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# WHAT THE *SHUTTS* OPT-OUT RIGHT IS AND WHAT IT OUGHT TO BE

Brian Wolfman\*  
Alan B. Morrison\*\*

## I. INTRODUCTION

In *Phillips Petroleum Co. v. Shutts*,<sup>1</sup> the Supreme Court addressed the question whether a Kansas state court had the power to certify a nationwide class of plaintiffs. The great majority of the class were citizens of other states who had no contact with Kansas relevant to the class members' claims for interest on natural gas royalties whose payment had been delayed by the defendant.<sup>2</sup> Drawing on the Court's jurisprudence regarding the due process limits on a court's exercise of personal jurisdiction over a *defendant*, Phillips Petroleum argued that such a class could not be certified because the Kansas court lacked personal jurisdiction over the unnamed absent *plaintiffs* who did not have "minimum contacts" with Kansas and who had not affirmatively consented to the Kansas court's jurisdiction.<sup>3</sup>

In arguing that nationwide certification was constitutionally impermissible, Phillips claimed concern over the possibility that the trial court might certify the nationwide class, and thereafter enter judgment on the merits, but that the judgment would lack binding effect on absent plaintiffs.<sup>4</sup> Phillips thus feared that the absentees would later claim that, because they had not been subject to the jurisdiction of the court that had issued the judgment, they were free to sue Phillips in a subsequent suit.<sup>5</sup> Although the Court understood that the judgment had to have binding effect, it rejected Phillips' analogy between the "minimum contacts" necessary for the exercise of personal jurisdiction over a defendant and the requisites for a court's exercise of jurisdiction over an absent class member.<sup>6</sup> In so holding, the Court expressly rejected the suggestion, built on personal jurisdiction doctrine, that, for absentees to be bound, they must affirmatively consent by *opting in* to the class, much as a defendant might affirmatively consent to jurisdiction by choosing to defend an action even when it lacks minimum contacts with the jurisdiction.<sup>7</sup>

Instead, the Court held that, for a class action to bind an absent class member,

[t]he plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, "reasonably calculated, under all the

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<sup>1</sup> *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

<sup>2</sup> *See id.* at 799-800.

<sup>3</sup> *Id.* at 802.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 805.

<sup>6</sup> *Shutts*, 472 U.S. at 808.

<sup>7</sup> *Id.* at 812.

circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” . . . The notice should describe the action and the plaintiffs’ rights in it. Additionally, we hold that due 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. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.<sup>8</sup>

Thus, notice to the class and the opportunity to exclude oneself from the class—which the Court viewed as a type of implied consent—was all the consent necessary to bind the class.

*Shutts* upheld the national certification because the trial court’s procedures had met the due process requisites: the plaintiff class was provided a detailed notice, that notice had given absentees an opportunity to object, the class members had been provided an opportunity to opt out (which many had exercised), and the Kansas courts’ determination that the named plaintiffs had provided adequate representation had not been challenged.<sup>9</sup>

The Court limited its holding to “an absent plaintiff concerning a claim for money damages or similar relief at law,”<sup>10</sup> specifying that it was addressing only “those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments[,] . . . [and] intimat[ing] no view concerning other types of class actions, such as those seeking equitable relief.”<sup>11</sup> As we shall see, this limitation has proved problematic for courts assessing the breadth of *Shutts*’ opt-out right.<sup>12</sup>

## II. THE SCOPE OF *SHUTTS*’ OPT-OUT RIGHT

### A. Personal Jurisdiction or More?

To appreciate current disputes over the breadth of *Shutts*’ opt-out right, it is necessary to understand how the class action terrain has changed since *Shutts* was decided in 1985. In *Shutts* itself, the defendant, while trumpeting the rights of the absentees to avoid the binding effect of a class judgment, was seeking to overturn a class certification ruling and set aside a large judgment in favor of the

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<sup>8</sup> *Id.* (citations omitted).

<sup>9</sup> *Id.* at 813-14.

<sup>10</sup> *Id.* at 811.

<sup>11</sup> *Shutts*, 472 U.S. at 811 n.3; see also *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848 & n.24 (1999) (reaffirming opt-out requirement and noting “important caveat” that *Shutts*’ holding applied only to claims “wholly or predominantly for money judgments”).

<sup>12</sup> In a second ruling, the Court held that due process did not allow application of Kansas law to all plaintiffs. *Shutts*, 472 U.S. at 814-23. We do not address this choice-of-law issue further, except to note that the Court rejected the argument that due process had been met because, by not opting out, the absentees had consented to be bound by Kansas substantive law. *Id.* at 820.

class. If Phillips had been successful in defeating nationwide certification, any subsequent single-state class action or a nationwide opt-in action might never have materialized. And even if such alternative class actions were filed, they would be far less powerful than a nationwide opt-out class like the one certified in Kansas. Of considerable significance is that *Shutts* was a *litigation* class action: one in which no settlement has been reached, and the plaintiff class seeks certification intending to take the case to trial and judgment. In such an action, the defendant opposes certification with the hope of derailing the case entirely or limiting its scope.

But this is not the context in which most *Shutts* opt-out disputes have arisen in recent years. Increasingly, in the late 1980s and 1990s, the major battles over opt-out rights have concerned *settlement* class actions, in which defendants agreed with the named plaintiffs' lawyers to class certification, but only for the purpose of carrying out a settlement on the merits.<sup>13</sup> In these cases, of course, the defendant is agreeing to, rather than resisting, class certification. And in many of these cases, the defendant would prefer that the class action be "mandatory," or non-opt-out, to maximize the settlement's res judicata effect.<sup>14</sup> Defendants' efforts to obtain mandatory class certification and settlement have occurred mainly, but not exclusively, in the mass tort context, rather than in small claims consumer, antitrust, or securities cases, in which defendants have little to fear from providing an opt-out right because class members in such cases rarely opt out. Indeed, because these small claims usually do not support individual litigation, defendants generally resist class certification in such cases because defeating certification effectively defeats the claims.

On the other hand, in the cases in which opt-out matters, ranging from high-value personal injury cases<sup>15</sup> to middle-value cases alleging financial misconduct<sup>16</sup> to certain employment disputes,<sup>17</sup> defendants want to cut off opt-out rights through a mandatory settlement, which, if approved by the court, fixes the price of an all-purpose "cram down" at the figure agreed to by plaintiffs' counsel.<sup>18</sup> This kind of class settlement is often attractive to a defendant facing a

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<sup>13</sup> See generally *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (overturning settlement class action and setting certification requirements for settlement classes); FED. JUD. CTR., MANUAL ON COMPLEX LITIGATION (FOURTH) § 21.132, 250 (2004) (discussing settlement classes).

<sup>14</sup> See, e.g., *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 976 (5th Cir. 2000) (discussing defendant's interest in maximizing res judicata effect through use of mandatory classes).

<sup>15</sup> See, e.g., *Ortiz*, 527 U.S. 815; *In re Telecommunications Pacing Sys., Inc.*, 221 F.3d 870 (6th Cir. 2000); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 176 F.R.D. 158 (E.D. Pa. 1997).

<sup>16</sup> See, e.g., *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171 (8th Cir. 1995); *Smith v. Tower Loan of Miss., Inc.*, 216 F.R.D. 338 (S.D. Miss. 2003), *aff'd sub nom. Smith v. Crystian*, 91 F. App'x 952 (5th Cir. 2004).

<sup>17</sup> See, e.g., *White v. Nat'l Football League*, 41 F.3d 402 (8th Cir. 1994).

<sup>18</sup> The term "cram down" comes from the Bankruptcy Code, under which a court, in specified circumstances, has the express power to force a plan of reorganization over the objections of some of the creditors. 11 U.S.C. § 1129(b) (2006). That is the effect of allowing non-opt-out class certification under Rule 23.

significant number of pending or future suits.<sup>19</sup> Indeed, the global peace that comes from mandatory certification is so enticing to defendants facing myriad individual suits that they have, on occasion, sought out plaintiffs' counsel with whom to agree on a mandatory class settlement even where no class action was previously pending.<sup>20</sup>

Thus, the present-day battle over opt-out rights involves settling defendants and plaintiffs' counsel seeking mandatory certification on the one hand, and putative opt-out absentee-objectors challenging the settling parties' cram down efforts on the other. Understanding this dynamic is important because it sheds light on the inadequacy of *Shutts*' reasoning in explaining why opt-out rights ought to be protected. *Shutts* involved a class certification challenge by a *defendant*, allegedly championing the absentees' rights, but for its own interests, not those of the class members.<sup>21</sup> Thus, Phillips was thinking like a *defendant*: it sought to apply to absent class members the due process doctrines that were developed to enable *defendants* to avoid the expense and inconvenience of being haled into court to defend lawsuits in distant, unfamiliar places. That analysis makes sense for defendants who may, in fact, not wish to be dragged into a distant (and inhospitable) forum. But "distant forum abuse"<sup>22</sup> is irrelevant for absent *plaintiffs* considering whether to opt out. Generally, an absent plaintiff who is notified of a class action and given the opportunity to opt out is deciding between two courses of action. First, the absentee may want to opt out so that she can continue prosecuting a pending lawsuit or file a new suit in the forum of her choice. The location of the class action forum or the geographical confines of the jurisdiction where the class action was filed will almost certainly not be a factor in making that decision. Second, the absentee may decide to stay in the class action and leave it to the class lawyer to litigate the suit wherever it was filed. Generally, a stay-in decision, because it is premised on a judgment that *someone else* will be competent to represent the absentee's interests, would also not be affected by the location of the class action forum. Since claims for monetary relief (whether through settlement or a litigated judgment) will almost certainly be submitted by mail or perhaps online (if any submission is required), proximity to the courthouse will be equally irrelevant.<sup>23</sup>

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<sup>19</sup> We acknowledge that such mandatory suits can benefit class members who might not otherwise have brought suit and would have obtained nothing. On the other hand, when a court strikes down a mandatory settlement, the parties may still negotiate an opt-out settlement that provides class members with substantial relief. *See, e.g., In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 985 (S.D. Ohio 2001).

<sup>20</sup> *See, e.g., Ortiz*, 527 U.S. at 825-27 (class complaint and settlement filed simultaneously).

<sup>21</sup> *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

<sup>22</sup> 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, 52-54 (1986).

<sup>23</sup> On occasion, a class member will object to a class settlement or intervene or otherwise participate in the case. When that occurs, the distance of the forum may be an impediment and thus an appropriate factor for a court to consider in facilitating the participation of absentees (such as holding hearings in locations other than the forum, allowing video and telephone participation, and the like). However, in that circumstance, the distant forum does not implicate the *opt-out right*. It

We believe that a view of *Shutts* that goes beyond personal jurisdiction can be derived from the decision itself. To be sure, the initial discussion in *Shutts* of the due process rights of absent class members is, as we have noted, cast in personal jurisdiction terms.<sup>24</sup> Thus, the Court stated that “a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant.”<sup>25</sup> Thereafter, however, the Court set forth the minimum due process protections that must be afforded to “absent plaintiff[s] concerning a claim for money damages or similar relief at law”<sup>26</sup> without geographical limitation. In our view, then, the teaching of *Shutts*, if not its actual holding, is that, although minimum contacts are not necessary to bind absent class members, minimal due process—notice, adequate representation, and an opportunity to opt out—must be accorded *all* class members who were not named as plaintiffs, not just those lacking jurisdictional contacts, before those class members can be bound. The property interests of those class members arise not from the Court’s personal jurisdiction cases, but from two other related strains of the Court’s due process jurisprudence. The first is exemplified by cases such as *Logan v. Zimmerman Brush Co.*<sup>27</sup> and *Shutts* itself,<sup>28</sup> which make clear that a cause of action is a form of property protected by the Due Process Clause, and the other by landmark rulings such as *Mullane v. Central Hanover Bank & Trust Co.*,<sup>29</sup> and *Mathews v. Eldridge*,<sup>30</sup> which establish that individuals retain considerable control over the disposition of their property interests when those interests are threatened by administrative or judicial processes.

Opt-out rights thus guard against the unconstitutional deprivation of property without adequate procedures, by allowing each class member to control the disposition of his or her constitutionally protected property. Under these strains of due process, the existence of an opt-out right does not turn on whether the absent class members lived in the forum state or a neighboring state, but simply on whether they had asserted an interest in retaining control over their property rights by filing an opt-out form with the court clerk’s office.

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is theoretically possible that a stay-in/opt-out decision might be affected by the convenience of the forum, on the assumption that an absentee would be more likely to stay in when capable of monitoring the class lawyer’s conduct of the litigation or the implementation of a settlement. We note only that, in the authors’ years of experience in observing nationwide class actions, both representing absentees and consulting with other lawyers representing them, we have never encountered a situation where the convenience of the class action forum appeared to influence the stay-in/opt-out decision. The distance of the forum does, on occasion, influence the decision whether to appear in-person at a settlement fairness hearing, rather than only to object in writing.

<sup>24</sup> *Shutts*, 472 U.S. at 811.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 811-12 (citation omitted).

<sup>27</sup> *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-29 (1982).

<sup>28</sup> *Shutts*, 472 U.S. at 807 (“[P]etitioner correctly points out that a chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs.”) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950)).

<sup>29</sup> *Mullane*, 339 U.S. at 318-20, cited in *Shutts*, 472 U.S. at 812.

<sup>30</sup> *Mathews v. Eldridge*, 424 U.S. 319, 341-49 (1976).

Over a decade after *Shutts*, in *Ortiz v. Fibreboard Corp.*,<sup>31</sup> the Court elaborated on its earlier due process concerns, explicitly extending them beyond a personal jurisdiction rationale. In *Ortiz*, the Court overturned a nationwide federal court settlement of future asbestos personal injury claims, rejecting the theory that the defendant company, and its liability insurer, constituted a “limited fund” that justified mandatory certification under Federal Rule of Civil Procedure 23(b)(1)(B).<sup>32</sup> The Court explained that opt-out rights stem from “our deep-rooted historic tradition that everyone should have his own day in court,”<sup>33</sup> specifically noting that “[t]he inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damages claims gathered in a mandatory class” where “[t]he legal rights of absent class members . . . are resolved regardless of either their consent, or, in a class with objectors, their express wish to the contrary.”<sup>34</sup> These concerns, among others, were the basis for the Court’s view that a narrow construction of Rule 23(b)(1)(B) was necessary to avoid “serious constitutional concerns” that would be presented by mandatory certification of traditional money damages claims.<sup>35</sup> *Ortiz* cited *Shutts* with approval, describing the case as one involving “related circumstances,”<sup>36</sup> which would have been an unusual characterization if *Shutts* were solely about the due process limits of personal jurisdiction. For present purposes, the importance of *Ortiz* is that its reasoning centers on the need to provide the affected absent class members, and not other parties to the class action, with *control* over disposition of their property interests, and not on a “minimum contacts” analysis.

### B. Does the Legal Rationale for Opt-Out Rights Matter?

Does it matter whether the justification for the opt-out right focuses on notions of personal jurisdiction or, rather, on individual control over property rights protected by the Due Process Clause? Both the case law and our practice experience suggest that it does. Viewing the opt-out right solely as a matter of personal jurisdiction, some courts have held that, when an absentee-objector challenges a settlement both on the ground that it does not accord an opt-out right *and* that the settlement is unfair or otherwise unlawful, the objector waives any right to opt out on the theory that addressing the merits constitutes consent to the jurisdiction of the court.<sup>37</sup> That result has bizarre practical consequences: a rule prohibiting the court from considering an objector’s twin challenge to the

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<sup>31</sup> *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

<sup>32</sup> *Id.*; see FED. R. CIV. P. 23(b)(1)(B).

<sup>33</sup> *Ortiz*, 527 U.S. at 846 (citing *Martin v. Wilks*, 490 U.S. 755, 762 (1989)) (internal marks omitted).

<sup>34</sup> *Id.* at 846-47.

<sup>35</sup> *Id.* at 842, 845, 864.

<sup>36</sup> *Id.* at 847.

<sup>37</sup> See, e.g., *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1175-76 (8th Cir. 1995); *White v. Nat’l Football League*, 41 F.3d 402, 407-08 (8th Cir. 1994); *In re Real Estate Title and Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 770-71 (3d Cir. 1989).

mandatory nature of a class action settlement and the settlement's fairness both discourages fairness objections and encourages objectors to abandon the class action forum and present their opt-out objection in a collateral attack.<sup>38</sup>

Of equal significance, settling class action defendants have argued that the right to opt out under *Shutts* does not apply to residents of the forum state who, in a traditional "minimum contacts" analysis, would have no due process basis for failing to answer a suit filed in that state.<sup>39</sup> This argument, if adopted, would have serious implications for forum state residents who would never, as a constitutional matter, have a right to opt out.<sup>40</sup> Limiting the opt-out right in that way makes no sense. In a nationwide class action pending in Philadelphia, for instance, it is difficult to argue based on distant forum abuse—or any other sensible rationale—that opt-out rights must be accorded to class members across the river in Camden, New Jersey, but not to class members over 400 miles away in Erie, Pennsylvania. Although traditional personal jurisdiction doctrine would allow suit against an in-state defendant no matter how distant the forum (but not

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<sup>38</sup> The argument that a class action objector "consents" to jurisdiction by presenting fairness objections is wrong even if *Shutts* is viewed through a personal jurisdiction lens. The notion that one consents to jurisdiction simply by appearing in the class action forum and raising both jurisdiction and merits-based arguments is at odds with the modern view taken by the Federal Rules, which permit a party to challenge personal jurisdiction under Rule 12(b)(2) at the outset of the case and also to participate fully in all aspects of the merits if the challenge to personal jurisdiction is rebuffed, without waiving the personal jurisdiction challenge. See 5B CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1351, at 313-14 (3d ed. 2004) ("A party who has unsuccessfully raised an objection [to personal jurisdiction] under Rule 12(b)(2) may proceed to trial on the merits without waiving the ability to renew the objection to the court's jurisdiction."). The idea that, by appearing in the class action forum, the absentee forfeits his opt-out right if he argues the merits, see *In re Real Estate Title and Settlement Servs. Antitrust Litig.*, 869 F.2d at 769, is implicitly predicated on the need for a "special appearance" to challenge jurisdiction, which has been abolished by the Federal Rules, see 5C CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1362, at 100 (3d ed. 2004). Moreover, this argument appears foreclosed by the Supreme Court's decision in *Ortiz*. There, the objectors appeared in the district court and raised a host of arguments on the merits of the settlement, as well as the right-to-opt-out argument based on *Shutts*. See Brief for Petitioners at 39-42, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (No. 97-1704), available at LEXIS, 1997 U.S. Briefs 1704. The Supreme Court gave no hint that the *Shutts* argument had been forfeited because arguments on the merits had also been raised. To the contrary, as we have discussed, the Court dealt with *Shutts* at some length, using it as additional authority for its decision rejecting the mandatory settlement there. *Ortiz*, 527 U.S. at 847-48.

<sup>39</sup> Cf. *Grimes v. Vitalink Commc'ns Corp.*, 17 F.3d 1553, 1559-60 (3d Cir. 1994) (suggesting that, under *Shutts*, absent class member's ownership of stock of Delaware corporation might be sufficient "minimum contacts" with Delaware forum to eliminate opt-out right).

<sup>40</sup> For class action plaintiffs seeking a state court forum, class actions filed solely by forum state plaintiffs against forum state defendants may proliferate in the wake of the Class Action Fairness Act of 2005, Pub. L. No. 109-2 (2005), which generally provides for original and removal federal jurisdiction in class actions against non-forum-state defendants. See 28 U.S.C. §§ 1332(d), 1453 (2005) (with section 1332(d) regarding original jurisdiction and section 1453 regarding removal).



necessarily over a much closer out-of-state defendant), there is no reason to extend that approach to the opt-out context.<sup>41</sup>

### C. Denying Opt-Out Based on “Predominance”

Another tactic used by litigating defendants and by settling parties (both plaintiffs and defendants) to obtain approval of mandatory classes has been to argue that injunctive (or other “equitable”) relief “predominates” over the class members’ damages claims, or that the damages claims flow from conduct that the plaintiffs seek to enjoin. In these so-called “hybrid” damages/injunctive relief cases, some courts have accepted these predominance arguments on the theory that reasonable plaintiffs would have sought injunctive relief and that an award of such relief would be “reasonably necessary and appropriate.”<sup>42</sup> Another court of appeals, in a novel interpretation of little-used Federal Rule of Civil Procedure 23(b)(1)(A),<sup>43</sup> denied absentees opt-out rights from a settlement because the class members’ claims for injunctive relief might have conflicted with similar claims in pending or even *potential* litigation, despite the presence of substantial damages claims.<sup>44</sup>

Other courts, led by the Fifth Circuit in *Allison v. Citgo Petroleum Corp.*,<sup>45</sup> have been wary of certifying hybrid mandatory classes, at least, as in *Allison*, where the defendant opposed class certification, rather than supporting it.<sup>46</sup> Thus, *Allison* would allow non-opt-out certification only where each class member’s damages recovery would be easily and mechanically calculable and flow directly from the conduct sought to be enjoined—in other words, only where each class member’s damages had resulted from conduct that affected each class member in a substantially identical manner.<sup>47</sup> Although these decisions purported to be deciding when injunctive relief “predominated” over claims for damages, they expressed concern that any broader test would trample class members’ rights to opt out and determine their own litigation destiny.<sup>48</sup> In

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<sup>41</sup> Accordingly, for the reasons discussed in this subpart B, the *Shutts* requirements of notice, right to opt-out, and court determination of adequacy of representation would apply in federal court, even if Rule 23 did not provide for them and even though state court territorial limits on personal jurisdiction would not control in federal court.

<sup>42</sup> See, e.g., *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 163-64 (2d Cir. 2001); see also *Molski v. Gleich*, 318 F.3d 937, 949-50 (9th Cir. 2002).

<sup>43</sup> FED. R. CIV. P. 23(b)(1)(A).

<sup>44</sup> *Smith v. Crystian*, 91 F. App’x 952 (5th Cir. 2004).

<sup>45</sup> *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998).

<sup>46</sup> *Id.* at 407.

<sup>47</sup> See *id.* at 415; see also, e.g., *Jefferson v. Ingersoll Int’l Inc.*, 195 F.3d 894, 898 (7th Cir. 1999). The Fifth Circuit also based its decision in part on the fact that, for some class claims for damages, there was a right to trial by jury that conflicted with the equitable aspects of a mandatory class. *Allison*, 151 F.3d at 422-26.

<sup>48</sup> See, e.g., *In re Teletronics Pacing Sys., Inc.*, 221 F.3d 870, 881 (6th Cir. 2000); *Jefferson*, 195 F.3d at 898; see also *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 976 (5th Cir. 2000)

this regard, these decisions resemble earlier rulings, warning that expansive interpretations of the mandatory subdivisions of Rule 23(b) would swallow up the notice and opt-out rights that the rule makers intended to provide class members having significant individual interests at stake.<sup>49</sup> And while these cases principally involved interpretations of Rule 23, they recognized that due process lurked in the background and that *Shutts* and *Ortiz* demanded an interpretation of the rule that protects opt-out rights whenever substantial damages claims are at stake.<sup>50</sup>

We agree with an approach that narrowly defines the circumstances in which hybrid classes can be certified on a non-opt-out basis. However, we also believe that the predominance inquiry has little to commend it, either doctrinally or as a practical basis for protecting the rights of absentees. As a doctrinal matter, reliance on “predominance” appears to have arisen from the 1966 Civil Rules Advisory Committee Notes to Rule 23(b)(2), which, after explaining that subdivision (b)(2) was intended to cover actions for injunctive or declaratory relief, stated that (b)(2) “does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages.”<sup>51</sup> The note thus sought to limit (not expand) the reach of (b)(2) certification. It did not address the question whether hybrid actions could be certified exclusively on a mandatory basis, or whether the opt-out subdivision—Rule 23(b)(3)—had to be employed in such circumstances, at least as to class members’ claims for substantial monetary relief.<sup>52</sup>

More fundamentally, Rule 23(b)(2)’s text does not mention “predominance.” It simply describes the kind of class claims amenable to certification under that subdivision—claims for final injunctive and declaratory relief—and it does not address how hybrid class actions ought to be treated.<sup>53</sup> Put differently, Rule 23(b)(2) does not attempt to patrol the borderline between it and Rule 23(b)(3), the rule’s non-mandatory subdivision. Ironically, it is only Rule 23(b)(3) that refers to predominance, and even there, the rule does not use the term to describe the relationship between subdivision (b)(3) and the mandatory subdivisions of the rule. Rather, Rule 23(b)(3) limits certification to

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(“Defendants attempting to purchase res judicata may prefer certification under (b)(2) over (b)(3).” (citing *Allison*, 151 F.3d 402).

<sup>49</sup> See, e.g., *In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1545 (11th Cir. 1987); *McDonnell Douglas Corp. v. U.S. Dist. Court for Cent. Dist.*, 523 F.2d 1083, 1086 (9th Cir. 1975) (expansive interpretation of Rule 23(b)(1)(A) would render Rule 23(b)(3) “superfluous”).

<sup>50</sup> See, e.g., *Telectronics*, 221 F.3d at 881; *Jefferson*, 195 F.3d at 899 (explaining that *Ortiz* “says in no uncertain terms that class members’ right to notice and an opportunity to opt out should be preserved whenever possible”); see also *Molski v. Gleich*, 318 F.3d 937, 950-51 (9th Cir. 2002); *Brown v. Tigor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), *cert. dismissed as improvidently granted*, 511 U.S. 117 (1994).

<sup>51</sup> FED. R. CIV. P. 23 advisory committee’s note; see, e.g., *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 163 (2d Cir. 2001) (discussing advisory committee’s note).

<sup>52</sup> FED. R. CIV. P. 23 advisory committee’s note.

<sup>53</sup> See FED. R. CIV. P. 23(b)(2) (applying where “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”).

those situations where common questions of law or fact “predominate” over individual questions,<sup>54</sup> and then only where two key safeguards—individualized notice and the right to opt out—are present.<sup>55</sup> In sum, nothing in Rule 23 provides that one of the rule’s subdivisions trumps another based on predominance.<sup>56</sup>

There is another adverse consequence of forcing a hybrid class action into either Rule 23(b)(1) or (b)(2): it eliminates the need for individual notice to class members and often any notice at all unless there is a settlement, in which case, under Rule 23(e), notice is required for all classes. For plaintiffs, not having to provide notice may be attractive because it eliminates potentially large out-of-pocket expenses, which is often why defendants in a litigation class action urge the court to allow certification only under Rule 23(b)(3), if at all. But lack of any kind of notice will generally mean that class members will learn of the case only if there is a settlement, instead of at a time when they might be able to participate—as they have the explicit right to do in Rule 23(b)(3) cases. Early notice, even if not to everyone in the class, increases the possibility of participation by absent class members that might alert class counsel and the court to possible differences of opinions among the class as to how to proceed or what kind of relief to seek. It also might bring to light differences among class members that would suggest the need for subclasses or changes in the class definition. To be sure, Rule 23(c)(2)(A) could be amended to make some notice mandatory for all certified classes, but until it is, forcing hybrid actions out of Rule 23(b)(3) denies the class and the court the benefits that flow from early notice to at least a representative portion of the class.

Another aspect of *Shutts* suggests that the focus on predominance may not pass constitutional muster. The Court there spoke of “claims wholly or predominately for money judgments”<sup>57</sup> and expressed no view on whether any part of its holding applied to other kinds of cases, “such as those seeking equitable relief.”<sup>58</sup> We emphasize the Court’s use of the word “claims” because we think it suggests that the proper approach to the hybrid class action is to focus on whether the absentees possess *claims* that are sufficiently substantial to warrant an opt-out right, regardless of whether those claims are appended to other claims that would not warrant such a right. We nonetheless recognize *Shutts* did not deal explicitly with hybrid class actions, let alone with whether there is a right to opt out on monetary claims that may be a part of them.<sup>59</sup>

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<sup>54</sup> See FED. R. CIV. P. 23(b)(3) (certification appropriate if, among other things, “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”).

<sup>55</sup> See FED. R. CIV. P. 23(c)(2)(B) (providing notice and opt-out rights in Rule 23(b)(3) actions).

<sup>56</sup> See FED. R. CIV. P. 23.

<sup>57</sup> *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 n.3 (1985) (emphasis added).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 801-02. Similarly, *Ortiz* did not address this question since the case involved only monetary claims. The Court has twice granted review to consider the question whether due process permits a class action settlement involving claims for both injunctive and monetary relief to be certified on an exclusively mandatory basis, but in both instances the Court dismissed the writ of

In any event, a claim-by-claim analysis makes sense. As long as an absentee holds a substantial claim for relief that, standing alone, would warrant an opt-out right and that the class complaint or settlement release would adjudicate or extinguish, it should not matter whether the *class* asserts claims for other relief that, standing alone, might justify mandatory treatment. After all, a class member wishing to sue individually on a claim for substantial money damages seeks a remedy for a past wrong, and so may have no interest in, and might not benefit from, the class's claims for injunctive relief, which involve only a prospective remedy. This is especially true where the plaintiffs allege that the defendant engaged in fraud or other similar conduct that would make it likely that the plaintiffs would take their business elsewhere in the future. Indeed, even prior to *Shutts*, some courts considering the proper treatment of hybrid claims under Rule 23 recognized that the best way to deal with the problem of hybrid cases was to approve a hybrid class certification: certifying aspects of the case (usually claims for injunctive relief) on a non-opt-out basis and other aspects (usually claims for monetary relief) on an opt-out basis.<sup>60</sup> Post-*Shutts*, courts have continued to suggest that such an approach may be required by the Constitution, if not by Rule 23.<sup>61</sup>

Assessing the propriety of mandatory versus opt-out certification on a claim-by-claim, rather than a predominance or, "whole case," basis is particularly important in the context of settlement classes. The vast majority of class actions settle. A large number of class actions that settle are, as we have explained, cases that are certified and settled simultaneously,<sup>62</sup> as distinguished from class actions where the case is certified for litigation, and the opt-out right (if any) is provided prior to any resolution on the merits.<sup>63</sup> In such cases, the settling parties jointly ask the district judge both to certify the class on whatever basis the settling parties have agreed upon and to approve the settlement as fair. As discussed earlier, at that juncture, the settling defendant has an enormous incentive to propose a mandatory settlement class to achieve a global resolution, particularly in cases where individual litigation is a viable option and thus opt-outs are likely. And, in such cases, class counsel has little incentive to resist.

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certiorari as improvidently granted without reaching the merits. *See also* *Adams v. Robertson*, 520 U.S. 83 (1997); *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994).

<sup>60</sup> *See, e.g.*, *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1152, 1156-57 (11th Cir. 1983); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 634-35 (9th Cir. 1982); *Penson v. Terminal Transp. Co.*, 634 F.2d 989 (5th Cir. 1981); *Bogard v. Cook*, 586 F.2d 399, 409 (5th Cir. 1978); *Soc'y for Individual Rights, Inc. v. Hampton*, 528 F.2d 905, 906 (9th Cir. 1975); *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 559, 565 (2d Cir. 1968).

<sup>61</sup> *See, e.g.*, *Molski v. Gleich*, 318 F.3d 937, 951 n.16 (9th Cir. 2003); *see also Ticor*, 511 U.S. at 121 (noting "substantial possibility" that Rule 23 may require opt-out rights in hybrid cases whenever substantial damages claims are present, but not addressing the possibility of a partial opt-out class action).

<sup>62</sup> *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 786-800 (3d Cir. 1995) (extended discussion of settlement classes).

<sup>63</sup> *Id.* Class actions certified for litigation often settle, but by that time the decision whether to certify on an opt-out or mandatory basis has already been made.

In our experience, the settlement class action setting is a breeding ground for manipulating mandatory certification. Prior to the Supreme Court's decision in *Ortiz*, for instance, even class actions that sought only monetary relief were sometimes cast as "equitable" in nature and thus purportedly subject to mandatory certification, on the ground that the defendant could not afford more than what it had agreed to pay in settlement, even where the settling defendant or its corporate parent was left with significant resources.<sup>64</sup> More frequently, both before and after *Ortiz*, we have been confronted with class action settlements involving claims that have historically been litigated exclusively, or nearly exclusively, as money damages claims, but which, for the purposes of a mandatory settlement, have been paired with claims for injunctive relief that are said, dubiously in our view, to predominate over the monetary claims.<sup>65</sup>

Take, for example, the *Tower Loan* class action,<sup>66</sup> involving allegations that a lender violated a variety of common-law and statutory prohibitions by, among other things, deceiving borrowers into buying useless insurance in conjunction with their loans, failing to disclose various fees, and "churning" the class members' loan refinancing solely to generate fees and interest for the defendants. Historically, every settlement and judgment against the *Tower Loan* defendants and others engaged in similar practices, involved substantial money damages, which ranged into the tens of thousands of dollars, sometimes included punitive damages, and varied considerably from plaintiff to plaintiff. The class action complaint contained eighteen counts seeking money damages, plus a boilerplate claim for injunctive relief asking the court to prohibit the defendant from engaging in future unlawful conduct.<sup>67</sup>

The *Tower Loan* class action was settled on a non-opt-out basis. The settlement provided small monetary payments of about forty to eighty dollars per class member, required the defendant to reform some of its future lending practices for five years (but not longer), and released all claims that the class members might have against the defendants arising out of their loan practices.<sup>68</sup> Approximately 1,200 class members, most of whom had already sued the defendants individually for money damages, opposed the mandatory settlement and requested the right to opt out.<sup>69</sup> The district court held that the presence of

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<sup>64</sup> See, e.g., *In re Teletronics Pacing Sys., Inc.*, 221 F.3d 870, 878-80 (6th Cir. 2000); *Ortiz*, 527 U.S. at 859-60.

<sup>65</sup> See, e.g., *Smith v. Tower Loan of Miss., Inc.*, 216 F.R.D. 338, 373-75 (S.D. Miss. 2003), *aff'd sub nom. Smith v. Crystian*, 91 F. App'x 952 (5th Cir. 2004); *Adams v. Robertson*, 676 So. 2d 1265, 1271 (Ala. 1995), *cert. dismissed as improvidently granted*, 520 U.S. 83 (1997).

<sup>66</sup> See generally *Tower Loan*, 216 F.R.D. 338.

<sup>67</sup> The first author of this essay represented putative opt-outs in the *Tower Loan* case. The facts recited here are taken from the reported decisions and from various filings in the case. For more details, see Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, *Crystian v. Tower Loan of Miss., Inc.*, No. 04-488 (filed Oct. 12, 2004), available at <http://www.citizen.org/documents/Certpetitionfinal.pdf> (unsuccessful petition for a writ of certiorari).

<sup>68</sup> *Id.* at 1.

<sup>69</sup> *Id.*

injunctive relief allowed the case to be certified and settled on a mandatory basis under Rules 23(b)(2) and (b)(1)(A), despite the presence of claims for monetary relief, and it rejected any due process right to opt out on essentially the same grounds.<sup>70</sup> The Fifth Circuit affirmed, solely under Rule 23(b)(1)(A), holding that where an injunction is sought, and another class member had sought or *could in the future seek* an injunction with respect to the same conduct, mandatory certification of all claims is appropriate, ignoring *Shutts* and *Ortiz* entirely.<sup>71</sup>

In our view, the request for injunctive relief in *Tower Loan* was not based on a genuine need or desire on the part of the class to obtain an injunction; rather, it served simply as a vehicle to allow the settling parties to argue that the predominance of injunctive relief justified mandatory settlement of the class's substantial monetary claims. Thus, the plaintiffs in *Tower Loan* had already suffered harm from defendant's alleged financial misconduct, and hence a promise to reform that conduct in future transactions would provide no benefit to vast numbers of class members who would not enter into such transactions again. The same is true in any hybrid damages/injunctive relief case, where the class includes *former* customers who will not benefit from injunctive relief unless they choose to do business with the defendant in the future. At the very least, at the time of settlement, those class members would have no genuine claims for an injunction, let alone claims that can be said to predominate over their very real claims for money damages.<sup>72</sup>

But the courts need not delve into whether a particular request for injunctive relief is a sham or whether class members would or would not benefit from such relief. That inquiry only matters if the question whether to certify on a mandatory or opt-out basis is seen as a unitary proposition. If, however, hybrid cases are seen as candidates for hybrid certification—as we think they should be—with some claims subject to mandatory certification and others subject to opt-out certification, the courts would not have to consider these questions. For instance, in *Tower Loan*, even if the injunctive claim of the plaintiff class to reform the defendant's future loan practices warranted mandatory certification because of the threat that another suit could subject the defendant to “inconsistent adjudications,”<sup>73</sup> that would not provide a reason to prevent the class members from opting out with respect to their damages claims alone.

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<sup>70</sup> See *Tower Loan*, 216 F.R.D. at 371-75, 379.

<sup>71</sup> See *Smith v. Crystian*, 91 F. App'x 952, 955 (5th Cir. 2004).

<sup>72</sup> See, e.g., *McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545, 553 (5th Cir. 2003) (denying (b)(2) certification in part because class members did not have on-going business relationship with defendants, thereby making it unlikely that injunctive or declaratory relief would be meaningful to them); *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 978 (5th Cir. 2000) (mandatory certification under Rule 23(b)(2) was inappropriate for class members “who [did] not face further harm from Sears's actions” because they no longer were subject to Sears' post-bankruptcy collection efforts challenged in the case).

<sup>73</sup> See FED. R. CIV. P. 23(b)(1)(A).

### III. WHY THE RIGHT TO OPT OUT MATTERS

After this extended discussion of the right to opt out, it seems fair to ask why we care. The answer is twofold, one based on class member self-determination and tradition, and the other based on practical class action reality. In *Ortiz*, the Supreme Court described the first set of concerns as flowing from the conflict between representative litigation and “our ‘deep-rooted historic tradition that everyone should have his own day in court,’” which is “magnified if applied to damages claims gathered in a mandatory class.”<sup>74</sup> Although that ideal may give way when there are special efficiencies and a demonstrable need for unitary adjudication, as discussed in Part IV below, the Court held that mandatory class treatment was the exception and relied on *Shutts* for the proposition that individuals holding substantial monetary claims could not be bound to a class judgment without being given the opportunity to exclude themselves from its preclusive effect.<sup>75</sup>

To be sure, some commentators have urged abandonment of the “day-in-court” ideal on the ground that mandatory class actions are the only fair and economically efficient means for resolving mass litigation.<sup>76</sup> Others argue that, given the purposes of representative litigation, it is the class, and not individuals within the class, whose interests warrant judicial protection.<sup>77</sup> Given the scope of this essay, and the depth, diversity, and complexity of the vast literature on this topic, this is not the place to confront these arguments in detail.<sup>78</sup>

In our view, however, the day-in-court ideal is more than an empty platitude untethered to the realities of modern litigation. We do not defend that ideal on the ground that the only real-world alternative to mandatory inclusion in a class is an individually-represented opt-out plaintiff trying her case to judgment. Like all claims, most claims held by opt-out plaintiffs settle. And many of these claims, particularly those held by mass personal injury claimants, are handled and settled (or, in rare cases, tried) by lawyers representing groups of plaintiffs. What makes these opt-out claimants different from absentees in a class is that they have a right to control their lawsuits themselves, including deciding when and where to file suit and whether to settle or litigate their personal case to conclusion.

As we noted earlier, *Shutts*’ due process holding is best understood as premised on each class member’s property interest in a cause of action that, if the

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<sup>74</sup> *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (quoting *Martin v. Wilks*, 490 U.S. 755, 762 (1989)).

<sup>75</sup> *Id.* at 847-48.

<sup>76</sup> See, e.g., David Rosenberg, *Mandatory Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831 (2002).

<sup>77</sup> See, e.g., David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913 (1998).

<sup>78</sup> See *id.* at 916 n.2 (citing several dozen then-recent articles “to provide a brief, accessible bibliography for those interested in further research” and noting that a “full bibliography . . . would warrant a sizeable appendix”).

class member so chooses, must be disposed of by the owner of that interest and not someone else claiming to be the owner's representative. We acknowledge that this "property rights" rationale is based, at bottom, not on logic, but on an irreducible judgment about the value of self-determination. Absent unusual circumstances, such as eminent domain proceedings, society does not generally question that it is the owner, and not someone else, who decides whether, when, or for how much to sell the owner's property, such as his car or home. And many of us bristle at the trend in the health care arena that it is often not "us"—the patients—or our personally-designated doctor, but an HMO that makes decisions about our medical care. Why, then, should the guiding principle be any different for a litigation interest that may involve a car, a home, medical care, or a wrongful death that is potentially far more valuable than all of those interests combined? In sum, one rationale for opt-out rights may be tradition, but it is a tradition upon which *Shutts* and *Ortiz* properly relied.<sup>79</sup>

Apart from tradition, opt-out rights make practical sense because they provide an important window on the fairness of some class action settlements. In "negative-value," small-claims damages class actions, class members rarely opt out because litigating individually would be economically irrational.<sup>80</sup> However, in cases where a substantial number of absent class members determine that it is economically rational to litigate on their own—for instance, because individual damages are potentially significant or because a statutory fee-shifting provision makes the case attractive to a lawyer—that sends a signal to the judge evaluating the fairness of a settlement.<sup>81</sup>

As discussed earlier, in the *Tower Loan* litigation, more than 1,200 class members, virtually all represented by counsel, sought to opt out.<sup>82</sup> Counsel for those class members had litigated similar cases in the past, and were well situated to advise their clients to opt out. And because the settlement's monetary recovery did not generally exceed eighty dollars per class member, it was not

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<sup>79</sup> We recognize that a rationale based on control over one's property interest might be extended to justify only opt-in, not opt-out class actions. Although that is not our view, that issue, too, is beyond the scope of this essay. Compare Mark K. Moller, *Let a Hundred Cases Bloom*, LEGAL TIMES, Feb. 21, 2005, at 62 (calling for opt-in class actions), with David Arkush & Brian Wolfman, *Let a Hundred Cases Wither*, LEGAL TIMES, May 9, 2005, at 58 (defending opt-out class actions).

<sup>80</sup> See *In re Monumental Life Ins. Co.*, 365 F.3d 408, 411 n.1 (5th Cir. 2004) ("A 'negative value' suit is one in which class members' claims 'would be uneconomical to litigate individually.'") (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985)).

<sup>81</sup> This factor comes into play in settlement class actions where certification (and, thus, opt-out) and settlement take place simultaneously, or under recently added Rule 23(e)(3), which grants the court discretion to provide class members in already-certified Rule 23(b)(3) class actions another opportunity to opt out at the time of settlement. See FED. R. CIV. P. 23(e)(3) (eff. Dec. 1, 2003). In cases involving small monetary claims, some courts have relied on the fact that there were very few opt-outs and/or objectors as an indication that a settlement was fair. We disagree. Given that, in many cases, the monetary claims are not viable on an individual basis, and given the difficulties for class members in objecting to settlements, see *infra* notes 87-94 and accompanying text, the absence of opt-outs and/or objectors should not be a factor unless the individual claims are substantial.

<sup>82</sup> *Smith v. Tower Loan of Miss., Inc.*, 216 F.R.D. 338, 350 (S.D. Miss. 2003).



surprising that anyone with a lawyer was willing to risk losing those modest benefits to seek much larger damages in an individual action. A similar situation was presented in *In re Community Bank of Northern Virginia*,<sup>83</sup> where insurgent lawyers, experienced in bringing consumer disclosure and fraud claims similar to those that were the subject of the class action settlement, solicited hundreds of opt-out clients, because their experience told them that the settlement's benefits were a fraction of what could be recovered individually.

We recognize that lawyers' self-interest in procuring opt-outs must be evaluated as well, and that the presence of a significant number of opt-outs will not always demonstrate a settlement's unfairness. In some instances, outside lawyers may have incentives to draw off class members for their own litigation, even if that litigation may not provide benefits to the opt-outs that are any greater than those available in the class action. However, in general, we have no greater concern over whether lawyer self-interest drives the opt-out market than whether it drives the market for plaintiffs' consumer and personal injury claims in general. In *Tower Loan*, for instance, the opt-out lawyers' self-interest was aligned with their clients' interests: a contingent fee plaintiff's lawyer presumably would have had better things to do than represent opt-out clients, unless those clients stood a chance of obtaining considerably more than the small amounts being offered in the class action settlement.

When a class action proceeds on a non-opt-out basis, the court considering a settlement cannot obtain a signal from the class members who would otherwise choose to exit, and thus it loses one of the few tools at its disposal for settlement evaluation. The court is already at a considerable disadvantage in evaluating class action settlements compared to its position in evaluating arguments in ordinary adversarial litigation. It is well understood that class action settlements create incentives for plaintiffs' counsel and defendants to collude because plaintiffs' counsel have interests in common with defendants and opposed to their class member-clients.<sup>84</sup> As Judge Becker has described it, a class action may become "a vehicle for collusive settlements that primarily serve the interests of defendants—by granting expansive protection from law suits—and of plaintiffs' counsel—by generating large fees gladly paid by defendants as a quid pro quo for finally disposing of many troublesome claims."<sup>85</sup> Furthermore, in contrast to ordinary litigation, the absent clients cannot control the conduct of their lawyers because they have little knowledge of their activities, and, even when the clients have sizeable claims that might support individual litigation brought by contingent-fee counsel, they typically have insufficient individual stakes in the outcome to motivate them to monitor the class attorneys' behavior.<sup>86</sup>

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<sup>83</sup> *In re Cmty. Bank of N. Va. & Guar. Nat'l Bank of Tallahassee Second Mortgage Loan Litig.*, 418 F.3d 277 (3d Cir. 2005).

<sup>84</sup> *See, e.g., In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 801-02 (3d Cir. 1995); *Mars Steel Corp. v. Cont'l Ill. Nat'l Bank and Trust Co.*, 834 F.2d 677 (7th Cir. 1987).

<sup>85</sup> *Gen. Motors*, 55 F.3d at 778.

<sup>86</sup> *Mars Steel*, 834 F.2d at 681-82 ("The danger of collusive settlements . . . [is] rendered much greater than in the ordinary litigation by the tenuousness of th[is] control . . ."); *see also Crawford*

Once the lead parties have reached a preliminary settlement agreement, their goal is to persuade the court to accept the agreement. The settling parties “can be expected to spotlight the [settlement] proposal’s strengths and slight [or even hide] its defects.”<sup>87</sup> Or, as Judge Easterbrook has colorfully put it, they “may even put one over on the court, in a staged performance.”<sup>88</sup> Thus, the court loses the benefit of the bilateral competition and “adversarial investigation”<sup>89</sup> that drives traditional litigation and that would tend to unearth information bearing on the settlement’s fairness and legality.

The ideal remedy for this lack of adversariness is the presence of objecting class members who seek to overturn unfair and unlawful class settlements. Because objectors are not aligned with the settling parties and seek to unveil a settlement’s weaknesses, they tend to provide a judge with important information and legal argument that would otherwise be absent.<sup>90</sup> However, because objectors are “outsiders,” they start at a considerable disadvantage in terms of knowledge of the case and access to crucial evidence. They are almost always placed under very tight time constraints by schedules typically set by the settling parties, whose goal is to allow as little time for objections, and as little access to information, as possible.<sup>91</sup> And, often, objectors do not come forward because their counsel have no realistic opportunity to be paid. Although courts have the power to award objectors’ counsel a fee if they find the objector has improved the settlement,<sup>92</sup> that is rare.<sup>93</sup> More fundamentally, objectors’ attorneys who are successful in defeating a settlement altogether get no fee because there is no fund from which a fee can be paid.<sup>94</sup> Instead, they retain only the opportunity to continue litigating on behalf of their clients—precisely what the opt-out right provides in the first place.

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v. Equifax Payment Servs., Inc., 201 F.3d 877, 880 (7th Cir. 2000); *Gen. Motors*, 55 F.3d at 789; *In re Am. Reserve Corp.*, 840 F.2d 487, 490 (7th Cir. 1987).

<sup>87</sup> *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1310 (3d Cir. 1993).

<sup>88</sup> *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1352 (7th Cir. 1996) (Easterbrook, J., joined by Posner, C.J., Manion, Rovner, and Wood, JJ., dissenting from denial of rehearing en banc).

<sup>89</sup> *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997).

<sup>90</sup> See *Gen. Motors*, 55 F.3d at 803 (“where there is an absence of objectors, courts lack the independently-derived information about the merits to oppose proposed settlements”) (emphasis added); DEBORAH HENSLER ET AL., CLASS ACTION DILEMMAS—PURSUING PUBLIC GOALS FOR PRIVATE GAIN 493-97 (Rand Inst. for Civil Justice 2000) (concluding that, because of an adversarial deficit, judges must increase regulation of settlements and provide objectors sufficient time and information to participate effectively). Cf. *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975) (because objector is in adversarial relationship with settling parties, objector is entitled to reasonable discovery from both).

<sup>91</sup> See, e.g., Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. REV. 439, 480-90 (1996).

<sup>92</sup> See, e.g., *Bowling v. Pfizer, Inc.*, 922 F. Supp. 1261, 1285 (S.D. Ohio 1996).

<sup>93</sup> See Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1106-07 & n.184 (1996) (“Objecting lawyers stand little chance of receiving fees or even the reimbursement of expenses incurred in mounting a challenge.”) (relying on Federal Judicial Center study).

<sup>94</sup> *Id.* at 1108.

In sum, although objectors play a critical role in some circumstances, their opportunity to unmask unfair or unlawful settlements is limited. In some cases, the existence of substantial opt-outs may provide important additional information for a judge being asked to approve a settlement under Rule 23(e). In any event, the opt-out right allows class members to escape a settlement that they believe is unfair, at least as to them, if not to the class as a whole.

#### IV. A PROPOSED SOLUTION

*Shutts* sets forth the constitutional minima for binding absent class members to a class judgment, including the right to opt-out.<sup>95</sup> We believe that, properly construed, both the Due Process Clause and Rule 23 (and its state law equivalents) preclude courts from approving non-opt-out hybrid class actions where some class members have substantial claims for monetary relief. However, based on our experience, we fear that some courts do not appreciate the problems created by mandatory hybrid classes, especially in settlement class actions, and that they are unlikely to change their propensity to certify any class action with a claim for injunctive relief under either Rule 23(b)(1) or (b)(2), and deny class members the right to opt out on their damages claims. We thought that the Supreme Court's decision in *Ortiz* signaled that mandatory classes were strongly disfavored,<sup>96</sup> but some lower courts have not read it that way.

For these reasons, we believe that the best way to remedy the problem is to amend Rule 23—and its state-law counterparts—to codify the right to opt out in a way that resolves any ambiguities left in *Shutts*' aftermath and deals effectively with the realities of modern class action practice. We have re-drafted Rule 23 (only through Rule 23(c)), and have appended both a red-line and a clean version of our proposal. What follows is our explanation of what we did and why. We envision that the substance of what follows would be found in the comments to any rule change.

##### A. Summary of Proposal

In class actions seeking solely an injunction or the distribution of a finite fund, we provide that opt-outs not be permitted, except where a subsequent action would not present a realistic risk of conflicting orders. With respect to notice at the certification stage, we recommend two changes: (1) in all class actions, notice would be provided to at least a representative sample of the class and those class members known to have an interest in these claims, and (2) in a Rule 23(b)(3) class action, individual notice would be required, but only for those class members who have claims for monetary relief that could support separate actions. To effect these changes, we propose that there be only two subdivisions to Rule 23(b): one would cover class claims for injunctive relief, plus those seeking distribution of a finite fund, and the other would cover class claims for

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<sup>95</sup> *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985).

<sup>96</sup> *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846-47 (1999).

monetary relief. We also make clear that if a class claim seeks both injunctive and monetary relief, the court should certify the claims separately to protect the opt-out right and to provide individual notice, if warranted, on claims for monetary relief.<sup>97</sup>

## B. Explanation of Proposal

### 1. New Rule 23(b)(1)

Some of the problems under Rule 23 concerning hybrid class actions arise from the substantial overlap and lack of clarity of coverage among the three subdivisions. Thus, present-day Rule 23(b)(1)(A) covers situations similar to the types of claims for injunctive relief generally brought under Rule 23(b)(2).<sup>98</sup> In many, but not all, cases covered by both rules, allowing an opt-out would run the risk of inconsistent injunctive orders (a very different problem from inconsistent results in claims for monetary relief), such that exclusion generally should not be permitted. Current Rule 23(b)(1)(B) deals with limited funds, whether an actual fund or, for example, an obligation under an insurance policy or other similar contractual obligation to pay a fixed total, where the value of the claims may be more than the funds available. In the limited fund cases, there is no need for an injunction to serve its ordinary coercive function. Rather, if one were needed at all, it would only be to prevent claimants from seeking more money from the person with the fixed obligation. Whether an injunction is needed or not, the purpose of adjudicating this type of dispute as a class action would be undermined if exclusion were permitted.<sup>99</sup>

Our new Rule 23(b)(1) would apply where “the relief sought is a declaratory or injunctive order or an order regarding the distribution of a finite fund or of money owed under a contractual or similar obligation that existed prior to the time that the claims in the action arose.” This provision would cover a subset of purely injunctive-type claims, now conceived as Rule 23(b)(2) class actions, in which relief for one would have to be relief for all because the defendant would be unable to comply with two differing injunctions on the same topic. For instance, in a case against a state prison seeking to alleviate overcrowding, an order requiring the state to build a new prison wing of a certain number of square feet to accommodate a certain number of new beds at a particular location would be at odds with an order saying that no such prison

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<sup>97</sup> For the convenience of the reader accustomed to Rule 23(b)'s three subdivisions, the appended proposed Rule eliminates subdivision (2) but keeps subdivisions (1) and (3). The text of Rule 23(b)(3) is close to current Rule 23(b)(3), but the text of new (b)(1) is now different from current Rules 23 (b)(1) and 23(b)(2).

<sup>98</sup> FED. R. CIV. P. 23(b)(2).

<sup>99</sup> If the number of claimants is small, interpleader could be used, and, in some cases, bankruptcy or state law receiverships might also serve the same function. But even with a narrowed group of cases subject to this part of Rule 23, there will still be some cases for which class action treatment may be sought.

wing need be built or that the wing be of a different size to accommodate a different number of beds. Similarly, in a Title VII suit on behalf of a class of present and future female job applicants, an order requiring the defendant employer to hire women over men in a ratio of 2 to 1 until a certain workforce gender ratio were met, or setting one set of rules for seniority rather than another, would be incompatible with other injunctions on those topics.

This new subdivision (b)(1) would also apply to most claims appropriate for certification under current Rule 23(b)(1)(A), which was intended to eliminate the risk that a defendant would be required to take action by one court but be prohibited from taking the same action by another court.<sup>100</sup> Thus, as the 1966 Rules Advisory Committee explained, “[s]eparate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment, might create a risk of inconsistent or varying determinations.”<sup>101</sup> Mandatory treatment is necessary in those circumstances because a municipality may either issue a bond or not, or it may appropriate money or not; it cannot do both. Our proposal includes cases seeking declaratory as well as injunctive relief since, in many cases, especially against governmental entities, a court will issue only a declaratory judgment on the theory that the defendant will conform its conduct to the law without the issuance of an injunction. This new subdivision would also include actions contemplated by current Rule 23(b)(1)(B),<sup>102</sup> involving multiple claims against a fund, a particular piece of property, or an insurance or similar contractual obligation, where the fund, property, or contract is finite and the claims may exceed the limit. The proposal also eliminates the practice of creating a fund as part of a suit so as to certify the class on a non-opt-out basis under Rule 23(b)(1)(B); the fund or obligation must exist before the claims in the action arose.

Under this new Rule 23(b)(1), some notice to the class would be required. It would not be individual notice, but rather only notice calculated to be received by a fair cross section of the class, including class members and lawyers known to have expressed an interest in the issues or who have filed similar cases. The

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<sup>100</sup> Under current Rule 23(b)(1)(A), a class may be certified on a mandatory basis if “(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 . . . .” FED. R. CIV. P. 23(b)(1)(A).

<sup>101</sup> FED. R. CIV. P. 23 advisory committee’s note.

<sup>102</sup> Current Rule 23(b)(1)(B) allows mandatory certification if

(1) the prosecution of separate actions by or against individual members of the class would create a risk of . . .

(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[.]

FED. R. CIV. P. 23(b)(1)(B).

purpose of this notice is to enable interested persons to make their views known to class counsel and in some cases to seek intervention to protect their interests in the case. Notice will also help assure that the court has the opportunity to hear from interested parties who may wish to contest certification or otherwise participate in the litigation before settlement, by which time substantial resources will have already been expended and changes will be more difficult to make.<sup>103</sup> However, notice would not be required to be comprehensive, at least at the certification stage. At the settlement stage, notice would also go to at least a fair cross section of the class and would be provided to all class members if necessary to enable them to obtain relief. On the other hand, if the settlement relief were of the kind that need not be provided directly to all class members, such as in the case regarding issuance of a municipal bond, settlement notice could be accomplished by publication or other means short of individualized notice.<sup>104</sup>

In at least some cases under our new Rule 23(b)(1), the requested injunctive-type relief could be provided to some class members but not others, and for those cases, we have provided that the court may permit class members to opt out, if certain conditions described below have been met. These cases would include, for instance, consumer challenges to business practices, where the defendant could, in fact, conduct itself in one way toward some of its customers and in another way toward others. It is not impossible for a national credit card company, for example, to make one set of disclosures to people living in New York and another to people living in Illinois. Businesses regularly treat various groups of customers differently to comply with differing state laws or because offering the same product at different prices in various locations, or accompanied by differing advertising based on perceived differences in regional or ethnic preferences, is considered advantageous. Similarly, some employment disputes—such as one requiring the employer to pay overtime to a certain class of employees, albeit on a non-uniform basis—would affect the class members' future pay, benefits, or other conditions of employment. In these cases, an opt-out might also be allowed.

Practicability would be the key factor for the court in deciding whether to allow opt-out in Rule 23(b)(1) cases. As set out in our new Rule 23(c)(5)(A), exclusion would not be allowed if there was a reasonable likelihood that the

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<sup>103</sup> Notice might be expanded beyond this minimum at relatively low cost via e-mail notice and other Internet publication. See, e.g., Brian Walters, "Best Notice Practicable" in the *Twenty-First Century*, 2003 UCLA J.L. & TECH. 4; Jordan S. Ginsburg, Comment, *Class Action Notice: The Internet's Time Has Come*, 2003 U. CHI. LEGAL F. 739.

<sup>104</sup> Current Rule 23(e) already provides this type of flexibility with respect to settlement notice. See FED. R. CIV. P. 23(e)(1)(B) ("The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise."). We leave unchanged the current practice that, absent agreement of the defendant, plaintiffs (or more accurately, their counsel) pay for the costs of notice. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 179 (1974). In injunctive class actions, the new sampling notice will result in some additional costs to class counsel. However, our proposal to reduce the instances in which individual notice is required in cases seeking monetary relief, see *infra* Part IV.B.2, will lower the costs to class counsel in many, if not most, cases brought under Rule 23(b)(3).

results of an injunction in a future case brought by an opt-out class member would make it impossible for the defendant to comply with both orders, or if doing so would create undue burdens for the defendant. Because we are proceeding in uncharted waters, we also provide a catch-all reason to deny exclusion: where circumstances “would make it unjust or unreasonable to permit exclusion.” Thus, even where the defendant literally could conduct itself in one way toward some class members and in another way toward other class members, the court would ask whether it is practical to allow class members to opt out to pursue injunctive claims against the defendant. Here, the court would consider whether any class member or group of class members have an economic incentive in pursuing such claims on their own and whether differing injunctive schemes would impose hardship or severe inefficiencies on the defendant. Weighing these concerns, the court would have discretion to allow class members to opt out on injunctive claims, even where the plaintiff class seeks “final injunctive relief”<sup>105</sup> or there is potential for “inconsistent or varying adjudications.”<sup>106</sup> To be sure, a mandatory class in such circumstances would be less expensive for the defendant and the court system, but we see no logical imperative that demands unitary treatment of all injunctive claims simply because they are forward-looking and opt-out treatment of all claims for monetary relief simply because they are retrospective in nature.

Two other aspects of the exclusion decision under Rule 23(b)(1) are significant. The norm is non-exclusion, and so the class members seeking exclusion must demonstrate that the party opposing exclusion (normally the defendant) would not likely encounter the problems described in Rule 23(c)(5)(A). Moreover, once the class member seeking exclusion sets forth a prima facie case for allowing it, the opposing party would have to explain why there was a reasonable likelihood that the harms set forth in that rule would occur. Second, the decision on exclusion may, but need not, be made at the time of class certification. In some cases, the court will be in a better position to make such a determination near the end of the case because it will have more information about both the class action before it and related cases, if any, and because the precise terms of the injunction will be known, allowing the judgments called for by new Rule 23(c)(5)(A) to be made based on an actual and not hypothetical injunction.

## 2. New Rule 23(b)(3)

Our new rule resembles current Rule 23(b)(3) quite closely, with most of the changes made in the parts of Rule 23(c) that govern notice in (b)(3) classes. We make one change to Rule 23(b)(3): it would apply only to claims in which “the relief sought is individual monetary relief.” This makes explicit what has always been implicit in the rule: that it covers individual monetary relief, whether denominated legal or equitable, whether called damages or restitution or

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<sup>105</sup> See FED. R. CIV. P. 23(b)(2).

<sup>106</sup> See *id.* at 23(b)(1)(A).

something else. Second, we have added the phrase “on their claim” to make clear that the requirements of this subdivision must be met on a claim-by-claim basis, and that, where a class has more than one claim against a defendant, those claims may not be treated on a unitary basis.<sup>107</sup> This claim-by-claim requirement is also found in additions to Rule 23(a), in the introduction to Rule 23(b), and in the amendments to Rule 23(c)(1)(A) regarding the timing of motions for class certification. Of greater significance is new Rule 23(c)(6), which repudiates the former practice under which courts often certified hybrid classes as mandatory classes. The new rule directs courts that are presented with hybrid injunctive and monetary relief cases to certify the two sets of claims separately (if at all), where necessary to protect other notice and opt-out rights under the rule.

Our new Rule 23(b)(3) would presume that individual notice should be given in class actions seeking monetary relief. Thus, in many cases, it would operate like current Rule 23(b)(3). However, at the certification stage, it would expressly permit “fair-cross-section” notice, as under new Rule 23(b)(1), if the court determines that “there is no reasonable likelihood that some or all of the class members would pursue their own separate actions.” Thus, this subdivision would alter current law by overruling in part *Eisen v. Carlisle & Jacquelin*,<sup>108</sup> which interpreted current Rule 23(b)(3) to require individualized notice to all class members possessing even the smallest of damages claims. Even if the court makes such a determination, it must still provide individual notice to “all persons who hold claims that might support individual actions.” Whether there are such persons will depend on such factors as the amount of the claim, the complexity of the case, and whether there are statutory attorney’s fees or liquidated damages provisions that might make the case viable on an individual basis. The best evidence of whether there are class members who might bring separate actions is that such actions already are pending or have been brought in the past. As under current law regarding class certification, the factual or legal merits of such claims are irrelevant to this inquiry. In some cases, the defendant will be the only person with information about the size of the claims held by various class members, and in such cases, discovery should be permitted to determine to whom individual notice should be sent.

An additional word is appropriate regarding statutory fee-shifting provisions as they relate to notice under new Rule 23(b)(3). Legislatures have enacted these provisions to enable plaintiffs to act as “private attorneys general” to enforce civil rights, consumer, and other rights. Congress alone has enacted dozens of such provisions.<sup>109</sup> Our initial inclination was simply to credit the legislature’s judgment that the presence of a fee-shifting provision would be sufficient to encourage individual litigation and, therefore, to require that all class

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<sup>107</sup> See *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 978 (5th Cir. 2000) (in conducting predominance analysis, “a court should certify a class on a claim-by-claim basis, treating each claim individually and certifying the class with respect to only those claims for which certification is appropriate.”). Cf. *Lewis v. Casey*, 518 U.S. 343 (1996).

<sup>108</sup> *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974).

<sup>109</sup> See *Marek v. Chesny*, 473 U.S. 1, 43-51 (1985) (Brennan, J., dissenting) (appendix containing list of over 100 federal fee-shifting provisions).



members with claims involving a fee-shifting provision be entitled to individual notice. That is still our view of what will happen in most cases. Our personal experience and discussions with plaintiffs' lawyers indicate that the presence of fee-shifting provisions do, in fact, often make individual, small-claim litigation viable. There is a vibrant plaintiffs' bar bringing individual claims under the Fair Debt Collection Practices Act,<sup>110</sup> the Truth in Lending Act,<sup>111</sup> and a range of other federal consumer protection statutes with fee-shifting provisions. Some of these statutes have minimum damages provisions that also enhance the prospects for individual enforcement.<sup>112</sup> Moreover, some statutes have aggregate limits on class action damages,<sup>113</sup> which, because they effectively limit personal recoveries in class actions, tend to make individual litigation more enticing.

We recognize, however, that in some types of cases—for instance, small-claims securities and consumer antitrust litigation—non-class litigation rarely, if ever, occurs, despite the presence of a fee-shifting provision<sup>114</sup> and in some cases the prospect of treble damages. Perhaps defendants' considerable resources and the enormity of discovery make such cases viable only on a class basis. Whatever the reason, because of this reality, the strong presumption that individual notice be afforded to all class members can be overcome where class counsel can show that the relevant fee-shifting provision has not created a market for individual small-claims litigation.

Thus, in certain small-claims cases under new Rule 23(b)(3), sampling notice would be sufficient. In addition, any class member who expressed an interest in the case, who had filed his or her own action, or who had a claim that might support a separate action, would receive individual notice. This type of hybrid notice would, in our view, satisfy the notice requirements described in *Shutts*, without the massive individualized notice required in every damages case under the current rule. We recognize a certain irony here: under the new rule, the class members in *Shutts* itself might not have been entitled to individual notice because the average value of their claims was \$100.<sup>115</sup> But neither *Shutts* nor any of the Court's other due process rulings suggest that the Constitution requires more than representative notice, a right to opt-out, and a court determination that the class representative and class counsel adequately represent the class, where the claims would ordinarily fall with the jurisdiction of a small claims court.

To the contrary, the due process balancing approach approved by the Supreme Court in *Mathews v. Eldridge*<sup>116</sup> suggests that the Court would uphold

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<sup>110</sup> 15 U.S.C. §§ 1692-1692o (2005).

<sup>111</sup> *Id.* §§ 1601-1667.

<sup>112</sup> *Id.* § 1640(a)(2)(A).

<sup>113</sup> *See, e.g., id.* § 1692k(2)(B).

<sup>114</sup> *See id.* § 15(a) (fee-shifting provision for antitrust cases).

<sup>115</sup> *Phillips Petroleum Co. v. Shutts*, 427 U.S. 797, 801 (1985). Similarly, we have been informed that the antitrust damages claims in another celebrated case presenting the opt-out issue, *Brown v. Ticor Title*, amounted to just a few dollars per class member, which, even when trebled, would presumably not have supported individual litigation. *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. dismissed as improvidently granted*, 511 U.S. 117 (1994).

<sup>116</sup> *Mathews v. Eldridge*, 424 U. S. 319 (1976).

the kind of notice provided for by this new rule. The practice of requiring class counsel to provide and pay for notice to persons with claims of \$5, \$50, or even \$500 in complex securities and antitrust class actions is both wasteful and unduly advantageous to defendants. However, under the Supreme Court's decision in *Eisen*, current Rule 23 mandates not only that mailed notice to all class members is required in all damages class actions, but that the plaintiff, not the defendant, bear the cost of that notice.<sup>117</sup> Thus, the only way to get the defendant to pay for notice is to settle, making the current Rule 23(b)(3) a breeding-ground for sell-out settlements. Under our new Rule 23, with its much less expensive "fair cross-section" notice in certain small-claims cases, plaintiffs' counsel would feel much freer to litigate the case vigorously at the certification stage (and then beyond), knowing that they would be under no obligation to foot the bill for a massive notice that does not advance the interests of their clients. Class counsel will still have to pay for notice at the certification stage, but the costs of sampling notice will be much more reasonable.

The right to opt-out under new Rule 23(b)(3) would continue to be absolute, even though in some cases class members would not have been provided individual notice. We considered whether opt-rights should be denied to class members with very small claims, on theory that they will never use them to bring their own separate actions. We concluded, however, that there is no need for a rule forbidding small-claims opt-outs: if a claim is not worth bringing separately, it will not be brought, and hence no court order precluding an opt-out is needed. On the other hand, if a class member determines that the claim is worth bringing or wishes to opt out for any other reason, there is no reason for Rule 23 not to honor that decision.

## V. CONCLUSION

Properly understood, *Shutts* and *Ortiz* support a broad right to opt out to pursue claims that rationally can be litigated on a non-class basis. That right can best be protected, and *Shutts*' ambiguities best resolved, through a restructuring of Rule 23(b)'s subdivisions that eliminates artificial divisions between claims seeking monetary and injunctive relief; forces the courts to focus on the specific claims brought on behalf of the class; allows opt-out rights with respect to at least some claims for injunctive relief; and eliminates the wasteful requirement of notice to all Rule 23(b)(3) class members whose claims are almost certain not to be brought on an individual basis. This proposal comports both with *Shutts* and the needs of class action practice today.

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<sup>117</sup> *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-79 (1974).

## APPENDIX

### I. Proposed Amendments to Rule 23 (Redline Version)

#### →Rule 23. Class Actions

**(a) Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of ~~all~~ the class with respect to a claim or defense only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class on such claims or defenses.

**(b) Class Actions Maintainable.** An action may be maintained as a class action with respect to a claim or defense if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the relief sought is a declaratory or injunctive order or an order regarding the distribution of a finite fund or contractual or similar obligation that existed prior to the time that the claims in the action arose;

~~(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 relief sought is individual monetary relief, and the court finds that the questions of law or fact common to the members of the class on their claim 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 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) Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.**

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

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

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

**(2)(A)** For any class certified under this Rule 23(b)(1) or (2), the court ~~may shall~~ direct appropriate notice to the class. ~~(B) For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.~~ The notice ~~must shall~~ concisely and clearly state in plain, easily understood language:

- the nature of the action,
- the definition of the class certified,
- the class claims, issues, or defenses,
- that a class member may enter an appearance through counsel if the member so desires,
- if the court determines that permitting exclusion is required by, or is otherwise appropriate under, Rule 23(c)(5), that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
- the binding effect of a class judgment on class members under Rule 23(c)(3).

**(B)(i)** For classes certified under Rule 23(b)(1), appropriate notice shall include individual notice to a representative sample of the class and to all persons that the court determines have manifest an interest in the action, including all persons who may be class members and who have filed other similar actions, and any other person who has requested to be informed about the action.

**(ii)** For classes certified under Rule 23(b)(3), appropriate notice shall include individual notice to all members of the class who can be identified through reasonable effort, unless the court determines that, because there is no

reasonable likelihood that some or all of the class would pursue their own separate actions, individual notice is not necessary or justified, in which case notice shall be provided pursuant to subdivision (c)(2)(B)(i), and individual notice shall be provided to all persons who hold claims that might support individual actions.

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

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

(5)(A) For a class certified under Rule 23(b)(1), there shall be no right of exclusion, unless the court determines that there is no reasonable likelihood that relief that might be granted in a subsequent action by class members seeking exclusion from this action (i) would make it impossible for a party to comply with a judgment or order in both actions; (ii) would impose undue burdens on a party having to comply with a judgment or order in both actions or (iii) would create circumstances that would make it unjust or unreasonable to permit exclusion. The court may, but need not, determine whether to permit exclusion at the time of certification, or it may make such determination at such other time before final judgment as it deems appropriate.

(B) The court shall permit exclusion from any class certified under Rule 23(b)(3).

(6) The court shall analyze separately each of the claims for relief asserted by the class in deciding whether, and under what subdivision of Rule 23(b), to certify the action as a class action, and may, as required by this Rule, certify one or more claims under Rule 23(b)(1) and one or more claims under Rule 23(b)(3).

[NO CHANGES AFTER THIS POINT.]

**(d) Orders in Conduct of Actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or

of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

**(e) Settlement, Voluntary Dismissal, or Compromise.**

**(1)(A)** The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

**(B)** The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

**(C)** The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

**(2)** The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

**(3)** In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

**(4)(A)** Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

**(B)** An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

**(f) Appeals.** A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

**(g) Class Counsel.**

**(1) Appointing Class Counsel.**

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

- the work counsel has done in identifying or investigating potential claims in the action,
- counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,
- counsel's knowledge of the applicable law, and
- the resources counsel will commit to representing the class;

(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

**(2) Appointment Procedure.**

(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h).

**(h) Attorney Fees Award.** In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

**(1) Motion for Award of Attorney Fees.** A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject

to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

**(2) Objections to Motion.** A class member, or a party from whom payment is sought, may object to the motion.

**(3) Hearing and Findings.** The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).

**(4) Reference to Special Master or Magistrate Judge.** The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).

## II. Proposed Amendments to Rule 23 (Clean Version)

### →Rule 23. Class Actions

**(a) Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of the class with respect to a claim or defense only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class on such claims or defenses.

**(b) Class Actions Maintainable.** An action may be maintained as a class action with respect to a claim or defense if the prerequisites of subdivision (a) are satisfied, and in addition:

**(1)** the relief sought is a declaratory or injunctive order or an order regarding the distribution of a finite fund or contractual or similar obligation that existed prior to the time that the claims in the action arose;

**(2) [THERE IS NO SUBSECTION (2)]**

**(3)** the relief sought is individual monetary relief, and the court finds that the questions of law or fact common to the members of the class on their claim 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 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) Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.**

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

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

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

**(2)(A)** For any class certified under this Rule, the court shall direct appropriate notice to the class. The notice shall concisely and clearly state in plain, easily understood language:

- the nature of the action,
- the definition of the class certified,
- the class claims, issues, or defenses,
- that a class member may enter an appearance through counsel if the member so desires,
- if the court determines that permitting exclusion is required by, or is otherwise appropriate under, Rule 23(c)(5), that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
- the binding effect of a class judgment on class members under Rule 23(c)(3).

**(B)(i)** For classes certified under Rule 23(b)(1), appropriate notice shall include individual notice to a representative sample of the class and to all persons that the court determines have manifest an interest in the action, including all persons who may be class members and who have filed other similar actions, and any other person who has requested to be informed about the action.

**(ii)** For classes certified under Rule 23(b)(3), appropriate notice shall include individual notice to all members of the class who can be identified through reasonable effort, unless the court determines that, because there is no reasonable likelihood that some or all of the class would pursue their own separate actions, individual notice is not necessary or justified, in which case notice shall be provided pursuant to subdivision (c)(2)(B)(i), and individual notice shall be provided to all persons who hold claims that might support individual actions.

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

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

(5)(A) For a class certified under Rule 23(b)(1), there shall be no right of exclusion, unless the court determines that there is no reasonable likelihood that relief that might be granted in a subsequent action by class members seeking exclusion from this action (i) would make it impossible for a party to comply with a judgment or order in both actions; (ii) would impose undue burdens on a party having to comply with a judgment or order in both actions or (iii) would create circumstances that would make it unjust or unreasonable to permit exclusion. The court may, but need not, determine whether to permit exclusion at the time of certification, or it may make such determination at such other time before final judgment as it deems appropriate.

(B) The court shall permit exclusion from any class certified under Rule 23(b)(3).

(6) The court shall analyze separately each of the claims for relief asserted by the class in deciding whether, and under what subdivision of Rule 23(b), to certify the action as a class action, and may, as required by this Rule, certify one or more claims under Rule 23(b)(1) and one or more claims under Rule 23(b)(3).

[NO CHANGES AFTER THIS POINT.]

**(d) Orders in Conduct of Actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

**(e) Settlement, Voluntary Dismissal, or Compromise.**

**(1)(A)** The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

**(B)** The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

**(C)** The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

**(2)** The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

**(3)** In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

**(4)(A)** Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

**(B)** An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

**(f) Appeals.** A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

**(g) Class Counsel.**

**(1) Appointing Class Counsel.**

**(A)** Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

**(B)** An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

- the work counsel has done in identifying or investigating potential claims in the action,
- counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,
- counsel's knowledge of the applicable law, and
- the resources counsel will commit to representing the class;

(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

**(2) Appointment Procedure.**

(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h).

**(h) Attorney Fees Award.** In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

**(1) Motion for Award of Attorney Fees.** A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

**(2) Objections to Motion.** A class member, or a party from whom payment is sought, may object to the motion.

**(3) Hearing and Findings.** The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).

**(4) Reference to Special Master or Magistrate Judge.** The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).