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Cover Page Footnote

For his support of this Note and countless other endeavors, I owe a debt of gratitude to my father, an alumnus of this law review, who taught me most of what I know about the law and about life.

GOOD “BRICK” WALLS MAKE GOOD NEIGHBORS: SHOULD A STATE COURT CERTIFY A MULTISTATE OR NATIONWIDE CLASS OF INDIRECT PURCHASERS?

*John C. Anderson**

Think for a moment about that compact disc you bought last week. Do you remember how much you paid for it? Hold onto your receipt. There is a good chance you were overcharged. Long ago you grudgingly accepted your inability to purchase CDs at a lower price, but perhaps the hour has come for a coordinated consumer challenge to the marketing practices of this powerful industry. The question is: what form should this challenge take?

When introduced in the early 1980s, CDs were quite expensive, in part because of the technological innovation required for their development and production.¹ As time passed and the technology became more accessible, industry observers expected prices to fall.² The general trend during the 1990s, however, has been exactly the opposite. Each year since 1991, the average price of a CD at retail has increased despite lower production costs.³ This increase, combined with recent consolidations of market power within the music industry, has given rise to numerous allegations of manufacturer collusion to artificially maintain prices.⁴

In 1995, the owner of a retail music store filed a class action in federal court in California against six major music distributors, claiming a manufacturer conspiracy to fix CD prices in violation of both the Sherman Act,⁵ and state antitrust laws.⁶ Following this filing

* For his support of this Note and countless other endeavors, I owe a debt of gratitude to my father, an alumnus of this law review, who taught me most of what I know about the law, and about life.

1. See David Segal, *A Class-Action Fight? That's Music to His Ears: Big CD Makers Are Michael Hausfeld's Latest Corporate Foes*, Wash. Post, Oct. 14, 1996, at F9.

2. *Id.*

3. *Id.*

4. *Id.*; see also Mark Hamblett, *CD Prices Hit Sour Note With Attorneys General: States File Lawsuit on Heels of FTC Probe*, N.Y. L.J., Aug. 9, 2000, at 1 (discussing recent actions brought by state attorneys general against members of the recording industry for alleged illegal price fixing).

5. 15 U.S.C. § 1 (1994) (rendering illegal any “combination in the form of trust or

by direct purchasers, a group of consumers who purchased CDs at the retail level filed a similar suit to recover alleged overcharges in CD prices.⁷ Despite the apparent similarity of these two suits, the interplay of antitrust and civil procedure issues surrounding these suits gave rise to significant differences between them.

This Note examines a decision that will, in all likelihood, soon face a state court: whether to certify a multistate or nationwide class of indirect purchasers, including plaintiffs from states without an established right of recovery for indirect purchasers.⁸ This Note attempts to answer whether such a certification would, in fact, be prudent given the policies of state antitrust law, the benefits sought under Rule 23 of the Federal Rules of Civil Procedure,⁹ relevant choice-of-law jurisprudence, and the constraints of the Constitution. Much of the discussion will focus on the contrasting interests of plaintiffs seeking aggregated recovery for antitrust violations through the use of the class action device¹⁰ and defendants' opposition to class certification in hopes of avoiding potentially massive liability.¹¹

Part I of this Note provides a sketch of the relevant antitrust law, and the recent jurisprudence out of which this issue has taken shape.¹² The discussion then shifts to outline the current status of antitrust class actions in state courts and the procedural tactics employed by both plaintiffs and defendants to further their respective interests in this context.¹³ Lastly, Part I examines the choice-of-law issues likely to arise in the context of the certification decision, and provides the necessary background in this area of law. The main proposal advanced here is that a plaintiff or plaintiff's counsel petitioning a court for certification will try to convince the court of the substantial justice to be achieved by such an action, while concurrently establishing the presence of important state interests that would be

otherwise, or conspiracy, in restraint of trade or commerce"); see *Wilder Enters., Inc. v. Allied Artists Pictures Corp.*, 632 F.2d 1135 (4th Cir. 1980); *Martin B. Glauer Dodge Co. v. Chrysler Corp.*, 570 F.2d 72, 81-82 (3d Cir. 1977) (discussing the elements necessary to sustain a cause of action for violation of § 1 of the Sherman Act). For a general scholarly discussion of the Sherman Act and its implications for business practices, see generally 2 Earl W. Kintner, *Federal Antitrust Law* (1980).

6. Jonathan Davies, *Labels' CD Pricing Draws Class-Action Suit in Calif.: Uniform Charge Means Fix Is in, Retailer Says*, *Hollywood Rep.*, June 1, 1995, at 4.

7. *Robinson v. EMI Music Distribution, Inc.*, 1996-2 Trade Cas. (CCH) ¶ 71,510 (Tenn. Cir. Ct. 1996).

8. See Kevin J. O'Connor, *Is The Illinois Brick Wall Crumbling?*, *Antitrust, Summer 2001*, at 34, 38 (describing the attempted certification of a multistate class of indirect purchasers as a possible trend in antitrust litigation).

9. See Fed. R. Civ. P. 23 (governing class actions). While this Note will focus primarily on class actions in state courts, most state rules governing class actions are substantially similar to the federal rules.

10. See *infra* Part I.B.

11. See *infra* Part III.G.

12. See *infra* Part I.A.

13. See *infra* Part I.B.

furthered through adjudication of such a dispute.¹⁴ To this end, plaintiff or plaintiff's counsel may attempt to justify application of forum law to the entire class, essentially permitting recovery by any indirect purchaser regardless of the policies or laws of sister states.¹⁵

Part II of this Note examines the arguments available to counsel for either maintaining or defeating class certification, with a focus on arguments supporting the constitutionality of class-wide application of forum law.¹⁶ This section also outlines secondary judicial initiatives enabling a state court to provide a remedy to a nationwide class of indirect purchasers despite constitutional choice-of-law restraints.¹⁷

Part III of this Note attempts to provide an analysis of the success or failure of the arguments proffered in Part II.¹⁸ The focus here will be threefold, addressing (1) the constitutionality of class-wide application of forum law,¹⁹ (2) concerns of federalism and interstate comity that may influence a court's decision,²⁰ and (3) a desire to prevent abuse of the class action device.²¹ This Note ultimately concludes that a state court should not certify a nationwide or multistate class of indirect purchasers primarily because constitutional mandates would require the forum state to discern and apply the laws of various states to the controversy. Aside from the possible failure of such an action to meet statutory requirements, certification of such a class would produce such inefficiencies as to benefit neither the state, nor the litigants, and in fact impose a significant burden on an already taxed state court system.

I. THE RISE AND FALL OF THE *ILLINOIS BRICK WALL*

This section begins by providing a brief background in antitrust principles and, specifically, the current relationship between federal and state antitrust law. It then looks at the procedural hurdles relevant to class certification and concludes with a sketch of the choice-of-law jurisprudence that comes into play when a state court certifies a multistate class. Despite its statutory foundations, the most significant developments in the fields of law discussed herein have come through judicial interpretations of these statutes. Thus, while paying due heed to the message contained within the statutes themselves, the main focus in this Note will be the case law shaping these bodies of law.

14. *See infra* Part I.C.

15. *See infra* Part I.C.

16. *See infra* Part II.A.

17. *See infra* Part II.B.

18. *See infra* Part III.A-B.

19. *See infra* Part III.B.

20. *See infra* Part III.F.

21. *See infra* Part III.G.

A. Indirect Purchasers in State and Federal Antitrust Law

A central tenet of antitrust law is the Sherman Act's prohibition of any "conspiracy in restraint of trade."²² Attempts by manufacturers to fix and maintain the price of goods entering the market constitute a violation of that law.²³ This type of illegal price fixing by manufacturers²⁴ may result in economic injury to two distinct groups of purchasers. Direct purchasers, such as the music retailers discussed above, suffer because they pay a higher price for the product than they would in a perfectly competitive marketplace.²⁵ Indirect purchasers,²⁶ those who purchase a manufacturer's goods through one or more middlemen, suffer when such an overcharge is passed-on to them by the retailer.²⁷

The Clayton Act²⁸ provides a private right of action for anyone harmed by illegal price fixing and allows for recovery of treble damages plus reasonable attorney fees for plaintiffs who demonstrate injury resulting from violation of federal antitrust law.²⁹ This provision is intended to provide a significant incentive for private parties to bring enforcement actions against perceived violators by permitting recovery far in excess of the actual injury.³⁰

22. 15 U.S.C. § 1 (1994).

23. See *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927) (condemning all price fixing arrangements as a violation of federal antitrust law).

24. While price fixing is illegal under both federal and state law, references will be primarily to the Sherman Act, 15 U.S.C. §§ 1-7 (1994) and the Clayton Act, 15 U.S.C. §§ 12-27 (1994), both prohibiting collusion to fix prices.

25. For a discussion of the nature of commerce in a situation of perfect competition and the effect of price fixing on such a market, see Phillip E. Areeda, *Introduction to Antitrust Economics*, in *Collaborations Among Competitors* 7 (Eleanor M. Fox & James T. Halverson eds., 1991).

26. By definition an indirect purchaser is one who purchases a product from anyone other than the manufacturer. In the present context, however, it most often refers to the end-user or consumer. For a general discussion of the distinction between direct and indirect purchasers, see C. Douglas Floyd & E. Thomas Sullivan, *Private Antitrust Actions: The Structure and Process of Civil Antitrust Litigation* § 6.2.2 (1996).

27. See Robert G. Harris & Lawrence A. Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. Pa. L. Rev. 269, 277-87 (1979) (discussing the economic principles at work in a situation of passing on an illegal overcharge).

28. 15 U.S.C. §§ 12-27 (1994); see also *In re Plywood Antitrust Litig.*, 655 F.2d 627, 635 (5th Cir. Unit A Sept. 1981) (requiring a demonstration of actual injury as a necessary element of antitrust cause of action).

29. 15 U.S.C. § 15(a); see also *Rosebrough Monument Co. v. Mem'l Park Cemetery Ass'n*, 666 F.2d 1130, 1138 (8th Cir. 1981) (holding that in order to prevail under § 15, plaintiff must prove both a violation of antitrust law and resultant injury).

30. See *infra* notes 43-46 and accompanying text (discussing the enforcement rationale behind federal antitrust law).

1. Indirect Purchasers Come Up Against a "Brick" Wall Under Federal Antitrust Statutes

Responding to private actions by direct purchasers alleging illegal collusion, defendants often assert that these purchasers avoided actual harm by passing-on any overcharge to the consumer.³¹ The Supreme Court addressed this "pass-on" argument in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*³² *Hanover Shoe* involved a civil suit filed by a shoe manufacturer against a producer of shoe manufacturing equipment, following an action by the United States government against the same defendant for violations of federal antitrust law.³³ Plaintiff Hanover Shoe Inc. claimed damage resulting from defendant United's monopolistic practices, including defendant's refusal to sell, rather than lease, vital and complex manufacturing equipment.³⁴ Contesting the award of damages, United claimed that Hanover had not suffered any damages because any overcharge initially borne by the plaintiff had been passed-on to Hanover's customers.³⁵ Resolving this question, the Court held that a manufacturer is liable for the entire overcharge paid by a direct purchaser regardless of whether or not the direct purchaser passed-on such overcharge to its customers.³⁶ This decision effectively barred the use of a pass-on theory by antitrust defendants.³⁷ This left the antitrust defendant subject to the possibility of liability to both direct and indirect purchasers for the same course of conduct.³⁸

The Supreme Court attempted to resolve this apparent inequity in *Illinois Brick Co. v. Illinois*.³⁹ *Illinois Brick* concerned a claim by the

31. This argument met with mixed results in lower federal courts. *Compare Wolfe v. Nat'l Lead Co.*, 225 F.2d 427, 433 (9th Cir. 1955) (sustaining a pass-on defense in a case involving the sale of manufacturing equipment), *with Atl. City Elec. Co. v. Gen. Elec. Co.*, 226 F. Supp. 59, 71 (S.D.N.Y. 1964) (rejecting a pass-on claim by defendant manufacturers of equipment used in the production of electricity).

32. 392 U.S. 481 (1968).

33. *Id.* at 484-85; *see United States v. United Shoe Mach. Corp.*, 110 F.Supp. 295 (D. Mass. 1953) (holding United Shoe liable for a violation of § 2 of the Sherman Act, which prohibits monopolization of an industry).

34. *Hanover Shoe*, 392 U.S. at 483.

35. *Id.* at 487-88.

36. *Id.* at 494.

37. *Id.* The Court carved a narrow exception to the use of a defensive pass-on argument. The Court held this defense permissible in situations in which the direct purchaser marketed the goods under a cost-plus contract. *Id.* This decision theoretically renders it quite easy for a defendant to demonstrate that a direct purchaser had passed on the overcharge to its customers. *Id.*; *see also Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 n.16 (1977) (noting that a pass-on defense may also be permitted in situations where the direct purchaser is owned or substantially controlled by the manufacturer). For a general discussion of the cost-plus exception to the rule of *Hanover Shoe*, *see* Herbert Hovenkamp, *The Indirect-Purchaser Rule and Cost-Plus Sales*, 103 Harv. L. Rev. 1717 (1990).

38. *See Illinois Brick*, 431 U.S. at 720.

39. *Id.* at 724-26.

state of Illinois and other indirect purchasers against manufacturers of concrete products, alleging illegal collusion, which resulted in artificially inflated prices for concrete block.⁴⁰ In *Illinois Brick*, the Court seemingly complemented its decision in *Hanover Shoe* by holding that a pass-on claim could not be used in an offensive capacity to establish a manufacturer's liability to indirect purchasers.⁴¹ That is, indirect purchasers cannot sustain a cause of action by claiming that a direct purchaser had passed-on an illegal overcharge to them. The obvious effect of this decision was to deny a remedy to indirect purchasers for violation of federal antitrust laws.⁴²

In establishing this rule, the Court in *Illinois Brick* announced an important policy goal that continues to influence antitrust litigation to this day.⁴³ First, the Court determined the primary goal of federal antitrust law to be deterrence of collusive conduct, rather than restitution for victims of such conduct.⁴⁴ Allowing indirect purchasers to enter their claims alongside direct purchasers would thwart this goal by requiring the court to entertain a complex economic analysis to determine the exact proportion of the overcharge passed on to the indirect purchaser.⁴⁵ This would have the effect of protracting such litigation as well as diluting the recovery available to direct purchasers, thus limiting the incentive for direct purchasers to bring antitrust suits and "seriously impair[ing] this important weapon of antitrust enforcement."⁴⁶

An influential counterweight to the holding in *Illinois Brick* came in the Court's resolution of *California v. ARC America Corp.*⁴⁷ *ARC America* involved a claim by several states to a portion of a settlement disposing of both state and federal antitrust claims against manufacturers of concrete products for their alleged collusive

40. *Id.* at 726-27.

41. *Id.* at 729-47.

42. *Id.*

43. See Stephen Calkins, *An Enforcement Official's Reflections on Antitrust Class Actions*, 39 *Ariz. L. Rev.* 413, 439-51 (1997) (discussing the tension between the dual purposes of deterrence and redress in the context of antitrust class actions).

44. *Illinois Brick*, 431 U.S. at 745-46; see also *Calderone Enter. Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971) (explaining the purpose of § 4 of the Clayton Act to be the provision of "a private enforcement weapon that will deter violation of the federal antitrust laws"). But see *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-86 (1977) (establishing the dual purposes of antitrust law as deterrence and provision of a remedy to victims of illegal conduct).

45. *Illinois Brick*, 431 U.S. at 740-43.

46. *Id.* at 745. For an economic analysis of the question of indirect purchaser standing, see William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws?: An Economic Analysis of the Rule of Illinois Brick*, 46 *U. Chi. L. Rev.* 602 (1979) (approving of the Court's ruling in *Illinois Brick* and arguing that deterrence rather than compensation should be the primary goal of antitrust law).

47. 490 U.S. 93 (1989).

attempts to stabilize the price of concrete block.⁴⁸ The state plaintiffs in *ARC America* were indirect purchasers of concrete products that had been incorporated into state sponsored building projects.⁴⁹ Reduced to its essence, the state plaintiffs sought federal recognition of the validity of state antitrust laws granting a right of recovery to indirect purchasers.⁵⁰ Both defendants and direct purchaser plaintiffs opposed such recovery on the grounds that federal approval of such laws would dilute the amount of recovery available to direct purchasers, thus circumventing the policy goals announced in *Illinois Brick*.⁵¹

Upholding the validity of such state laws, the Court granted recovery to the state plaintiffs and held that in enacting federal antitrust law, Congress had not intended to "occup[y] the field"⁵² and preempt state law.⁵³ To the contrary, Congress intended federal antitrust law to supplement state antitrust law, principally for the purpose of addressing those violations falling outside the ambit of an individual state's jurisdiction.⁵⁴ The Court further held that state antitrust laws permitting recovery by indirect purchasers did not "pose an obstacle to the accomplishment of the purposes and objectives of Congress"⁵⁵ and consequently did not run afoul of the Supremacy Clause.⁵⁶ In so holding, the Court effectively opened the door to a new generation of antitrust actions in state courts governed by state rather than federal, antitrust law.⁵⁷

2. State Antitrust Actions in the Wake of *ARC America*

Following *ARC America*, several state legislatures passed statutes granting indirect purchasers a right of recovery for violation of state antitrust law, or amended the state antitrust law to allow for such recovery.⁵⁸ Presently, thirty-three states and the District of Columbia

48. *Id.* at 97-99.

49. *Id.* at 97.

50. *Id.* at 100.

51. *Id.* at 102.

52. *Id.* at 100.

53. *Id.* at 100-02.

54. Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 Ind. L.J. 375, 378 (1983); see also 21 Cong. Rec. 2456-57 (1890) (providing remarks of Senator Sherman).

55. *ARC America*, 490 U.S. at 102.

56. U.S. Const. art. VI, § 2.

57. See Ronald W. Davis, *Indirect Purchaser Litigation: ARC America's Chickens Come Home to Roost on the Illinois Brick Wall*, 65 Antitrust L.J. 375, 376 (1997).

58. *ARC America Task Force Report: Report of the American Bar Association Section of Antitrust Law Task Force to Review the Supreme Court's Decision in California v. ARC America Corp.*, 59 Antitrust L.J. 271, 278. (1990). Prior to the Court's decision in *ARC America*, several states had passed laws granting a right of recovery to indirect purchasers. See, e.g., Ala. Code § 6-5-60 (Michie 1975); Miss. Code Ann. § 75-21-9 (West 1999). Several states not passing repealer statutes, granted indirect purchasers standing through common law repealers or decisions

allow for some type of recovery by indirect purchasers.⁵⁹ The remaining states, however, implicitly⁶⁰ deny a right of recovery to indirect purchasers.⁶¹ Many do so through the assertion that state antitrust law should be read in conformity with its federal counterpart.⁶²

Actions brought in state courts under these *Illinois Brick* repealer⁶³ statutes often follow nationwide actions by direct purchasers in federal courts.⁶⁴ Consequently, many indirect purchaser actions are brought in response to national, rather than local, activities.⁶⁵ Very often such cases are filed in multiple jurisdictions concurrently.⁶⁶ Unlike the federal system, which consolidates multi-district litigation,⁶⁷ no multi-district procedure exists at the state level.⁶⁸ Accordingly, many state court cases may proceed at the same time against the same defendant or defendants.⁶⁹

The allowance of multiple suits results in numerous inefficiencies including duplicative discovery and other pre-trial proceedings.⁷⁰

interpreting state laws against unfair trade practices to allow for recovery by indirect purchasers. *See, e.g.*, *FTC v. Mylan Labs, Inc.*, 99 F. Supp. 2d 1 (D.D.C. 1999) (establishing a right of recovery for indirect purchasers in several states); *Hyde v. Abbott Labs, Inc.*, 473 S.E.2d 680 (N.C. Ct. App. 1996) (establishing a right of recovery for indirect purchasers in North Carolina); *Blake v. Abbott Labs Inc.*, 1996-1 Trade Cas. (CCH) ¶ 71, 369 (Tenn. Ct. App. 1996) (interpreting Tennessee Consumer Protection Act of 1977 to allow for recovery by indirect purchasers).

59. For a comprehensive list of states having so called *Illinois Brick* repealer statutes, and the variations among them, see Thomas Greene et al., *State Antitrust Law and Enforcement*, 1252 PLI/Corp 1129 (2001).

60. *See, e.g.*, Tex. Bus. & Com. Code Ann. § 15.04 (Vernon 1987); *Abbott Labs, Inc. v. Segura*, 907 S.W.2d 503 (Tex. 1995) (finding Texas antitrust law to prohibit recovery by indirect purchasers).

61. *See Davis, supra* note 57, at 379-80 nn.24-29 and accompanying text.

62. *See, e.g.*, Tex. Bus. & Com. Code Ann. § 15.04 (stating “[t]he provisions of this Act shall be construed . . . in harmony with federal judicial interpretations of comparable federal antitrust statutes”); Del. Code Ann. tit. 6, § 2113 (1974).

63. *Davis, supra* note 57, at 375.

64. *Id.* at 376; *see also In re Brand Name Prescription Drugs Antitrust Litig.*, MDL 997, 1994 U.S. Dist. LEXIS 7146 (N.D. Ill. May 27, 1994) (illustrating nationwide antitrust suit in federal courts giving rise to indirect purchaser claims in state courts); *In re Infant Formula Antitrust Litig.*, MDL 878, 1992 U.S. Dist. LEXIS 21981 (N.D. Fla. Mar. 2, 1992).

65. *See Greene, supra* note 59, at 1144-47.

66. *See Private Class Action Suits Against Microsoft Dismissed in Iowa, Kentucky, Nevada, Rhode Island, May Proceed in Tennessee, California*, National Association of Attorneys General-Antitrust Report, July/Aug. 2000, at 14. [hereinafter *Private Class Action*]; *see also In re Vitamin Antitrust Litig.*, 2001-2 Trade Cas. (CCH) ¶ 73,339 (D.D.C. 2001).

67. *See* 28 U.S.C. § 1407(a) (1994) (“When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.”).

68. Joel M. Cohen & Trisha Lawson, *Navigating Multistate Indirect Purchaser Lawsuits*, Antitrust, Summer 2001, at 29, 31.

69. *See Private Class Action, supra* note 66.

70. *See Cohen & Lawson, supra* note 68, at 29 (describing the current situation as an “uncoordinated wave of state court cases raising substantially the same legal and

Further, the concurrent filing of many actions against the same defendants permits what some perceive to be a chess game of sorts, with each side litigating more aggressively in forums they perceive as favorable to their position.⁷¹

B. *Nationwide or Multistate Certification in State Courts*

One tactic that has recently emerged in this context is the attempted certification of a nationwide or multistate class of indirect purchasers in a state in which the plaintiffs perceive some type of advantage, such as favorable certification standards.⁷² While this phenomenon has appeared in few published decisions, it has the potential to become more widespread.⁷³ This section discusses the procedural issues raised generally by multistate or nationwide class certification.

1. State Court Jurisdiction Over a Multistate Class: A *Shutts* Analysis

As an initial inquiry, a state court considering certification of a multistate class must ensure proper personal jurisdiction over both the plaintiff class members as well as the defendant.⁷⁴ Assuming for present purposes the proper exercise of personal jurisdiction over the defendant, a nationwide class would almost certainly include plaintiffs having had no prior contact with the forum state.⁷⁵ As such, a straightforward reading of the Supreme Court's "minimum contacts" holding in *International Shoe Co. v. Washington*⁷⁶ would seem to preclude a state court's exercise of jurisdiction over such plaintiffs. In

factual issues").

71. See O'Connor, *supra* note 8, at 35 (stating that "each side may attempt to have the class certification issue resolved first in states with law perceived to be favorable to its side, thereby adding another layer of tactical complexity to these cases").

72. See *Robinson v. EMI Music Distribution, Inc.*, 1996-2 Trade Cas. (CCH) ¶ 71,510 (Tenn. Cir. Ct. 1996) (granting conditional certification to a class of CD purchasers from fourteen states with *Illinois Brick* repealer statutes or common law decisions affording a remedy to indirect purchasers). The vast majority of indirect purchaser actions are filed in the form of a class action due to the generally small amount of each potential claim. William H. Page, *The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of Illinois Brick*, 67 *Antitrust L.J.* 1, 3 & n.12 (1999); see also *City of St. Paul v. FMC Corp.*, 1991-1 Trade Cas. (CCH) ¶ 69,305 (D. Minn. 1990) (certifying nationwide class of indirect purchasers in federal court).

73. See John C. Coffee Jr., *Class Actions: Interjurisdictional Warfare*, N.Y. L.J., Sept. 25, 1997, at 5.

74. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

75. If plaintiffs hail from every state in the union, reason informs us that at least some portion of those plaintiffs would, prior to the filing of the lawsuit, have had no meaningful contact with the forum state.

76. 326 U.S. 310 (1945). The Supreme Court held in *International Shoe* that in order to issue a judgment binding on a party, that party must "have certain minimum contacts with [the forum state] such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

Phillips Petroleum Co. v. Shutts,⁷⁷ however, the Court rejected this assumption.⁷⁸

Clarifying its holding in *International Shoe*, the Court explained that the minimum contacts standard of *International Shoe* was established to protect defendants from the difficulties and expenses of conducting litigation in a foreign jurisdiction.⁷⁹ A defendant hailed into court in a distant jurisdiction almost certainly faces significant expenditures for travel and the hiring of local counsel to represent him,⁸⁰ whereas the unnamed plaintiff in a class action bears none of these risks or expenses. In short, the burdens imposed upon an out-of-state defendant are far greater than those imposed on an out-of-state unnamed plaintiff adequately represented by named parties.⁸¹ Therefore, the constitutional demands of due process do not require minimum contacts with unnamed plaintiffs in a multistate class action in order to issue a judgment binding on the plaintiff.⁸² Kansas, the Court held, could properly exercise judicial jurisdiction over the claims of the entire plaintiff class.⁸³ In so holding, the Court effectively opened the door to the adjudication of claims by a forum lacking substantial contact with the underlying controversy and provided apparent encouragement for the use of multistate class actions in state courts.⁸⁴

2. Statutory Requirements for Class Certification: A Rule 23 Analysis

Assuming proper jurisdiction over the parties, a state court contemplating certification of a multistate or nationwide class of indirect purchasers must determine whether the proposed class complies with the relevant statutory provisions governing class actions.⁸⁵ Such statutes⁸⁶ typically require a proposed class to meet

77. 472 U.S. 797 (1985); see *infra* notes 100-05 and accompanying text.

78. The Court in *Shutts* held that the state of Kansas could properly exercise jurisdiction over the claims of non-resident plaintiffs lacking minimum contacts, in the context of a multistate class action. For a further discussion of *Shutts*, see *infra* notes 100-05 and accompanying text.

79. *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945); see *Shaffer v. Heitner*, 433 U.S. 186 (1977) (holding that a state court could not properly exercise jurisdiction over a non-resident having no purposeful contact with the forum state).

80. See *Int'l Shoe*, 326 U.S. at 317.

81. *Shutts*, 472 U.S. at 808.

82. See *id.* at 812. The court did hold, however, that demands of due process require potential class members be afforded the opportunity to opt out of the class and the "opportunity to be heard and participate in the litigation, whether in person or through counsel." *Id.* For a more detailed discussion of the opt-out requirement in class actions, see John E. Kennedy, *Class Actions: The Right to Opt Out*, 25 *Ariz. L. Rev.* 3 (1983).

83. See *Shutts*, 472 U.S. at 812.

84. See 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, 57 (1986).

85. See *Fed. R. Civ. P.* 23.

several fundamental standards. Chief among these are commonality of legal or factual issues,⁸⁷ typicality of the claims of class representatives,⁸⁸ numerosity of plaintiffs such that traditional joinder would be impracticable,⁸⁹ and adequacy of representation by named plaintiffs.⁹⁰ Should a court find a proposed class in satisfaction of these prerequisites, the threshold for class certification has been met.⁹¹

Subsumed under Rule 23, or the state equivalent, are three types of class actions. For purposes of the present discussion the only relevant one is that found in Rule 23(b)(3), which allows for groups of claimants with common questions of law or fact to join their claims for treatment as a class.⁹² The crux of 23(b)(3) is the "predominance" test, requiring that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members."⁹³ This statement does not require a complete absence of individual issues, only that common ones "predominate."⁹⁴

Though often fatal to otherwise viable class actions,⁹⁵ the predominance requirement of Rule 23 is undoubtedly consistent with the announced policy goal of enhanced efficiency through collective resolution of claims of a similar nature.⁹⁶ Absent the predominance requirement, the employment of a class action device would yield no benefit in terms of judicial economy since a court would then have to apply varying standards of substantive law to each plaintiff class member.⁹⁷

In summary, the primary statutory and constitutional obstacles to the certification of a multistate or nationwide class of indirect purchasers are personal jurisdiction and the statutory requirements attendant to class treatment. The former obstacle was seemingly neutralized by the Supreme Court's decision in *Shuttz*; the latter, however, remains and must be satisfied before a court may proceed.

86. See *infra* notes 272-73 and accompanying text. Most, if not all state rules of civil procedure mirror the federal rules with respect to class actions. See, e.g., Tenn. R. Civ. P. 23.01.

87. Fed. R. Civ. P. 23(a)(2).

88. *Id.* R. 23(a)(3).

89. *Id.* R. 23(a)(1).

90. *Id.* R. 23(a)(4).

91. Before certifying a class, however, the court must determine class treatment to be the best available method for resolution of the claims. See *id.* R. 23(b).

92. *Id.* R. 23(b)(3).

93. *Id.*

94. See Stephen R. Bough & Andrea G. Bough, *Conflict of Laws and Multi-State Class Actions: How Variations in State Law Affect the Predominance Requirement of Rule 23(b)(3)*, 68 UMKC L. Rev. 1 (1999) (discussing the treatment of multistate class actions in federal courts).

95. See *infra* Part III.D.

96. Fed. R. Civ. P. 23(b)(3) advisory committee's note (1966).

97. See *id.*; see also *infra* Part III.D.

C. Choice-of-law Inquiry

Central to a determination of the suitability of treating a group of plaintiffs from different states as a single class is the question of choice-of-law. For reasons discussed below,⁹⁸ the determination of applicable law may be dispositive in the context of a proposed multistate or nationwide class. This section provides some useful background regarding choice-of-law in the context of recent Supreme Court jurisprudence.

1. Choice-of-law in *Phillips Petroleum Co. v. Shutts*

In a multistate or nationwide class action, the most serious potential challenge to class-wide application of forum law is that such application would be inconsistent with the demands of the Constitution.⁹⁹ Applicability would center on a discussion of the Supreme Court's treatment of this issue under similar circumstances in *Phillips Petroleum Co. v. Shutts*.¹⁰⁰ *Shutts* involved a multistate class action filed by the owners of oil and gas royalties, claiming that Phillips failed to pay interest on royalties temporarily withheld from the plaintiffs pending approval of a rate increase by the Federal Power Commission.¹⁰¹ The leased lands from which Phillips produced natural gas were located in eleven different states.¹⁰² The owners of the royalties were located in all fifty states and several foreign countries.¹⁰³ Plaintiffs initiated this class action in Kansas¹⁰⁴ on behalf of all royalty holders despite the fact that fewer than 1000 of the 28,000 plaintiffs resided in that state and less than one quarter of one percent of the land in question was located in Kansas.¹⁰⁵

In this context, choice-of-law concerns figure importantly for two distinct reasons. First, concern for constitutional due process rights¹⁰⁶ requires that before subjecting a defendant to the substantive law of a given jurisdiction, that defendant must have some contact with a state so as to avoid unfair surprise in the application of unfavorable substantive law.¹⁰⁷ In forming its conduct, a potential defendant may

98. See *infra* Part II.A.1.

99. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (challenging the constitutionality of uniform application of forum law to a multistate class).

100. *Id.* For a fuller discussion of the factual background of the *Shutts* case, see John E. Kennedy, *The Supreme Court Meets the Bride of Frankenstein: Phillips Petroleum Co. v. Shutts and the State Multistate Class Action*, 34 U. Kan. L. Rev. 255 (1985).

101. *Shutts*, 472 U.S. at 800.

102. *Id.* at 799.

103. *Id.*

104. *Id.*

105. *Id.* at 801.

106. U.S. Const. amend. V.

107. See Joseph William Singer, *Real Conflicts*, 69 B.U. L. Rev. 3, 93 & n.253 (1989).

well have relied on the substantive law of a given jurisdiction, rendering it unfair to apply a different set of laws to that defendant's conduct after a dispute has arisen.¹⁰⁸ Second, the nature of our federal system and the demands of the Full Faith and Credit Clause¹⁰⁹ inform us of a sovereign state's right to further the policies behind its laws through application of those laws to disputes with which it has a significant connection.¹¹⁰ As one commentator explains:

A state court applying its law to a multistate plaintiff class disregards any interest other states may have in applying their laws to the matters from which the dispute arose. In so doing, the forum encroaches upon the rights of other states to adjudicate disputes according to the social and economic policies enacted by their legislatures or formed by their courts.¹¹¹

This concern is well illustrated by the Court's discussion of the secondary purpose behind the minimum contacts standard as established by *International Shoe*.¹¹² The minimum contacts requirement was intended not only for the protection of the defendant, but also for the protection of the interests of the states—that their fellow sovereigns not overstep the bounds of their proper authority in the application of their laws.¹¹³

In short, a choice-of-law determination would most likely have a profound influence on a state court's willingness to certify a nationwide or multistate class of indirect purchasers. Such a determination, however, is neither simple nor without significant ramifications for interstate relationships. As demonstrated in the following section, choice-of-law has historically been an area of some

108. Restatement (Second) of Conflict of Laws § 6 cmt. g (1971) ("Generally speaking, it would be unfair and improper to hold a person liable under the local law of one state when he had justifiably molded his conduct to conform to the requirements of another state."); see also Melvin A. Eisenberg, *The Nature of the Common Law* 110-12 (1988) (discussing the validity of the reliance interest and distinguishing various types of reliance).

109. U.S. Const. art. IV, § 1 (providing that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State").

110. See *infra* note 113 and accompanying text.

111. William D. Torchiana, Comment, *Choice of Law and the Multistate Class: Forum Interests in Matters Distant*, 134 U. Pa. L. Rev. 913, 918 (1986).

112. See *supra* notes 74-84 and accompanying text.

113. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292-94 (1980) (explaining that the minimum contacts required for exercise of personal jurisdiction serve to protect not only the right of defendants, but additionally the right of states to further their own policies through application of their laws); *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958) (explaining that although the difficulties attendant to distant litigation may diminish with the rise of technology, the minimum contacts standard serves the dual purpose of maintaining "territorial limitations on the power of the respective States"). But see *Ins. Corp. of Ireland v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694 (1982) (holding that state interests are secondary to protection of the defendant in personal jurisdiction analyses).

difficulty for the Supreme Court, with the resultant failed emergence of a clear constitutional mandate.¹¹⁴

2. Choice-of-law in Pre-*Shutts* Supreme Court Jurisprudence

Concerns of federalism and due process dictate that a state court may not blindly apply its own law to an entire multistate class without engaging in a principled choice-of-law analysis. This analysis seeks to determine whether the forum has significant contacts creating state interests such that there is neither unfair surprise to a defendant nor complete disregard for the policies of its fellow sovereign states.¹¹⁵ This section attempts to provide an overview of the Supreme Court's pre-*Shutts* choice-of-law jurisprudence to achieve a more complete understanding of the constitutional boundaries of choice-of-law and the application of this standard to a multistate or nationwide class of indirect purchasers.

In several notable cases, state courts have applied forum law to disputes having little or no connection to the forum state.¹¹⁶ The Supreme Court's decision in *Allstate Insurance Co. v. Hague*¹¹⁷ was an apparent attempt to formulate concrete constitutional standards for choice-of-law.¹¹⁸ At issue in *Allstate* was the application of Minnesota law to a suit by a widow seeking recovery on three automobile insurance policies issued to her late husband.¹¹⁹ Prior to the husband's death in a motorcycle accident, the couple resided in Wisconsin, where the policies were issued.¹²⁰ The cars on which the policies were issued were garaged principally in Wisconsin, and the accident in which he was killed occurred in Wisconsin as well.¹²¹ Mrs. Hague filed

114. See Gene R. Shreve, *Choice-of-Law and the Forgiving Constitution*, 71 Ind. L.J. 271, 271-72 (1996) (contending that the Supreme Court's failure to employ the tools of the Constitution to cure "conflicts localism unfairly damages nonforum litigants").

115. This statement of interest analysis-based choice-of-law considerations marks a notable shift from earlier jurisprudence, which stressed a territorial, or vested rights approach. For a comprehensive overview of the history of choice-of-law, see Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 Colum. L. Rev. 772 (1983).

116. See *Blamey v. Brown*, 270 N.W.2d 884 (Minn. 1978) (applying Minnesota law to a claim by a Minnesota resident against a Wisconsin tavern owner, for damages resulting from an automobile accident following the driver drinking at defendant's establishment, where, despite defendant's residence, and localization of business activities in Wisconsin, the Minnesota court denied him the protection of Wisconsin's Dram Shop Act, and held him liable under Minnesota law).

117. 449 U.S. 302 (1981).

118. Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 Mich. L. Rev. 2448, 2506-07 (1999) (analyzing the Court's attempt to construct a meaningful constitutional standard for choice-of-law, and concluding that the holding "suppose[s] that the Constitution cares very little about the resolution of conflicts between laws").

119. *Allstate*, 449 U.S. at 305.

120. *Id.*

121. *Id.*

suit in Minnesota, claiming a right to "stack"¹²² the three policies issued on each of Mr. Hague's automobiles.¹²³ Wisconsin law would not permit the three insurance policies to be "stacked," limiting Mr. Hague's widow to a maximum recovery of \$15,000.¹²⁴ Minnesota law, however, permitted such stacking. In sanctioning the applicability of Minnesota law despite Wisconsin's overwhelming connection with the dispute, the Minnesota court relied on Mrs. Hague's permanent relocation to Minnesota following her husband's death and the fifteen years during which Mr. Hague commuted to work in Minnesota.¹²⁵

Rendering its decision, the Minnesota Supreme Court analyzed the choice-of-law issue in light of Professor Leflar's choice-of-law considerations.¹²⁶ Among other considerations discussed by Prof. Leflar, the court concluded that Minnesota's state interest would be substantially furthered by application of its law to the present controversy.¹²⁷ While the court recognized Wisconsin's many substantial contacts with this dispute, the court also noted that plaintiff's present status as a Minnesota resident created a state interest in providing her with adequate means to support herself and ensuring her continued self-sufficiency.¹²⁸

Interestingly, the court also based its decision on the "better law" consideration advocated by Professor Leflar,¹²⁹ which argues that in determining the applicable law, a state court should inquire as to which law would better serve the "total ends of justice under law."¹³⁰ Under this analysis the court concluded that allowing the plaintiff to stack the coverage on her husband's policies would spread the risk of accidents with uninsured motorists more broadly through insurance premiums, rather than laying the burden on the unfortunate accident victim.¹³¹ In making this determination, the court took into account

122. "Stacking" here refers to recovery for Mr. Hague's death through each of his three policies containing coverage for injury by an uninsured motorist. Mr. Hague was killed when an uninsured motorist rear-ended a motorcycle on which he was a passenger. *Id.*

123. *Id.*

124. While the Minnesota court conceded that the status of stacking law in Wisconsin was not entirely clear, the court saw no reason to deviate from the Wisconsin court's holding in *Nelson v. Employers Mutual Casualty Co.*, 217 N.W.2d 670 (Wis. 1974), which upheld limitations on the stacking of insurance policies. *Allstate*, 449 U.S. at 316 n.22.

125. *Allstate*, 449 U.S. at 313-20.

126. See Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. Rev. 267 (1966).

127. *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 49 (Minn. 1979), *aff'd*, 449 U.S. 302 (1981).

128. *Id.*

129. See Leflar, *supra* note 126. For further discussion of the application of Prof. Leflar's jurisprudence, see Robert L. Felix, *Leflar in the Courts: Judicial Adoptions of Choice-Influencing Considerations*, 52 Ark. L. Rev. 35 (1999).

130. Leflar, *supra* note 126, at 299.

131. *Hague*, 289 N.W.2d at 49.

the fact that a majority of other jurisdictions had adopted a similar rule permitting stacking of insurance policies.¹³² The Minnesota court seems to have based the application of its own law not only on that state's contacts with the parties and the events, but also on policy considerations that many claim reflect a pro-forum bias in choice-of-law.¹³³ Although the Minnesota Court's reasoning is of no guidance in determining the constitutionality of its decision, it is at least interesting to note its unwillingness to give serious consideration to the admittedly greater interests of a sister sovereign.

Allstate reached the Supreme Court of the United States for a determination of whether Minnesota's choice-of-law met constitutional requirements.¹³⁴ The Court's holding is succinctly expressed in the proposition that concern for the due process rights of the defendant required that "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact, or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."¹³⁵

The Supreme Court found that the aggregation of Minnesota's contacts with the litigation provided it with a sufficient interest in the underlying dispute to justify application of forum law.¹³⁶ The Court further held that since *Allstate* had a significant business presence in Minnesota, and familiarity with the law of that jurisdiction, it could not claim unfair surprise upon the application of Minnesota law to a dispute between the company and a member of that state's workforce.¹³⁷ Although this line of reasoning has been subject to extensive scholarly criticism,¹³⁸ it nonetheless provides a strong precedent on which to base extraterritorial application of state antitrust law.¹³⁹

This part looked at the areas of law necessarily implicated by a multistate or nationwide class action by indirect purchasers. Part II examines a state court decision certifying such a class and considers

132. *Id.* See also Neil Chamberlin & J. Stephen Holt, *Why Arkansas Should Overturn Its Anti-Stacking Precedent: A Look at Aggregating Uninsured and Underinsured Motorist Coverage*, 21 U. Ark. Little Rock L. Rev. 413 (1999).

133. See Korn, *supra* note 115, at 796-98.

134. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

135. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (quoting *Allstate*, 449 U.S. at 312-13).

136. *Allstate*, 449 U.S. at 320.

137. *Id.* at 317-18.

138. See Russell J. Weintraub, *Commentary on the Conflict of Laws* 593-95 (4th ed. 2001) [hereinafter Weintraub, *Commentary*]; Linda Silberman, *Can the State of Minnesota Bind the Nation?: Federal Choice-of-Law Constraints After Allstate Insurance Co. v. Hague*, 10 Hofstra L. Rev. 103 (1981) (arguing that the Court's decision in *Allstate* failed to enact meaningful constitutional standards for state choice-of-law).

139. See Korn, *supra* note 115, at 798-99.

the arguments for and against the certification of such a class were it to include purchasers from states denying indirect purchasers standing to recover under state antitrust law.

II. OPPOSING ARGUMENTS FOR STATE CERTIFICATION OF INDIRECT PURCHASER CLASS ACTIONS

A multistate class of indirect purchasers was recently certified in Tennessee. *Robinson v. EMI Music Distribution, Inc.*¹⁴⁰ involved a class action filed in July 1996 in Tennessee Circuit Court on behalf of CD purchasers from fourteen different states and the District of Columbia, alleging a price fixing conspiracy by CD manufacturers. Plaintiffs claimed that manufacturer collusion, in violation of the antitrust laws of these fourteen states and the District of Columbia, resulted in artificially inflated retail prices for CDs.¹⁴¹ The Tennessee Circuit court found that plaintiffs met the requirements for class treatment under the Tennessee Rules of Civil Procedure¹⁴² and granted conditional certification.¹⁴³

Having addressed in the previous section the relevant antitrust law,¹⁴⁴ and the recent proliferation of antitrust actions filed in state court,¹⁴⁵ this part looks at the advantages as well as the peculiar problems raised by state courts certifying a multistate or nationwide class of indirect purchasers.¹⁴⁶ In doing so, this part attempts to provide a framework within which to view this decision, taking into account the viewpoint of the plaintiff and defendant, as well as the state court system. This part begins with a discussion of the potential benefits realizable by a state court through application of its law to a multistate or nationwide class of indirect purchasers. This part then focuses on an analysis of the constitutional legitimacy of such an application¹⁴⁷ and concludes with a discussion of alternative means

140. *Robinson v. EMI Music Distribution Inc.*, 1996-2 Trade Cas. (CCH) ¶ 71,510 (Tenn. Cir. Ct. 1996).

141. *Id.*

142. Tenn. R. Civ. P. 23.01 (requiring plaintiff to demonstrate numerosity, commonality, typicality, and adequacy in order to maintain class treatment, requirements analogous to Rule 23 of the Federal Rules of Civil Procedure).

143. Tenn. R. Civ. P. 23.03(1); *see also* *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996) (asserting that the purpose of conditional certification is "'to preserve the Court's power to revoke certification in those cases wherein the magnitude or complexity of the litigation may eventually reveal problems not theretofore apparent'" (quoting *In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974))); *see also* Note, *Back to the Drawing Board: The Settlement Class Action and the Limits of Rule 23*, 109 Harv. L. Rev. 828 (1996) (discussing the use of conditional certification for purposes of settlement classes in federal courts).

144. *See supra* Part I.A.

145. *See supra* notes 58-73 and accompanying text.

146. *See infra* Part II.A.

147. *See infra* Part II.B.

through which a state court might apply its law to a multistate or nationwide class despite constitutional limitations.¹⁴⁸

A. Discretionary Factors Influencing the Certification Decision

Despite class satisfaction of threshold statutory and jurisdictional requirements for class treatment described above, a state court is not required to grant class certification.¹⁴⁹ Congested state court dockets and scarce judicial resources demand that state courts give serious consideration to efficiency concerns in determining the desirability of adjudicating a class action.¹⁵⁰ This holds especially true in the context of a nationwide class action, as such a move would employ the state's resources for the benefit of non-citizens.¹⁵¹ This also holds true in the *Robinson* case described above, because plaintiffs hailed from a number of states other than Tennessee. When contemplating certification, a state court will almost certainly inquire regarding the benefits that class certification might generate for the forum state. Essentially, this calculus may become one of utility for the state court. If the court determines that the benefits achieved through certification outweigh the resources expended in handling such a dispute, the court would be prone to certify. A plaintiff's goal, then, would be to convince the court of the efficiency gains ostensibly resulting from certification.

1. Rule 23(b)(3) and the Desirability or Undesirability of Conducting the Litigation in a Particular Forum

An initial argument in favor of certification highlights the substantial justice that may be achieved through class treatment.¹⁵² Employing an argument based on the equities of the situation, the interests of justice require the provision of coordinated relief to persons injured as a result of an illegal practice.¹⁵³ This line of

148. See *infra* Part II.C.

149. See Fed. R. Civ. P. 23(b)(3) (requiring a court considering certification to find that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy").

150. See Judith S. Kaye, *State Courts: Grace Under Pressure: New York Judges Manage Large and Diverse Docket*, N.Y. L.J., Jan. 24, 1994, at S-1 (praising the work of state courts in the face of congested dockets and minimal resources).

151. This statement contemplates indirect purchasers who neither reside, nor made the relevant purchases, in the forum state bringing suit against an out-of-state defendant. If either plaintiff or defendant is found to have a more substantial connection with the forum state, this analysis may not apply.

152. At least one commentator has noted the more cynical possibility that a state court may certify simply out of a desire for prestige. See Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. Rev. 461, 476 (2000).

153. See Abraham J. Pomerantz, *New Developments in Class Action—Has Their Death Knell Been Sounded?*, 25 Bus. Law. 1259, 1259-60 (1970) (noting that the class action device has provided a means of redress for "an endless variety of consumer wrongs" and calling the class action "one of the most socially useful remedies in

argument is strengthened by the policy goals intended by Rule 23,¹⁵⁴ which envision the collective resolution of claims of a similar nature in a single proceeding, rather than requiring each injured party to file a separate suit.¹⁵⁵ Coordinating indirect purchaser litigation in a single state would yield a tremendous gain in efficiency since purchasers in each state would not be required to file a separate action in their respective state courts.¹⁵⁶

Additionally, one may note the justice achieved by providing a meaningful possibility of relief for indirect purchasers from states without a sufficient number of purchasers to merit an independent class action.¹⁵⁷ While success in this line of argument would necessarily represent an altruistic motivation on the part of larger states that would likely have a sufficient number of indirect purchasers, the reverse would be true if the forum state has an insufficient number of plaintiffs. In such a case, a court may find a benefit to its own plaintiffs through the attachment of plaintiffs from other states in order to meet the numerosity requirement for maintenance of a class action.¹⁵⁸ For example, the *Shutts* court correctly found the main benefit of class treatment to be the possibility of a grant of relief to plaintiffs with claims too menial to merit individual litigation. In *Shutts*, those class members hailing from Texas and Oklahoma would have had the resources to mount independent class actions, but plaintiffs from abroad, or even those in states with smaller numbers of plaintiffs, Kansas possibly included, would be left without a practical remedy. Stressing this point, Justice Rehnquist, writing for the Court, noted "this lawsuit involves claims averaging about \$100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available."¹⁵⁹

Such a consideration appears important if the vindication of consumer rights is to be taken at all seriously. The idea that a manufacturer might market overpriced goods with impunity in a given state simply due to the relative paucity of consumers located there offends basic notions of substantial justice.¹⁶⁰

history").

154. See *supra* notes 85-97 and accompanying text.

155. See Charles Alan Wright, *Law of Federal Courts* § 72 (4th ed. 1983) [hereinafter Wright].

156. See O'Connor, *supra* note 8, at 35-36 (examining the possibilities for coordination of indirect purchaser litigation). While this action would presumably favor plaintiffs, the opt-out requirement announced in *Shutts* would preserve an individual plaintiff's right to file suit in another jurisdiction, such as plaintiff's home state.

157. See Fed. R. Civ. P. 23(a)(1) (requiring that in order to merit class action treatment the number of plaintiffs must be such that joinder is impracticable).

158. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985).

159. *Id.*

160. See *id.*

On its face, this argument carries tremendous equitable force, yet proponents of judicial economy might regard this as too high a cost for a questionable benefit.¹⁶¹ If class members hail primarily from the forum state, critics may be heard to argue that inclusion of foreign plaintiffs only serves to expend the judicial resources of the forum state for the benefit of non-citizens and local attorneys.¹⁶² If domestic plaintiffs require additional claimants in order to merit class treatment, the forum state may object that the adjudication of a large class action is simply too costly an undertaking for the benefit of a small group of citizens.¹⁶³

2. Protection of State Interests as Motivation to Certify a Multistate or Nationwide Class of Indirect Purchasers

A second potential benefit prompting a state court to certify is the possible vindication and protection of important state interests.¹⁶⁴ Constructing an argument on this basis, two notable state interests may be asserted as conceivably protected by certification; (1) protection of state citizens from violations of antitrust law¹⁶⁵ and (2) regulation and protection of an industry with special significance to the forum state.¹⁶⁶ If certification of a class and the subsequent adjudication of a class action would serve to protect these important state interests in a meaningful way, a state court would seize the opportunity.

3. Determination of Applicable Law

Most importantly, however, a state court should inquire into the substantive law applicable to the class.¹⁶⁷ This consideration takes on tremendous weight here because the determination of the applicable law will necessarily inform the court's ability to avail itself of the potential benefits previously discussed. If, through a choice-of-law

161. See *infra* notes 310-12 and accompanying text.

162. See *infra* notes 303-15 and accompanying text.

163. See *Osborne v. Subaru of America Inc.*, 243 Cal. Rptr. 815, 825-26 (Cal. Ct. App. 1988) (explaining that entertaining a class action would not promote concerns of judicial economy).

164. See Lea Brilmayer, *Legitimate Interests in Multistate Problems: As Between State and Federal Law*, 79 Mich. L. Rev. 1315 (1981) (discussing construction of state interests which form the basis for application of forum law). *But see* John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 Wm. & Mary L. Rev. 173, 180 (1981) (contesting the assertion that a state's primary interest in a multistate dispute is the protection of its own citizens and regarding it as "wishful thinking").

165. See *infra* notes 175-77 and accompanying text.

166. See *infra* notes 179-80 and accompanying text (providing examples of situations in which a state court would perceive a state interest to be protected through application of forum law).

167. See *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996) (stressing the importance of ascertaining the applicable law prior to making a decision on certification, especially when the laws of more than one jurisdiction may apply).

analysis, a court determines that forum law is applicable to the entire class, the substantial justice and efficiency gains envisioned by the court would be readily realizable. Further, application of forum law would allow for protection of state interests.¹⁶⁸ Conversely, if a court determines that it must apply the laws of other interested jurisdictions, any efficiency gains would be largely mooted because the court would almost certainly be forced to make use of subclasses, which in turn would require numerous duplicative proceedings analogous to separate filings in each individual state.¹⁶⁹ In sum, a petition for certification establishing class-wide applicability of forum law would seem to have a much greater chance of success, since it would facilitate the realization of the potential benefits attendant to class certification.¹⁷⁰

B. The Constitutional Question

Given the precedent set forth by the Tennessee court in *Robinson*,¹⁷¹ could a plaintiff class of indirect purchasers establish a sufficient connection between the forum state and the entire plaintiff class to justify class-wide application of forum law under the standard set by *Allstate*? This section attempts to extend the choice-of-law inquiry laid out in the previous section and explores lines of argument available to both plaintiffs and defendants in arguing either for or against the application of forum law to the entire plaintiff class, with a focus on the constitutional mandates regarding choice-of-law. As noted earlier the success or failure of these arguments will be a critical factor in a court's certification decision.¹⁷²

1. Establishing Compliance with the "Contacts Creating Interests" Requirement of *Allstate Insurance Co. v. Hague*

As discussed in Part I, the Supreme Court's choice-of-law jurisprudence requires that before a state may apply its own law to a multistate class, that state must establish some contact with the underlying dispute that creates a cognizable interest on the part of the forum state.¹⁷³ Using the *Robinson* case¹⁷⁴ as a paradigm, if a

168. See *infra* note 231 and accompanying text (describing how protection of state interests is a central factor in choice-of-law inquiries).

169. See *Rink v. Cheminova, Inc.*, 203 F.R.D. 648, 671 (M.D. Fla. 2001) (describing the difficulties attendant to class treatment when individual issues figure prominently and concluding that class treatment would be inefficient).

170. See *infra* Part II.B.

171. See *supra* notes 140-43 and accompanying text.

172. See *supra* notes 167-70 and accompanying text.

173. See *supra* notes 134-39 and accompanying text.

174. *Robinson v. EMI Music Distribution, Inc.*, 1996-2 Trade Cas. (CCH) ¶ 71,510 (Tenn. Cir. Ct. 1996). While the class certified in *Robinson* included only plaintiffs from states with established *Illinois Brick* repealer statutes, this Note attempts to address the question of whether a future multistate class of indirect purchasers could

nationwide class of indirect purchasers petitioned the Tennessee court to apply its own law to the case so as to affect the largest possible recovery, could that state establish a sufficient connection with non-residents who purchased their CDs in other states?

Any attempt to establish forum contact with the dispute begins with the contention that although the activity complained of occurred primarily in other states, that conduct had foreseeable consequences within the forum state.¹⁷⁵ In the case of a potential nationwide class of indirect purchasers seeking certification in state court, it may be argued that CD sales to non-residents taking place outside of the state have a perceptible effect on the prices of CDs within the forum state, creating legitimate contact between the forum and the entire plaintiff class.¹⁷⁶ Bolstering this contention is the fact that the same manufacturer marketing the offending products in other states also sells the same products to Tennessee residents in Tennessee. If successful in this claim, plaintiffs would proceed to establish the presence of state interests based on this contact.¹⁷⁷ The primary state interest asserted here would be the protection of state residents against the collusive practices of manufacturers operating in the forum state.¹⁷⁸ Application of forum law would vindicate this interest by subjecting out-of-state transactions to the same protective standard governing domestic transactions.

This line of argument takes on added force in cases purporting to regulate a business having special economic significance to the forum state.¹⁷⁹ In such a case, forum interests would be especially strong since industry practices may have a significant impact on the economic well-being of the forum state. In a *Robinson* paradigm, plaintiffs may

include purchasers from states without such statutes or states expressly rejecting a right of recovery for indirect purchasers.

175. See *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957) (upholding California's exercise of personal jurisdiction over a Texas insurance company having no physical presence in California but purposely engaged in business with a California resident); *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997) (holding Japanese corporation criminally liable for violations of the Sherman Act even though all alleged violations took place outside of the United States).

176. This line of argument was quite similar to that relied upon by the Minnesota Supreme Court in *Hague v. Allstate Insurance Co.*, 289 N.W.2d 43 (Minn. 1978), which held that plaintiff's residence in Minnesota permits that state to maintain an interest in ensuring her self-sufficiency.

177. See *id.*

178. A Florida Appellate court recently expressed this state interest in *Renaissance Cruises, Inc. v. Glassman*, 738 So. 2d 436 (Fla. Dist. Ct. App. 1999), a nationwide class action by purchasers of cruise line tickets alleging fraudulent assessment of port charges. The Florida appellate court upheld application of Florida law to the entire plaintiff class and upheld the district court's finding that "Florida has a great interest in protecting people dealing with corporations doing business within Florida." *Id.* at 438.

179. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 819 (1985) (citing the importance of natural gas production as an industry in Kansas, as a possible connection through which to justify application of forum law).

point to the importance of the music business to bolster this contention.¹⁸⁰

A more significant hurdle to potential plaintiffs may lie in the necessary demonstration that universal application of forum law is "neither arbitrary nor fundamentally unfair."¹⁸¹ Plaintiff's argument would begin with the assertion that it cannot be "unfair surprise"¹⁸² when the substantive law of a single state in which the defendant is engaged in business activities is applied to a dispute to which they are party.¹⁸³ Defendants marketing their product in every state at least implicitly accept the laws of that jurisdiction as acceptable regulations of business conduct.¹⁸⁴ Furthermore, by all appearances manufacturers do not rely on their presumptive immunity from suit by indirect purchasers in making marketing decisions. They were most likely marketing through a uniform nationwide pricing scheme, rather than requiring purchasers in certain states to pay a premium for the right of recovery.

Moreover, a defendant's claim of reliance on immunity from suit by indirect purchasers is highly suspect. Surely a manufacturer engaged in nationwide commerce realizes that products sold within a given state are often purchased by individuals from another state, resulting in the creation of choice-of-law interests in two separate states. In such a case, a manufacturer cannot be sure which law would govern,¹⁸⁵ and simple percentages¹⁸⁶ inform us that one of the states most likely affords indirect purchasers a right of recovery.¹⁸⁷

180. See *N'ville Music Biz Puts \$1.2 Bil Into State*, *Billboard*, Aug. 3, 1991, at 37 (reporting that the entertainment industry in Tennessee accounts for an annual revenue of \$2.5 billion and employs approximately 18,000 people). There is no doubt that the Florida court in *Glassman* had a strong incentive to apply Florida law to the entire plaintiff class, so as to protect the cruise line industry.

181. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981). For a more detailed discussion of the distinction between arbitrary and unfair in this context, see Weintraub, Commentary, *supra* note 138, at 595.

182. See Weintraub, Commentary, *supra* note 138, at 595.

183. See *Allstate*, 449 U.S. at 316 n.22 (discussing possible claims of reliance by Allstate, the Court noted that "reliance by the insurer that Wisconsin law would necessarily govern any accident that occurred in Wisconsin, or that the law of another jurisdiction would necessarily govern any accident that did not occur in Wisconsin, would be unwarranted").

184. *Id.* at 317-18.

185. A possible means of circumventing ambiguity in applicable law would be to condition purchase of the product on acceptance of a choice-of-law clause, presumably included in the packaging.

186. See *supra* note 59 and accompanying text.

187. See *Allstate*, 449 U.S. at 316 n.22. Writing for the majority, Justice Brennan noted that since a majority of states prohibited stacking at the time of the accident "Allstate could not have expected that an anti-stacking rule would govern any particular accident in which the insured might be involved and thus cannot claim unfair surprise from the Minnesota Supreme Court's choice of forum law."

A pertinent example of the failure of this type of reliance claim can be seen in *Keeton v. Hustler Magazine, Inc.*¹⁸⁸ In *Keeton*, the plaintiff, a New York resident, filed suit in a New Hampshire federal court against Hustler magazine alleging that she had been libeled in recent issues of the magazine.¹⁸⁹ Both the district court and the court of appeals dismissed the case, reasoning that New Hampshire had too small an interest in adjudicating the claims of a non-citizen for injuries occurring primarily outside of that state, especially when the defendant had such a small presence in the state. Despite the admittedly small circulation of Hustler in New Hampshire,¹⁹⁰ the Supreme Court reversed the lower courts, holding Hustler subject to personal jurisdiction in New Hampshire.¹⁹¹ The Court's ruling, although explicitly disavowing parallel application to choice-of-law inquiries,¹⁹² indicates something about the extent of a state's ability to adjudicate what is essentially a nationwide controversy, based on its own standards. By providing the plaintiff a forum in New Hampshire, the Court at least left the door open for the adjudication of the claim according to New Hampshire law, despite the fact that only a small portion of the injury actually occurred in that state.¹⁹³

Despite the Court's refusal to discuss choice-of-law considerations, the decision in *Keeton* has serious implications in that area. Like most states New Hampshire follows the "single publication rule,"¹⁹⁴ which permits recovery for each instance of communication through a single cause of action. In this case the communication was nationwide.¹⁹⁵ Application of the single publication rule would thus permit the plaintiff to recover for communication to persons in other states, ignoring the possibility that other states afford varying substantive rights to plaintiffs pressing such claims. The Court's decision then may be read as tacit approval of application of forum law to injuries occurring primarily outside of the forum state. If this reading of

188. 465 U.S. 770 (1984).

189. *Id.* at 772 (noting that New Hampshire was the only state in which the statute of limitations would not have barred her claim).

190. *Id.* (pointing out that Hustler sells between 10,000 and 15,000 copies in New Hampshire each month).

191. *Id.* at 773-74.

192. *Id.* at 778 (dismissing choice-of-law concerns as irrelevant to the question of personal jurisdiction over defendant).

193. See Debra R. Cohen, *The Single Publication Rule: One Action, Not One Law*, 62 Brook. L. Rev. 921, 942-43 (1996).

194. Restatement (Second) of Torts § 577A cmt. b (1977) (explaining that the single publication rule serves to avoid a barrage of lawsuits in cases where "the same communication is heard at the same time by two or more persons," thus giving rise to a single cause of action). New Hampshire's adherence to that rule has been established by *Keeton v. Hustler Magazine, Inc.*, 549 A.2d 1187 (N.H. 1988), *rev'd*, 465 U.S. 770 (1994). For further discussion of the single publication rule and its relation to choice-of-law considerations see, Cohen, *supra* note 193, at 929-43.

195. *Keeton*, 549 A.2d at 1193.

Keeton is accepted, it heralds an unsympathetic response to claims of reliance by the publisher.

It may further be argued on this basis that a business decision made on the basis of the protective character of a particular state's law fails to insulate business transactions from scrutiny under a less favorable law.¹⁹⁶ The holding in *Allstate* may plausibly be read as failing to establish that physical localization has a preclusionary effect on contacts with, or interests of, other states.¹⁹⁷ That is, even if a manufacturer localized operations in one state, relying on the protection of that state's laws, if foreseeable effects of his conduct are felt in other states, the law of those other states may be applied to a resultant dispute. Given this precedent, interstate effects in a case such as *Robinson* would be that much easier to establish since the manufacturer markets its product nationwide.

To summarize, application of forum law to a nationwide class of indirect purchasers will be constitutional if plaintiffs can demonstrate that manufacturer conduct had foreseeable effects within the forum state, despite defendant's claim of reliance on more favorable state law.

2. Distinguishing the Multistate Indirect Purchaser Paradigm from the Court's Holding in *Shutts*

The Supreme Court revisited the choice-of-law issue in *Shutts*¹⁹⁸ to determine whether Kansas's application of forum law to the entire plaintiff class met the constitutional requirements as announced in *Allstate*. In its review of the Kansas Supreme Court's decision, the Court implemented a two-step process, based on the Due Process Clause¹⁹⁹ and Full Faith and Credit Clause²⁰⁰ to refine and apply the *Allstate* standard.²⁰¹ First, the Court established the presence of an apparent conflict between the applicable Kansas law and that of other states in which the leases were located.²⁰² Absent such a conflict the choice-of-law question would be moot. Application of Kansas law in such a case would offend neither the due process concerns of the

196. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 316-18 (1981) (indicating that *Allstate* could have anticipated that either Wisconsin or Minnesota law could apply to a car accident occurring in Wisconsin).

197. See *id.*

198. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 814-23 (1985).

199. U.S. Const. amend. V.

200. U.S. Const. art. IV, § 1.

201. *Shutts*, 472 U.S. at 818-23.

202. *Id.* at 816-18 (establishing the possibility that laws of Oklahoma and Texas, states containing a significant portion of the leased lands, may not impose liability for interest on suspended oil and gas royalties and that, should such liability be established, the applicable interest rate would be lower than under Kansas law); see Okla. Const. art. XIV, § 2 (setting the maximum interest rate at six percent for contracts in which an interest rate is otherwise unspecified).

defendant, nor the policy considerations of other states because the same result would ultimately obtain regardless of which law applied.²⁰³ Second, the Supreme Court proceeded to find that Kansas lacked sufficient contact with non-resident plaintiffs, whose land was located outside of the state, to justify application of Kansas law to the claims of those plaintiffs.²⁰⁴

Through its reversal of Kansas' application of forum law, the Supreme Court apparently established boundaries for a state's choice-of-law.²⁰⁵ While the Court laid the groundwork for this holding through the standard announced in *Allstate*, it had yet to provide a tangible example of the failure of state interests to meet that standard. *Shutts* ostensibly defines this boundary through its refusal to sanction class-wide application of Kansas law.²⁰⁶ Therefore, it may be argued that *Shutts* provides a more applicable precedent for current purposes than does *Allstate*.²⁰⁷

Upon closer examination, however, *Shutts* may not be as significant a decision in delineating the boundaries of choice-of-law as it might appear. *Allstate* and several other notable choice-of-law cases were based on interpretation of contracts²⁰⁸ and employee benefits,²⁰⁹ *Shutts*, however, centered on what was essentially a land-based dispute.²¹⁰ In such cases, traditional choice-of-law principles have established an enduring practice of applying the law of the situs of the land.²¹¹ *Shutts* may have been decided as it was simply because of its relation to that strong legal principle. Although the task of the Court in *Shutts* was not to determine which state or states had the greatest interest in adjudicating this controversy according to its laws but rather whether Kansas had sufficient contacts and interests to do so,

203. See *Shutts*, 472 U.S. at 816.

204. *Id.* at 822. In those cases, plaintiff had absolutely no material contact with Kansas other than the fact that suit was initiated there on their behalf, a factor which the Court specifically noted as failing to influence a determination as to permissible choice-of-law. *Id.* at 815.

205. See Weintraub, Commentary, *supra* note 138, at 602.

206. See *id.*

207. See James R. Safley & Bethany D. Krueger, *Shutts Meets the Baby Shermans: Considerations Affecting Choice of Federal or State Court for the Prosecution of Antitrust Class Actions*, 2 Sedona Conf. J. (Fall 2001) (discussing the idea of a multistate class of indirect purchasers with direct reference to *Shutts* as controlling precedent).

208. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 309-12 (1981).

209. See *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532 (1935) (upholding California's refusal to enforce a choice-of-law clause requiring application of Alaska law to a contract between a non-resident alien and a California resident, as contrary to the public policy of the state of California).

210. See *supra* notes 100-105 and accompanying text.

211. Restatement (First) of Conflict of Laws §§ 214-231 (1934); see also Robby Alden, Note, *Modernizing the Situs Rule for Real Property Conflicts*, 65 Tex. L. Rev. 585, 587 (1987) (characterizing the lex situs approach to choice-of-law in land disputes as "anachronistic in an era of minimum contacts and interest analysis, and constitutionally intolerable in some instances").

one cannot ignore the possibility that some sort of weighing analysis figured in the Court's decision. In effect, the Court decided *Shutts* as it did, not because of the lack of contacts with Kansas, but rather because of the overwhelming contacts and interests of sister states wherein the majority of the leases were located. If this reading is correct, *Shutts* may leave the door open for application of forum law in cases like *Allstate*, in which the dispute has a less intimate connection to an individual state. In this sense *Shutts* does not signal a marked change in the Court's attitude towards choice-of-law.²¹² Despite *Shutts*'s apparent restriction on application of forum law, it may still be constitutionally permissible for a state court to apply its law to an entire multistate or nationwide class of indirect purchasers.²¹³

Central to plaintiff's goal of establishing the constitutionality of class-wide application of forum law is the ability to distinguish the multistate or nationwide indirect purchaser class action from the Supreme Court's holding in *Shutts*, which apparently limits a state court's power to apply its own law to an entire multistate class.²¹⁴ The foregoing examination of both *Shutts* and *Allstate*, however, provides some basis for arguing that class-wide application of forum law to a multistate or nationwide class of indirect purchasers may withstand a constitutional challenge despite the holding in *Shutts*.

C. Alternate Grounds for Application of Forum Law to The Multistate Class of Indirect Purchasers

Should a state court reject the constitutionality of class-wide application of forum law, several options remain through which a state court may nonetheless afford a remedy to a nationwide class of indirect purchasers. This section examines such "back doors" and

212. See Torchiana, *supra* note 111, at 918 (characterizing *Shutts* as rendering *Allstate* applicable in a class action context).

213. *City of St. Paul v. FMC Corp.*, 1991-1 Trade Cas. (CCH) ¶ 69,305, at 65,418 (D. Minn. 1990) (holding that "the claims of foreign purchasers against foreign defendants simply have no meaningful contact with Minnesota"). *But see* Saffley & Krueger, *supra* note 207, at 105. (concluding that "[i]n these situations, it would be very difficult for the forum to find that it had an interest in applying its law to the claims of out-of-state plaintiffs").

214. See *supra* notes 100-139 and accompanying text. An initial barrier to application of forum antitrust law to a multistate class may be the presence of state decisions relegating the application of state antitrust, or comparable law, to intrastate violations. See *Blake v. Abbott Labs., Inc.*, 1996-1 Trade Cas. (CCH) ¶ 71,369 (Tenn. Ct. App. 1996) (restricting application of Tennessee Consumer Protection Act to intrastate violations); see also *OCE Printing Sys. USA, Inc. v. Mailers Data Services, Inc.*, 760 So. 2d 1037, 1042 (Fla. Dist. Ct. App. 2000) (decertifying a class seeking recovery under the Florida Unfair Trade Act on the theory that the Florida Act was "enacted to protect in-state consumers"); *Jurisdiction and Procedure: Florida Court Overturns Certification of Three Nationwide Antitrust Classes*, 79 Antitrust & Trade Reg. Rep. (BNA) 90 (July 28, 2000) (explaining that Florida antitrust law expresses an intent to regulate only intrastate commerce).

describes how courts have utilized these options to circumvent choice-of-law restrictions.

1. The False Conflict Approach

Assuming defendant successfully establishes *Shutts* as an applicable precedent governing a multistate class of indirect purchasers, an argument for class-wide application of forum law can be maintained on the basis of an absence of a real conflict of laws.²¹⁵ Upon remand of *Shutts*, the Kansas court was required to submit the competing bodies of law to a conflicts analysis to determine whether or not the law of any other jurisdiction having an interest in this case presented a real conflict²¹⁶ with the applicable Kansas law.²¹⁷ In doing so, the Kansas court determined that there was in fact no real conflict of law as other interested states would arrive at the same result as would obtain through application of Kansas law.²¹⁸

In this sense, the Kansas court seemingly exploited the loophole pointed out by Justice Stevens's concurrence in *Shutts*,²¹⁹ which stressed the necessity for an established conflict between applicable laws before a state court was required to defer to the law of another state. This allowed the Kansas court significant leeway in its interpretation of competing law with the resultant determination that there was in fact no conflict at all.²²⁰

The same result in a similar case led Justice O'Connor to criticize this formula as providing too much latitude for a state court to construct a permissible rationale justifying application of forum law. She noted that in order to avoid application of another state's law, a forum state:

need only take two steps in order to avoid applying it. First, invent a legal theory so novel or strange that the other State has never had an opportunity to reject it; then, on the basis of nothing but

215. See *supra* notes 202-04 and accompanying text.

216. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 823-24, (1985) (Stevens, J., concurring in part and dissenting in part). "Real conflict" here is used in the same sense as used by Justice Stevens in his concurring opinion in *Shutts*. That is, Justice Stevens distinguishes a real conflict, defined as a situation in which the application of forum law would result in a materially different outcome than through application of the law of another interested state, from a false conflict, defined as a situation in which the law of the forum appears to be in conflict with that of other interested states, but which may be reconciled upon closer analysis. See *id.* at 838 & n.20.

217. *Id.* at 818 (noting that decisions and statutes from other states in which oil and gas leases were located present a colorable conflict with the applicable Kansas law).

218. *Shutts v. Phillips Petroleum Co.*, 732 P.2d 1286, 1293-1312 (Kan. 1987) (holding that other states, following Kansas rule, would allow recovery for interest withheld on royalties, but applying the statutory interest rate of each state to the leases located in that state), *aff'd in part and rev'd in part*, 472 U.S. 797 (1985).

219. *Shutts*, 472 U.S. at 823-824 (Stevens, J., concurring in part and dissenting in part).

220. See *Shutts*, 732 P.2d at 1293-312.

unsupported speculation, "predict" that the other State would adopt that theory if it had the chance.²²¹

Several commentators have echoed Justice O'Connor's sentiment that the failure of the Court to invoke meaningful constitutional constraints on a state's choice-of-law has left the door open to substantial pro-forum bias.²²²

Despite Justice O'Connor's vehement criticism, demonstrating the absence of a conflict of laws may remain a viable option for a plaintiff seeking uniform application of forum law. Namely, through an inventive reading of the antitrust statutes of other states, a state court may determine that other states would reach the same result as the forum state, thus avoiding the presence of a conflict altogether. This avenue was exactly the one taken by the Kansas court on remand of the *Shutts* case through which Kansas finally applied its own law to most issues in the case.²²³

In an antitrust context, however, a state court would be hard pressed to gloss over a conflict between state antitrust laws in order to justify application of forum law to an entire multistate class of indirect purchasers. Variations in the explicit statutory language of state antitrust laws are abundant.²²⁴ Some statutes purport to provide protection for defendants against multiple liability to both direct and indirect purchasers.²²⁵ Statutes also vary on the question of assessment of damages. While many states follow the federal rule allowing for recovery of treble damages plus attorney's fees,²²⁶ others set a fixed amount in addition to actual damages.²²⁷ Statutes further vary as to whom the grant of standing extends. Some state statutes grant standing to any persons injured,²²⁸ while others are far more restrictive.²²⁹ Given this wide array, it may be difficult to apply the

221. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 749 (1988) (O'Connor, J., concurring in part and dissenting in part).

222. See Korn, *supra* note 115, at 786-87; Miller & Crump, *supra* note 84, at 61 (labeling this the "false 'false conflict'" and stating that "[t]he conflict is real, but it disappears because the forum says that it does"); Shreve, *supra* note 114, at 271-72.

223. *Shutts*, 732 P.2d at 1291-92.

224. See Cohen & Lawson, *supra* note 68, at 30. (illustrating the myriad variations in state antitrust law which complicate coordination of indirect purchaser claims on a multistate or national level); see also 6-7 Julian O. von Kalinowski et al., *Antitrust Laws and Trade Regulation* (2d ed. 2001) (summarizing the antitrust law of each state).

225. See Minn. Stat. Ann. § 325D.57 (West 1995) (establishing that "[i]n any subsequent action arising from the same conduct, the court may take any steps necessary to avoid duplicative recovery against a defendant").

226. See, e.g., Cal. Bus. & Prof. Code § 16750(a) (West 1997); D.C. Code Ann. § 28-4508(a) (Lexis 2001).

227. See Ala. Code § 6-5-60(a) (1993) (allowing indirect purchasers to recover actual damages plus \$500); Miss. Code Ann. § 75-21-9 (1999).

228. See, e.g., Kan. Stat. Ann. § 50-801(b) (1994).

229. See e.g., Md. Code Ann., Com. Law I § 11-209(b)(2)(ii) (Lexis 2000) (providing that only "[t]he United States, the State, or any political subdivision

law of the forum state to the entire class on the basis of a failure to establish a material conflict.

Most importantly, however, seventeen states afford no remedy at all to indirect purchasers.²³⁰ The absence of a remedy in such states seems to present an insurmountable conflict. A forum state would be hard pressed to avoid such a conflict through inventive jurisprudence and apply forum law to the entire class. Nor could a plaintiff convincingly argue for class-wide application of forum law based on the absence of other states' interest in the dispute. Engaging in an interest analysis²³¹ seems to lead to the same result. The policy behind most state laws denying a remedy to indirect purchasers is to "maintain and promote economic competition in trade and commerce,"²³² presumably by protecting corporate defendants. To that end such laws are often subject to an interpretive maxim guaranteeing their harmonization with federal antitrust law.²³³ In such cases, application of forum law allowing recovery would offend both due process concerns because manufacturers could credibly claim reliance on their immunity from indirect purchaser suit in that state, as well as Full Faith and Credit Clause concerns, because application of recovery law would conceivably harm the policy goal of protecting a state's corporate citizens.

2. Assignment of Procedural Status to the Grant of Remedy

Lastly, a plaintiff may accept application of the substantive law of other states to the case but nonetheless insist on application of the forum state's procedural law. A plaintiff would then argue for assignment of procedural status to the remedy, thus circumventing the lack of a right of recovery in other states. Although quite antiquated, and unlikely to be argued in a modern court, there are numerous examples of state and federal courts employing a distinction between right and remedy, ostensibly in order to provide a more generous recovery than would be available in the alternate forum.²³⁴

organized under the authority of this State" has standing to sue as an indirect purchaser); see also R.I. Gen. Laws § 6-36-12(a), (g) (Lexis 1985) (providing that only the attorney general, acting in a *parens patriae* capacity, shall have the power to bring an indirect purchaser action).

230. See *supra* note 59 and accompanying text.

231. Although a protracted discussion of interest analysis in a choice-of-law context goes well beyond the scope of this Note, the basic premise of interest analysis is that choice-of-law should be based on a determination of which jurisdiction's policies would be most furthered through application of its law to the present dispute. For a much more thorough and intelligent discussion, see Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. Chi. L. Rev. 227 (1958).

232. Tex. Bus. & Com. Code Ann. § 15.04 (Vernon 1987).

233. *Id.*

234. For a general discussion of this area, see Robert A. Leflar et al., *American Conflicts Law* § 126 (4th ed. 1986); see also *Dorr Cattle Co. v. Des Moines Nat'l Bank*,

In *Sun Oil Co. v. Wortman*,²³⁵ the Supreme Court upheld application of a forum state's statute of limitations despite the fact that the forum lacked sufficient contact with the dispute to justify application of its substantive law. In its opinion, the Court distinguished the presence of a right from the necessity of granting a remedy, noting "the bar of the statute does not extinguish the underlying right but merely causes the remedy to be withheld . . . the forum may choose to allow its courts to provide a remedy, even though the jurisdiction where the right arose would not."²³⁶

The implications of this reasoning for a nationwide class of indirect purchasers are sweeping. Accepting the fact that price fixing is illegal in every jurisdiction,²³⁷ a state court need only decide to afford a remedy to injured consumers. A state court predisposed to provide a remedy to indirect purchasers may assign procedural status to the remedy, circumventing the substantive law of other jurisdictions. This sort of judicial maneuver would almost certainly be met with claims of justified reliance on the protective character of other states' laws. A defendant would be unlikely, however, to find a court sympathetic to a claim that reliance on presumptive immunity from suit by indirect purchasers should justify impunity for an admittedly illegal course of conduct.

With primary focus on a constitutional framework, this part has outlined various arguments available to both plaintiffs and defendants in effecting a determination regarding the applicability of forum law to the entire plaintiff class.

III. THE FAILURE OF THE MULTISTATE CLASS TO PROVIDE AN EFFICIENT MEANS OF CONSUMER REDRESS

This part proceeds to further analyze the arguments set forth in Part II, evaluates their relative chances of success, and argues that in light of the general failure of those arguments in favor of multistate or nationwide certification, a state should not certify a nationwide class of indirect purchasers due to both statutory and pragmatic concerns. Additional consideration is given to the potential for abuse presented by many antitrust class actions. Finally, this part attempts, through several illustrative examples, to provide a framework within which to analyze the certification decision.

98 N.W. 918, 922 (1904) (holding that "under all authorities the character and extent of the remedy is governed by the law of the forum").

235. 486 U.S. 717 (1988).

236. *Id.* at 725; see also *Graves v. Graves' Ex'rs*, 5 Ky. (2 Bibb) 207, 208-09 (1810) (distinguishing the presence of a right from the presence of a remedy); *Kilberg v. Northeast Airlines, Inc.*, 172 N.E.2d 526, 529 (N.Y. 1961) (characterizing a remedy as procedural, thus avoiding less favorable statutory recovery limit in place under Massachusetts law).

237. See *supra* notes 225-29.

A. *A Prudential Argument Against Class-Wide Application of Forum Law*

Despite CD purchasers' legitimate grievance against the music industry, other concerns outweigh allowing vindication through multistate or nationwide class actions. Conceding for the moment the possible constitutionality of class-wide application of forum law, there remains a powerful argument that a state should not avail itself of its full range of power in this manner. Such a prudential argument against class certification calls into question the wisdom of a state's availing of the wide constitutional boundaries seemingly established by *Allstate*. Although it is not my intention to restate the extensive body of scholarly criticism surrounding the *Allstate* decision,²³⁸ further analysis will demonstrate the negative consequences that may flow from a full-blown application of the standard announced therein.

Examination of *Allstate* reveals that Minnesota's interests in the underlying dispute were minimal.²³⁹ The fact that the deceased commuted to work in Minnesota appears too tenuous a contact through which to establish an interest in the litigation on the part of that state.²⁴⁰ This is especially true in light of the fact that all of his cars were garaged and registered in Wisconsin, and the accident was entirely unrelated to Mr. Hague's employment.²⁴¹

Furthermore, plaintiff's post-accident move to Minnesota seems a rather tenuous connection on which to base application of Minnesota law.²⁴² Plaintiff's post-accident move may be a contact with the litigation, but it certainly should not form a cognizable interest on which to base application of forum law. Even if we accept, as the Court did, plaintiff's relocation as unrelated to the litigation, the application of Minnesota law runs counter to the announced principle of avoiding an arbitrary element in choice-of-law. Justice Powell expressed this sentiment in dissent, noting "[i]f a plaintiff could choose the substantive rules to be applied to an action by moving to a hospitable forum, the invitation to forum shopping would be irresistible. Moreover, it would permit the . . . choice-of-law question to turn on a post-accrual circumstance."²⁴³ By legitimating Minnesota's application of forum law, the Court effectively

238. See generally Symposium, *Conflict-of-Laws Theory After Allstate Ins. Co. v. Hague*, 10 Hofstra L. Rev. 1 (1981).

239. See Russell J. Weintraub, *Who's Afraid of Constitutional Limitations on Choice of Law?*, 10 Hofstra L. Rev. 17, 31 (1981).

240. *Id.* at 28-29.

241. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 314, 315 n.21 (1980).

242. The Minnesota court, however, found plaintiff's post-accident move to Minnesota unrelated to the litigation. See *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 47 (1979).

243. *Allstate*, 449 U.S. at 337 (Powell, J., dissenting).

announced that a contract may be interpreted under the law of any state that can obtain personal jurisdiction over the defendant.²⁴⁴

Analysis of *Allstate* seems to reveal that whenever a state can assert judicial jurisdiction over a controversy, it may, with little resistance, assert legislative jurisdiction as well. Given the precedent set by *Allstate*, it seems clear that the Supreme Court has been hesitant to employ constitutional constraints on a state's choice-of-law. The result, as seen above, is a strong bias in favor of forum law, with little hope of accountability to the demands of the Constitution.²⁴⁵

Indeed, Professor Harold Korn notes that what few constraints the Court has managed to place on a state's choice-of-law have been accomplished through restrictions on judicial rather than legislative jurisdiction.²⁴⁶ In the celebrated case of *Rush v. Savchuk*,²⁴⁷ the Supreme Court held that a Minnesota court could not exercise judicial jurisdiction over a suit by an injured passenger against the driver's insurance company when Minnesota's only contact with the dispute was the insurance company's business presence in the state. Had the Court not reversed Minnesota's exercise of jurisdiction, the application of Minnesota law would have had sweeping implications for the nature of our federal system.²⁴⁸ In cases involving insurance companies or other entities doing business nationwide, the Minnesota court's holding would have allowed a plaintiff to file suit against the company in any jurisdiction and apply the law of that jurisdiction, regardless of the location of the accident or the residence of the insured.²⁴⁹ This result would have had the practical effect of impairing a state's ability to effectively govern contracts through the application of state law.

B. Failure of Class-Wide Application of Forum Law to Meet the Demands of the Constitution

Despite the Supreme Court's history of significant deference to state legislative jurisdiction,²⁵⁰ application of forum law to a multistate class of indirect purchasers would almost surely exceed the bounds of constitutionality. Notwithstanding the apparently significant effects of nationwide antitrust violations within a particular state, application of forum law to an entire indirect purchaser class would render the substantive policies of sister states entirely ineffectual. The "magnet forum" problem²⁵¹ would become an instant reality. Plaintiff's

244. See Korn, *supra* note 115, at 798.

245. See Shreve, *supra* note 114, at 271.

246. See Korn, *supra* note 115, at 786-87.

247. 444 U.S. 320 (1980).

248. See Korn, *supra* note 115, at 793-94.

249. *Savchuk v. Rush*, 272 N.W.2d 888 (Minn. 1978), *rev'd*, 444 U.S. 320 (1980).

250. See Weintraub, Commentary, *supra* note 138, at 596-600.

251. See Miller & Crump, *supra* note 84, at 57 (arguing that allowing a state court

attorneys would feel bound to file suit in the jurisdiction with the most favorable law, thus evading the policies and restrictions of the plaintiff's home state. Additionally, application of forum law to a *Robinson* type of class action would place a tremendous strain on the due process rights of defendants. No longer could a defendant expect purposeful conduct in one state to be judged according to the laws of that state.²⁵² Instead, a corporate defendant would have to proceed under the assumption that all conduct will be judged under that state law most favorable to the plaintiff. These two by-products of an overly permissive choice-of-law doctrine, the magnet forum problem and potential due process violations, were exactly those the Court sought to avoid through restriction of judicial jurisdiction in cases such as *Rush v. Savchuk*.²⁵³

At least one federal court has explicitly rejected the contention that a state can establish sufficient contact with indirect purchasers in other states to justify the application of that state's law.²⁵⁴ *City of St. Paul v. FMC Corp.*²⁵⁵ involved a class action filed on behalf of municipalities nationwide, alleging price-fixing by chlorine and caustic soda producers in violation of both federal and state antitrust law. On a motion to limit the application of Minnesota's antitrust law to Minnesota purchasers, the Court proceeded through a *Shutts* analysis and found a conflict between Minnesota's antitrust law and that of other involved states.²⁵⁶ The court, however, refused to give serious consideration to the second prong of the *Shutts* test,²⁵⁷ simply stating that "[h]ere, the claims of foreign purchasers . . . simply have no meaningful contact with Minnesota. The conflicts analysis is thus determinative of the issue's outcome."²⁵⁸ Although not binding on state courts, the District Court's ruling provides a strong argument

excessive latitude in application of forum law would create centers for certain types of litigation since claimants would file in the jurisdiction with the most favorable law; prior to *Shutts*'s limitation on choice-of-law, application of forum law by the Kansas courts had created a sort of magnet forum for royalty class actions); see e.g., *Nix v. N. Natural Gas Producing Co.*, 567 P.2d 1322 (Kan. 1977); *Sterling v. Superior Oil Co.*, 567 P.2d 1325 (Kan. 1977) (exemplifying previous class actions filed in Kansas seeking recovery of interest on unpaid royalties from oil and gas leases).

252. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 333 (1981) (Powell, J., dissenting) (arguing that the constitutional standard for choice-of-law begins with the "reasonable expectation of the parties").

253. 444 U.S. 320 (1980); see also *supra* note 247 and accompanying text.

254. See *City of St. Paul v. FMC Corp.*, 1991-1 Trade Cas. (CCH) ¶ 69,305 (D. Minn. 1990).

255. *Id.*

256. *Id.*

257. The second prong of the *Shutts* test refers to the determination of whether the competing laws present a real conflict, rather than simply appearing to. See *supra* Part II.C.1.

258. *FMC Corp.*, 1991-1 Trade Cas. (CCH) at 65,148.

against the constitutionality of applying the antitrust law of a single state to an entire nationwide class of indirect purchasers.²⁵⁹

C. Manageability Concerns

Assuming, *arguendo*, that a state would have to apply the laws of other interested states to indirect purchaser class members, would it still be in the best interests of a state to entertain such an action? Many of the benefits discussed earlier would not be realizable by the forum state if it were required to apply the law of sister states.²⁶⁰ However, a state might proceed with such an action through the use of subclassing,²⁶¹ which refers to the division of the class into a number of smaller classes, with the intention of applying a different body of law to each subclass.²⁶²

Under such circumstances, the arguments against certification become far more persuasive. After accepting the necessity of subclasses, not only must a state court undertake the significant task of interpreting the antitrust law of another jurisdiction,²⁶³ but it must also analyze competing state interests to determine which state law should apply. In such a suit, there may be three or more states with a justifiable interest in the application of its law. One can imagine a scenario in which a purchaser living in state A orders a product, while in state B, from a manufacturer incorporated in state C, which is subsequently delivered to the purchaser in state D. Such a case

259. Ultimately, a determination of the constitutionality of class-wide application of forum law would turn on the specific facts of the case and, of course, the relationship between the conduct at issue and the forum state. As one commentator aptly noted:

In the antitrust context, analyzing a state's contacts to the plaintiffs' claims may involve an examination of many factors including not only the location of the defendants but also where and how the defendants' alleged anticompetitive conduct occurred, and where the effects . . . were felt. These inquiries would seem to be fact specific and will require a determination of whether the forum state has such a significant interest in the anticompetitive conduct at issue that it may constitutionally justify applying its own antitrust laws to the claims of out-of-state plaintiffs.

Safley & Krueger, *supra* note 207.

260. See *supra* notes 164-66 and accompanying text (describing the putative benefits that a state may realize through adjudication of a nationwide class action).

261. See Fed. R. Civ. P. 23(c)(4)(B) (stating that "a class may be divided into subclasses and each subclass treated as a class").

262. See *Miner v. Gillette Co.*, 428 N.E.2d 478, 483-85 (Ill. 1981) (finding the use of subclasses an efficient vehicle for the application of the laws of the fifty states in the context of a multistate class action). In some instances, subclassing may only be necessary for a determination of damages, such as situations where the factual assertions are identical, but variation exists in state damage provisions. See *supra* note 227 and accompanying text.

263. *FMC Corp.*, 1991-1 Trade Cas. (CCH) at 65,147-48; see *Miller & Crump, supra* note 84, at 64.

provides a complex choice-of-law nexus for a state court to navigate in order to determine which law to apply.²⁶⁴

Any action considered in light of this conclusion must also recognize that such a class would be limited to indirect purchasers from states with an established statutory or common law right of recovery.²⁶⁵ Even within this limited group, sufficient variation exists between state laws²⁶⁶ so as to require the presumptive application of each state's law to plaintiffs who have made purchases in those states.²⁶⁷ Such a situation poses serious difficulties in the context of a multistate class action.

First, the assessment and application of numerous states' antitrust laws may prove a very difficult task for a state court judge.²⁶⁸ In this setting, plaintiffs are asking a state court judge to understand and apply the laws of numerous sister states, and possibly foreign countries, to a single set of facts. In other words, the burden placed on a court to make determinations about the law of foreign jurisdictions and to apply that law, may render the class unmanageable,²⁶⁹ or certainly unattractive, to a state court.²⁷⁰ This situation presents the further danger that analysis of other states' law

264. See Restatement (Second) of Conflict of Laws § 6(1) (1969) (stating that "[a] court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law"). Such a directive, however, will often require the court to determine which state has the greatest contact with the dispute, or which state has the most important interests at stake. See *id.* at § 6(2). Such a decision may be a daunting one in a nationwide class action. See *Spence v. Glock*, 227 F.3d 308, 311-16 (5th Cir. 2000) (describing the difficulty in determining applicable law in the context of a nationwide class action).

265. See *Robinson v. EMI Music Distribution, Inc.*, 1996-2 Trade Cas. (CCH) ¶ 71,510 (Tenn. Cir. Ct. 1996).

266. See *supra* notes 225-30 and accompanying text.

267. This conclusion, of course, ultimately avoids a protracted choice-of-law analysis. It may be that a state court entertaining a multistate class of indirect purchasers decides to apply the law of the plaintiff's home state, but in light of the conclusions already drawn, it seems most feasible to retain a *lex loci* approach as the court in *Robinson* apparently did. See *Robinson*, 1996-2 Trade Cas. (CCH) at 77,688-89.

268. See *Miller & Crump*, *supra* note 84, at 64 (explaining this difficulty by analogy to a first year law student required to understand the law of all fifty states and apply it correctly on the exam).

269. Rule 23(b)(3)(D) of the Federal Rules of Civil Procedure requires the court to take into account "the difficulties likely to be encountered in the management of a class action." See Christopher J. Willis, *Collision Course or Co-Existence?* *Amchem Products v. Windsor and Proposed Rule 23(B)(4)*, 28 *Cumb. L. Rev.* 13, 25 (1998) (explaining that "courts frequently find manageability problems when the presence of individual issues in class members' claims would require separate 'mini-trials' on issues not common to the class, or when different class members' claims would have to be analyzed under varying states' laws").

270. *City of St. Paul v. FMC Corp.*, 1991-1 Trade Cas. (CCH) ¶ 69,305, at 65,148 (D. Minn. 1990) (describing the task of analyzing and predicting the law of other states as "burdensome"); see *Sollenbarger v. Mountain States Tel. & Tel. Co.*, 121 F.R.D. 417, 427-36 (D.N.M. 1988) (describing variations in the contract law of several states).

may ignore nuanced or underdeveloped aspects of those states' antitrust laws.²⁷¹

D. Meeting the Predominance Requirement of Rule 23(b)(3)

Even if attempts to create subclasses may cause some difficulty for state courts, a more significant problem with the application of various state laws to a class action is the threat that the task of adjudicating such a complex action may fail the statutory requirements of class action statutes such as Rule 23 of the Federal Rules of Civil Procedure.²⁷² Although Rule 23 is not binding upon state courts, many states have adopted rules substantially similar or identical to Rule 23 to govern class actions in their courts.²⁷³

The predominance requirement as set forth in Rule 23(b)(3) requires that issues affecting every member of the class, either factual or legal, must "predominate" over those not affecting the entire class.²⁷⁴ A strict interpretation of the predominance requirement has been a favorite tool of federal courts in recent years to decertify nationwide class actions under 23(b)(3).²⁷⁵

Exemplifying this pattern is the Fifth Circuit's decision in *Castano v. American Tobacco Co.*²⁷⁶ Plaintiffs in *Castano* were addicted smokers who sought certification of a nationwide class action against tobacco companies, alleging, *inter alia*, fraud and breach of various consumer protection statutes arising from the companies' failure to warn the public of the addictive properties of nicotine.²⁷⁷ The district court granted certification pursuant to Rule 23(b)(3).²⁷⁸

Reversing the district court's certification, the Fifth Circuit criticized the lower court's reasoning on two distinct counts. First, the court held that "[n]othing in the record demonstrates that the

271. See Thomas D. Waterman, Comment, *State Court Jurisdiction over Multistate Plaintiff Class Actions: Minimum Contacts and Miner v. Gillette*, 69 Iowa L. Rev. 795, 804 n.73 (1984) ("Courts applying the law of a different forum generally are less knowledgeable in interpretation and less interested in fostering the policies of the foreign jurisdiction than courts established by the state that provides the applicable law.").

272. Fed. R. Civ. P. 23(b)(3) (requiring that in order to maintain class status "questions of law or fact common to the members of the class predominate over any questions affecting only individual members"); see also *supra* note 9 and accompanying text.

273. See, e.g., Tenn. R. Civ. P. 23.01 (containing the same general requirements for class treatment as the federal rule including numerosity, commonality, typicality, and adequacy). For a discussion of class actions and the policy goals supporting them, see *supra* notes 152-56 and accompanying text.

274. See *supra* notes 91-97 and accompanying text.

275. See Ryan Patrick Phair, Comment, *Resolving the "Choice of Law Problem" in Rule 23(b)(3) Nationwide Class Actions*, 67 U. Chi. L. Rev. 835, 841-42 (2000).

276. 84 F.3d 734 (5th Cir. 1996).

277. *Id.* at 737.

278. See *Castano v. Am. Tobacco Co.*, 160 F.R.D. 544 (E.D. La. 1995).

[district] court critically analyzed how variations in state law would affect predominance.²⁷⁹ Examining the applicable state laws, the circuit court found significant material variations, which may have the effect of causing individual issues to predominate over common ones in contravention of Rule 23(b)(3).²⁸⁰ The circuit court further criticized the district court for failing to consider “whether the class action would be manageable in light of state law variations.”²⁸¹ The Court proceeded to decertify the class.²⁸²

Castano sends an important message regarding the difficulty that variations in state law may pose to the successful prosecution of a class action.²⁸³ The court’s strict interpretation of the predominance requirement provides a strong precedent against certification of multistate classes.²⁸⁴

Another notable decertification ruling came in *Spence v. Glock*.²⁸⁵ *Spence* involved a suit brought against a gun manufacturer, alleging a design defect which resulted in jamming and accidental discharge of the pistols.²⁸⁶ The district court had granted certification, but the Fifth Circuit again reversed, citing erroneous analysis in the area of choice-of-law.²⁸⁷ Following the choice-of-law rules of the forum state, Texas, the circuit court concluded that the Second Restatement’s “most significant relationship”²⁸⁸ test governed the choice-of-law determination.²⁸⁹ Rejecting the district court’s finding that Georgia, as the site of manufacture of the guns, had the most significant relationship to the controversy, Judge Jones, writing for the court, held that “Texas’ adoption of the most significant relationship test requires that the policies of each state with contacts be examined.”²⁹⁰ Consistent with its decision in *Castano*,²⁹¹ the court in *Spence* placed the burden on the plaintiff class to present “a sufficient choice-of-law analysis.”²⁹² Concluding that plaintiffs had not presented such a

279. *Castano*, 84 F.3d at 743.

280. *Id.* at 740-43.

281. *Id.*

282. *Id.* at 752.

283. See Phair, *supra* note 275, at 841-42 (noting that “the comprehensiveness of the Fifth Circuit’s opinion has presented the federal courts with a towering precedent that has been consistently used to resist certification of Rule 23(b)(3) nationwide class action on choice-of-law grounds”).

284. For a more complete discussion of *Castano* and the predominance requirement at issue there, see Michael H. Pinkerton, Note, *Castano v. American Tobacco Company: America’s Nicotine Plaintiffs Have No Class*, 58 La. L. Rev. 647 (1998).

285. 227 F.3d 308 (5th Cir. 2000).

286. *Id.* at 310.

287. *Id.* at 311-15.

288. Restatement (Second) of Conflict of Laws § 145(1) (1969).

289. *Spence*, 227 F.3d at 311-12.

290. *Id.* at 313.

291. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996).

292. *Spence*, 227 F.3d at 313.

workable analysis or a subclassing plan, the court decertified on the basis of a putative failure to comply with the predominance requirement of Rule 23(b)(3).²⁹³

Spence thus seems to rest on the proposition that class certification must fail if multiple laws apply and plaintiffs fail to provide a workable plan for the application of the various laws. Although the court does not state that such a plan would be impossible to construct, the bar for certification nonetheless seems to be set quite high in dealing with the laws of multiple jurisdictions.²⁹⁴

The difficulties encountered due to variations in state law in the context of class actions in federal courts would seemingly be compounded in an antitrust setting. Whereas the above examples of federal class actions were dismissed because of variations in the law of one or two particular standards, indirect purchaser class actions would necessarily involve several elements of state law containing significant variations.²⁹⁵ A state court would have to contend with variations in standing requirements, requisite levels of proof, and variations in damage allowances, with the resultant creation of a labyrinth of laws through which the state court must weave its way if determined to adjudicate the matter.

E. Some Cases Offering Practical Guidance for Resolution

A California federal court offered an interesting response to the persistent obstacle to class treatment presented by the variations in interested state law in *In re Pizza Time Theatre Securities Litigation*.²⁹⁶ *Pizza Time* involved a class action alleging violations of securities regulations with pendent fraud and negligent misrepresentation claims.²⁹⁷ Adjudication of these pendent common law claims required a choice-of-law inquiry to determine which state's law should govern.²⁹⁸

Applying California's choice-of-law principles,²⁹⁹ the district court determined that "each of the interested jurisdictions shares the goals of deterring fraudulent conduct, protecting those wrongly accused of fraud, and providing a remedy for [those] who have been defrauded in

293. *Id.* at 316.

294. *But see* *Amchem Prods., Inc., v. Windsor*, 521 U.S. 591 (1997) (promoting the use of subclasses for settlement purposes in class action suits).

295. *See* *City of St. Paul v. FMC Corp.*, 1991-1 Trade Cas. (CCH) ¶ 69,305, at 65,147-48 (D. Minn. 1990).

296. 112 F.R.D. 15 (N.D. Cal. 1986); *see also* *In re Seagate Techs. Sec. Litig.*, 115 F.R.D. 264 (N.D. Cal. 1987).

297. *Pizza Time*, 112 F.R.D. at 15.

298. *Id.*

299. *Id.* at 19. In discussing California's approach to choice-of-law, the court stated "the [California] court employs the 'comparative impairment' approach to determine which jurisdiction's interest would be more impaired if its policy were subordinated to the policy of the other." *Id.*

the manner alleged here.”³⁰⁰ Concluding that the separate prosecution of each individual claim would be “complex and expensive to litigate,”³⁰¹ the court found class certification to be the most effective method of redressing the alleged economic injury. In reconciling the laws of the varying jurisdictions, the court found that, despite minor variations, each state’s interest in providing a remedy is paramount and, as such, “[no] jurisdiction has a greater interest in applying its own law than in assuring the maintenance of a class action.”³⁰² Essentially, the court here subordinated the possible variations in relevant state law to the policy behind that law, which favored recovery for injured residents.

In indirect purchaser suits, subordinating the variations in state law will not result in the vindication of “shared goals” by all the states involved. As discussed, states have made conflicting determinations as to what the goals of purchaser suits are generally. The California Appellate Division put the scenario of a multistate class action into excellent perspective in its decision in *Osborne v. Subaru of America, Inc.*³⁰³ *Osborne* involved a class action filed on behalf of Subaru owners nationwide, complaining of a design defect that caused widespread breakdowns.³⁰⁴ Upholding the trial court’s denial of class certification, the appellate division applied the two-prong choice-of-law test laid out in *Shutts*.³⁰⁵ The court first concluded, over petitioners’ objections, that there existed meaningful variations between applicable laws of other states.³⁰⁶ Furthermore, the appellate division agreed with the trial court that California lacked sufficient contacts with the out-of-state plaintiffs, such that California law could not apply to their claims.³⁰⁷ Given this state of affairs, the court concluded that “certification of a nationwide class would require the adjudication of numerous separate questions of law.”³⁰⁸

More importantly, the *Osborne* court provided a strong jurisprudential framework within which to view this certification decision. The court laid out three compelling circumstances, all absent in indirect purchaser suits, under which California should undertake to adjudicate such a large class action: (1) if to do so would benefit the California claimants, (2) if it would benefit the California

300. *Id.* at 20.

301. *Id.* The court found that the attempted application of each states’ laws would “pose fatal manageability problems under Rule 23.” *Id.*

302. *Id.*

303. 243 Cal. Rptr. 815 (Cal. Ct. App. 1988).

304. *Id.* at 816.

305. *Id.* at 819-22.

306. *Id.* at 819.

307. *Id.*

308. *Id.* at 822.

judicial system, or (3) if California has some special obligation to adjudicate the controversy.³⁰⁹

No benefit would have accrued to the California litigants in *Osborne* because the time and energy required to dispose of a multitude of claims would only delay recovery by requiring California plaintiffs to "endure the many years of litigation that would inevitably be entailed in the adjudication of a nationwide class claim."³¹⁰ Additionally, this action would not have benefited the judicial system of the state because "[i]t is unrealistic to think that claimants from other states would pursue individual lawsuits against Subaru in California."³¹¹ Although the California courts may obtain judicial jurisdiction over such a subsequent action, the court quite properly noted that it was unlikely that a nationwide class would eliminate duplicative proceedings in the state.³¹²

Finally, California had no special obligation to expend its resources in the adjudication of these claims.³¹³ The court quoted a previous decision, noting "California has no interest in providing residents of other states greater protection than their home states provide [W]hy should California take it upon itself to be the savior of the other 49 states of the union?"³¹⁴

The court's lack of interest in adjudicating a nationwide class action demonstrates an implicit rejection of the considerations of substantial justice that may be achieved through adjudication of an indirect purchaser class action. It further appears that the court was not concerned with the inability of plaintiffs from less populous states to mount an independent class action. Although both of these considerations should carry significant weight with a state court, they need not require the state system to navigate an unwieldy lawsuit through often unfamiliar legal territory.

In an indirect purchaser paradigm, a state court considering class certification should take note of the court's decision in *Osborne*. In the vast majority of situations, none of the positive effects noted by *Osborne* would be derived from certifying those class actions. There would certainly be no benefit to the judicial system, since application of laws of other jurisdictions would not further the interests of the forum state and would likely consume significant judicial resources within the forum state. The burdens accompanying the resolution of

309. *Id.* at 825-26.

310. *Id.* at 825.

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.* (quoting *Clothesrigger, Inc. v. GTE Corp.*, 236 Cal. Rptr. 605, 611 (Cal. Ct. App. 1987)).

such a large and complex class action would not be offset by any corresponding benefits save a possible sense of prestige.³¹⁵

Although potential plaintiffs could obtain personal jurisdiction over a corporate defendant in the forum state, the court's reasoning in *Osborne* holds true nonetheless. Most plaintiffs from other states simply would not choose to bring suit in a distant forum.³¹⁶ Additionally, no benefit would accrue to the litigants from the forum state, who would have to await the resolution of the entire class action before receiving their presumably meager and diluted recoveries.³¹⁷

A state's most persuasive argument may be based on a "special obligation," as explained in *Osborne*.³¹⁸ Depending upon the industry involved in the litigation, a state may perceive a duty to maintain economic competition within that industry for the benefit of the forum state.³¹⁹ For example, in *Robinson*, the Tennessee court may well have employed such an argument in defense of certification. Absent this special situation, however, a state would have no alternate reason to certify a class of indirect purchasers.³²⁰

F. Deference as a Matter of Federalism and Comity

Thus far, this Note has argued that if a state court must apply the laws of sister states to a multistate class action, certification of that class would be a mistake. The challenge of manageability attendant to such a suit would far outweigh any efficiency gains intended by the use of the class action device. If, however, the forum state found it desirable and constitutionally permissible to apply its own law to the entire plaintiff class, would this affect the efficiency calculation in the certification decision?

As a matter of federalism and comity with its fellow sovereigns, a state considering certification of a multistate class would be well advised to defer to the greater interests of a sister state. In an antitrust context, several states will maintain an interest in the application of their antitrust laws to the dispute, with the twin aims of protecting their citizens and furthering the policies giving rise to their antitrust laws.³²¹ Notwithstanding the constitutionality of applying

315. See Wasserman, *supra* note 152, at 476.

316. See *Osborne*, 243 Cal. Rptr. At 825.

317. *Id.*

318. *Id.* at 825-26.

319. See *supra* note 179-80 and accompanying text.

320. Other difficulties attendant to the certification of a multistate class of indirect purchasers, although quite prevalent, are beyond the scope of this discussion. For a more complete discussion of such difficulties, see Page, *supra* note 72, at 3. Among other difficulties, Page notes the challenge of proving actual pass-on of damages through complex economic models. See *id.* at 12-19.

321. See Currie, *supra* note 231, at 237-44 (explaining how interest analysis may play a distinct role in resolving conflicts of laws). For a typical statement of state interests at work in the context of state antitrust law, see Texas Business &

forum law, concerns of federalism argue strongly for deference to the law of a more interested jurisdiction when the levels of interest are so disparate.³²²

Although the idea of a state court abstaining in favor of an anticipated proceeding in a more interested state court is a novel one, an apposite and informative parallel can be gleaned through examination of the common law doctrine of abstention employed by federal courts.³²³ The abstention doctrine holds that, in certain situations,³²⁴ federal courts should "decline to proceed" despite having proper jurisdiction over the matter.³²⁵ For present purposes, the most apposite precedent is provided by *Burford v. Sun Oil Co.*,³²⁶ which centered on the decision of a state regulatory commission granting drilling rights along a railroad right of way.³²⁷ Despite proper federal jurisdiction based on both diversity and a federal question, a divided Court found that the federal court should abstain from acting on the current matter, as such action would interfere with a matter of vital state policy.³²⁸ Citing Texas's "well organized system of regulation and review,"³²⁹ the Court held that federal action would only serve to create "[d]elay, misunderstanding . . . and needless federal conflict with the state policy"³³⁰

The Court's holding in *Burford* informs us of the strong basis for abstention in cases bearing on a central question of state policy.³³¹ As noted above, abstention doctrine has no formal application as between states. A state court, however, would be well-advised to

Commerce Code Annotated § 15.04 (Vernon 1987) ("The purpose of this Act is to maintain and promote economic competition in trade and commerce . . . and to provide the benefits of that competition to consumers in the state.").

322. This argument is by no means intended to establish an enduring legal holding that all courts should defer to the most interested jurisdiction, as such a rule would result in only one forum having the ability to adjudicate any given case.

323. See Wright, *supra* note 155, § 52. The federal abstention doctrine is, in fact, a number of doctrines illustrating situations in which federal courts should "decline to proceed" despite having proper jurisdiction over the subject matter and the parties. *Id.* at 303.

324. Though primary reference here will be made to "Burford abstention," see Wright, *supra* note 155, § 52, federal abstention doctrine addresses a number of diverse situations. See, e.g., *R.R. Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 500 (1941) (justifying abstention of federal courts when the matter in question may be decided as a matter of state law, rather than through a "premature constitutional adjudication" by federal courts).

325. Wright, *supra* note 155, § 52.

326. 319 U.S. 315 (1943).

327. *Id.*

328. *Id.* at 334.

329. *Id.* at 327.

330. *Id.*

331. Wright, *supra* note 155, § 52. Abstention is also justified in cases involving unsettled state law. See *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593 (1968). Such grounds for abstention may be particularly germane to an antitrust context, in which the right of indirect purchasers to recover may not be fully resolved as yet.

entertain similar reasoning in passing a decision on certification of a multistate class of indirect purchasers.

G. Use or Abuse: Potential Misuse of the Class Action Device

An examination of the practical situation in which many indirect purchaser class actions are brought supplies a potential defendant with a strong equitable argument against certification.³³² Such class actions are often filed with the ostensible aim of forcing a defendant into a universal settlement, which could be challenged in any number of other jurisdictions.³³³ Faced with a multistate class involving potentially hundreds of thousands of claimants, a corporate defendant is forced to choose between settlement and a small chance of potentially ruinous liability at the hands of a jury.³³⁴ Judge Friendly has termed such situations "blackmail settlements,"³³⁵ especially since such settlements often "constitut[e] a small fraction of the amount claimed but large enough to yield compensation to the plaintiffs' lawyers which seems inordinate even in these days of high legal fees."³³⁶ The underlying motivation for a state to grant certification to these cases may be the almost assuredly large attorney's fee generated by the settlement of a multistate class action.³³⁷

Judge Posner recently expressed his own contempt for the notion of a "blackmail settlement" in *In re Rhone-Poulenc Rorer, Inc.*³³⁸ *Rhone-Poulenc* involved a nationwide class action brought by hemophiliacs claiming they had been infected with HIV through the use of defendant's blood products. Although the class action had been granted certification at the district level,³³⁹ Judge Posner, writing

332. See Coffee, *supra* note 73.

333. See O'Connor, *supra* note 8, at 38.

334. See Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941, 958 (1995) (claiming that "[t]he certification of mass tort class actions, moreover, practically ensures that the litigation will be settled short of trial").

335. Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973).

336. *Id.*; see also *In re Cedant Corp. Prides Litig.*, 243 F.3d 722, 735-39 (3d Cir. 2001) (holding district court's award of nearly \$20 million attorney fee to be an abuse of discretion because the matter was neither exceedingly complicated nor time consuming).

337. See *In re Fine Paper Antitrust Litig.*, 98 F.R.D. 48, 68 (E.D. Pa. 1983) (discussing the perception that plaintiffs' lawyers have developed a "class action industry"). For a discussion of the role of attorneys fees in antitrust litigation, see Edward D. Cavanagh, *Attorneys' Fees in Antitrust Litigation: Making the System Fairer*, 57 Fordham L. Rev. 51 (1988) (presenting the issue of attorney's fees as inherent in the system of privatized antitrust enforcement), and Jack B. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 Buff. L. Rev. 433, 436 (1960) ("The most serious objections that individual parties threatened by class actions have raised is that class actions . . . are used primarily to earn legal fees for attorneys who bring them.").

338. 51 F.3d 1293 (7th Cir. 1995).

339. *Id.* at 1296-97 (citing the district court's certification of a class of hemophiliacs infected with HIV for the limited determination of defendants' liability with regard to

for a split panel, issued a writ of mandamus decertifying the class.³⁴⁰ Posner's main objection to certification, even for the limited determination of negligence, was a fear that an adverse judgment might render a company, even an entire industry, bankrupt.³⁴¹ Posner's aversion to class treatment in this instance was compounded by the fact that twelve of the thirteen verdicts in the individual lawsuits on identical claims had been rendered in favor of the defendant.³⁴² Posner noted, however, "jury number fourteen[] may disagree with twelve of the previous thirteen juries—and hurl the industry into bankruptcy."³⁴³ Facing such an adverse judgment, the defendant would be forced to settle to avoid bankruptcy. Consideration of other factors notwithstanding,³⁴⁴ the motivation behind this decision appears to be the protection of an industry from facing a virtually forced settlement in the face of dubious liability.³⁴⁵

Judge Posner's explicit recognition of the dangers of the class action proceeding for a defendant and the lack of protection afforded a defendant by Rule 23 provides federal courts with a strong precedent through which to view class certification. Although Judge Posner's opinion has been criticized on both economic and legal grounds,³⁴⁶ his decision does go a long way towards curbing perceived abuses of the class action procedure.

CONCLUSION

Despite an original understanding to the contrary, federal antitrust law has long constituted the principal means of enforcement against antitrust violators, both private and public. In the wake of the Supreme Court's decision in *ARC America*, however, state antitrust law is re-emerging as an important factor in the antitrust landscape.

negligence under either of two theories proffered by plaintiffs).

340. *Id.* at 1304.

341. *Id.* at 1298.

342. *Id.*

343. *Id.* at 1300.

344. Posner also expressed concern over the standard of negligence according to which defendant's conduct was to be judged. *Id.* at 1300-02. Rather than adopting the standard of one state, or creating subclasses through which to apply the laws of multiple states, the district judge proposed application of a generalized "common law" theory of negligence to be uniformly applied. *Id.* at 1300. Posner also noted that the sizeable nature of each individual claim would merit individual litigation. *Id.* Failure of class certification, therefore, would not have the effect of denying plaintiffs a remedy. This contention, however, may carry far less weight in the context of indirect purchaser litigation, where the relatively small amount of each individual claim would, as a practical matter, preclude the filing of individual actions. Compare *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996), where the claims might practically have been filed on an individual basis, with *In re Pizza Time Theatre Sec. Litig.*, 112 F.R.D. 15 (N.D. Cal. 1986), where the claims could only be prosecuted as a class action.

345. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1304 (7th Cir. 1995).

346. See *Bough & Bough*, *supra* note 94, at 19-20.

In no area has this proven more true than in the context of suits brought by indirect purchasers seeking recovery for overcharges resulting from manufacturer price fixing, as federal law fails to provide a remedy for such injury.

Although the provision of a remedy to indirect purchasers is an assuredly noble goal of state antitrust law, the uncoordinated nature of state court proceedings in this area has led to numerous inefficiencies and novel legal challenges. This Note has attempted to isolate and analyze one such area of concern, namely, the question of whether a state court should certify a nationwide class of indirect purchasers seeking recovery under state antitrust law.

Class certification has the potential both to provide substantial benefits to the forum state and to achieve some measure of substantial justice through the provision of a remedy to victims of admittedly illegal conduct. Such a suit, however, may also become a "mine field"³⁴⁷ through its ramifications for federalism and individual due process rights. This Note focuses on the question of certification and analyzes arguments both for and against such certification. Concluding that constitutional constraints prohibit application of forum law to a nationwide class of indirect purchasers, this Note cautions that certification of such a class would saddle a state court with a tremendous judicial task, while failing to achieve any meaningful benefit for the litigants or the forum state. Certification of a nationwide class of indirect purchasers opens the door, moreover, to manifold abuse of the class action device.

347. *Enforcement: ABA Committee Surveys Landscape of State Antitrust Law and Trade Regulation*, 76 *Antitrust & Trade Reg. Rep.* (BNA) 413 (Apr. 22, 1999).