Procedural Impediments to the Resolution of Mass Tort Cases: The Anti-Injunction Act and the Due Process Clause

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I. INTRODUCTION

Mass tort litigation has strained the judicial process to the point where finding alternative means of dispute resolution (ADR) is essential. Judges and lawyers have come up with a number of innovative solutions to resolving the onslaught of civil suits, and commentators have tried to analyze their efforts by comparing them to traditional ADR mechanisms.[1] Much of this analysis makes little sense, however, without recognizing that the actions of those involved in the mass tort arena are controlled as much by procedural limitations as by the nature of the matter in dispute. While the sheer volume of claims and the large sums of money involved encourage aggregating claims and mediating settlement agreements rather than litigating individual actions, courts' efforts are skewed by the limited procedural mechanisms available to them.

This Note examines the two largest hurdles judges and litigants face in dealing with mass tort disputes—the Anti-Injunction Act[2] and the Fourteenth Amendment.[3] The Anti-Injunction Act prohibits federal injunctions of state court proceedings; thus, a court cannot consolidate all state and federal tort claims in one proceeding. Part Two of this Note examines how the decisions by the Supreme Court of the United States might allow an exception to the Act in aid of a federal court's jurisdiction in approving a settlement agreement. Part Three looks at the problems associated with certifying a mandatory class under Rules 23(b)(1), 23(b)(2) or 23(c) of the Federal Rules of Civil Procedure.[4] The Due Process Clause

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[1] *See* Deborah R. Hensler, *Symposium: National Mass Tort Conference, A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1619-1620 (1995).

[2] 28 U.S.C. § 2283 (1994).

[3] U.S. CONST. amend. XIV.

[4] The relevant sections of Rule 23 of the Federal Rules of Civil Procedure relating to class action disputes read as follows:

> (b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
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> (1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of the members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED; NOTICE; JUDGMENT; ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.

(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. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each members that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion, may, if the member desires, enter an appearance through counsel.

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

of the Fourteenth Amendment may prohibit a court from determining the rights of an individual who has not been given the opportunity to opt out of an action. In short, courts must address certain procedural limitations before adjudicating mass tort disputes either through traditional or alternative dispute resolution methods.

II. THE ANTI-INJUNCTION ACT

A. *Pre-1948 Exceptions to the Anti-Injunction Act*

The All-Writs Act[5] authorizes a court to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[6] The Anti-Injunction Act,[7] originally passed as part of the Judiciary Act of 1793, directs federal courts to respect the sovereignty of state courts. The Act provides that a "court of the United States may not grant an injunction to stay proceedings in a state court."[8] Federal courts have construed the two acts jointly as providing a basis for injunctions against state court proceedings.[9]

Although a federal court's power to stay state court actions is discretionary, courts have traditionally viewed the Anti-Injunction Act as a bar to the issuance of an injunction.[10] There is little historical basis for a narrow interpretation of the Act, however, because there is no record of why the Act passed.[11]

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

FED. R. CIV. P. 23.

[5] 28 U.S.C. § 1651 (1994).

[6] *Id.* § 1651(a).

[7] 28 U.S.C. § 2283 (1994).

[8] *Id.*

[9] *See, e.g.*, Carlough v. Amchem Prods., Inc., 10 F.3d 189, 197 (3d Cir. 1993); *In re* "Agent Orange" Prod. Liab. Litig., 996 F.2d 1425, 1431 (2d Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994); *In re* Asbestos Sch. Litig., No. 83-0268, 1991 U.S. Dist. LEXIS 5142, at *4 (E.D. Pa. Apr. 16, 1991), *aff'd mem.*, 950 F.2d 723 (3d Cir. 1991).

[10] *See* 17 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4222 (1988).

[11] *See* Mitchum v. Foster, 407 U.S. 225, 231 (1972) ("The history of this provision in the Judiciary Act of 1793 is not fully known.") (quoting American State Papers, Misc., vol. 1, No. 17, pp. 21–36); Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398

In *Kline v. Burke Construction Co.*,[12] the United States Supreme Court interpreted the Anti-Injunction Act as recognizing the concurrent jurisdiction of state and federal courts.[13] In that case, a construction company brought suit for breach of contract in federal court, and the defendants subsequently filed an action in state court.[14] The federal district court refused to grant an injunction against the state proceeding, but the appellate court reversed. The Supreme Court upheld the district court's ruling, stating "where the action first brought is in personam and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded."[15] The Anti-Injunction Act purportedly "prevent[ed] needless friction between state and federal courts."[16]

There are numerous exceptions to the Anti-Injunction Act. The statute does not apply to in rem actions. Where a federal court has jurisdiction over a specific piece of property, the exercise of jurisdiction of another court over that same res necessarily interferes with the jurisdiction of the federal court.[17] Furthermore, the basis for jurisdiction for an in rem proceeding stems from control over the object in question, rather than from the presence of a person within specific territorial limits. Two courts cannot theoretically have in rem jurisdiction over the same piece of property.[18]

The Anti-Injunction Act does not apply to injunctions against matters which are filed in state court after a federal court has reached a decision. The Supreme Court differentiated the situation in *Kline*, which involved two concurrently pending matters, from one where a court had already reached a final judgment in one action. The court stated, "Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of *res judicata* [in the other court]."[19] Thus, the Anti-Injunction Act applies only to actions in progress, and a federal court can enjoin parties from relitigating future proceedings.[20]

U.S. 281, 284 (1970) ("[T]he reasons that led Congress to adopt this restriction on federal courts are not wholly clear . . . .").

[12] 260 U.S. 226 (1922).

[13] *See id.* at 235.

[14] *See id.* at 227.

[15] *Id.* at 230.

[16] Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 211, 286 (1970) (quoting Oklahoma Packing Co. v. Gas Co., 309 U.S. 4, 9 (1940)).

[17] *See* Kline v. Burke Constr. Co., 260 U.S. 226, 229 (1922).

[18] *See id.*

[19] *Id.* at 230.

[20] Courts are split as to whether the Anti-Injunction Act applies to state proceedings filed after the commencement of a federal suit but before a court has ruled on an injunction. *See*

Congress recognized the traditional in rem and relitigation exceptions in its most recent amendments to the Act. After the Supreme Court overruled the relitigation exception in *Toucey v. New York Life Insurance Co.*,[21] Congress modified the Anti-Injunction Act in 1948 to restore "the basic law as generally understood and interpreted prior to the *Toucey* decision."[22] The amended statute prohibits injunctions against state court proceedings except "as expressly authorized by Act of Congress, or where necessary in aid of [a court's] jurisdiction, or to protect or effectuate [a court's] judgments."[23] In short, although courts would hold the Anti-Injunction Act to be a bar to federal court interference in state court proceedings, there have traditionally been broad exceptions to that bar.

B. *The "Act of Congress" Exception*

The "Act of Congress" provision of the Anti-Injunction Act reflects Congress' intention to allow statutory exceptions. Prior to 1940, courts had recognized seven such exceptions to the Act: (1) bankruptcy proceedings, (2) the removal of state based claims, (3) limitations on the liability of shipowners, (4) federal interpleader actions, (5) farm mortgages, (6) habeus corpus proceedings and (7) price controls.[24] Today, the Act of Congress exception has been invoked in areas such as civil rights and antitrust proceedings where Congress has preempted state action.[25]

The Supreme Court defined what constitutes an "Act of Congress" in *Mitchum v. Foster*.[26] The City of Bay County, Florida, filed suit in state court to enjoin a bookstore from selling pornography.[27] The state court granted the injunction, and the bookstore owners filed a claim in federal court under 41 U.S.C. section 1983 (authorizing a suit in equity to redress a state intrusion on one's constitutional rights) alleging that the state court

generally 17 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4222 (1988).

[21] 314 U.S. 118 (1941).

[22] Mitchum v. Foster, 407 U.S. 225, 236 (1972) (quoting H.R. Rep. No. 308, 80th Cong., A181-182 (1947)).

[23] 28 U.S.C. § 2283 (1994).

[24] *See Mitchum*, 407 U.S. at 234-235.

[25] *See id.* at 242-243 (declaring civil rights statute to fall within the Act of Congress exception to the Anti-Injunction Act); Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 623-624 (1977) (divided court reversing lower court's decision holding that the Clayton Act, 15 U.S.C. § 26 (1994), falls within the Act of Congress exception to the Anti-Injunction Act), *clarification denied*, 434 U.S. 425 (1978), *and cert. denied*, 455 U.S. 921 (1982).

[26] 407 U.S. 225 (1972).

[27] *See id.* at 227.

action deprived him of rights guaranteed by the First and Fourteenth Amendments.[28] After convening a three-judge panel pursuant to 28 U.S.C. sections 2281 and 2284, the court refused to enjoin the state court proceeding because of the Anti-Injunction Act.[29] The Supreme Court reversed the lower court's decision, holding that 42 U.S.C. section 1983 fell within the Act of Congress exception to the Act.[30] In deciding what legislation constituted an Act of Congress the Court considered "whether . . . a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding."[31]

Several commentators have argued that Federal Rules can accord equitable remedies that fall within the Act of Congress exception to the Anti-Injunction Act.[32] Although courts have held that a rule of civil procedure does not create a right or remedy enforceable in a court of equity,[33] decisions by the Third Circuit imply that the court would allow an injunction to be brought under the exception.[34]

In *In re Glenn W. Turner Enterprises Litigation*,[35] purchasers of distributorships and franchises from Glenn Turner filed claims in a federal district court alleging that they had been defrauded by a pyramid scheme. At the same time, the attorneys general of forty-one states brought parallel actions in state courts against Mr. Turner. The federal district court later allowed the attorneys general to intervene in the federal action provided that they restrained their state court proceedings. The Kentucky Court of Appeals affirmed a state court injunction against Turner, and the Kentucky Attorney General moved to amend the federal district court's order.[36] The district court denied the motion, and the Third Circuit reversed.[37]

The Third Circuit cited *Mitchum* and noted that Rule 23(b)(3), which provides an "opt-out" mechanism for class members, could not be given its "intended scope by the stay of a state court proceeding."[38] In other words, Rule 23(b)(3), by expressly allowing parallel proceedings to a federal class

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[28] *See id.*

[29] *See id.* at 227-228.

[30] *See id.* at 242-243.

[31] *Id.* at 238.

[32] *See* Edward F. Sherman, *Class Actions and Duplicative Litigation*, 62 IND. L.J. 507, 529 (1987) (citing Steven Larimore, *Exploring the Interface Between Rule 23 Class Actions and the Anti-Injunction Statute Reconsidered*, 18 GA. L. REV. 259, 268 (1971)).

[33] *See id.*

[34] *See In re* Glenn W. Turner Enter. Litig., 521 F.2d 775 (3d Cir. 1975).

[35] 521 F.2d 775 (3d Cir. 1975).

[36] *See id.* at 777-778.

[37] *See id.* at 778.

[38] *Id.* at 780-781 (quoting *Mitchum*, 407 U.S. at 238 (1972)).

action suit, would prohibit a federal court from issuing an injunction. Conversely, Rule 23(b)(1) and Rule 23(b)(2), which do not provide an opt-out mechanism, can only achieve their intended objectives by restricting all state court actions.[39]

Courts have suggested that Rule 23 represents a clear intention on the part of Congress to preempt state action. The District Court for the Eastern District of Pennsylvania, in *In re Asbestos School Litigation*,[40] noted that the Supreme Court had modified its position regarding the "outcome determinative test" of *Erie Railroad Co. v. Tompkins*[41] and would allow a federal court to enjoin state proceedings in the context of a class action dispute.[42] Where a federal rule applies to a particular situation, "the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions."[43] The Third Circuit qualified the district court decision by maintaining that federal courts should not "bury" state actions under the "vast expense of a federal class action."[44] However, if Congress intended Rule 23(b)(1) and Rule 23(b)(2) to give federal courts exclusive jurisdiction over no-opt-out class action proceedings, district courts must be able to issue injunctions.

While there is indirect support for allowing a court to issue an injunction against state proceedings under the Act of Congress exception to the Anti-Injunction Act, no court has expressly stated that Rule 23 provides an equitable remedy which meets the test outlined in *Mitchum*. Courts are more likely to allow an injunction brought under the "in aid of jurisdiction" and "to effectuate judgments" exceptions discussed below.[45]

C. *The "In Aid of Jurisdiction" Exception*

The "in aid of jurisdiction" provision of the Anti-Injunction Act embodies the pre-1948 in rem exception to the Act.[46] Courts continue to

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[39] *See* Sherman, *supra* note 32, at 531.

[40] 107 F.R.D. 215 (E.D. Pa. 1985), *aff'd mem.*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986).

[41] 304 U.S. 64 (1948).

[42] *See In re* Abestos Sch. Litig., 107 F.R.D. at 226.

[43] *Id.* (quoting Hanna v. Plummer, 380 U.S. 460, 471 (1965)), *aff'd in part*, 789 F.2d 996 (3d Cir. 1986).

[44] *In re* Asbestos Sch. Litig., 789 F.2d 996, 1007 (3d Cir. 1986).

[45] *See* discussion *infra* Parts II.B. and II.C.

[46] *See* 17 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4225 (1988).

respect the notion that two courts cannot have concurrent jurisdiction over the same res. Courts have expanded their interpretation of the concept to include in personam cases where "relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case."[47]

Most courts will not issue an injunction merely because a judgment in one court may impair the ability of a party in another court to collect damages. In *In re Federal Skywalk Cases*,[48] the Eighth Circuit rejected the argument that a corporation's assets should be treated as a res, giving the court exclusive jurisdiction over the matter.[49] In 1981, two skywalks in the central lobby of the Hyatt Regency Hotel in Kansas City collapsed, killing 114 people and injuring others. Victims filed class action claims for compensatory and exemplary damages in both state and federal courts. One of the parties in federal court moved to enjoin the state court action out of the concern that there would be inadequate funds to satisfy a judgment in his favor.[50] The district court granted the injunction, but the Eighth Circuit reversed, concluding that "the class has an uncertain claim for punitive damages against defendants who have not conceded liability."[51]

Other courts have not always followed the *Skywalk* decision. The Fifth Circuit approved an injunction against state courts in *In re Corrugated Container Antitrust Litigation*.[52] Purchasers of corrugated containers filed a price-fixing claim against manufacturers. After certifying the class,[53] several of the plaintiffs filed a parallel action in state court claiming a violation of state antitrust laws.[54] The district court enjoined the plaintiffs from continuing the state claim, and the Fifth Circuit affirmed.[55] The circuit court held that state proceedings would interfere with the federal court's ability to approve any settlement.[56]

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[47] Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 295 1975).

[48] 680 F.2d 1175 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982).

[49] *See id.* at 1182-1183.

[50] *See id.* at 1177-1178.

[51] *Id.* at 1182.

[52] 659 F.2d 1332 (5th Cir. 1981), *cert. denied*, 456 U.S. 936 (1982).

[53] *See In re* Corrugated Container Antitrust Litig., 80 F.R.D. 244, 245 (S.D. Tex. 1978), *aff'd*, 659 F.2d 1332 (5th Cir. 1981).

[54] *See In re* Corrugated Container Antitrust Litig., 659 F.2d 1332, 1334 (5th Cir. 1981), *cert. denied*, 456 U.S. 998 (1982).

[55] *See id.* at 1336.

[56] *See id.* at 1335.

Drawing on *Corrugated Container*,[57] the Second Circuit, in *In re Baldwin-United Corp.*,[58] held that a court may grant an injunction in a class action proceeding when settlement is imminent. In that case, the holders of Baldwin single-premium deferred annuities filed claims against brokers alleging violations of securities laws. Negotiations led to settlements by a majority of the brokers. State attorneys general concluded that claimants were not adequately represented and commenced state administrative proceedings. In return for a higher settlement, the attorneys general offered to end their efforts.[59] The district court issued an injunction against the state court proceedings and the Second Circuit affirmed.[60] While recognizing that courts may have concurrent jurisdiction over in personam proceedings, the court compared the settlement process to in rem actions.[61] The court held, "it is intolerable to have conflicting orders from different courts."[62] The court stated that the parallel actions were "harassing" and "frustrated efforts to craft a settlement."[63]

The Third Circuit approved the use of an injunction against state proceedings in *Carlough v. Amchem Products, Inc.*[64] A group of asbestos victims filed personal injury claims against manufacturers. The parties reached a proposed settlement, but the court had to stay settlement hearings in order to consider the effect of a parallel action filed in Virginia state courts. The district court granted an injunction against the state proceedings.[65] The Third Circuit affirmed, noting the trend to approve an injunction in cases where "the existence of actions in [the] state court jeopardizes its ability to rule on the settlements."[66]

Despite significant precedent taking advantage of the in aid of jurisdiction exception to the Anti-Injunction Act, it does not necessarily follow that courts will stay state court proceedings in no-opt-out class action situations under Rule 23(b)(1). Previous rulings involved Rule 23(b)(3) certifications[67] or hybrid actions involving Rule 23(b)(3) certifications for

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[57] 659 F.2d 1332 (5th Cir. 1981).

[58] *See In re* Baldwin-United Corp., 770 F.2d 328, 335 (2d Cir. 1985).

[59] *See id.* at 331-333.

[60] *See id.* at 341-342.

[61] *See id.* at 335 (citing Kline v. Burke Constr. Co., 260 U.S. 226, 229 (1922)).

[62] *Id.* at 336 (quoting 17 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4225 at 105 n.8 (Supp. 1985)).

[63] *Baldwin-United Corp.*, 770 F.2d at 337.

[64] 10 F.3d 189 (3d Cir. 1993).

[65] *See id.* at 193-194.

[66] *Id.* at 203 (quoting *Baldwin-United Corp.*, 770 F.2d at 333).

[67] *See generally* Carlough v. Amchem Prods., Inc., 10 F.3d 189 (3d Cir. 1993); *Baldwin-United Corp.*, 770 F.2d 328; *Corrugated Container*, 643 F.2d 195.

compensatory damages and Rule 23(b)(1) certifications for punitive damages.[68]

Judge Weinstein in the Eastern District of New York issued an injunction against state proceedings which interfered with the settlement of a no-opt-out class action.[69] In *In re Joint Eastern and Southern District Asbestos Litigation*,[70] a manufacturer of asbestos products sought an alternative to bankruptcy by moving for certification of a class pursuant to Rule 23(b)(1)(B).[71] A court-appointed expert reviewed the financial condition of the manufacturer and verified that there was "a substantial probability that claims of earlier litigants would exhaust [the company's assets]."[72] The judge conditionally approved the class certification and issued an injunction against other pending state proceedings.[73]

Judge Weinstein noted that not only would the defendant likely go bankrupt if the court allowed parallel proceedings, but all of the victims might not receive the same treatment.[74] Reiterating the reasoning found in cases considering actions under Rule 23(b)(3), the judge compared the limited fund available to potential claimants to a res which could effectively be under the jurisdiction of only one court.[75] The court concluded by criticizing *Skywalk* and maintaining that the necessary in aid of jurisdiction exception to the Anti-Injunction Act justifies a stay of state proceedings.[76]

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[68] *See In re* Agent Orange Prod. Liab. Litig., 818 F.2d 145, 154 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988); *In re* Sch. Asbestos Litig., 789 F.2d 996, 998 (3d Cir.), *cert. denied*, 479 U.S. 915 (1986). The court in *School Asbestos* approved an injunction against state proceedings; however, the court decertified the class under FED. R. CIV. P. 23(b)(1). *See id.* at 1007, 1011.

[69] 134 F.R.D. 32, 37–40 (E.D.N.Y. 1990).

[70] *Id.*

[71] *See id.* at 34.

[72] *Id.* at 34-35.

[73] *See id.* at 35.

[74] *See id.* at 33-34.

[75] *See id.* at 37-38.

[76] *See In re* Joint E. and S. Dist. Asbestos Litig., 134 F.R.D. 32, 37-40 (E.D.N.Y. 1990) (citing *In re* Dennis Greenman Sec. Litig., 829 F.2d 1539, 1544 (11th Cir. 1987) (finding "the [Anti-Injuction Act] not a bar to class certification"); *In re* Federal Skywalk Cases, 680 F.2d 1175, 1192 (8th Cir. 1982) (Heaney, J. dissenting) ("It seems self-evident that an injunction to protect the ordinary scope of a mandatory class action is 'necessary in aid of' the federal jurisdiction over such a class."), *cert. denied*, 459 U.S. 988 (1982); *In re* Dennis Greenman Sec. Litig., 622 F. Supp. 1430, 1449 n.15 (S.D. Fla. 1985), *rev'd on other grounds*, 829 F.2d 1539 (11th Cir. 1987) (disagreeing with reasoning of *Skywalk* majority and certifying class for settlement); *In re* Asbestos Sch. Litig., 104 F.R.D. 422, 436 (E.D. Pa. 1984), *modified sub nom. on other grounds*, *In re* Sch. Asbestos Litig., 789 F.2d 996 (3d Cir.

One might interpret *In re School Asbestos Litigation*[77] as indicating that the Third Circuit might not allow an injunction against state proceedings in no-opt-out class situations. In *School Asbestos*, a group of school districts filed claims against asbestos manufacturers. The district court certified a no-opt-out class for punitive damages, but the Third Circuit reversed, stating concerns regarding the Anti-Injunction Act.[78] The court did not, however, go as far as to say that it would never allow an injunction in a case involving a mandatory class. The court stated that the district court had not done adequate fact-finding to determine whether there was a limited fund which might impair a recovery by future claimants.[79] Furthermore, the court did not accept the "limited generosity theory," which holds that a defendant should not have to pay repetitive punitive damage awards.[80]

In circuits that have not considered whether to allow an injunction against parallel proceedings for a class certified under Rule 23(b)(1), there is a strong argument in favor of granting such an injunction. The arguments for granting an injunction in opt-out and no-opt-out class actions are essentially the same: parallel actions interfere with a court's ability to approve a settlement agreement. Finally, an analogy to in rem actions is even stronger where the court is dealing with a limited fund under Rule 23(b)(1)(B).

1986); Robert C. Gordon, *The Optimum Management of the Skywalks Mass Disaster Litigation by Use of the Federal Mandatory Class Action Device*, 52 U.M.K.C. L. REV. 215, 231-232 (1984) (noting that several articles have described the Eighth Circuit's decision as "unreasonable," "untenable," "arcane," "obscure," "unnecessarily narrow" and "inequitable"); Note, *Class Certification in Mass Accident Cases Under Rule 23(b)(1)*, 96 HARV. L. REV. 1143, 1159-1161 (1983) (stating certification of mandatory class comes within "necessary in aid of jurisdiction" exception to the Anti-Injuction Act); Note, *Mechanical and Constitutional Problems in the Certification of Mandatory Multistate Mass Tort Class Actions Under Rule 23*, 49 BROOKLYN L. REV. 517 (finding compelling reasons for conclusion that "necessary in aid of jurisdiction" exception allows mandatory class certification).

[77] 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 915 (1986).

[78] *See id.* at 998, 1002.

[79] *See id.* at 1003 ("Because plaintiffs had presented no evidence that the defendant's available assets would be insufficient to pay all claims, the district court did not rely on a 'limited fund' theory as a basis for class certification.").

[80] *See id.* at 1003-1007.

D. *The "To Protect or Effectuate Judgments" Exception*

1. *Actually Litigated?*

The Supreme Court has long recognized that matters decided regarding a class in one suit may not be relitigated in a subsequent action. For example, in *Supreme Tribe of Ben-Hur v. Cauble*,[81] beneficiaries of a mortuary pre-need trust fund brought suit in federal court against a fraternal benefit association regarding maintenance of trust fund proceeds and a proposed reorganization of the association.[82] The district court dismissed the action, and the beneficiaries filed suit in an Indiana state court.[83] The benefit association sought an injunction in federal court against the state court proceeding.[84] The district court refused to grant the injunction for want of jurisdiction, but the Supreme Court reversed.[85]

While only expressly ruling on jurisdictional issues, the Supreme Court considered the res judicata effect of the previous class action decision.[86] The Court held that interests of efficiency in a class action proceeding outweighed the right of individual claimants to have their day in court.[87] The Court concluded that a "decree binds [all the members of a class] as if all were before the court."[88] The Court noted that had the situation been reversed, the state court decision would have been binding on the federal courts.[89] The class action mechanism will not work if members are allowed to contest a previous action in a subsequent proceeding.[90] The Court observed, "[i]f [a] decree is to be effective and conflicting judgments are to be avoided all of the class must be concluded by the decree."[91]

The third exception to the Anti-Injunction Act, "to protect or effectuate judgments," codified the pre-1948 exception for staying state court proceedings to prevent relitigation of a previous federal court ruling.[92]

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[81] 255 U.S. 356 (1921).

[82] *See id.* at 360-361.

[83] *See id.* at 361-362.

[84] *See id.* at 362.

[85] *See id.* at 362, 367.

[86] *See id.* at 366-367.

[87] *See id.* at 365-367.

[88] *Id.* at 363 (quoting Smith v. Swormstedt, 57 U.S. 288, 303 (1850)).

[89] *See id.* at 362.

[90] *See id.* at 366-367.

[91] *Id.* at 367.

[92] *See* 17 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4226 (1988). *See generally* 7A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1780 (1986 & Supp. 1996).

However, the recent Supreme Court decision in *Chick Kam Choo v. Exxon Corp.*,[93] has caused some confusion as to how broadly courts should interpret the exception.[94] Courts are divided as to whether the relitigation exception applies to the same situations as did issue preclusion and claim preclusion prior to *Toucey* or whether the exception applies only to matters "actually decided."[95]

In *Chick Kam Choo*, a Singapore resident was killed while working on a ship, and the decedent's wife sued the owner in federal court.[96] The court granted a motion for summary judgment in favor of the owner on the basis that Singapore law governed the dispute and on forum non conveniens grounds.[97] The widow then sued in state court, but the federal court issued an injunction against the state proceeding.[98] The appellate court affirmed, but the Supreme Court reversed, declaring that the district court's injunction was unnecessarily broad.[99]

Although not expressly stated in the opinion, the underlying concern in *Chick Kam Choo* was that the court would be predetermining the res judicata effect of its judgment by the issuance of an injunction against future proceedings.[100] Claim preclusion and issue preclusion normally would prevent relitigation of a matter already decided regardless of an injunction, and the ability of a person to initiate a subsequent proceeding to determine the merits of the res judicata defense complies with due process requirements. On the other hand, an injunction against a parallel state court proceeding deprives a person of his day in court and may bind him to a judgment where he did not have adequate representation. The due process concern is even more acute in class action situations where a person is

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[93] 486 U.S. 140 (1988).

[94] *See* 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4414 (1981).

[95] *See* 17 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4226, at 202 n.12.1 (Supp. 1996).

[96] *Chick Kam Choo*, 486 U.S. at 142.

[97] *See id.* at 202-204 (citing Deus v. Allstate Ins. Co., 15 F.3d 506 (5th Cir.), *cert. denied*, 115 S. Ct. 573 (1994)); LCS Serv. Inc. v. Hamrick, 925 F.2d 745 (4th Cir. 1991); Staffer v. Bouchard Transp. Co., 878 F.2d 638, 643 (2d Cir. 1989); *see also In re* Bolar Pharmaceutical Co., MDL No. 849, 1994 U.S. Dist. LEXIS 9236, at *16 (E.D. Pa. July 5, 1994).

[98] *See Chick Kam Choo*, 486 U.S. at 143-144.

[99] *See id.* at 144-145, 151.

[100] *See id.* at 147-148.

supposedly guaranteed the opportunity to question the validity of class certification in later proceedings.[101]

The "actually decided" requirement of *Chick Kam Choo* restrains the power of a court to issue an injunction by adopting a stricter standard than that involving claim preclusion. Claim preclusion would normally prevent relitigation between two parties of any matters regarding a common nucleus of operative fact, whether or not the issue was actually decided in a previous suit.[102] The "actually decided" exception applies only to issue preclusion where a nonparty to a previous action tries to enforce a previous decision against a party to that action.[103] Although not prohibiting injunctions against state proceedings altogether, *Chick Kam Choo* crafted a hybrid standard based on issue preclusion and claim preclusion in order to restrict the power of federal courts to predetermine the res judicata effect of their decisions.[104]

Professors Wright and Miller argue that applying the actually decided test to situations involving claim preclusion is "unduly restrictive."[105] The professors maintain, "[t]he *Chick Kam Choo* opinion is ambiguous and does not show that a distinction between claim preclusion and issue preclusion was really considered or intended."[106] Whether or not the professors' interpretation is correct, many courts seem to have adopted the actually decided requirement.[107] The professors cite only one circuit court which has given *Chick Kam Choo* a broader reading.[108]

In summary, there is a split of opinion concerning the meaning of *Chick Kam Choo*. Although there is ample evidence to support an interpretation of the relitigation exception to the Anti-Injunction Act as understood prior to

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[101] *See generally* 7A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1779 (1986 & Supp. 1996).

[102] *See* 17 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4414 (1981).

[103] *See id.* § 4416.

[104] *See Chick Kam Choo*, 486 U.S. at 146–148.

[105] 17 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4226, at 202 n.12.1 (Supp. 1996).

[106] *Id.*

[107] *See id.* at 202-204 (citing Deus v. Allstate Ins. Co., 15 F.3d 506 (5th Cir.), *cert. denied*, 115 S. Ct. 573 (1994)); LCS Serv. Inc. v. Hamrick, 925 F.2d 745 (4th Cir. 1991); Staffer v. Bouchard Transp. Co., 878 F.2d 638, 643 (2d Cir. 1989); *see also In re* Bolar Pharmaceutical Co., MDL No. 849, 1994 U.S. Dist. LEXIS 9236, at *16 (E.D. Pa. July 5, 1994).

[108] *See* 17 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4226, at 202 n.12.1 (Supp. 1996) (citing Western Sys., Inc. v. Ulloa, 958 F.2d 864, 870 (9th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993)).

the 1948 amendments, many courts have adopted an actually decided requirement to issue an injunction. In any case, a settlement decree constitutes a final judgment, and a court should interpret the settlement's res judicata effect according to the intent of the parties.[109]

2. *No-Opt-Out Class Action Disputes*

Decisions involving no-opt-out class action disputes have been contradictory or inconclusive at best. In *Grimes v. Vitalink Communications Corp.*,[110] the Third Circuit enforced a state-approved settlement decree involving a no-opt-out class action.[111] In *Grimes*, shareholders of Vitalink Communications filed actions in California and Delaware contesting a merger between Vitalink and Network Systems Corporation.[112] The plaintiffs in both states stipulated to a settlement agreement, the Delaware court certified the settlement class under Court of Chancery Rules 23(b)(1) and 23(b)(2),[113] and the Supreme Court denied a petition for certiorari.[114] Prior to the Supreme Court's denial of review, shareholders filed suit in federal court alleging breach of federal securities laws.[115] The district court granted a motion for summary judgment in favor of Vitalink because the state court settlement barred all future claims, and the United States Constitution[116] and the Full Faith and Credit Act[117] required that the court respect state decisions.[118] The Third Circuit upheld the lower court decision finding no due process violation and approving the broad preclusive effect of the settlement agreement.[119]

Despite the fact that *Grimes* treats whether a federal court should view a broad state-approved settlement agreement as res judicata, the Third Circuit relied on cases involving federal injunctions of state court

[109] *See* 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4443 (1981).

[110] 17 F.3d 1553 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 480 (1994).

[111] *See id.* at 1561.

[112] *See id.* at 1554.

[113] DEL. R. ANN. RULE 23. The Court of Chancery Rule 23 is "virtually identical" to FED. R. CIV. P. 23. *See Grimes*, 17 F.3d at 1555 n.2.

[114] *Grimes*, 17 F.3d at 1554-1555.

[115] *See id.* at 1556.

[116] U.S. CONST. art. IV, § 1.

[117] 28 U.S.C. § 1738 (1988).

[118] *See Grimes*, 17 F.3d at 1556 n.4.

[119] *See id.* at 1564.

proceedings.[120] Although the circuit court cited these cases for the proposition that a federal court may approve a settlement agreement precluding relitigation of state based claims, two of the cases deal specifically with granting an injunction "to protect and effectuate judgments."[121] In *Class Plaintiffs v. Seattle*,[122] the court granted an injunction under the relitigation exception to the Anti-Injunction Act at the same time it approved a settlement agreement.[123] In *In re Corrugated Container Antitrust Litigation*,[124] the court granted an injunction against state proceedings shortly after approval of a settlement agreement.[125] The Third Circuit concluded in *Grimes* that enforcing the preclusive effect of a settlement agreement served the "important policy interest of judicial economy."[126]

The Second Circuit has come out squarely in favor of allowing injunctions in mandatory class situations. In *In re "Agent Orange" Product Liability Litigation*,[127] veterans from the Vietnam War sued the manufacturers of the defoliant Agent Orange.[128] The claims were consolidated in the District Court for the Eastern District of New York under Judge Weinstein.[129] The court certified a class with opt-out rights for compensatory damages and a limited fund, no-opt-out class for punitive damages.[130] The court granted summary judgment against the opt-out plaintiffs and approved a broad settlement agreement including "persons who have not yet manifested injury."[131] Subsequently, two class action proceedings were filed in state court.[132] A federal court allowed removal of the claims and transferred them to the Eastern District of New York.[133] The

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[120] *See id.* at 1563 (citing Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1287-1288 (9th Cir. 1985), *cert. denied*, 506 U.S. 953 (1992); *In re* Corrugated Container Antitrust Litig., 643 F.2d 195, 221-222 (5th Cir. 1981), *cert. denied*, 456 U.S. 998 (1982)).

[121] *Class Plaintiffs*, 955 F.2d at 1287-1290; *Corrugated Container*, 643 F.2d at 221-222.

[122] *Class Plaintiffs*, 955 F.2d at 1268.

[123] *See id.* at 1279.

[124] 659 F.2d 1322 (5th Cir. 1981).

[125] *See id.* at 1334-1336.

[126] *Grimes*, 17 F.3d at 1563 (quoting TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456, 460 (2d Cir. 1992)).

[127] 996 F.2d 1425 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1126 (1994).

[128] *See id.* at 1428.

[129] *See id.*

[130] *See id.*

[131] *Id.* at 1429.

[132] *See id.* at 1430.

[133] *See id.*

district court dismissed the claims as barred by the previous settlement and issued an injunction against the filing of future claims by class members.[134] The circuit court approved the decision.[135]

In considering whether removal of the cases violated the Anti-Injunction Act, the court concluded that the action fell within the "necessary in aid of jurisdiction" exception to the Act.[136] The court emphasized that the district court had continuing jurisdiction over the case in order to oversee the disbursement of funds under the settlement agreement.[137] The court held, "[i]n a class action, the district court has a duty to class members to see that any settlement it approves is completed, and not merely to approve a promise."[138] The court pointed out that the settlement included "persons who have not yet manifested injury" and precluded all relitigation of claims.[139]

In summary, the Anti-Injunction Act would seem to allow courts to stay parallel proceedings to aid in the settlement of a class action dispute. Although commentators have suggested that the Federal Rules can accord equitable remedies which would preempt state action, no federal court has ever declared Rule 23 to fall within the "Act of Congress" exception[140] to the Anti-Injunction Act.[141]

On the other hand, there is growing support for allowing injunctions under the "necessary in aid of jurisdiction" and "to protect or effectuate judgments" exceptions. Some circuits would likely stay court proceedings in a mandatory class situation or where a company is on the verge of bankruptcy. Without a clear decision on the part of the Supreme Court, however, efforts at settlement in mass tort situations will be difficult.

III. DUE PROCESS CONCERNS

A. *The Minimum Contacts Requirement*

While the Supreme Court has developed substantial jurisprudence regarding a defendant's due process rights, it has largely ignored the

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[134] *See id.*

[135] *See id.* at 1439.

[136] *Id.* at 1431.

[137] *See id.* at 1432.

[138] *Id.* (citing *In re* Corrugated Container Antitrust Litig., 752 F.2d 137, 141 (5th Cir.), *cert. denied*, 473 U.S. 911 (1985)).

[139] *Id.*

[140] *See* discussion *infra* part II.B.

[141] *See* discussion *infra* part II.C. and II.D.

parallel question of what safeguards a court must accord a plaintiff.[142] Generally, a plaintiff consents to the jurisdiction of a particular forum when the plaintiff initiates an action.[143] Courts have only considered a defendant's due process rights since the defendant is the only one likely to object.[144]

The United States Supreme Court considered a plaintiff's due process rights for the first time in *Perkins v. Benguet Consolidated Mining Corporation.*[145] The Court held that a foreign plaintiff state may assert jurisdiction over a defendant who has substantial contacts with a forum but maintains its principal place of business elsewhere.[146] A foreign corporation owning mines in the Philippines moved much of its management activities to Ohio during the Japanese occupation of the islands during the Second World War.[147] A non-Ohio citizen served summons on the president of the corporation in Ohio regarding a matter which arose outside of the state.[148] The Ohio Supreme Court quashed the summons, but the Supreme Court reversed the decision, holding that a state may assert jurisdiction over a defendant who has substantial and continuous contacts with the forum.[149] The Court largely ignored the citizenship of the plaintiff and concentrated on the "overall fairness" to the defendant and maintained that a person who does substantial business in a forum should be amenable to suit there.[150]

In *McGee v. International Life Insurance Co.*[151] and *Hanson v. Denkla,*[152] the United States Supreme Court indirectly considered the rights of a plaintiff by gauging a state's "manifest interest" in adjudicating a matter by the plaintiff's contact with a forum.[153] In *McGee,* a nonresident defendant sold an insurance agreement to a resident of California and later refused to honor a claim by the insured.[154] Noting the interest California

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[142] *See* Linda S. Mullenix, *Symposium, Fifty Years of* International Shoe*: The Past and Future of Personal Jurisdiction: Class Actions, Personal Jurisdiction, and Plaintiffs' Due Process: Implications for Mass Tort Litigation,* 28 U.C. DAVIS L. REV. 871, 887–890 (1995).

[143] *See id.*

[144] *See id.*

[145] 342 U.S. 437 (1952).

[146] *See id.* at 444–447.

[147] *See id.* at 447.

[148] *See id.* at 438, 446.

[149] *See id.* at 438, 445, 449.

[150] *See id.* at 444–447.

[151] 355 U.S. 220 (1957).

[152] 357 U.S. 235 (1958).

[153] *See Hanson,* 357 U.S. at 251-255; *McGee,* 355 U.S. at 223-224.

[154] *See McGee,* 355 U.S. at 221-222.

had in providing effective redress for its residents, the Supreme Court upheld California's assertion of jurisdiction over the foreign party.[155]

The Supreme Court reached the opposite result in *Hanson*, however, when it held that Delaware did not have to give full faith and credit to a Florida decision regarding the status of a will because Florida did not have jurisdiction over an "indispensable party" to the action, a Delaware trust company.[156] The Supreme Court held that Florida's interest in the matter did not rise to the same level of importance as that of California in *McGee*.[157] Furthermore, the suit did not arise from "a privilege the defendant exercised in Florida."[158] The Court held that despite a number of contacts with Florida, a party must "purposely avail" himself of a particular forum to be amenable to suit there.[159] Taken together, *McGee* and *Hanson* suggest that although a plaintiff's interest should be a factor in determining whether jurisdiction is proper, a forum cannot acquire jurisdiction automatically by being the place where most of the events in a particular matter took place.

The Supreme Court stated that a court should consider a plaintiff's interest as one factor among many in determining whether a defendant should be subject to jurisdiction in *World-Wide Volkswagen Corp. v. Woodson*.[160] Drivers of a Volkswagen car were involved in an accident while on vacation in Oklahoma and instituted a products liability suit against both the New York automobile retailer and wholesaler.[161] The retailer and wholesaler appealed, claiming that it was unreasonable for Oklahoma to assert jurisdiction over them because they did no business in that state.[162] The Court recognized that a plaintiff had a strong interest in "obtaining convenient and effective relief."[163] However, the Supreme Court rejected the idea that defendants should be liable for any "foreseeable" acts arising out of the sale of their products.[164] Drawing on the "purposeful availment test" used in *Hanson*, the Court held that only forums where defendants "deliver[ed] [their] products into the stream of commerce with

155 *See id.* at 223-224.

156 *See Hanson*, 357 U.S. at 254-255.

157 *See id.* at 252-253.

158 *Id.* at 252.

159 *See id.* at 253.

160 444 U.S. 286, 292 (1980).

161 *See id.* at 288.

162 *See id.* at 288-290.

163 *Id.* at 292.

164 *See id.* at 295-298.

the expectation that they will be purchased by consumers"[165] could assert jurisdiction.

The Supreme Court has been much more willing to overlook a defendant's minimum contacts with a forum state and give more weight to a plaintiff's interests where the matter in question arises directly out of a defendant's contacts with a forum. In *Keeton v. Hustler Magazine, Inc.*,[166] the defendant distributed pornographic material in Maine which libeled the plaintiff.[167] The Supreme Court upheld jurisdiction over the magazine, holding that it had actively marketed its goods in Maine and should have expected such a cause of action.[168] Despite the fact that the plaintiff had engaged in blatant forum-shopping,[169] the Court held that it had never required plaintiffs to have minimum contacts with a particular forum.[170]

In summary, the Supreme Court has stated that a plaintiff's due process rights are a non-issue except in the context of evaluating the due process rights of a defendant. The Supreme Court has considered the interest of a plaintiff indirectly and has gone as far as to say that it should be a factor in deciding whether to allow jurisdiction over a defendant. A plaintiff's interests are given considerable weight where the defendant's contact with a forum directly relates to a cause of action, but, in the end, a plaintiff's right to chose a particular forum to redress his grievances will never overshadow the rights of a defendant.

B. *Due Process in Opt-Out Class Action Suits*

The recent explosion of class action litigation has prompted courts to take a new look at plaintiffs' due process rights. Defendants have sought to challenge the validity of a class certification by objecting to the procedure used to notify absent class members.[171] Plaintiffs have objected to inclusion in a class when they wish to pursue their own private right of action.

Class action suits by their very nature must entail some exception to in personam jurisdiction.[172] Class action suits are an invention of equity courts to enable actions to proceed where the interests of the participants are so similar that it does not make sense to pursue separate actions, but the usual

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[165] *Id.* at 297-298.

[166] 465 U.S. 770 (1984).

[167] *See id.*

[168] *See id.* at 779-781.

[169] Maine was the last state in which the statute of limitations had not run.

[170] *See Keeton*, 465 U.S. at 779-780.

[171] *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 800 (1985).

[172] *See* Hansberry v. Lee, 311 U.S. 32, 40-43 (1940).

process of joinder would be impracticable.[173] The United States Supreme Court has held that there is no due process violation for absent members when "they are in fact adequately represented by the parties who are present . . . ."[174]

Although the due process jurisprudence regarding in personam jurisdiction developed separately from that involving class action disputes, the Supreme Court has used similar language in evaluating the two situations. In *Hansberry v. Lee*, the Supreme Court stated, "[T]his Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it."[175] As in cases involving in personam jurisdiction, the Court would consider the facts of each case individually, weighing a myriad of factors in order to determine whether there has been a constitutional violation. In both types of disputes the main object is mainly one of "fundamental fairness."

In *Phillips Petroleum v. Shutts*,[176] the Court considered what type of notice requirements had to be given to absent plaintiffs in an opt-out class situation.[177] Individuals who owned royalty rights from the sale of natural gas brought suit against producers.[178] The state trial court certified a class of 33,000 royalty owners. The class representative provided notice to absent class members by first-class mail and gave each person the right to opt-out of the class.[179] Despite the fact that ninety-nine percent of the leases and ninety-seven percent of the royalty owners had no connection with the forum state, the Supreme Court found that the notice and opt-out procedures did not violate the plaintiffs' due process rights and held the state decision as res judicata with respect to any future claims.[180]

In *Shutts*, the Supreme Court held that plaintiffs' due process rights in a class action deserved more attention than in a suit brought in personam, but maintained that their rights did not face the same threat of abuse as those of defendants in non-class civil suits.[181] The Court noted that the requirements of *Hansberry* already provided a certain level of protection for the plaintiff.[182] In addition, the Supreme Court asserted that a class action

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[173] *See id.* at 41-42.
[174] *Id.* at 42-43.
[175] *Id.* at 42.
[176] 472 U.S. 797 (1985).
[177] *See id.* at 806.
[178] *See id.* at 799.
[179] *See id.* at 801.
[180] *See id.* at 814.
[181] *See id.* at 812.
[182] *See id.* at 808.

plaintiff must be given adequate notice[183] and an opportunity to opt-out of an action.[184]

The Court cautioned against "confusing" the predicament of a non-class defendant with that of a class plaintiff.[185] The Court rejected the *International Shoe Co. v. Washington*[186] line of cases. Unlike a defendant who may be forced to defend an action far away from his primary place of residence,[187] a class plaintiff may "sit back and allow the litigation to run its course . . . ."[188] The Supreme Court noted that in many cases a plaintiff would not be able to bring an action on his own and benefited greatly from the class action device.[189] Although the Court recognized that a class plaintiff may be bound by an adverse judgment foreclosing any individual suit,[190] the Supreme Court maintained that the procedural safeguards it had established more than protected the interests of an absent plaintiff.[191] The plaintiff would have adequate counsel, his interests would have to be identical to the class representative and he could always pursue a separate individual action if he so desired.

The Supreme Court carefully delineated the scope of its decision. The Court stated that its holding addressed only claims wholly or predominantly for money damages.[192] The Court refused to make any statement regarding suits seeking equitable relief.[193] The Court's decision applies only to non-mandatory class situations[194] and did not state whether similar procedures should apply to a federal court.

In short, the Supreme Court has shown little concern for the due process rights of plaintiffs in both in personam cases and class action disputes. There is some sense that the plaintiff is master of his own destiny, and procedural mechanisms already in place provide adequate protection.

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[183] *See id.* at 812 (stating that notice must be "reasonably calculated, under all circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections") (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-315 (1950)).

[184] *See id.* at 812.

[185] *See id.*

[186] 326 U.S. 310 (1945).

[187] *See* Shutts, 472 U.S. at 807.

[188] *Id.* at 810.

[189] *See id.* at 809.

[190] *See id.* at 807.

[191] *See id.* at 811.

[192] *See id.* at 811-812 n.3.

[193] *See id.*

[194] *See id.* at 814-815.

The question remains, however, whether the Supreme Court will apply the same type of reasoning to mandatory class situations.

C. *Due Process Concerns in Mandatory Class Situations*

Despite the Supreme Court's insistence that class action plaintiffs do not face the same problems as non-class defendants,[195] many courts continue to apply the traditional "minimum contacts" test in deciding whether to assert jurisdiction over absent plaintiffs in a class certified under Rules 23(b)(1) and 23(b)(2).[196] Courts have also refused to enforce injunctions against future proceedings for similar reasons.[197] A mandatory class is only effective if all potential plaintiffs are included in an action and the court's decision is res judicata with respect to all future claims. Without such certainty the mandatory class differs very little from the opt-out class. The disparity of court opinions has eviscerated the no-opt-out class mechanism.

The problems posed by differing interpretations of the Fourteenth Amendment with respect to absent plaintiffs in a mandatory class are illustrated in *Brown v. Ticor Insurance Co.*[198] Twelve class actions were filed in five federal courts in four states alleging price fixing by various title insurance companies.[199] The actions were consolidated in the Eastern District of Pennsylvania, and the Third Circuit issued an injunction against all future claims and approved a settlement agreement decree with a no-opt-out provision.[200] The Arizona and Wisconsin attorneys general then filed new complaints in Arizona state and federal district courts on behalf of state school districts seeking damages from the same defendants.[201] The Federal District Court for the Eastern District of Pennsylvania issued an injunction against the Arizona proceeding, but the Third Circuit reversed. The Ninth Circuit refused to dismiss the complaint for similar reasons.[202]

In general, courts that refuse to grant an injunction against parallel proceedings interpret *Shutts* as guaranteeing an automatic right to opt-out in

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[195] *See id.* at 808-815.

[196] *See In re* Federal Skywalk Cases, 680 F.2d 1175, 1179-1180 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982).

[197] *See* Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions after* Phillips Petroleum v. Shutts, 96 YALE L.J. 1, 45-47 (1986).

[198] 982 F.2d 386 (9th Cir. 1992), *cert. granted*, 114 S. Ct. 56 (1993), *cert. dismissed per curiam*, 114 S. Ct. 1359 (1994).

[199] *See id.* at 388.

[200] *See id.*

[201] *See id.*

[202] *See id.* at 388-391.

any class action claim seeking monetary damages.[203] In *Ticor*, the Third Circuit held that if a class member had "not been given the opportunity to opt-out in a class action involving both important injunctive relief and damage claims, then the class members must have either minimum contacts with the forum or consent to jurisdiction in order to be enjoined by the district court that entertained the class action."[204] The Third Circuit interpreted the right to opt-out as being mandatory in a class action setting.[205] Absent such an opportunity, due process guidelines applying to non-class civil defendants would also apply to all class action plaintiffs whether certified under Rules 23(b)(1), 23(b)(2) or 23(b)(3).[206]

Other courts have recognized, however, that one cannot resolve many mass tort cases without certifying a mandatory class. In *In re DES Cases*,[207] women who developed cancer from DES, a synthetic estrogen taken during pregnancy, sued several pharmaceutical manufacturers who had sold the drug.[208] Judge Weinstein wrote a lengthy decision in favor of doing away with traditional due process requirements in the class action context. Weinstein particularly focused on *Keeton v. Hustler*[209] because in that case neither the plaintiff nor the defendant had substantial contacts with the forum state, a situation which closely mirrors many class action disputes.[210] The United States Supreme Court downplayed the traditional minimum contacts test and instead focused on balancing the interests of the plaintiffs against the fairness of subjecting the defendants to jurisdiction by a particular court.[211] Pointing out that the Supreme Court had recognized in *Shutts* that the minimum contacts requirements were unworkable in a class action situation,[212] Weinstein suggested using an "interest nexus" test instead of a "territorial nexus" test.[213] Judge Weinstein maintained that the

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[203] Courts will, however, uphold an injunction against future proceedings seeking equitable relief. *See* Silber v. Mahon, 18 F.3d 1449, 1451 (9th Cir. 1994); *In re* Temple, 851 F.2d 1269, 1271-1272 (11th Cir. 1988).

[204] *Ticor*, 982 F.2d at 388 (quoting *In re* Real Estate and Settlement Servs. Antitrust Litig., 869 F.2d 760, 769 (3rd Cir.), *cert. denied*, 493 U.S. 821 (1989)).

[205] *See id.* at 389.

[206] *Cf.* Grimes v. Vitalink Communications Corp., 17 F.2d 1553, 1560-1561 (3d Cir. 1994) (implying that the court would allow injunctions against future proceedings in a mandatory class situation).

[207] 789 F. Supp. 552 (E.D.N.Y. 1992), *appeal dismissed*, 7 F.3d 20 (2d Cir. 1993).

[208] *See id.* at 558.

[209] 465 U.S. 770 (1984).

[210] *See In re* DES Cases, 789 F. Supp. 552, 574-575 (E.D.N.Y. 1992).

[211] *See id.*

[212] *See id.* at 576.

[213] *See id.* at 579-589.

question should be why a forum with some requisite interest in entertaining a particular suit should be allowed to take an action rather than why it should not be allowed to take an action.[214] The presumption should be in favor of allowing a forum to hear a dispute unless a party can show substantial unfairness.[215]

Although in *DES Cases* Judge Weinstein dealt largely with the question of jurisdiction over defendants in a class action suit, his argument applies equally to the due process rights of absent plaintiffs in a no-opt-out case. For example, in *In re "Agent Orange" Product Liability Litigation*,[216] Judge Weinstein upheld the certification of a mandatory class by holding, "[S]ociety's interest in efficient and fair resolution of large-scale litigation outweighs the gains from individual notice and opt-out rights, whose benefits here are conjectural at best."[217] In some situations, a no-opt-out class is the only feasible way of dealing with a mass tort situation. Courts are able to administer relief fairly to a large number of people. Companies can pay out settlement funds assured that they will not be forced into bankruptcy by an endless onslaught of future claims.

IV. CONCLUSION

The settlement of large class action disputes cannot proceed unless courts are free to stay parallel state proceedings and certify no-opt-out classes. The Anti-Injunction Act and Fourteenth Amendment present procedural barriers that hinder the ability of courts to administer settlements.

Although many courts have viewed the Anti-Injunction Act as an absolute bar to injunctions against state proceedings, there have been broad exceptions to that bar. No court has ever declared Rule 23 to fall within the "Act of Congress" exception to the Anti-Injunction Act, but precedent exists for issuing an injunction under the "in aid of jurisdiction" and "to protect or effectuate judgments" exceptions.

Courts have confused plaintiffs' due process concerns with those of defendants. In non-class civil suits, the United States Supreme Court has consistently held that a plaintiff has few due process rights. While there is some concern for the rights of absent plaintiffs in a class action dispute, *Phillips Petroleum v. Shutts* allows courts to bind all plaintiffs in an opt-out situation. Given the pressing need to bind all plaintiffs in mass tort cases,

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[214] *See id.* at 585 (citing Martin H. Redish, *Due Process, Federalism and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1134 (1981)).

[215] *See id.*

[216] 996 F.2d 1425 (2d Cir. 1993).

[217] *Id.* at 1435.

the Supreme Court should also declare actions under Rules 23(b)(1) and 23(b)(2) constitutional.