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PRECLUSION, DUE PROCESS, AND THE RIGHT TO OPT OUT OF CLASS ACTIONS

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A debate over due process has lurked near the surface of class actions for quite some time. The foundations of a constitutional constraint on class actions may be seen in landmark cases, such as *Hansberry v. Lee*,[1] in which the ability of an individual to be bound by representative litigation implicates a due process standard for adequate representation.[2] Similarly, strains of due process emerge in the Supreme Court's recent decisions in *Amchem Products, Inc. v. Windsor*,[3] and particularly in *Ortiz v. Fibreboard Corp.*,[4] in which the capacity to bind future litigants or involuntary participants in a limited fund was heavily conditioned by an overriding concern over the quality of representation afforded in litigation in absentia.[5] Most notably, in *Phillips Petroleum Co. v. Shutts*,[6] due process was directly invoked to restrict the ability of courts to exercise in personam jurisdiction over out-of-state absent class members unless individual notice and an ability to opt out are provided.[7]

In each of these cases, however, due process is considered inferentially as either a backdrop to the structure of class action rules or as a framing point for dealing with the paradox of consent jurisdiction

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1 311 U.S. 32 (1940).

2 *Id.* at 45–46.

3 521 U.S. 591 (1997).

4 527 U.S. 815 (1999).

5 *See id.* at 864 (finding the limited fund class action mechanism unavailable because "the representation of class members by counsel also representing excluded plaintiffs . . . precluded adequate structural protection by subclass treatment"); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625–27 (1997) (finding the disparity between currently injured and exposure-only class plaintiffs too great to satisfy Rule 23(a)(4)'s requirement that named parties "will fairly and adequately protect the interests of the class").

6 472 U.S. 797 (1985).

7 *Id.* at 806–14.

under the post-*International Shoe*[8] approach to personal jurisdiction cases. Absent from these decisions is a direct confrontation with the nature of the class action as a state-created mechanism for binding absent parties to a judgment.[9] If we are to return to an older, more formal conception of a legal claim as a *chose* in which a distinct property interest accrues,[10] the due process implications of class action judgments is brought into sharper relief. A class action is simply, when all else is stripped away, a state-created procedural device for extinguishing claims of individuals held at quite a distance from the "day in court" ideal of Anglo-American jurisprudence. Regardless of whether a case is won or lost, or (more likely) settled along the way, the class action serves to provide closure and repose across the aggregated individual claims. To the extent that we may identify a legal entitlement in an individual's ability to assert and control the prosecution of a cognizable legal claim, the state sponsorship of the class mechanism must, at the very least, implicate due process issues. Following the logic of this argument, a case can be made that due process may be satisfied only when, as with the consent to personal jurisdiction under *Shutts*, an absent class member is insured notice and the ability to opt out.[11]

This formal account is not altogether satisfying for at least three reasons. First, in a broad swath of cases it is difficult to identify an individual *chose*, even where a cause of action might lie. Thus, in cases for injunctive relief against institutional conduct, it is difficult to conceptualize an individual right of autonomy, even where we would no doubt recognize an individual's ability to bring a claim in court. In such circumstances, an individual may be an exemplar of the harm visited by allegedly wrongful institutional conduct, but that same individual cannot claim an autonomous right to separate control of the outcome of the legal challenge. To give but the most obvious example, a school desegregation challenge may or may not succeed, but if

8 Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945) (establishing a test for personal jurisdiction based on minimum contacts within a state).

9 *See* Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2144–48 (2000) (viewing class actions as "state-enabled litigation").

10 *See* Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571, 585–89 (1997) (treating a cause of action as a *chose*, a form of property protected by the Due Process Clause).

11 I have previously argued that the emergence of a robust inquiry into the adequacy of representation pursuant to *Amchem* and *Ortiz* brings the rules-based certification inquiry into alignment with the constitutional due process demands of representative actions. *See* Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 353.

it does it will establish the wrongful conduct directed across a group of affected school children. In such cases, which are formed under Rule 23(b)(2),[12] it would be nonsensical to claim that any one child has an autonomous right to an independent outcome of the litigation. While each aggrieved child is deemed to have standing to bring a claim for wrongful deprivation of a claimed right to integrated schools, no child has an individual stake in the outcome of that litigation separate from that of the other similarly situated children.

Similarly, there is little realistic prospect for individual control of claims in cases in which a group of claimants is seeking recompense from a limited fund, as contemplated under Rule 23(b)(1).[13] This is a common problem when individuals may have a claim for compensation, but the limitation on the corpus of available funds requires a just assessment of their claims measured not only in terms of an abstract right against a defendant, but also by comparison to other potential claimants. There are colorful historical precedents, as when a warship returning victorious to harbor must have a mechanism to clear accounts and divide the war booty according to a binding allocation.[14] There are also numerous more prosaic examples, as when a group of injured parties is seeking recovery from an insufficient reservoir of insurance proceeds.[15] The fact that each individual's capacity to recover is dependent on the other plaintiffs means that there no longer can be an individual right of autonomy in pursuing claims against the defendant. As with the claim for injunctive relief, no individual has a divisible claim, even though all have standing to bring suit.

Second, there is a strategic reason to doubt the importance of the individual right to control one's litigation destiny. One of the prime reasons for the development of the class action is the insufficiency of resources of individual litigants facing a common course of conduct by a repeat actor. In such cases, the "negative value" of any individual claim defeats the prospect for meaningful individual enforcement of even well-established, meritorious claims. The concept of the negative value claim is most often applied when the value of the claim is

12 FED. R. CIV. P. 23(b)(2).

13 *Id.* 23(b)(1).

14 *See* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 182–83 (1987); Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 243 & n.63 (1990).

15 *See, e.g.*, *In re* A.H. Robins Co., 880 F.2d 709, 747–48 (4th Cir. 1989) (upholding certification of a limited fund class for distribution of insurance policy proceeds).

itself is too small to justify the cost of prosecution.[16] But it applies as well when the multiple exposure of the defendant creates an incentive to expend resources in litigation that would overwhelm any individual litigant, even if the amount of the claim would conceivably justify one-on-one litigation.[17] As a result, an individual litigant who is unlikely to sue outside an aggregate action is similarly unlikely to exercise a right to opt out into the domain of unviable individual claims. Whatever the broader teachings of class action jurisprudence, with *Amchem* the most significant recent addition, one clear tenet is that the exit option of exclusion from the class cannot serve standing alone as the guarantor of equity in the class action setting.

Third, there is increasing skepticism over the view that a class action is simply an unaltered aggregation of individual claims. Courts are well aware that the decision to certify or not radically alters the incentive structure of litigation, as reflected in the creation of the interlocutory appeal mechanisms of Rule 23(f).[18] Classes do take on the form of an "entity," to borrow Professor Shapiro's term from an earlier volume of this law review,[19] with rather immediate consequences for the prospect of successful prosecution of a claim.[20] In light of the strategic implications of class certification, it is difficult to reduce the due process concerns to simply a question whether something approximating an individual right of action may be recreated.[21]

16 *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) ("Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually.").

17 *See* David Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 B.U. L. REV. 695, 709–10 (1989) (outlining the advantages to defendants in the individual litigation of potential class action claims).

18 FED. R. CIV. P. 23(f).

19 David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 917 (1998) (arguing that "the notion of class as *entity* should prevail over more individually oriented notions of aggregate litigation" (emphasis added)).

20 This may be seen from both the vantage point of the class and the defendant. In many negative value cases, the failure to certify the class is rightly seen as the "death knell" of the case. *See, e.g.*, Coopers & Lybrand v. Livesay, 437 U.S. 463, 470–71 (1978) (recognizing that refusing to certify a class "may induce a plaintiff to abandon his individual claim"). By contrast, the aggregation of claims may dramatically alter the ability to risk litigation in a "bet the ranch" mass case, as argued by Judge Posner in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297–99 (7th Cir. 1995) (noting the "sheer *magnitude* of the risk to which the class action, in contrast to the individual actions pending or likely, exposes [the defendant]").

21 I leave aside the broader implications of Shapiro's claim that the entity status of a class action should permit certain binding decisions to be taken on behalf of absent class members. This issue is addressed elsewhere. *See, e.g.*, John C. Coffee, Jr.,

Nonetheless, the right to opt out may have great significance. The clearest example is in the mass tort context. This is the arena in which individual claims are likely to have the greatest potential value and in which the capacity to opt out is likely to be most meaningful.[22] In the highly publicized fen-phen litigation, for example, a mass tort settlement was approved based on the ability to opt out not only initially but also on the "back end."[23] The fact that the settlement provided for a right of exit into the tort system should an individual's drug-induced harm progress to serious levels was a critical ingredient in securing judicial approval of the settlement.[24] As opposed to the low value claim, or even the unknown prospect of future harm, each of which may be thought to engender "rational indifference" on the part of the bulk of the affected class,[25] high value claims of salient harms will likely provoke great vigilance on the part of class members. When the vigilance is combined with the right to opt out, the prospect

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Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation, 100 COLUM. L. REV. 370, 438 (2000). *See generally* Issacharoff, *supra* note 11.

22 *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1447, 1465 (1995) (stressing the importance of the right to opt out in mass tort cases); Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 833 (1997) (focusing on "preserving the forms of individual participation—most critically, a meaningful right to opt out of class actions").

23 *See In re* Diet Drugs Prods. Liab. Litig., No. 99-20593, 2000 U.S. Dist. LEXIS 12275, at *63 (E.D. Pa. Aug. 28, 2000) (describing the "back-end opt out" right as an option for class members whose illness progresses to a serious level to receive compensation according to the settlement or to "pursue their claim for compensatory damages . . . in the tort system without any time bar"). I must disclose that I participated in this ligitation.

24 *See id.* at *119 (certifying mass tort class action in part because "the instant settlement's intermediate and back-end opt out rights allow class members to make informed choices about whether to remain in or opt out of the settlement"); *see also* Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 796–97 (2001) (describing the back-end opt out in the fen-phen settlement as a put option). *But see* David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 835–38, 841–43 (2001) (criticizing Nagareda in favor of an ex ante approach to measures of fairness in settlement).

25 *See* Coffee, *supra* note 22, at 1362–63 ("[B]ecause only a relatively small percentage of individuals exposed to most toxic substances will actually develop compensable physical injuries, members of the future claimant class can be expected to be rationally apathetic about their future legal rights . . . .").

for exit is quite meaningful,[26] as evident in such high profile mass tort examples as the breast implant litigation.[27]

The Supreme Court's engagement with asbestos litigation in the recent *Amchem* and *Ortiz* cases has drawn much attention to the role of class actions encompassing high value individual claims. The most significant recent addition to this literature is by Professor Richard Nagareda, who relies on the fen-phen settlement to endorse non-coercive mass settlements that generate the equivalent of "put options" for potential future claimants.[28] My focus here is different and addresses a less explored implication of the right to opt out. Here my attention is not so much on the high value cases, such as the mass tort, but on class actions in which the bulk of the class has claims that are unlikely to merit individual prosecution. I want to suggest that the right to opt out may be of considerable significance in this context, although not necessarily because of a meaningful exit strategy from the class. Rather, the right of exit may be thought of as significant not because of the prospect of individual removal from any particular case, but instead, because of its impact on the preclusive effect of class action litigation. The argument proceeds in two parts. First, I want to examine the case law surrounding the right to opt out of a class action as a determinant of the future preclusive effects of a judgment on absent class members. The key case here is the Ninth Circuit's decision in *Brown v. Ticor Title Insurance Co.*[29] and the key insight is the inability to preclude future individual claims unless class members have been afforded an opportunity to opt out in the initial class action. I then apply the rationale of *Ticor* to the current dispute over the scope of

26 For an analysis of class action governance using the concepts of "exit, voice and loyalty" inherited from Albert O. Hirschman's classic work, *Exit, Voice, and Loyalty: Responses To Decline in Firms, Organizations, and States*, see LINDA J. SILBERMAN & ALLAN R. STEIN, CIVIL PROCEDURE: THEORY AND PRACTICE 897 (2001) (structuring presentation of class action practice around problems of exit, voice and loyalty); *see also* Coffee, *supra* note 21, at 438 (concluding that a strategy of enhancing "exit" should outperform alternative efforts aimed at improving either client "voice" or agent "loyalty"); Issacharoff, *supra* note 11, at 341–42.

27 *See In re* Silicone Breast Implant Prods. Liab. Litig., No. CV 92-P-10000-S, 1994 U.S. Dist. LEXIS 12521, at *17 (N.D. Ala. Sept. 1, 1994) (noting that approximately 7800 persons in the United States and approximately 6500 persons outside the United States had opted out of the settlement); *see also* Nagareda, *supra* note 24, at 751; Steve Baughman, Note, *Class Actions in the Asbestos Context: Balancing the Due Process Considerations Implicated by the Right To Opt Out*, 70 TEX. L. REV. 211, 221–25 (1991) (arguing for the importance of opt-out rights for class members who have "suffered injuries disproportionately greater than the class average").

28 Nagareda, *supra* note 24, at 747.

29 982 F.2d 386 (9th Cir. 1992).

Rule 23(b)(2) certification in the employment discrimination context. Second, I want to look at the emerging cause of action for medical monitoring to show a direct application of the limitations on the preclusive effects of class actions that do not afford an individual right of exit. The conclusion will then focus on the nature of the class action certification as determining its future preclusive effects on absent class members.

I. DUE PROCESS AND PRECLUSION

A. Limiting the Preclusive Effect of Class Actions

Much of the focus on the right to opt out arises from the increasingly "adventuresome" use of class actions as an attempt to secure closure to mass exposure claims.[30] In *Ortiz*, for example, the Court struck down an attempt to create a litigation-generated limited fund that would have bound all potential asbestos claimants to recovery from within a single action and all without a right to opt out.[31] Although the Court rejected the proposed settlement as falling outside the constrained ambit of a true limited fund,[32] the proposed settlement nonetheless served to highlight the precarious quality of the right of exit, and the attempt to terminate future legal claims without any capacity for individual control of legal claims. Indeed, *Ortiz* may derive its inspiration from the fact that, in the mass tort context, the right of exit has shown itself to be a significant guarantor that the constitutional and rule-based requirements of adequate representation are met.[33] As expressed by Professor Coffee, "[m]uch less should need to be shown to demonstrate adequate representation where there is an effective exit than where the class is a mandatory one from which exit is not permitted."[34]

Even accepting the limitation that *Ortiz* places on the use of the limited fund class action, the question remains as to the source of the differentiation in process protections offered to absent class members in mandatory, as opposed to non-mandatory, classes. In order to ad-

30 Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617–18 (1997) ("In the decades since the 1966 revision of Rule 23, class-action practice has become ever more 'adventuresome' as a means of coping with claims too numerous to secure their 'just, speedy, and inexpensive determination' one by one." (internal citation omitted)).

31 Ortiz v. Fibreboard Corp., 527 U.S. 815, 864–65 (1999).

32 *Id.* at 864–65.

33 *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812–14 (1985) (holding that Kansas's procedure of using first-class mail to send notice that explained the right to opt out satisfied due process).

34 Coffee, *supra* note 21, at 428.

dress this question directly, we must return to the initial formulation of the inquiry in *Shutts*. *Shutts* begins by addressing the unique problem of how a court may acquire jurisdiction over absent class members whose claims are not transactionally related to the jurisdiction. Were the absent class members required to affirmatively consent to the jurisdiction of the court, the class action would cease to be a viable mechanism for aggregating geographically-dispersed small claims cases.[35] The transaction costs of securing individual consent would significantly compromise the aggregative efficiency of the class action. Hence, *Shutts* inverts the inquiry from that required of a defendant. Rather than affirmatively consent to jurisdiction, absent plaintiffs must only be afforded the opportunity to register their lack of consent, and any ensuing silence will be construed as an acceptance of the court's jurisdiction: "[D]ue process requires at a minimum that an absent plaintiff 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."[36]

While *Shutts* opened the due process inquiry, it is generally seen as having done so for the limited purpose of resolving the problem of personal jurisdiction.[37] Nonetheless, *Shutts* introduces a critical qualifier by announcing its rule of personal jurisdiction as applying only to cases "wholly or predominantly for money judgments."[38] The clear implication is that where a claim cannot be thought to belong to an individual plaintiff, even if only as a hypothetical matter, the due process consideration did not arise.[39] Viewed in this light, the *Shutts* rule

35 *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 813 (1985).

36 *Id.* at 812.

37 As Henry Monaghan points out, "*Shutts*'s opt-out right is limited to contexts in which [the court] would not otherwise have a basis for in personam jurisdiction." Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1168 (1998). Newberg focuses his discussion on whether opt-out rights serve as a substitute for minimum contacts as a way of ensuring jurisdiction. 1 HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 1.20, at 1-48 (3d ed. 1992). Miller and Crump suggest viewing *Shutts* as a case about distant forum abuse and point out that a forum can "force a class member to litigate in the action if that member or the object of the action has sufficient contacts with the forum," a holding, they claim, "is implicit in the common rights and limited fund class cases." Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1, 52 & n.369 (1986).

38 *Shutts*, 472 U.S. at 811 n.3.

39 *See, e.g.*, *In re* Real Estate Title & Settlement Servs. Antitrust Litig., 869 F.2d 760, 769 (3d Cir. 1989) (holding that the *Shutts* right to opt out attaches to class actions involving "both important injunctive relief *and* damage claims" (emphasis added)). *But see* Waldron v. Raymark Indus., Inc., 124 F.R.D. 235, 238 (N.D. Ga. 1989)

is an attempt to strike a balance between class actions that are primarily the amalgamation of individual claims and those that represent claims that only exist in the aggregated collective.[40] With regard to the former, the day in court ideal of individual control still holds sway,[41] whereas with the latter, the individual litigant is truly simply a representative for the affected class.

Viewed in this light, *Shutts* invites an expansion of the due process rationale to permit binding class members to preclusive resolution of their individually-defined damages claims only if they have been afforded the right to opt out. As expressed by Professor Monaghan, "Recognition of a substantive due process right to opt out of at least some damage claims has considerable plausibility. It would limit the threat posed by modern aggregation practice to our long-standing tradition of individual litigation autonomy."[42] The reasoning for providing the right to opt out in Rule 23(b)(3) class actions may therefore be recast mildly as a recognition of at least a formal right to litigant autonomy in cases that could plausibly be cast as stand-alone claims for recompense.[43] By contrast, the impossibility of disentangling an autonomous individual claim from the limited fund or injunctive class action explains both the impracticability of a right

("[A] mandatory class action would violate the constitutional rights of those persons who have insufficient contacts to allow the court to exercise personal jurisdiction over them.").

40 *See* George Rutherglen, *Better Late Than Never: Notice and Opt Out at the Settlement Stage of Class Actions*, 71 N.Y.U. L. REV. 258, 281 (1996).

41 *See* Martin v. Wilks, 490 U.S. 755, 762 (1989).

42 Monaghan, *supra* note 37, at 1174; *see also* Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 ARIZ. L. REV. 461, 472 (1997) (arguing that an opt-out right is necessary to the historic recognition of individual entitlements and responsibilities and the centrality of "the right to assert one's own rights").

43 Herbert Newberg states the traditional rationale for the opt-out right in 23(b)(3) actions: "When a small segment of class members has a strong interest in individual litigation, that interest may be served by opting out of the suit. . . ." 1 NEWBERG & CONTE, *supra* note 37, § 4.29, at 4-114. In their treatise on Federal Practice and Procedure, Wright, Miller, and Kane explain the history of the right to opt out as it emerged from the "spurious" class actions of pre-1966 federal procedure:

> By requiring the absentee to take affirmative action to avoid being bound, the rule attempts to eliminate the common practice in "spurious" class suits prior to 1966 of waiting to see if the adjudication was favorable to the class before deciding whether to enter the action. Furthermore, the opt-out procedure in the amended rule preserves the right of a potential class member who feels that his interests are in conflict with or antagonistic to the other class members to bring his own action . . . .

7B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1787, at 210–11 (2d ed. 1986).

of individual exit and the absence of a formal opt-out procedure under Rule 23.

Thus, the unstated assumption of *Shutts* appears to be that in cases which were not "wholly or predominantly for money judgments," personal jurisdiction would attach based on the defendant, and would in turn implicate no corresponding due process inquiry about absent class members.[44] What remain unexplored are those cases in which there are elements that raise collective injunctive claims for relief *and* potential individual damages claims by absent class members. The logic of *Shutts* would indicate that in such cases a due process right to opt out is a prerequisite for a binding judgment as to the damages claims, but not as to the injunctive component. The effect of focusing on the preclusive nature of the judgment is to disaggregate the two components of the case and to allow a binding judgment on some claims, but not others.

The clear example here is the Ninth Circuit's handling of *Brown v. Ticor Title Insurance Co.*,[45] a case that unfortunately had certiorari dismissed on the very issue at the core of this Article.[46] *Ticor* concerned the preclusive effect of a settlement for injunctive and other equitable relief in an antitrust class action arising from a consolidated multidistrict litigation (MDL) proceeding.[47] The class was certified under Rule 23 subsections (b)(1) and (2), and the settlement was upheld on appeal to the Third Circuit.[48] Shortly thereafter, class actions

44 Wright, Miller, and Kane take the position that there is no due process requirement of a right to opt out of mandatory class actions. "The preferred view should be that Shutts does not foreclose the possibility of binding absent members who do not receive notice and thus the opportunity to opt out when the court has adopted a reasonable notice scheme." *Id.* § 1789, at 43–44 (2d ed. Supp. 2001). Wright, Miller, and Kane base this argument on their reading of *Shutts* as "setting forth . . . requirements only for Rule 23(b)(3) damage suits, and not as suggesting that similar restraints may be placed on other class actions." *Id.* at 256 (2d ed. 1986); *see also In re* Cherry's Petition to Intervene, 164 F.R.D. 630, 636–37 (E.D. Mich. 1996). In *White v. National Football League*, 822 F. Supp. 1389 (D. Minn. 1993), the district court similarly held that *Shutts* does not apply in cases where claims for injunctive relief predominate, whatever the accompanying damage claims, and pointed out that where other procedural safeguards, including adequate representation and notice, are used, opt out is not constitutionally required. *Id.* at 1410–12.

45 982 F.2d 386, 392 (9th Cir. 1992), *cert. dismissed*, 511 U.S. 117 (1994).

46 The Court subsequently dismissed another suit on which it had granted certiorari to address this question, finding that the federal question was insufficiently presented by the state courts. *See* Adams v. Robertson, 520 U.S. 83 (1997).

47 *Ticor*, 982 F.2d at 390.

48 *See In re* Real Estate Title & Settlement Servs. Antitrust Litig., MDL Docket No. 633, 1986 U.S. Dist. LEXIS 24435, at *31–*34, *72 (E.D. Pa. June 10, 1986), *aff'd without opinion by* 815 F.2d 695 (3d Cir. 1987).

were filed on behalf of consumers in Arizona[49] and Wisconsin[50] claiming actual damages as a result of the same price fixing activity as had been challenged in the Third Circuit MDL proceeding.[51] The *Ticor* defendants then attempted to defend on the grounds of res judicata,[52] arguing that the claims being asserted had already been pressed or could have been pressed in the prior litigation.[53] At the heart of the res judicata argument was the question whether a class member could be barred in seeking individual damages by a class action from which she had never been afforded the opportunity to opt out.[54]

According to the Ninth Circuit, the absence of an opt-out provision was dispositive. Extending the due process argument of *Shutts*, the court found that

> [b]ecause Brown had no opportunity to opt out of the MDL 633 litigation, . . . there would be a violation of minimal due process if Brown's damage claims were held barred by *res judicata*. Brown will be bound by the injunctive relief provided by the settlement in MDL 633, and foreclosed from seeking other or further injunctive relief in this case, but *res judicata* will not bar Brown's claims for monetary damages against Ticor.[55]

Ticor may be thought of as anticipating the rationale of *Ortiz* to limit the coercive capacity of class actions from which the exit option was not even a theoretical possibility. As one lower court expressed this approach: "In a class action in which unnamed plaintiff class members are not permitted the opportunity to opt out, an unnamed plaintiff class member is not bound by that portion of a settlement which purports to preclude further claims for damages based on the same facts encompassed by the litigation."[56] The key to this approach is to divide the world of aggregate litigation between those claims that would, absent transaction costs and considerations of efficiency, be-

49 *Ticor*, 982 F.2d at 389–90.

50 *Id.*

51 *Id.* at 388.

52 Under the standard formulation of res judicata, a lawsuit involving the same parties and based upon the same underlying cause of action as that asserted in a previous case is barred, as are all claims that were raised or could have been raised in the earlier proceeding. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979).

53 *See Ticor*, 982 F.2d at 390.

54 *See id.* at 392.

55 *Id.*

56 Clarke v. Advanced Private Networks, Inc., 173 F.R.D. 521, 522 (D. Nev. 1997).

long to individuals on the one hand, and those in which individuals cannot be thought of independent of the collectivity.

B. Confusing Certification with Preclusion

Despite the general approval of *Ticor*, the case law has not integrated the distinction in class actions based on the preclusive effects of the case. The reason is that although *Ticor* deals with the preclusive effects of mandatory class actions, it also reflects a view as to when a class action should be certified as Rule 23(b)(1) or (b)(2) even when damage claims are raised (or foreclosed by settlement). This issue stems from the decree in *Shutts* that opt-out rights should be available in claims that are "wholly or predominately for money judgments."[57] The lower courts have generally interpreted and applied the requirement to focus on the form of class certification rather than on the preclusive effect of the certification. Thus, in cases that raise issues of both injunctive relief and monetary damages, courts have attempted to determine which component is paramount. The result is a "predominance" test asking whether the monetary claims predominate over the claims for equitable relief, thus requiring notice and opt out, or whether the monetary claims are merely incidental to the equitable relief.[58] This, in turn, leads to a division on the courts as to location of the dividing line so as to determine the extent to which a claim for

57 Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 n.3 (1985).

58 *See, e.g.*, Robinson v. Metro-N. Commuter R.R. Co., 267 F.3d 147, 164 (2d Cir. 2001).

> [W]e hold that when presented with a motion for (b)(2) class certification of a claim seeking both injunctive relief and non-incidental monetary damages, a district court must "consider" the evidence presented at a class certification hearing and the arguments of counsel, and then assess whether (b)(2) certification is appropriate in light of "the relative importance of the remedies sought, given all of the facts and circumstances of the case."

Id.; Jefferson v. Ingersoll Int'l Inc., 195 F.3d 894, 899 (7th Cir. 1999) ("The district court must squarely face and resolve the question whether the money damages sought by the plaintiff class are more than incidental to the equitable relief in view."); Eubanks v. Billington, 110 F.3d 87, 92 (D.C. Cir. 1997) ("Courts have generally permitted (b)(2) classes to recover monetary relief in addition to declaratory or injunctive relief, at least where the monetary relief does not predominate."); *In re* A.H. Robins Co., 880 F.2d 709 (4th Cir. 1989); Robinson v. Metro-N. Commuter R.R. Co., 197 F.R.D. 85, 87 (S.D.N.Y. 2000).

> In any such action in which both injunctive and monetary relief [are] sought, the inherently individualized nature of the determination of damages . . . render[s] it predominant, and thereby makes class action status under Rule 23(b)(2) inappropriate, except in those rare incidences in which the request for monetary relief [is] wholly "incidental" to the requested injunctive relief.

monetary relief is sufficiently central to the case as to take it out of the Rule 23(b)(2) category of certification.[59]

The clearest example comes with the current circuit split on the availability of Rule 23(b)(2) certification for employment discrimination class actions. Not so long ago, claims of disparate impact resulting from an employer's hiring or promotional policies were considered the very backbone of the Rule 23(b)(2) class action for equitable relief.[60] In 1991, however, Congress amended Title VII to allow, for the first time, civil rights claimants to seek legal, as opposed to equitable, relief, including "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses."[61] The immediate effect of the creation of legal damages remedies was to trigger the right to trial by jury in all Title VII cases that sought the full spectrum of available relief. As summarized in the most significant post-1991 Title VII class action case, the Fifth Circuit's decision in *Allison v. Citgo Petroleum*

Id. See generally 1 NEWBERG & CONTE, *supra* note 37, § 4.14, at 4-48 to 4-49; Lesley Frieder Wolf, Note, *Evading Friendly Fire: Achieving Class Certification After the Civil Rights Act of 1991*, 100 COLUM. L. REV. 1847, 1853–55 (2000) (analyzing different courts' treatment of the predominance issue after the Civil Rights Act of 1991); Robert L. Serenka, Jr., Annotation, *Propriety of Allowing Class Member to Opt Out in Class Action Certified Under Subsections (b)(1) or (b)(2) of Rule 23 of the Federal Rules of Civil Procedure*, 146 A.L.R. FED. 563 (1998) (analyzing different courts' approaches to the predominance test).

59 For example, some courts require that the monetary claims be incidental to the main claims for equitable relief. *See Jefferson*, 195 F.3d at 898; Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998). Other courts look to the extent that the claims of individual class members are cohesive in determining whether the class as a whole or individual members deserve the right to opt out. *See, e.g., Eubanks*, 110 F.3d at 98; County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1305 (2d Cir. 1990); Holmes v. Cont'l Can Co., 706 F.2d 1144, 1160 (11th Cir. 1983); Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439, 452 (N.D. Cal. 1994). Sometimes the court will simply not certify the case if it is determined that claims for monetary relief predominate. *See, e.g.*, Celestine v. Citgo Petroleum Corp., 165 F.R.D. 463, 469 (W.D. La. 1995), *aff'd sub nom.* Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998); Angelastro v. Prudential-Bache Sec., Inc., 113 F.R.D. 579, 583 (D.N.J. 1986). At least one court simply considers the relative importance of the claims on an ad hoc basis even when the monetary damages claim is "non-incidental." *See Robinson*, 267 F.3d at 162–67. Finally, in some cases, the predominance test has little meaning since some courts have characterized money damages as equitable relief. *See, e.g.*, Hynson v. Drummond Coal Co., 601 A.2d 570, 575 (Del. Ch. 1991) (certifying a securities class action under provisions identical to Rule 23 subsections (b)(1) and (b)(2) even though the claim was solely for money damages because the "particularities of any holder would have no bearing on the appropriate remedy").

60 *E.g., Allison*, 151 F.3d at 409; *Robinson*, 267 F.3d at 169.

61 42 U.S.C. § 1981a(b)(3) (1994).

Corp., "[b]y injecting jury trials into the Title VII mix, the 1991 Act introduced, in the context of class actions, potential manageability problems with both practical and legal, indeed constitutional, implications."[62]

For the *Allison* court, the result was to restrict the application of the Rule 23(b)(2) class action "to focus on cases where broad, class-wide injunctive or declaratory relief is necessary."[63] Accordingly, a class certified under Rule 23(b)(2) could recover only "incidental" damages, defined as "damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief," that are "capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances."[64] Because the damages authorized by the 1991 Act fell outside this range, the Fifth Circuit rejected the certification of a broad-scale challenge to alleged discriminatory employment practices.[65]

Allison was immediately seen as the "death-knell" of employment discrimination class actions.[66] The response was to challenge, incorrectly in my view, *Allison* on what it meant for class-wide issues to predominate. In the most significant of the post-*Allison* cases, the Second Circuit's decision in *Robinson v. Metro-North Commuter Railroad Co.*,[67] the court rejected the incidental damages theory in favor of an "ad hoc balancing" to determine whether the injunctive and declara-

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62 *Allison*, 151 F.3d at 410.

63 *Id.* at 412.

64 *Id.* at 415; *see also* Bolin v. Sears Roebuck & Co., 231 F.3d 970, 976 (5th Cir. 2000) (citing the definition of incidental damages provided in *Allison*, 151 F.3d at 415).

65 *See Allison*, 151 F.3d at 407, 425–26.

66 *See, e.g.*, Reap v. Cont'l Cas. Co., 199 F.R.D. 536, 548 (D.N.J. 2001) (following *Allison* in denying class certification because discrimination claims would inherently involve individual hearings to determine damages); Miller v. Hygrade Food Prods. Corp., 198 F.R.D. 638, 642 (E.D. Pa. 2001) (holding that damages claims would require individual examinations and therefore did not meet *Allison*'s objective standards test); Ramirez v. DeCoster, 194 F.R.D. 348, 355 (D. Me. 2000) (finding class action certification inappropriate in discrimination claims where the plaintiff seeks compensatory and punitive damages and also demands right to jury). *See generally* Nikaa Baugh Jordan, Comment, Allison v. Citgo Petroleum*: The Death Knell for the Title VII Class Action?*, 51 ALA. L. REV. 847, 867–81 (2000) (analyzing the effects of *Allison* on class certification of discrimination claims); Wolf, *supra* note 58, at 1852 ("In the wake of this decision, there is reason to believe that class certification has become an impossibility where employment discrimination plaintiffs seek damages, injunctive relief, and to exercise their right to demand a jury trial.").

67 267 F.3d 147 (2d Cir. 2001).

tory components of the relief sought predominated.[68] Relying on the power of district courts to certify issues or parts of claims for class treatment under Rule 23(c)(4)(A),[69] the court allowed for class certification of Title VII claims so long as "(1) 'the positive weight or value [to the plaintiffs] of the injunctive or declaratory relief sought is predominant even though compensatory or punitive damages are also claimed,' . . . and (2) class treatment would be efficient and manageable, thereby achieving an appreciable measure of judicial economy."[70]

The "ad hoc balancing" test of *Robinson* fails to engage fully the concerns of *Allison* for at least two reasons. First, it is not clear how a court would actually handle a case in which a class of substantial size sought the type of highly individualized damages anticipated by the 1991 amendments to Title VII. Allowing certification under Rule 23(b)(2) may evade the manageability requirement for certification under Rule 23(b)(3), but it does not circumvent the nagging issue of what exactly a court is supposed to do if the 1300 members of the *Robinson* class were actually to attempt to press their claims for compensatory relief before a jury.[71] Even were the class to be certified, what would an actual trial look like if 1300 class members were to attempt to put on proof of their emotional distress? The practical answer is that few cases are likely to reach that point. Nonetheless, the stewardship of a court over a certified class implicates some concern about how individual claims will be tried.

More significantly, *Robinson* does little to reconcile the presumptive collective quality of the relief sought in injunctive claims with the individualized notion of the recovery allowed under amended Title VII. Although the court relies on rather circular claims that Rule 23(b)(2) actions may rely on a "presumption of cohesion and unity between absent class members and the class representatives,"[72] the court adds little about how that presumed coherence diminishes in any significant way the individualized character of the damages asserted. The class may be cohesive in its standing with relation to the

68 *Id.* at 164.

69 *Id.* at 167.

70 *Id.* at 164 (quoting *Allison*, 151 F.3d at 430 (Dennis, J., dissenting)).

71 This would then lead to a confrontation with another body of Fifth Circuit law, the reading of the Re-examination Clause of the Seventh Amendment as prohibiting the bifurcation of review between two different juries. *See* Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996); *see also In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995). *But see* Patrick Woolley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause*, 83 IOWA L. REV. 499 (1998) (arguing that jury issues can be sufficiently severed as to not offend the Seventh Amendment).

72 *Robinson*, 267 F.3d at 165.

defendant—the core definitional requirement of a Rule 23(b)(2) class action—but the remedial phase of the litigation threatens to push very far beyond the presumption that the damages would flow directly from the equitable order directed against the defendant.[73]

For purposes of this Article, however, what is of greatest interest is the court's recognition that the existence of damages claims, while not a bar to certification, nonetheless presents "due process risks posed by Rule 23(b)(2) class certification of claims for damages."[74] Here the court returns full circle to the initial problem by, in effect, transforming the Rule 23(b)(2) class into a Rule 23(b)(3) action:

> [W]here non-incidental monetary relief such as compensatory damages are involved, due process may require the enhanced procedural protections of notice and opt out for absent class members. This is because entitlement to non-incidental damages may vary among class members depending on the circumstances and merits of each claim. The presumption of class homogeneity and cohesion falters, and thus, adequate representation alone may prove insufficient to protect absent class members' interests.[75]

The resulting Second Circuit standard strikes me as needlessly complex. The core of the difficulty comes from attempting to circumvent the logic of *Allison* by creating a rather rudderless "ad hoc" standard and then grafting onto it a series of due process limitations of unknown dimensions. At some level this must have been apparent to the *Robinson* court, for the term "ad hoc balancing" is usually a term of derision for unprincipled adjudication rather than a label for an inquiry of constitutional dimensions. The same result could have been

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73 In this regard, the 1991 amendments to Title VII changed the landscape in two significant ways. Prior to 1991, the remedies were limited to the harms caused directly by the defendant's unlawful conduct. Allison v. Citgo Petroleum Corp., 151 F.3d 402, 409–10 (5th Cir. 1998). Thus, in a typical refusal to hire case, the defendant would be forced to pay the amount of back pay owing to the class of potential employees. This would remove any subjective inquiry as to the anguish or any other subjective harm incurred by the employee. Second, the fact these remedies were deemed equitable meant that the Seventh Amendment right to trial by jury was not implicated. *Id.* at 410. Thus, the remedial phase of a Title VII disparate impact case was left to what was termed a "Phase II" proceeding in which there would be an administrative calculation of damages to those employees who would actually have been hired in the absence of the unlawful pattern or practice. The parties, or a special master, or a magistrate, or even the supervising judge could then examine the administrative record to determine whether the back-pay awards should be offset by other wages, transfer payments, or revenues during the class period and, if so, what the extent of the offset would be. Because there was no jury impanelled, this process could take an extended period of time and be reviewed as the administrative record was created.

74 *Robinson*, 267 F.3d at 165.

75 *Id.* at 165–66.

achieved far more economically by applying the logic of *Ticor* to address the certification question through the prism of the potential preclusive scope of the class action. The *Robinson* court could simply have limited the certification to a class claiming injunctive relief and those forms of readily quantifiable back-pay claims as would have created a non-objectionable class under Title VII as it stood prior to the 1991 amendments. The scope of the class would also limit its preclusive effect to only those non-individually based claims to which, under the court's view, no independent due process concerns would attach. Under the facts of the case, which asserted racially disparate results from insufficient oversight of supervisory power to discipline,[76] it is exceedingly unlikely that there would have been any individual damages claims meriting individual prosecution. But absent a clear doctrine on the res judicata effect of a Rule 23(b)(2) class action, diligent plaintiffs' counsel would have felt compelled to assert all possible remedies for the class members for fear of waiving valuable individual claims of some of the class members. Were the court to have followed *Ticor*, however, this problem could have been avoided. The certification would have been limited to those claims that actually fit the Rule 23(b)(2) model, leaving individuals free to pursue their separate claims should individual class members (and presumably other lawyers) find that these claims merited individual prosecution.

II. A Case Example: Medical Monitoring

To return to the main theme, *Ticor* draws an important distinction between the types of remedies available in Rule 23(b)(2) class actions as opposed to Rule 23(b)(3) class actions and the range of preclusive power of the respective class action devices. The inability to opt out is significant, but not necessarily because individual class members may or may not wish to pursue the action *sub judice* on their own. Rather, the difference in treatment of the two types of class actions arises from an important distinction in the nature of the claim between those that truly inhere in the collective entity of the class and those that are merely an aggregation of what might otherwise be self-sustaining individual causes of action.

The focus on the preclusive effect of a class action actually serves to resolve some of the contentious issues in class action practice today. In this Part, I want to focus on the preclusive effect of a judgment in a Rule 23(b)(2) class action in order to give greater content to the significant but relatively recent type of aggregate claim generally termed

76 Robinson v. Metro-N. Commuter R.R. Co., 197 F.R.D. 85, 87 (S.D.N.Y. 2000).

"medical monitoring."[77] The purchase from assessing different class actions in terms of their preclusive effects can be gleaned from an examination of the emerging claim for medical monitoring in response to a mass toxic exposure. The basic insight behind the medical monitoring class action is set forth in an important early case from the Utah Supreme Court, *Hansen v. Mountain Fuel Supply Co.*[78]:

> Jones is knocked down by a motorbike which Smith is riding through a red light. Jones lands on his head with some force. Understandably shaken, Jones enters a hospital where doctors recommend that he undergo a battery of tests to determine whether he has suffered any internal head injuries. The tests prove negative, but Jones sues Smith solely for what turns out to be the substantial cost of the diagnostic examinations.
>
> From our example, it is clear that even in the absence of physical injury Jones ought to be able to recover the cost for the various diagnostic examinations proximately caused by Smith's negligent action. A cause of action allowing recovery for the expense of diagnostic examinations recommended by competent physicians will, in theory, deter misconduct, whether it be negligent motorbike riding or negligent aircraft manufacture. The cause of action also accords with commonly shared intuitions of normative justice which underlie the common law of tort. The motorbike rider, through his negligence, caused the plaintiff, in the opinion of medical experts, to need specific medical services—a cost that is neither inconsequential nor of a kind the community generally accepts as part of the wear and tear of daily life. Under these principles of tort law, the motorbiker should pay.[79]

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77 *See* Victor E. Schwartz et al., *Medical Monitoring—Should Tort Law Say Yes?*, 34 WAKE FOREST L. REV. 1057, 1063–71 (1999).

78 858 P.2d 970 (Utah 1993).

79 *Id.* at 977–78 (quoting Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 825 (D.C. Cir. 1984)); *see also* Paoli R.R. Yard PCB Litig., 916 F.2d 829, 852 (3d Cir. 1990) (*Paoli I*) (recognizing a cause of action for medical monitoring absent physical injury); Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 823 (Cal. 1993) ("[W]e conclude that a reasonably certain need for medical monitoring is an item of damage for which compensation should be allowed."). As one court expressed the growing view on medical monitoring:

> It is difficult to dispute that an individual has an interest in avoiding expensive diagnostic examinations just as he or she has an interest in avoiding physical injury. When a defendant negligently invades this interest, the injury to which is neither speculative nor resistant to proof, it is elementary that the defendant should make the plaintiff whole by paying for the examinations.

Friends, 746 F.2d at 826; *see also Potter*, 863 P.2d at 823–24.

Although the example in *Hansen* is framed in terms of an injured individual, the case nonetheless sets out the framework for an aggregate claim of tortious toxic exposure. As the discussion of the hypothetical *Jones v. Smith* reveals, the real issue in the case is probabilistic. The determination by medical experts that a particular examination is necessary is predicated on the likelihood that injuries of the sort observed will be accompanied by harms that may only be detected by further examination.[80] If that detection in turn could lead to suitable medical treatment, then the monitoring serves to foreclose tort liability rather than to substitute for it. In other words, the negligence of the tortfeasor is the occasion for a legal intervention that seeks not retrospective restoration of the status quo ante, but rather seeks to determine whether a probability of harm may be reduced to zero by early medical intervention.[81]

The departure from classic tort law is two-fold.[82] First, the purpose of the intervention is to forestall the emergence of a potential harm occasioned by the defendant's negligence. Thus, there is no compensatory component to the claim for medical monitoring.[83] Second, there is an arguable claim for reducing the overall social cost

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> Recognition that a defendant's conduct has created the need for medical monitoring does not create a new tort. It is simply a compensable item of damage when liability is established under traditional tort theories of recovery . . . . It would be inequitable for an indivdiual wrongfully exposed to dangerous toxins . . . to have to pay the expense of medical monitoring when such intervention is clearly reasonable and necessary.

Id.

80 *See generally* Susan L. Martin & Jonathan D. Martin, *Tort Actions for Medical Monitoring: Warranted or Wasteful?*, 20 COLUM. J. ENVTL. L. 121, 122–32 (1995) (outlining the elements of a medical monitoring claim); Arvin Maskin et al., *Medical Monitoring: A Viable Remedy for Deserving Plaintiffs or Tort Law's Most Expensive Consolation Prize?*, 27 WM. MITCHELL L. REV. 521, 523–25 (2000) (describing the historical development of medical monitoring awards).

81 *See, e.g.*, Ayers v. Township of Jackson, 525 A.2d 287, 312 (N.J. 1987) ("The availability of a substantial remedy before the consequences of the plaintiffs' exposure are manifest may also have the beneficial effect of preventing or mitigating serious future illnesses and thus reduce the overall costs to the responsible parties.").

82 *See generally* Kara L. McCall, Comment, *Medical Monitoring Plaintiffs and Subsequent Claims for Disease*, 66 U. CHI. L. REV. 969, 987–88 (1999) (explaining the unique nature of medical monitoring claims).

83 *See* Patricia E. Lin, Note, *Opening the Gates to Scientific Evidence in Toxic Exposure Cases: Medical Monitoring and* Daubert, 17 REV. LITIG. 551, 554 (1998) ("Instead of compensating toxic exposure plaintiffs for injuries they have yet to manifest, an award for medical monitoring encourages them to take preventative or early detection measures to protect their long-term health.").

occasioned by a defendant's negligence.[84] Here it is worth considering the distinction between the medical monitoring claim and the equally novel, though generally frowned upon claim of fear of disease following a toxic exposure.[85] When plaintiffs exposed to a toxin sue for "fear of cancer," to take the most noteworthy example, they are seeking an ex ante distribution of the likely harm caused by the totality of the defendant's conduct. In essence, a "fear of cancer" claim is simply a demand for a distribution of the likely social cost of the defendant's negligence paid to the entirety of the at-risk group rather than the individuals who ultimately contract the disease suing after-the-fact. By way of example, the payment of $1000 to 1000 exposed individuals for fear of disease is the same as the payment of $100,000 to the ten individuals who actually contract the disease. So long as the probabilistic assessments are accurate, the deterrence objectives of the tort system are met in either case, as are the compensatory claims of the affected group as a whole.[86] One may argue about the merits of ex ante versus ex post compensatory systems, but these arguments are fairly well confined within the core tenets of the tort system.

The probabilistic nature of the harm is directly evident in the mass toxic exposure cases. Instead of the plaintiff being an identifiable individual whose harms may be greater than immediately apparent, the probabilities attach to the epidemiological likelihood that a certain number of individuals among the affected group will manifest pathologies at some future date. As should be evident from the nature of epidemiological proof, there is no difference among the affected class members in terms of proof of harm. All affected individuals become the basis of the same probabilistic risk of harm. The key, however, is that there is no effort to provide compensation to

84 *See Hansen*, 858 P.2d at 976 (noting that the medical monitoring claim "furthers the deterrent function of the tort system by compelling those who expose others to toxic substances to minimize risks and costs of exposure"); McCall, *supra* note 82, at 989–90 (outlining the societal benefits of recognizing a medical monitoring awards including ensuring that defendants pay all costs associated with their negligence).

85 For a general discussion of the difference between medical monitoring and fear of disease claims, see 2 AMERICAN LAW INST., ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 380 (1991). In that study, the American Law Institute (ALI) declared that "treating medical surveillance costs as a compensable harm is *not* equivalent to reimbursing individuals for their fear of cancer nor for the pain and suffering associated with increased risk." *Id.* Furthermore, the ALI supports medical monitoring awards, but does not support claims for fear of disease presented as "cancerphobia." *Id.*

86 It is of course assumed that recovery for fear of cancer ex ante must preclude a claim for compensation ex post for those unfortunate individuals who actually do become ill.

the affected group of individuals—only to detect and forestall adverse consequences from the toxic exposure.

For those jurisdictions that have recognized medical monitoring as a cause of action, which stands at slightly more than half of those jurisdictions that have considered the question,[87] there are two significant issues that bear on the topic of this Article.[88] The first, although somewhat more tangential, is the nature of the medical monitoring claim. The example provided by the Utah court in *Hansen* makes clear that the medical response must be an appropriate and distinct response to the tortious harm, not simply a disguised form of recovering damages. As expressed by the leading opinion in this area, *Barnes v. American Tobacco Co.*,[89] the requirements for medical monitoring arising out of a mass toxic exposure are

> (1) exposure greater than normal background levels; (2) to a proven hazardous substance; (3) caused by the defendant's negligence; (4) as a proximate result of the exposure, plaintiff has a significantly increased risk of contracting a serious latent disease; (5) a monitoring procedure exists that makes the early detection of the disease possible; (6) the prescribed monitoring regime is different from that normally recommended in the absence of the exposure;

87 For thorough recent surveys of the status of medical monitoring claims across states, see *In re* Telectronics Pacing Sys., Inc., 168 F.R.D. 203, 215–17 (S.D. Ohio 1996); Badillo v. Am. Brands, Inc., 16 P.3d 435, 438–39 (Nev. 2001) (per curiam) (summarizing data to show that eleven state courts of appeals and federal courts in seven more states had recognized a cause of action for medical monitoring); *see also* Craig A. Stevens, Casenote, Redland Soccer Club, Inc. v. Department of the Army: *The Recovery of Medical Monitoring Costs Under HSCA's Citizen-Suit Provision*, 10 VILL. ENVTL. L.J. 201, 208 n.24 (1999) (updating some of the research done in *In re Telectronics*). In an interesting recent development, the Louisiana State Legislature voiced its opinion regarding the viability of a medical monitoring claim. 1999 La. Acts no. 989, § 2, http://www.legis.state.la.us/ leg_docs/99RS/CVT7/OUT/0000FVRJ.PDF. Shortly thereafter the Louisiana Supreme Court held that plaintiffs who were exposed to asbestos but were not suffering any present injury could recover an award for future medical monitoring in *Bourgeois v. A.P. Green Industries, Inc.*, 716 So. 2d 355, 361 (La. 1998), the State Legislature overturned that decision by passing a statute excluding future medical treatment from damage awards. 1999 La. Sess. Law Serv. 989 (West). *See generally* James E. Lapeze, Comment, *Implications of Amending Civil Code Article 2315 on Toxic Torts in Louisiana*, 60 LA. L. REV. 833 (2000) (discussing the effect of amending article 2315 on medical monitoring claims under Louisiana law).

88 There is one significant matter that is outside the scope of my concern. There are ongoing disputes in the states on whether medical monitoring is a stand-alone claim or is simply a remedy for a tort suit. I see this as largely a divide between the states that have allowed medical monitoring and those that have not, and accordingly, I do not separately address this question.

89 161 F.3d 127 (3d Cir. 1988).

> and (7) the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles.[90]

Barnes provides a structure for allowing a limited form of recovery to a class of persons who have been exposed to a probabilistic harm, although it is in the nature of the probability that only a subset will ever succumb to the harm. What also emerges from the *Barnes* test is the departure from the normal concept at law of damages-based recovery. The *Barnes* factors are designed to allow a medical intervention to forestall a probabilistic harm before it is fully manifest—and before a full tort cause of action would accrue.[91]

The second requirement is that there be a separation between the recovery to the affected group necessary for medical monitoring and any individual compensation. A useful distinction may be made between monitoring as an equitable remedy for a defendant's tortious negligence, and compensation for individual harms, a classic remedy at law. This then brings the medical monitoring issue into the center of this Article. If medical monitoring is found to be an equitable remedy that stands apart from traditional common-law compensatory remedies, then an aggregate claim for probabilistic medical monitoring should assume the characteristics of the antitrust injunction in *Ticor*. As it turns out, this is precisely the distinction that is emerging in the case law. Returning to the leading case, *Barnes*, we find a direct instruction that medical monitoring claims be brought as Rule 23(b)(2) class actions, as a proper example of "those class actions seeking primarily injunctive or corresponding declaratory relief."[92]

Thus, under *Barnes*, one of the requirements for a medical monitoring claim is that there be a hermetic seal between funds used to pay for medical surveillance of the affected class and funds used to com-

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90 *Id.* at 138–39.

91 This is stressed in the testimony of Dr. Troyen Brennan in support of the medical monitoring program created in the fen-phen litigation. Dr. Brennan expressed the criteria as follows:

> (1) asymptomatic progression of disease following toxic exposure; (2) the existence of a test with high sensitivity; (3) exposed population with relatively high prevalence; (4) the test has a high predictive value; (5) the test is relatively low cost; (6) monitoring is capable of integration into standard clinical follow-up of those with disease; (7) monitoring should allow early preventive care; and (8) monitoring should allow appropriate timing of definitive care.

In re Diet Drugs Prods. Liab. Litig., No. 99-20593, 2000 U.S. Dist. LEXIS 12275, at *167 (E.D. Pa. Aug. 28, 2000). I must disclose that I worked with Dr. Brennan in the preparation and presentation of these criteria to the court.

92 *Barnes*, 161 F.3d at 142 (quoting 1 NEWBERG & CONTE, *supra* note 37, § 4.11, at 4-39).

pensate plaintiffs in any fashion. According to *Barnes*, the establishment of a court-supervised program through which class members would undergo periodic medical examinations in order to promote early detection of diseases is a "paradigmatic request for injunctive relief."[93] As such, medical monitoring stands in the same posture toward future damages actions as does the injunctive claim in *Ticor*. The difference is that *Ticor* involved a purely prohibitory injunction, whereas medical monitoring compels actual payment of the costs of the monitoring program by the defendant. This is an issue that has caused some jurisdictions to disallow medical monitoring as a distinct cause of action.[94] But for those that have recognized this relatively novel claim, the distinction between a prohibitory injunction and one that obligates the payment of money is more a matter of form than substance.[95] Any prohibitory injunction compelling the cessation of a profitable business practice may be costed out and its financial consequences as readily defined as that of a medical surveillance program.

Of more concern is the potential preclusion of subsequent claims for those individuals who actually succumb to illness. As a matter of substantive law there is a distinction between the medical monitoring claim and the anticipatory "fear of cancer." As discussed above, the latter actually tries to compensate the entire pool of affected persons on an ex ante rather than ex post basis. There would be no basis for the actually harmed to then claim to sue again if they were the holders of the losing lottery ticket. But the medical monitoring claimants have had no opportunity to seek compensatory damages, either ahead of time as a probabilistic matter, or subsequently. Therefore, as a mat-

93 *Id.* at 132.

94 *See, e.g.*, Ball v. Joy Techs., Inc., 958 F.2d 36, 39 (4th Cir. 1991) (holding that under West Virginia and Virginia law a claim for medical monitoring is an action for future damages and therefore requires actual physical injury before a claim against defendant can be established); Reed v. Philip Morris, Inc., No. 96-5070, 1997 WL 538921, at *15 (D.C. Super. Aug. 18, 1997) (holding that a medical monitoring claim is simply a form of damages under traditional common law tort theory of recovery).

95 *See, e.g.*, Gibbs v. E.I. DuPont de Nemours & Co., 876 F. Supp. 475, 479 (W.D.N.Y. 1995) (holding that medical monitoring award is equitable in nature); Yslava v. Hughes Aircraft Co., 845 F. Supp. 705, 707 (D. Ariz. 1993) ("[P]laintiffs' request for court-supervised program requiring ongoing, elaborate medical monitoring of members of class exposed to contaminated groundwater qualified as injunctive relief."); Cook v. Rockwell Int'l Corp., 151 F.R.D. 378, 379 (D. Colo. 1993) ("[The] request for medical monitoring of residents exposed to weapons production facility's release of radioactive and non-radioactive substances presented request for injunctive relief.").

ter of substantive law, there should be no preclusion of a subsequent tort claim.[96]

The procedural law should follow apace. A claim for medical monitoring should fall exclusively within the confines of a Rule 23(b)(2) class action. It is an injunction seeking to compel an alteration of a defendant's conduct independent of any compensation to any individual claimant.[97] An individual may choose not to realize the benefits of a court-supervised monitoring program, just as an individual may choose not to engage in any further transactions with an antitrust defendant whose conduct has been altered under injunction. But it would have no meaning to allow an individual claimant to "opt out" since there is no individual claim to pursue separately—just as there is no such individual claim in any other injunctive action.

Finally, to bring the discussion fully within the *Ticor* doctrine, it is important not to overlook the significance of *Barnes* in confining the claim for medical monitoring within the Rule 23(b)(2) class action. Under Rule 23(b)(2), the class action is mandatory, allows no individual discretion to leave and pursue other avenues of redress,[98] and does not purport to allow for individual recovery of damages. Accordingly, this procedural device allows the substantive claim for medical monitoring to achieve its intended goals without compromising the ability of the actually injured to seek redress.

CONCLUSION

Class actions are necessarily a difficult undertaking. The central advantage of tailoring the preclusion to the type of class action is that it allows a class to be defined according to the level of due process protections owed the absent class members. The line between Rule 23(b)(2) and Rule 23(b)(3) actions is, and has always been, somewhat muddled. Courts have a difficult time discerning when class actions should be considered primarily injunctive in nature and when the individual damages component rises to the fore. By focusing on the preclusive effect of the class action, courts can shift the burden onto the litigants of properly defining the scope of the class action.

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96 *See* McCall, *supra* note 82, at 987–90 (arguing that an award for medical monitoring does not preclude a subsequent claim for actual damages).

97 *See Barnes*, 161 F.3d at 131–32.

98 *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 833 n.13 (1998) ("[I]n cases brought under subdivision (b)(1), Rule 23 does not provide for absent class members to receive notice and to exclude themselves from class membership as a matter of right. . . . It is for this reason that such cases are often referred to as 'mandatory' class actions.").

This is of particular significance in the settlement context that has proved so vexing for the courts in recent years. If the parties, particularly in the settlement context, try to cheat by compromising the ability to opt out and by short-circuiting the more exacting Rule 23(b)(3) certification standards, then they should be limited in their claim to have achieved finality. That is ultimately the lesson of *Ticor* and the emerging lesson of the medical monitoring case law as well.