercising their right to opt out. This is discussed below.

K. The Practical Reality of the Right to Opt Out

Rule 23 allows class members the unconditional right to opt out.[304] The Supreme Court has held that the right to opt out is a due process guarantee in class actions for damages.[305] However, that right does not come without burdens and responsibilities. Class members who opt out are alone because they have no right to the fund generated by the class judgment or settlement. If they want to obtain relief for their claims, they need to actively pursue their own individual lawsuits against the defendant. This requires hiring an attorney and possibly incurring substantial expenses and considerable risk.[306] Opting out, of course, is only advisable in the few cases in which the individual claim is economically viable.[307]

In face of all the difficulties, it is safe to conclude that a plaintiff who opts out of a class is fully committed to go it alone.[308] First, very few classes are ever certified,[309] making reliance on a class-wide resolution of the controversy a gamble at best. In addition, of those class actions that are certified, the vast majority will be terminated by class-wide settlements.[310] A settled class action will not have any issue preclusion effect on nonparties or opt-out class members, unless some issues were actually

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304. Fed. R. Civ. P. 23(c)(2)(B)(v) ("[T]he court will exclude from the class any member who requests exclusion. . . ."); *see also* Rutherglen, *supra* note 185, at 281 ("If [class members] exercise their right to opt out, they are simply making a decision which, as a matter of substantive law, they are entitled to make."); *id.* at 283 ("[T]he right to opt out has a strong claim to being characterized as substantive. If denying the right to opt out denies class members a realistic opportunity to pursue individual actions, then it denies them a substantive right.").

305. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) ("We hold that due process requires at a minimum that an absent plaintiff [in a class action seeking claims wholly or predominately for money judgments] be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court.")

306. *See supra* Part IV.J (discussing the complexity and expense involved in class litigation, which requires intense commitment and enormous financial investment).

307. *See* Rutherglen, *supra* note 185, at 279. ("In general, the right to opt out has only as much value as the individual class member's claim, determined according to its discounted present value as of the time at which the right to opt out is exercised. If the claim is not viable, then the right to opt out has no value.").

308. *See* 5 Rubenstein, et al., *supra* note 80, § 16:28 ("Waiting on the sidelines is a luxury few absent class members can afford. Those who can may have extenuating and supplemental factual circumstances and should not be penalized because they may share class characteristics as well.").

309. *See* Eisenberg & Miller, *supra* note 78, at 280 (reporting that, according to a 2007 RAND Institute for Civil Justice Study, less than 15% of class actions were certified); 1 Rubenstein, *supra* note 78, § 1.17 (reporting the figure above and concluding that "the class probably got certified as a result of a settlement agreement").

310. *See* Willging et al., *supra* note 79, at 10, 60 (finding that, of the four districts studied, "a substantial majority of certified class actions were terminated by class-wide settlements"); Garth, *supra* note 79, at 501 (noting that, after certification, "most class actions, like most litigation, settle prior to trial").

litigated before settlement.[311] In addition, individual cases brought in federal courts are often consolidated or coordinated with their respective class actions.[312]

Opting out is a legitimate procedural tool for class members who distrust the adequacy of the representative, who fear conflicts of interest, or who disagree with the strategy of the class proceeding.[313] Another equally valid reason to opt out is that it may be possible to obtain higher judgments or settlements than those obtained by class members who remained in the class.[314] Nowhere in Rule 23 or in the advisory committee notes, does it say that opt-out rights are disfavored or that courts could or should deter or discourage class members from opting out and punish those who do.[315]

Although *Parklane* only speaks of unfairness to the defendant, it is reasonable to assume that in the class action context, offensive nonmutual issue preclusion cannot be allowed if it will operate unfairly upon the class or class counsel.

When a class member decides to exercise the right to opt out of a class, the class member is protecting a legitimate personal interest. The class member's objective is not to undermine the class action effort, although it may ultimately have that effect (especially in conjunction with other opt-out members). This could be unfair to the class counsel who may have

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311. *See* Arizona v. California, 530 U.S. 392, 414 (2000) ("[S]ettlements ordinarily occasion no *issue preclusion* . . . unless it is clear . . . that the parties intend their agreement to have such an effect."); *see also* 5 RUBENSTEIN, ET AL., *supra* note 80, § 16:28 ("The likelihood of settlement may also eliminate collateral estoppel rights."); *supra* Part II.A (discussing the requirements for the application of issue preclusion). The only exception to the general rule, but one that does not concern us here, is that the adequacy of the settlement in a previous class action is an issue that may not be relitigated on a subsequent malpractice suit against the class attorney. *See* Thomas v. Powell, 247 F.3d 260, 262–63 (D.C. Cir. 2001).

312. *See* WILLGING ET AL., *supra* note 79, at 14–15.

313. Eisenberg & Miller, *supra* note 119, at 1530 ("Over time, [opt-out] has developed into a fundamental part of class action practice. Indeed, the right to opt-out provides a key premise for many of the basic principles that shape the (b)(3) action . . . .") (footnote omitted); George Rutherglen, *Future Claims in Mass Tort Cases: Deterrence, Compensation, and Necessity*, 88 VA. L. REV. 1989, 1995 (2002) ("[T]he right to notice and to opt out has remained at the center of class action litigation for the last three decades . . . .").

314. *See, e.g.*, TIDMARSH, *supra* note 119, at 39 (reporting that absent class members who opted out of a class action settlement were able to settle their individual claims for higher amounts than the one offered to class members); Reed R. Kathrein, *Opt-Outs, MFNs and Game Theory: Can the High Multiples Achieved by Opt-Outs in Recent Mega-Fraud Settlements Continue, A Discussion Draft*, *in* SEC. LITIG. & ENFORCEMENT INST. 583, 588–90 (PLI Corp. L. & Practice, Course Handbook Ser. No. B-1620, 2007).

315. Not everyone agrees. *See, e.g.*, Friedman, *supra* note 100, at 756–57 (arguing against an "excessive deference to unconstrained individualism" and proposing that absent members should only be able to opt out if they can convince the court that they have "good cause" to do so); *see also* CUNNINGHAM ET AL., *supra* note 127, at 207 (a discussion proposal from the ABA Section of Litigation Association allowing courts "to attach conditions to a request for exclusion or to prohibit exclusion altogether"); Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CAL. L. REV. 1573, 1612–14 (2007) (criticizing the "waiver-through-total passivity" nature of opt-out in class actions). The unfortunate proposal from the ABA Section of Litigation was discussed *supra* at note 288.

spent time and money to litigate the most difficult part of a massive controversy. It is reasonable, therefore, to expect that opt-out class members cannot unfairly benefit from the work of the class counsel. That person may legitimately be labeled a free rider. Class actions are sufficiently profitable to justify class counsel's expense and effort, but in appropriate cases, it might be fair for the court to order the plaintiff who opted out of a class action to contribute at some level to the class counsel's attorney's fees and expenses, from the plaintiff's own individual recovery. This is a reasonable resolution, but nothing justifies holding class members hostage to the class action—either directly prohibiting opt-outs, or indirectly making their lives unnecessarily more difficult than non-class members.

Allowing opt-out class members to assert offensive nonmutual issue preclusion against the class defendant may appear unfair at first glance, but it is no more unfair than other situations where such a device is allowed. The mutuality train departed almost a century ago, and arguments of unfairness to the defendant are no longer compelling.[316] Moreover, it makes little sense to turn the whole procedural system upside down just because of irrational fears of en masse opt-outs that rarely, if ever, materialize in practice. The anecdotal evidence and the empirical research simply do not support a fear of several opt-out class members bringing individual lawsuits, making a mockery of the class action rule, and unfairly benefiting from the preclusive effect of the class judgment.[317] Even if that was the case, however, and such massive exclusion was to occur, this should not be interpreted as a sign that there is something wrong with the class members who, supposedly, are reasonable economic actors. Maybe this is a sign that something is wrong with the class action itself.[318]

It is unnecessary to further weaken the position of an already vulnerable party by taking away what *Parklane* gave all litigants thirty years ago,[319] using as excuse the obsolete technicalities of mutuality. It is conceivable, but not probable, that the number of opt-out class members is currently reduced because of the uncertainty regarding whether they would benefit from offensive nonmutual issue preclusion. And it is undeniable that if the device was more readily available, at least in some cases, more class members would exclude themselves from the class. But this is not a valid reason to justify such unequal treatment between nonmembers and opt-out members.[320] In any event, opt-outs occur with such low

316. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326–28, 335–37 (1979); *see supra* Part II.B (discussing the erosion of the mutuality doctrine) and Part IV.C (discussing the use of mutuality arguments against opt-out class members).

317. *See* WILLGING ET AL., *supra* note 79, at 79 (proposing research on whether opt-out plaintiffs "filed an action on the same issues that were addressed in the class action").

318. *Cf.* Patrick Wooley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571, 609–10 (1997) (linking the quantity of class members seeking to intervene in a class action with the level of satisfaction with the representation of their interests).

319. *See supra* Part II.C–D (discussing offensive nonmutual issue preclusion).

320. *See supra* Part IV.G (discussing the incoherence and unfairness of allowing the assertion of offensive nonmutual issue preclusion by non-class members, but denying the same prerogative to opt-out class members).

frequency that whatever minimal increase is caused by allowing opt-out class members to assert offensive nonmutual issue preclusion would not be a debilitating blow to efficiency.

One can even argue that by allowing opt-out class members to assert offensive nonmutual issue preclusion against the class defendant, market forces will lower costly attorney's fees, which would have to be reduced to more acceptable levels to make opting out a less attractive option for class members. Fears of massive opt out can also be a strong incentive for adequate settlement offers. That is how one legitimately deters massive opt outs, not by creating artificial barriers.

This Article, therefore, does not question that the legal system should encourage class participation or class cohesiveness, but suggests that this ideal must be reached by making class action more attractive to absent class members, not by forcefully tying them to the class.

The practical reality of the constitutional right to opt out is that it is worthless in most cases. It is only valuable when economically viable to bring an individual lawsuit. Class members do not opt out from a class action to undermine it, nor do they do so with the objective of sitting "idly on the sidelines"[321] and benefitting from the class judgment without the risk of being prejudiced by it. Class members opt out for legitimate reasons, whatever they are. That is the whole reason why Rule 23 provided for a right to opt out and why this right may be constitutionally required.

L. A Possible Middle Ground: Analyzing the Motives of Opt Out

As the argument comes to a close, it becomes clear that this Article proposes a general rule allowing opt-out class members to assert offensive nonmutual issue preclusion against the class defendant in all circumstances, whenever the requirements are present, exactly like any nonparty.

But even for those against such rule, there must be some situations where its use is justified. A middle ground must exist between a facile rule prohibiting any opt-out class member from benefiting from the class judgment and a rule that openly allows it in any circumstance. Even for the opponents of the rule herein proposed, therefore, there is a clear need for a more flexible standard that will consider all circumstances of a case, and a refutation of the "categorical rule" proposed by Judge Easterbrook in *Premier*.[322]

One such situation may occur when a class member has an independent reason that justifies an interest in opting out of a class. After all, if the class member will opt out anyway and pursue individual litigation regard-

321. *See In re* TransOcean Tender Sec. Litig., 455 F. Supp. 999, 1007 (N.D. Ill. 1978).
322. *See* Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, 814 F.2d 358, 367 (7th Cir. 1987) ("We conclude that class members who opt out may not claim the benefits of the class's victory. . . . [T]his is a categorical rule.").

less of the possibility of benefitting from offensive nonmutual issue preclusion, there is no reason to punish or to deter. And there is no reason to treat the class member as a person who will sit "idly on the sidelines"[323] waiting to benefit from the class judgment without the risk of being bound by it. Furthermore, in these cases, there is no reason to suppose that rejecting the application of issue preclusion will promote judicial efficiency, if efficiency is the concern.

An early commentator, for example, argued that opt-out class members should not ordinarily be allowed to assert nonmutual offensive issue preclusion against the class defendant, except for "one exceptional situation": when the former class member has such a strong interest in suing individually that it would have opted out even if not allowed to assert issue preclusion against the defendant.[324] According to the author, offensive nonmutual issue preclusion should be permissible when the absent class member has a compelling reason to opt out. But, continues the author, offensive issue preclusion should not be available to those who opt out simply to benefit from the class action preclusion without any risk of being bound by an unfavorable judgment.[325]

The author proposed, therefore, a strict inquiry into the subjective reasons that motivated the class member to opt out.[326] One factor to consider, for example, is whether the plaintiff promptly brought an individual lawsuit and prosecuted it vigorously, instead of sitting idly by waiting for the class result.[327] The burden would be on the class member to convince the court of the existence of a legitimate motive to opt out.[328]

An interesting scenario illustrates this point. When a person brings an individual lawsuit before a class action is filed, there can be no clearer example in which a class member had an independent reason to bring an individual lawsuit. She clearly did not opt out from a class to sit idly and benefit from issue preclusion; she did not even opt out. She brought her own lawsuit independently of the class action. Faced with this situation, the Fourth Circuit admitted that this situation negated the notion that the individual plaintiff was "poised on the sidelines of the class suit." Yet, despite the fact that the plaintiff was not really an opt-out class member, the court still declined to allow her to assert offensive nonmutual issue preclusion against the defendant. The court reasoned that she had had "ample opportunity to join in the class action at a relatively early stage in the litigation and thereby eliminate the need to have separate trials for arguably similar claims."[329]

The idea to create an exception for the situations when opt-out class members have a strong interest in suing individually, as interesting as it

323. *See In re* TransOcean Tender Sec. Litig., 455 F. Supp. 999, 1007 (N.D. Ill. 1978).
324. Furman, *supra* note 122, at 1191, 1199.
325. *Id.* at 1213.
326. *Id.* at 1205.
327. *Id.*
328. *Id.*
329. *See* Polk v. Montgomery Cnty., Md., 782 F.2d 1196, 1202 n.7 (4th Cir. 1986).

might be, is too narrow to take into account the "many possible reasons why class members might elect to exclude themselves."[330] One could even go as far as saying that any reason to opt out is legitimate—there are no illegitimate motives.

Indeed, the *TransOcean* court was not willing to investigate the subjective motives that prompted the class member to opt out.[331] Those who find it troubling that a class member who excluded from the class may comply with *Parklane*'s "easily join" factor may find solace in knowing that this is only one factor among several others that a court must consider before exercising its broad discretion to allow issue preclusion.[332] The absence of one factor is not grounds to refuse application of offensive nonmutual issue preclusion.[333] Finally, in practice, attempts to consider the motives of an opt-out class member are not only extremely difficult, but futile because class members could simply manipulate their behavior to adapt to the court's expectations.[334]

Therefore, the rule that is most consistent with modern civil procedure is to treat opt-out class members as any nonparty or any non-class member and allow them in all situations, regardless of their motivation, to assert offensive nonmutual issue preclusion against the class defendant if all prerequisites are present.

V. CONCLUSION

Great controversy surrounds the offensive use of nonmutual issue preclusion by absent class members who opt out of a class action. The solution to this controversy will certainly revolve around the question of which policy promotes judicial efficiency and fairness to the class as a whole, the class members, the opt-out members, the defendant, the class counsel, and the court.

Whether one likes it or not, qualified offensive nonmutual issue preclusion is here to stay. Once the policy behind the doctrine of mutuality of

330. *In re* TransOcean Tender Offer Sec. Litig., 455 F. Supp. 999, 1008 (N.D. Ill. 1978).

331. *Id.* ("Courts which have enforced the offensive use of collateral estoppel have not considered the motives of those plaintiffs who, though not joining in the first lawsuit, seek the benefit of the judgment in a subsequent lawsuit. This court will likewise not indulge in exploring the motives of the opt out plaintiffs . . . . The overriding considerations are whether the defendants had a full and fair opportunity to litigate in the Delaware proceedings and whether judicial economy would be served by an application of collateral estoppel.").

332. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330–32 (1979) (listing additional "circumstances that might justify reluctance to allow the offensive use of collateral estoppel").

333. *See* Furman, *supra* note 122, at 1202–04 (defending that either the easily join factor is present because its objective is merely to avoid a wait and see attitude or that the fact that it was not present is offset by the ample satisfaction of the other three factors); *see also* RUBENSTEIN, ET AL., *supra* note 80, § 16:28.

334. *See* RUBENSTEIN, ET AL., *supra* note 80, § 16:28 ("Any attempt to examine the motives of one who has chosen exclusion in order to determine whether the inability to join the action easily requirement has been satisfied is ineffectual and would only promote behavior by the party opting out of the suit which conforms to any standards which may develop in this area.").

estoppel was openly abandoned,[335] no legitimate reason remains to insist on its application exclusively for opt-out class members. There is no need to significantly depart from the general rules and policies developed in the past seventy years since *Bernhard*, *Blonder-Tongue*, *Parklane*, and the ALI *Restatement (Second) of Judgment*.[336] Using their "broad discretion," courts need to adapt some of the traditional factors to the realities of modern class action litigation (such as apportioning part of the individual award to contribute to class counsel's expenses and fees),[337] but a rupture with this evolution is unnecessary.

Moreover, it is important to acknowledge the lonely position of the opt-out class member[338] and recognize that the main reason for denying them the right to assert offensive nonmutual issue preclusion has more to do with deterrence and punishment than with fairness.[339] Once that justification is realized, it becomes apparent that a universal canon against such possibility is not a defensible proposition. Hopefully this acknowledgment could lead to a more reasonable treatment of opt-out class members.

Further, because most class actions settle, and settled class actions have generally no issue preclusion effect, opt-out class members must be committed to litigating individually all issues of their claim. In practice, therefore, in the rare cases in which the individual members' claims are economically viable, it is not realistic for the opt-out class member to sit idly on the sidelines waiting for a favorable class judgment simply because there may never be a class judgment. The whole idea of class members opting out to benefit from a favorable result without expense and without the risk of being bound by an adverse judgment is not grounded in reality, and a lawyer that gives such advice is probably flirting with malpractice. There is a substantial probability that such a strategy will backfire, and the class member will be stuck with the burden of proving a complex claim from scratch, while the other class members would have already received their settlement portion and benefited from the economy of scale and leverage afforded by class action litigation.[340]

This Article can identify no legitimate reason why opt-out class members should be guided by special preclusion rules that are not applicable to non-class members. Accordingly, opt-out class members must be

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335. *See supra* Part II.B (discussing the erosion of the mutuality doctrine).

336. *See supra* Part IV.C (demonstrating how objections to opt-out members asserting offensive issue preclusion is an unwarranted return to the old mutuality doctrine).

337. *See supra* Part IV.K (proposing that the court to order opt-out class members, in appropriate cases, to contribute at some level to the class counsel's attorney's fees and expenses, from the plaintiff's own individual recovery).

338. *See supra* Part IV.I (discussing the lonely position of opt-out class members, whose interests are ignored by all, and attributing to this fact the reason why their needs and interests are unrepresented in all class-action policy debates).

339. *See supra* Part IV.J (stating that denying opt-out class members the possibility of asserting offensive nonmutual issue preclusion is used as a deterrence mechanism or a punishment for opting out).

340. *See supra* Part IV.K (discussing the difficult financial and technical hurdles opt-out class members face to bring an individual lawsuit against the class defendants).

treated as any nonparty and allowed to assert offensive nonmutual issue preclusion against the class defendant if all traditional prerequisites are present.