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ARTICLES

U.S. CLASS ACTIONS GO GLOBAL: TRANSNATIONAL CLASS ACTIONS AND PERSONAL JURISDICTION

*Debra Lyn Bassett**

In *Phillips Petroleum Co. v. Shutts*, the United States Supreme Court held that plaintiff class members residing outside the forum state are entitled to the “minimal due process protections” of notice, an opportunity to be heard, an opportunity to opt out, and adequate representation. However, class actions involving class members not just from other states but from other countries raise distinctive due process concerns in each of these areas. In this Article, Professor Bassett examines the considerations impacting on due process and personal jurisdiction when non-U.S. claimants participate in class litigation, and proposes guidelines necessary to ensure that the class judgment will have a binding effect on foreign claimants.

INTRODUCTION

United States courts learned long ago that injuries sometimes occur on a large scale crossing state boundaries. And courts within this country employ the class action device, not without controversy, to bring dispersed class members before a single geographically-situated court for a “global” resolution of the claims.¹ But what about the situation in which the class action is literally global, involving injuries distributed among several countries throughout the world? Can these

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1. Federal Rule of Civil Procedure 23 governs class actions filed in federal court, and most states have modeled their class action provisions upon Rule 23. See Kurt A. Schwarz, Note, *Due Process and Equitable Relief in State Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 68 Tex. L. Rev. 415, 425 n.84 (1989) (stating that “thirty-eight states have adopted a class action rule modeled on amended federal rule 23”); see also Robert H. Klonoff & Edward K.M. Bilich, *Class Actions and Other Multi-Party Litigation* 439 (2000) (“Approximately two-thirds of the states have class-action rules patterned after Federal Rule 23.”). Recent legislation authorizes increased use of the federal courts as forums for class litigation based on reduced diversity jurisdiction requirements. See *Multiparty, Multiforum Trial Jurisdiction Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758 (2002) (codified at 28 U.S.C. § 1369 (2002)) (authorizing original jurisdiction over single-event accidents in which there is minimal diversity between adverse parties and where seventy-five or more natural persons have died).

class members be brought before a United States court for a “global” resolution?

Surprisingly little attention has been paid to the special problem of non-U.S. class members’ participation in U.S.-situated class litigation. “International” class actions tend to evoke images of an entirely foreign class suing a U.S. defendant, as in the Bhopal disaster.² However, class actions have an “international” component whenever class membership crosses national boundaries, such as cases where the vast majority of the class members are from the U.S., but the class also includes non-U.S. individuals.³ In light of current marketing, transportation, and communication technologies, it is not surprising that many kinds of harm pay no attention to state—or national—geographical boundaries, thus damaging people on both sides of a territorial border. And, in fact, at least some U.S.-based class actions have included class members from outside the United States, but without any serious judicial discussion of the potential implications to the non-U.S. class members, to the defendant, or to the efficacy of the court’s judgment.⁴

Previous commentary regarding “international class actions” has tended to focus on the unavailability of a class action procedural device in most other countries.⁵ Other authorities⁶ and

2. See *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195 (2d Cir. 1987). The Bhopal case, which was dismissed on forum non conveniens grounds, involved: thousands of claims by citizens of India and the Government of India arising out of the most devastating industrial disaster in history—the deaths of over 2,000 persons and injuries of over 200,000 caused by lethal gas known as methyl isocyanate which was released from a chemical plant operated by Union Carbide India Limited (UCIL) in Bhopal, India . . .

Id. at 197.

3. See *infra* note 4 and authorities cited therein.

4. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 799 (1985) (noting that class members resided “in all 50 states, the District of Columbia, and several foreign countries”) (emphasis added); see also *In re Pizza Time Theatre Sec. Litig.*, 112 F.R.D. 15, 17 (N.D. Cal. 1986) (class included members from 28 states and 15 foreign countries); *In re U.S. Fin. Sec. Litig.*, 69 F.R.D. 24, 32 (S.D. Cal. 1975) (named plaintiff class representatives “are foreign entities that operate abroad”).

5. See, e.g., Am. Arbitration Ass’n, *ADR Vision Roundtable: Challenges for the 21st Century*, 56 Disp. Resol. J. 8, 86 (2001) (noting that “there aren’t any international class actions—there are just U.S. class actions”); see also Neil Andrews, *Multi-Party Proceedings in England: Representative and Group Actions*, 11 Duke J. Comp. & Int’l L. 249 (2001); Christopher Hodges, *Multi-Party Actions: A European Approach*, 11 Duke J. Comp. & Int’l L. 321 (2001); Harald Koch, *Non-Class Group Litigation Under EU and German Law*, 11 Duke J. Comp. & Int’l L. 355 (2001); Gerhard Walter, *Mass Tort Litigation in Germany and Switzerland*, 11 Duke J. Comp. & Int’l L. 369 (2001); *infra* note 131 and accompanying text.

6. See, e.g., Am. Law Inst., International Jurisdiction and Judgments Project, Discussion Draft § 6, at 70-71 (Mar. 29, 2002) (“[D]omicile, habitual residence, or place of incorporation of the plaintiff is not an acceptable ground for exercise of judicial jurisdiction for purposes of recognition or enforcement; in contrast, domicile, habitual residence, and place of incorporation of the defendant are universally accepted bases of judicial jurisdiction, as they are in this Act.”); Am. Law Inst.,

commentators⁷ have discussed the impact of a foreign defendant in traditional, non-class litigation. Largely unexplored, however, is the impact of the participation of other countries' citizens in U.S.-based class action litigation.⁸

Some of the ramifications of a transnational class action become evident when viewed through the lens of so-called "nationwide" class actions.⁹ Nationwide class actions have presented issues concerning pre-existing cases,¹⁰ manageability,¹¹ choice of law,¹² and personal

Principles and Rules of Transnational Civil Procedure, Discussion Draft No. 3 § 3, at 27 (Apr. 8, 2002) ("Jurisdiction over a party should be exercised when the connection between the forum state and the party or the transaction or occurrence in dispute is substantial."); *id.* at 27–28 ("The standard of 'substantial connection' has been generally accepted for international legal disputes. That standard excludes mere physical presence, which within the United States is colloquially called 'tag jurisdiction.'"); Gary B. Born et al., *International Civil Litigation in United States Courts* 92–93, 137 (3d ed. 1996) [hereinafter Born, *International Civil Litigation*] (observing that "personal jurisdiction analysis ordinarily focuses on the burdens that litigation in the forum imposes on the defendant, not the plaintiff," and discussing due process implications of presence of a foreign defendant).

7. A number of commentators have discussed the implications of transnational litigation in the non-class context. *See, e.g.*, Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 Ga. J. Int'l & Comp. L. 1, 1 (1987) [hereinafter Born, *Reflections*] (proposing "a modification of domestic Due Process limitations on personal jurisdiction in cases involving foreign defendants"); Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 Tex. Int'l L.J. 501, 504 (1993) (proposing "federal legislation establishing standards for jurisdiction over alien defendants and clearer rules for access to United States courts by foreign plaintiffs injured abroad"); Andrew L. Strauss, *Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts*, 36 Harv. Int'l L.J. 373, 375 (1995) ("challeng[ing] the current assumption that the domestic law of jurisdiction should be applied by domestic courts when asserting personal jurisdiction in cases involving foreign litigants").

8. *See* Am. Law Inst., *Complex Litigation: Statutory Recommendations and Analysis* § 3.08, at 147–49 (1994) (discussing personal jurisdiction in complex litigation cases involving transfer and consolidation under 28 U.S.C. § 1407, and stating that because "opposition to transfer and consolidation may come from the plaintiff, the defendant, or both," the transferee court "should apply the same personal jurisdiction analysis to unwilling plaintiffs and defendants alike"); *id.* at 448 (proposing new § 2370, which would authorize personal jurisdiction "over any party . . . to the full extent of the power conferrable on a federal court under the United States Constitution"); *see also id.* at 158–60 (discussing impact of foreign defendant, but not foreign plaintiff).

9. *See, e.g.*, Graham C. Lilly, *Modeling Class Actions: The Representative Suit as an Analytic Tool*, 81 Neb. L. Rev. 1008, 1045 (2003) (noting "the rise of nationwide class actions").

10. *See, e.g.*, *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1088 (6th Cir. 1996) (reversing class certification because, among other reasons, "previously-filed cases at more advanced stages of litigation" would thus "[be thrown] into disarray"); *Geraghty v. U.S. Parole Comm'n*, 719 F.2d 1199, 1205 (3d Cir. 1983) (upholding refusal to certify a nationwide class because it "might interfere with the litigation of similar issues in other judicial districts").

11. *See, e.g.*, *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 328 (5th Cir. 1978) (reversing certification of a nationwide class, in part, because "we have difficulty envisioning how the plaintiffs can prove in a *manageable manner* that the [alleged]

jurisdiction.¹³ Extending the reach of a class action judgment beyond U.S. borders adds a new dimension to each determination in class litigation. A transnational class action requires an examination of potential international law and treaty obligations, a careful evaluation of the laws of the countries involved, and an examination of the potential cultural, linguistic, and logistical implications. As an initial foray into this arena, this Article undertakes an examination of only one of those issues—that of personal jurisdiction.

The United States Supreme Court has provided guidelines for dealing with due process and personal jurisdiction in the class action context.¹⁴ However, as this Article explains, the presence of non-U.S. claimants in class litigation requires additional due process protections.¹⁵ In particular, this Article concludes that due process requires an affirmative opt-in procedure in order to bind non-U.S. claimants to a U.S. class judgment.¹⁶

Part I sets forth the due process and personal jurisdiction concepts underlying the discussion in this Article.¹⁷ Part II examines how personal jurisdiction issues arise in transnational class actions, and how the principles of current personal jurisdiction jurisprudence facilitate—and hinder—due process.¹⁸ Finally, Part III proposes additional due process safeguards for transnational class actions.¹⁹

conspiracy was indeed implemented in a particular geographical area”).

12. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 823 (1985) (reversing judgment “insofar as [the state court’s judgment] held that Kansas law was applicable to all of the transactions which it sought to adjudicate”); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (reversing certification of a nationwide class, in part, due to differences in the laws among the states); *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (finding that choice of law issues in a nationwide class action created concerns sufficient to reverse class certification).

13. See, e.g., *Shutts*, 472 U.S. at 806–14 (discussing personal jurisdiction issues raised by the inclusion of citizens of other states who lack local contacts); *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1002 (3d Cir. 1986) (observing that mandatory class actions “raise[] serious questions of personal jurisdiction and intrusion into the autonomous operation of state judicial systems”).

14. See *infra* notes 94–117 and accompanying text (discussing Supreme Court guidance in *Shutts* regarding personal jurisdiction in class actions).

15. See *infra* notes 125–220 and accompanying text (analyzing shortcomings of current approaches); see also *infra* note 134 (discussing the propriety of according full due process protections to foreign claimants).

16. See *infra* notes 233–41 and accompanying text (proposing affirmative opt-in procedures for non-U.S. claimants).

17. See *infra* notes 20–124 and accompanying text (setting out concepts).

18. See *infra* notes 125–93 and accompanying text (discussing personal jurisdiction and due process issues in transnational class actions).

19. See *infra* notes 194–242 and accompanying text (proposing jurisdictional analysis for transnational class actions).

I. UNDERLYING CONCEPTS OF DUE PROCESS AND PERSONAL JURISDICTION

The jurisdictional analysis proposed by this Article presupposes an understanding of due process and personal jurisdiction principles. This section begins with a brief background regarding these areas.

A. *A Brief Overview of Due Process in the Context of Litigation Rights*

The United States Supreme Court has articulated the notion of constitutional due process²⁰ in a number of different ways. The Court has stated that due process “is not a technical conception with a fixed content unrelated to time, place and circumstances,”²¹ but rather, “expresses the requirement of ‘fundamental fairness,’ a requirement whose meaning can be as opaque as its importance is lofty.”²² Indeed, “[d]ue process is that which comports with the deepest notions of what is fair and right and just.”²³

Although due process may equate with fairness, more detailed descriptions are helpful in ascertaining whether the purposes and goals of due process are satisfied. Due process plays dual roles in several ways. Courts and commentators refer to both “substantive” due process and “procedural” due process under the Fifth and Fourteenth Amendments in discussing personal jurisdiction.²⁴ When

20. Although the Supreme Court has approached state court jurisdiction as involving constitutional considerations of due process, at least one commentator has argued that personal jurisdiction is not of a constitutional dimension. See Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. Davis L. Rev. 19 (1990) [hereinafter Borchers, *Death of Personal Jurisdiction*] (arguing that state court personal jurisdiction is not a matter of constitutional law).

21. *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961) (internal citation omitted); see also *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.”).

22. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 24 (1981); see Harold S. Lewis, Jr., *The Three Deaths of “State Sovereignty” and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 Notre Dame L. Rev. 699, 732 (1983) (describing the due process clause as “one of the murkiest constitutional mandates”); Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. Rev. 296, 357 (1996) (“While the sources are history, tradition, the Constitution, judicial applications, and democratic principles, the definition of due process offered is, save for the articulation of the concepts of notice and hearing, close to tautological.”); *id.* (noting that the purposes of due process are “ensuring accuracy and legitimacy of decisionmaking and popular acceptance”).

23. *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting).

24. Black’s Law Dictionary 449 (5th ed. 1979) (“There are two aspects [of due process]: procedural, in which a person is guaranteed fair procedures and substantive which protects a person’s property from unfair governmental interference or taking.”). But see Jay Conison, *What Does Due Process Have to Do With Jurisdiction?*, 46 Rutgers L. Rev. 1071, 1074-75 (1994).

The law of due process is usually thought to have two components:

discussing due process of law, the term again encompasses dual concepts of jurisdiction and procedure.²⁵ Thus, a valid judgment requires that the court have jurisdiction (physical power) over the person or property involved, and that the procedural protections of notice and an opportunity to be heard have been accorded.²⁶

Courts and commentators refer to personal jurisdiction in both contexts. The Due Process Clause of the Fourteenth Amendment acts as a limitation upon state court assertions of personal jurisdiction²⁷ by requiring that the defendant have minimum contacts with the forum state.²⁸ “[P]ersonal jurisdiction has come to involve

procedural due process and substantive due process. The constitutional law of jurisdiction resembles neither. It differs from the law of procedural due process, which ensures fairness in the decision-making procedures used by judicial, administrative and other governmental bodies. Procedural due process requires that before any person is deprived of life, liberty or property through an official proceeding, he be given notice and a meaningful opportunity to protect his interests. By contrast, the law of jurisdiction is not concerned with notice and the opportunity to be heard. Rather, its stated concerns are the power of a court to determine a defendant's obligations and the propriety of the court's doing so.

The law of jurisdiction also differs from the law of substantive due process, which prevents excessive government encroachment on fundamental rights and interests. There is no identifiable, fundamental right threatened by exercises of jurisdiction. . . . [T]he Constitution betrays no concern, express or implied, to protect individuals from having to defend lawsuits in states where they do not live. Quite the contrary. The Constitution's Article III grant of diversity jurisdiction presumes that individuals will litigate, both as plaintiffs and as defendants, away from their homes, and facilitates that litigation by providing a neutral forum.

Id.

25. 1 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 1.15, at 1-41 (3d ed. 1992) (“In traditional suits, due process involves two elements: a jurisdictional one and a procedural one.”). In federal question cases involving foreign defendants, the legal standard is whether the foreign defendant has “sufficient contacts with the United States as a whole in order to satisfy Fifth Amendment Due Process requirements.” *Pyrenees, Ltd. v. Wocom Commodities Ltd.*, 984 F. Supp. 1148, 1159 (N.D. Ill. 1997); *see also Go-Video, Inc. v. Akai Elec. Co.*, 885 F.2d 1406 (9th Cir. 1989) (same).

26. 1 Newberg & Conte, *supra* note 25, § 1.15, at 1-41 to 1-42.

27. *See, e.g., World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 294 (1980) (“Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for the litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.”); *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (noting that jurisdictional restrictions are “more than a guarantee of immunity from inconvenien[ce],” but are “a consequence of [the] territorial limitations on the power[s] of the respective States”).

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

The requirement that a court have personal jurisdiction flows . . . from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.

not only an inquiry into the territorial power of the sovereign,^[29] but also the protection of the defendant's individual due process interests in avoiding unduly burdensome litigation in a distant forum."³⁰ Second, the procedural components also must be accorded: ineffective service of process, for example, will prevent the court from acquiring personal jurisdiction over the defendant.³¹ These concepts can overlap, as in "tag" jurisdiction, where service of process within the forum state accomplishes the procedural component and also confers personal jurisdiction, even if the defendant's contacts with the forum would not otherwise independently satisfy the minimum contacts test.³²

The standards needed to satisfy due process in a class action context may differ from those in traditional non-class litigation, but the overall goal—to obtain a fair and binding judgment—is the same.³³ A class action, of course, is representational litigation, in which the named plaintiffs³⁴ represent both themselves and a class of similarly-

Thus, the test for personal jurisdiction requires that "the maintenance of the suit . . . not offend 'traditional notions of fair play and substantial justice.'"

Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702–03 (1982) (citation omitted).

29. See *Pennoyer v. Neff*, 95 U.S. 714 (1878) (holding that state court jurisdiction rests on notions of territoriality and state sovereignty); see also Lea Brilmayer, *An Introduction to Jurisdiction in the American Federal System* 20 (1986) [hereinafter Brilmayer, *American Federal System*] (noting that both "basis and process" must exist for a court to exercise personal jurisdiction); *id.* ("Basis refers to the relationship between a party and the sovereign (the state) from which the court derives its power. Process refers to the procedural steps prescribed by the sovereign to connect the party with the court: that is, process requires sufficient notice to the defendant.").

30. Elizabeth Barker Brandt, *Fairness to the Absent Members of a Defendant Class: A Proposed Revision of Rule 23*, 1990 BYU L. Rev. 909, 934; see also *Ins. Corp. of Ireland*, 456 U.S. at 702 n.10 ("The restriction on state sovereign power described in *World-Wide Volkswagen* . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause.").

31. See *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) ("Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied."); *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 444–45 (1946) ("[S]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served.").

32. See *Burnham v. Superior Court*, 495 U.S. 604 (1990) (holding that if the defendant is physically present in the forum state at the time that process is served upon him, satisfaction of the minimum contacts test is unnecessary).

33. 1 Newberg & Conte, *supra* note 25, § 4.46, at 4–183 to 4–184.

Fundamental elements of due process in traditional litigation require that personal rights cannot be legally compromised without notice and opportunity to be heard by a court with personal jurisdiction over the party defendant involved. Due process necessary to reach a binding decision on common issues in a class action is satisfied by different procedures than those necessary in traditional, nonclass litigation.

Id. (internal footnotes omitted).

34. This Article will tend to refer to plaintiff classes, which are far more common than defendant classes. See Robert R. Simpson & Craig Lyle Perra, *Defendant Class Actions*, 32 Conn. L. Rev. 1319, 1322–23 (2000) (noting that defendant class actions

situated others in pursuing a remedy.³⁵ In recognition of this representational aspect, the United States Supreme Court has observed:

The only way a class-action defendant like petitioner can assure itself of this binding effect of the judgment is to ascertain that the forum court has jurisdiction over every plaintiff whose claim it seeks to adjudicate, sufficient to support a defense of *res judicata* in a later suit for damages by class members.³⁶

Thus, the binding effect of the lawsuit is crucial to evaluating due process in the class action context.³⁷

In *Hansberry v. Lee*,³⁸ the Supreme Court observed that although one generally is not bound by a judgment unless she has been made a party, the class action device is an exception to this rule.³⁹

[M]embers of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties, . . . or where the interest of the members of the class, some of whom are present as parties, is joint, or where for any other reason the relationship between the parties present

are rare).

35. See 1 Newberg & Conte, *supra* note 25, § 1.02, at 1–5 (“The fundamental nature of a class suit is its representative status. . . .”); Charles Alan Wright & Mary Kay Kane, *Law of Federal Courts* § 72, at 510 (6th ed. 2002) (“[A class action] provides a means by which, when a large group of persons are interested in a matter, one or more may sue or be sued as representatives of the class without needing to join every member of the class.”).

36. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985). Under *res judicata* principles, a lawsuit involving the same parties and based upon the same underlying cause of action as was asserted in a previous case in which there has been a judgment on the merits is barred, including all claims that were raised or which could have been raised in the previous proceeding. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979).

37. See Linda S. Mullenix, *Class Actions, Personal Jurisdiction, and Plaintiffs’ Due Process: Implications for Mass Tort Litigation*, 28 U.C. Davis L. Rev. 871, 910 (1995) [hereinafter Mullenix, *Mass Tort*] (noting that “a court’s judgment preclusively binds the plaintiffs as well as the defendants”); see also 1 Newberg & Conte, *supra* note 25, § 4.46, at 4–183 (“Generally, due process in the class action context must assure procedural fairness to absent members before they will be held bound by a final decision on the common issues involved.”).

38. 311 U.S. 32 (1940).

39. *Id.* at 40–41. The Court stated:

It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. . . . To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a “class” or “representative” suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it.

Id. (citations omitted).

and those who are absent is such as legally to entitle the former to stand in judgment for the latter.⁴⁰

The *Hansberry* Court viewed adequate representation as the benchmark of due process for absent class members.

[S]o far as it can be said that the members of the class who are present are, by generally recognized rules of law, entitled to stand in judgment for those who are not, we may assume for present purposes that such procedure affords a protection to the parties who are represented though absent, which would satisfy the requirements of due process and full faith and credit.⁴¹

The Supreme Court subsequently modified this view by finding that adequate representation alone will not always satisfy due process—at least in Rule 23(b)(3) class actions involving monetary relief, an opportunity to opt out also must be provided.⁴² However, adequate representation remains the absolute baseline of due process in class actions.⁴³ Without adequate representation, due process cannot exist in the class action context; at least in some circumstances, more will be required even if adequate representation exists.

In *Amchem Products, Inc. v. Windsor*,⁴⁴ the Supreme Court returned to the importance of adequate representation in the context of reviewing a class action settlement. The Court found that the defined class did not satisfy adequacy of representation because “[t]he settling parties . . . achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected.”⁴⁵ The Court noted that “[i]n significant

40. *Id.* at 42–43 (citations omitted). The Supreme Court again recently affirmed the ability to collaterally attack a prior class action judgment on the basis of inadequate representation. See *Dow Chem. Co. v. Stephenson*, 123 S. Ct. 2161 (2003) (4 to 4 per curiam opinion affirming a Second Circuit decision holding that a veteran injured by exposure to Agent Orange while serving in the military in Vietnam—but whose injuries did not become manifest until the settlement funds from a prior global class action settlement were exhausted—could collaterally attack the prior class action settlement on the basis of inadequate representation). See generally William T. Allen, *Finality of Judgments in Class Actions: A Comment on Epstein v. MCA, Inc.*, 73 N.Y.U. L. Rev. 1149 (1998); Marcel Kahan & Linda Silberman, *The Inadequate Search for “Adequacy” in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L. Rev. 765 (1998); Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 Tex. L. Rev. 383 (2000) [hereinafter Woolley, *Collateral Attack*].

41. *Hansberry*, 311 U.S. at 43; see also *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848 & n.24 (1999) (reiterating *Hansberry*’s requirement of adequate representation to protect the interests of absent class members).

42. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985).

43. See, e.g., Elizabeth J. Cabraser, *Life After Amchem: The Class Struggle Continues*, 31 Loy. L.A. L. Rev. 373, 383 (1998) (“Adequacy of representation is the touchstone of due process . . .”); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 Sup. Ct. Rev. 337, 369 (noting that due process traditionally has been measured by adequacy of representation).

44. 521 U.S. 591 (1997).

45. *Id.* at 627.

respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future.⁴⁶ The fact that there was “no assurance here—either in the terms of the settlement or in the structure of the negotiations—that the named plaintiffs operated under a proper understanding of their representational responsibilities” was one of the reasons that the Court rejected the class settlement.⁴⁷ The impact of the representative nature of class actions upon personal jurisdiction is the subject of the next section.

B. *A Brief Overview of Personal Jurisdiction Principles*

As Professor Mullenix has observed, personal jurisdiction jurisprudence has tended to focus on due process concerns as they relate to the defendant.⁴⁸ Indeed, in a traditional two-party lawsuit in which a single plaintiff sues a single defendant, personal jurisdiction issues typically arise only with respect to the defendant because the plaintiff is deemed to have consented to personal jurisdiction by electing to file suit.⁴⁹ Interestingly, the Supreme Court has not drawn distinctions in its due process-personal jurisdiction analysis between defendants who are residents of other states and defendants who are residents of foreign countries. Indeed, the Court’s personal jurisdiction cases have regularly used the word “foreign” in describing both other states and other countries,⁵⁰ and the Court has employed the same minimum contacts test in evaluating whether personal jurisdiction exists over a non-U.S. defendant.⁵¹

46. *Id.* at 626.

47. *Id.* at 627–28; *see also* *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 & n.31 (1999) (discussing the importance of adequate representation in class action settlement).

48. Mullenix, *Mass Tort*, *supra* note 37, at 887 (noting that “personal jurisdiction jurisprudence has, for fifty years, . . . exclusively focused on defendants’ due process concerns”); *see also* *Ins. Co. of N. Am. v. Marina Salina Cruz*, 649 F.2d 1266, 1272 (9th Cir. 1981) (noting that “[t]he law of personal jurisdiction . . . is asymmetrical” and “[t]he primary concern is for the burden on a defendant”).

49. *See* *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1984) (holding that a plaintiff is not required to have “minimum contacts” with the forum; by filing suit, the plaintiff has consented to the exercise of personal jurisdiction over her); *see also* *Calder v. Jones*, 465 U.S. 783, 788 (1984) (same); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 412 n.5 (1984) (holding that a plaintiff is not required to have minimum contacts with the forum).

50. *See, e.g., Helicopteros*, 466 U.S. at 414 (using “foreign corporation” to describe both a U.S. entity and a non-U.S. entity); *Keeton*, 465 U.S. at 774 n.4 (including any nonresident corporation in the term “foreign corporation”); *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (including any tribunal outside the defendant’s home state in the term “foreign tribunal”); *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 222 (1957) (including any nonresident corporation in the term “foreign corporations”).

51. *See, e.g., Helicopteros*, 466 U.S. at 413–18 (applying minimum contacts test to

1. Defendants and Personal Jurisdiction

With respect to defendants, the United States Supreme Court has imposed a minimum contacts analysis,⁵² looking to the relationship between the defendant, the forum, and the litigation,⁵³ reflecting purposeful availment,⁵⁴ reasonableness,⁵⁵ and fairness.⁵⁶ The relationship of the defendant's forum contacts to the plaintiff's claim also plays a role in the minimum contacts analysis:

When a controversy is related to or "arises out of" a defendant's contacts with the forum, . . . a "relationship among the defendant, the forum, and the litigation" is the essential foundation of *in personam* jurisdiction. Even when the cause of action does not arise out of or relate to the foreign [defendant's] activities in the forum State, due process is not offended by a State's subjecting the [defendant] to its *in personam* jurisdiction when there are sufficient contacts between the State and the foreign [defendant].⁵⁷

Consent also plays a role in personal jurisdiction. Even absent minimum contacts, personal jurisdiction will still be found if the defendant expressly or implicitly consents to suit in the forum state.⁵⁸

non-U.S. corporation); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952) (same).

52. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (holding that "due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play or substantial justice") (internal citation and quotation marks omitted); *id.* at 319 ("[The Due Process] clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.").

53. See *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977) (noting that the "central concern of the inquiry into personal jurisdiction" involves "the relationship among the defendant, the forum, and the litigation").

54. See, e.g., *Hanson*, 357 U.S. at 253 ("[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.").

55. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

56. See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 116 (1987) (a plurality opinion in which eight of the Justices agreed that the exercise of personal jurisdiction over the foreign defendant would be "unreasonable and unfair," regardless of whether the minimum contacts test was satisfied).

57. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 (1984) (quoting *Shaffer*, 433 U.S. at 204) (internal citation and footnote omitted). The assertion of personal jurisdiction when the lawsuit arises out of, or is related to, the defendant's forum contacts is called "specific jurisdiction." *Id.* at 414 n.8. The assertion of personal jurisdiction when the lawsuit does not arise out of or is not related to the defendant's forum contacts is called "general jurisdiction." *Id.* at 414 n.9.

58. See *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982) (discussing "constructive consent" and noting, "[b]ecause the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived").

The minimum contacts doctrine is not well-defined, and a consistent, comprehensive approach to analyzing the existence of minimum contacts simply does not exist. Rather than providing a thorough analytical framework, the Supreme Court has instead approached each case on its own facts, and the Court's explanations have been too conclusory to offer effective guidance.

The Supreme Court first articulated the concept of minimum contacts nearly sixty years ago in *International Shoe Co. v. Washington*.⁵⁹ "[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"⁶⁰

Various factors for evaluating the sufficiency of a defendant's contacts with the forum state have been chiseled from *International Shoe*, including the "nature and quality" of the contacts with the forum state,⁶¹ an "estimate of the inconveniences" of litigating in the forum state,⁶² whether the contacts are "continuous and systematic," "single or isolated," or "irregular [or] casual,"⁶³ whether exercising jurisdiction would promote "the fair and orderly administration of the laws,"⁶⁴ whether the defendant has "enjoy[ed] the benefits and protection of the laws of [the forum] state,"⁶⁵ and whether the contacts are related or unrelated to the claim.⁶⁶ These largely vague, and heavily fact-specific, considerations rendered the determination of personal jurisdiction ambiguous and unpredictable.

Subsequent Supreme Court decisions have provided additional descriptions and illustrations, but the precise parameters of personal jurisdiction remain amorphous, and predictions regarding when personal jurisdiction will—or will not—exist cannot be made with certainty. However, the Court has introduced additional descriptive factors into the personal jurisdiction evaluation, most notably pertaining to the purposefulness of the contacts, the foreseeability of subsequent litigation, and the reasonableness of asserting jurisdiction. In *Hanson v. Denckla*,⁶⁷ the Supreme Court set forth the enduring

59. 326 U.S. 310 (1945).

60. *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

61. *Id.* at 318.

62. *Id.* at 317 (internal citation and quotation marks omitted).

63. *Id.* at 317, 320.

64. *Id.* at 319.

65. *Id.*

66. *Id.* at 317 ("'Presence' in the state . . . has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on Conversely it has been generally recognized that . . . single or isolated . . . activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there." (internal citations omitted)).

67. 357 U.S. 235 (1958).

prerequisite of purposeful availment: “[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”⁶⁸

Purposeful availment requires that the defendant’s contacts with the forum state were “purposefully directed”⁶⁹ rather than contacts resulting from the “unilateral activity of another party or a third person,”⁷⁰ or from contacts that are random, fortuitous, or attenuated.⁷¹ “Jurisdiction is proper . . . where the contacts proximately result from actions by the defendant *himself* that create a ‘substantial connection’ with the forum State.”⁷²

With respect to foreseeability, the Court has consistently held that the foreseeability of causing injury in another state is not a “sufficient benchmark” for personal jurisdiction.⁷³ Rather, “the foreseeability that is critical to due process analysis . . . is that the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.”⁷⁴

The Court has described the Due Process Clause as “protect[ing] an individual’s liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful ‘contacts, ties, or relations.’”⁷⁵ A defendant’s contacts with a particular state serve as a type of “fair warning” that his activities may subject him to that state’s jurisdiction.⁷⁶ “[T]his fair warning requirement is satisfied if the defendant has purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities.”⁷⁷

In the context of non-U.S. defendants, the Supreme Court has applied the same minimum contacts analysis, and has observed that, depending upon the facts, either specific jurisdiction or general jurisdiction may exist.⁷⁸ The lack of any analytical distinction between

68. *Id.* at 253.

69. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (internal quotation marks omitted).

70. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 417 (1984).

71. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 299 (1980).

72. *Burger King*, 471 U.S. at 475 (quoting *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957)).

73. *World-Wide Volkswagen*, 444 U.S. at 295.

74. *Id.* at 297.

75. *Burger King*, 471 U.S. at 471–72 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

76. *Id.* at 472 (internal citation and quotation marks omitted).

77. *Id.* (internal citations and quotation marks omitted).

78. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 (1984) (“Even when the cause of action does not arise out of or relate to the foreign corporation’s activities in the forum State, due process is not offended by a State’s subjecting the corporation to its *in personam* jurisdiction when there are sufficient contacts between the State and the foreign corporation.” (footnote omitted)); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 438 (1952) (finding that an Ohio court’s exercise of

U.S. and non-U.S. defendants with respect to due process and personal jurisdiction may be due, in large part, to our system of state sovereignty. As Professor Hazard has observed:

The jurisdictional problem in the United States is distinctive because, while the country is socially and economically essentially a unitary state, legally and politically it is in many respects a federation of distinct polities. . . . The peculiar features of the jurisdictional problem in the United States, then, is that our national economic and social unity is conducive to the full panoply of substantive transactions found internally in a unitary state but our political plurality requires a choice of law and jurisdictional rules as among separate sovereigns.⁷⁹

Even after determining that the defendant has satisfied the minimum contacts test, the defendant's contacts "may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'"⁸⁰ Accordingly, courts in "appropriate case[s]" may examine "the burden on the defendant,"⁸¹ "the forum State's interest in adjudicating the dispute,"⁸² "the plaintiff's interest in obtaining convenient and effective relief,"⁸³ "the interstate judicial system's interest in obtaining the most efficient resolution of controversies,"⁸⁴ and "the shared interest of the several States in furthering fundamental substantive social policies."⁸⁵ In *Asahi Metal Industry Co. v. Superior Court*,⁸⁶ a splintered Court, issuing a plurality opinion, nevertheless had eight Justices in agreement that an additional reasonableness factor comes into play when a defendant is not merely from a different state, but instead is from a foreign country: "The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders."⁸⁷

Despite Supreme Court pronouncements in numerous cases,⁸⁸ the

general jurisdiction over a Philippine corporation was "reasonable and just" where the corporation's president "ha[d] been carrying on in Ohio a continuous and systematic, but limited, part of its general business").

79. Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 Sup. Ct. Rev. 241, 246-47.

80. *Burger King*, 471 U.S. at 476 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)).

81. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. 480 U.S. 102 (1987).

87. *Id.* at 114; see also *id.* at 115 ("[A] court [must] consider the procedural and substantive policies of other *nations* whose interests are affected by the assertion of jurisdiction by the [forum state].").

88. See, e.g., *Asahi*, 480 U.S. at 102; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984); *World-*

concept of minimum contacts remains vague and difficult to apply under the best of circumstances.⁸⁹ Different issues arise, however, when examining personal jurisdiction with respect to plaintiffs.

2. Plaintiffs and Personal Jurisdiction

With respect to plaintiffs, the minimum contacts test is unnecessary in a traditional non-class lawsuit.⁹⁰ By filing the lawsuit, the plaintiff effectively has consented to the forum's assertion of personal jurisdiction over her.⁹¹ The ability to consent to personal jurisdiction means that a plaintiff—like a defendant—may consent to jurisdiction even absent minimum contacts with the forum.⁹²

In the more difficult context of class litigation, personal jurisdiction issues become thornier. "It is, after all, one thing to say that a court may bind persons without formally making them parties, but quite another to accord a state 'the ability to affect the legal relations of persons' who have no contact with it."⁹³ In traditional non-class litigation, all plaintiffs are named and personally participate in the lawsuit, and therefore to hold that such plaintiffs have consented to the court's jurisdiction seems appropriate. However, in class litigation involving a plaintiff class, the vast majority of plaintiffs are unnamed and do not personally participate—which is the very reason that class litigation is economical. For those members of a prospective plaintiff

Wide Volkswagen v. Woodson, 444 U.S. at 286 (1980); McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957); see generally Borchers, *Death of Personal Jurisdiction*, *supra* note 20, at 19 (tracing the Supreme Court's personal jurisdiction cases).

89. See Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 Sup. Ct. Rev. 77 [hereinafter Brilmayer, *Contacts Count*] (discussing difficulties in resolving "how contacts count"); Hazard, *supra* note 79, at 283 ("[T]he vagueness of the minimum-contacts general principle can make jurisdictional litigation uncertain at the trial level and frequent at the appellate level."); Rex R. Perschbacher, *Foreword, Fifty Years of International Shoe: The Past and Future of Personal Jurisdiction*, 28 U.C. Davis L. Rev. 513, 514 (1995) (noting "the vagueness of the minimum-contacts general principle").

90. See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 (1983) ("[W]e have not to date required a plaintiff to have 'minimum contacts' with the forum State before permitting that State to assert personal jurisdiction over a nonresident defendant. On the contrary, we have upheld the assertion of jurisdiction where such contacts were entirely lacking.").

91. See Linda Sandstrom Simard, *Exploring the Limits of Specific Personal Jurisdiction*, 62 Ohio St. L.J. 1619, 1659 (2001) ("In filing the complaint against the defendant, the plaintiff impliedly consents to personal jurisdiction in that court."); see also *Adam v. Saenger*, 303 U.S. 59, 67–68 (1938) ("The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence.").

92. See *Keeton*, 465 U.S. at 780–81 (upholding plaintiff's choice of forum on a consent theory, despite plaintiff's lack of any connection to New Hampshire).

93. Note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification*, 92 Harv. L. Rev. 718, 724 (1979) [hereinafter Note, *Multistate Plaintiff Class Actions*].

class who are not class representatives, the reason for finding implied consent in non-class litigation—the plaintiff's intentional choice to file a lawsuit in a specific court—does not exist. Therefore a court cannot automatically assume that absent class members are willing to consent to the court's jurisdiction. The question then becomes how personal jurisdiction is satisfied in the class action context.

The major Supreme Court decision addressing personal jurisdiction in the class action context is *Phillips Petroleum Co. v. Shutts*.⁹⁴ The *Shutts* case is of particular importance because the class action at issue included foreign claimants. However, aside from mentioning that the class included claimants from foreign countries, the Court made no further mention of the foreign claimants in the opinion.⁹⁵ Although this would seem to suggest that the Court regarded the foreign claimants as adding nothing to jurisdictional due process analysis, such a conclusion is flawed, as explained in Part III.⁹⁶

Shutts was a (b)(3)-type class action filed in Kansas state court by gas company investors seeking to recover interest on delayed royalty payments.⁹⁷ The 28,000-plus member class resided “in all 50 States, the District of Columbia, and several foreign countries,”⁹⁸ and class members had an average claim of \$100.⁹⁹

94. 472 U.S. 797 (1985).

95. One might have wondered whether the presence of foreign claimants would introduce principles of international law into the personal jurisdiction analysis. See Strauss, *supra* note 7, at 374 for “a model that describes the role of international law in governing a state's assertion of jurisdiction in civil cases involving foreign defendants or plaintiffs.” However, the fact that the Supreme Court ignored the foreign claimants would seem to suggest that the Court considers international law to play no role in determinations of personal jurisdiction.

96. See *infra* notes 125–220 and accompanying text (examining impact of non-U.S. claimants upon due process considerations).

97. *Shutts*, 472 U.S. at 799. Federal Rule of Civil Procedure 23 requires the class to satisfy the four prerequisites of numerosity, commonality, typicality, and adequacy of representation set forth in subdivision (a), as well as the requirements for one or more of the types of classes set out in subdivision (b). See Fed. R. Civ. P. 23(a)(1)–(4), (b); see generally 7A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §§ 1762–66, at 151–98 (2d ed. 1986) (discussing Rule 23(a) prerequisites); Debra Lyn Bassett, *Pre-Certification Communication Ethics in Class Actions*, 36 Ga. L. Rev. 353, 359–67 (2002) (discussing class action procedural requirements under Rule 23). A Rule 23(b)(3) class requires that questions of law or fact common to the class predominate over questions affecting only individual members, and that the class action is a superior method for obtaining a fair and efficient adjudication of such issues. Fed. R. Civ. P. 23(b)(3); see 1 Newberg & Conte, *supra* note 25, § 4.20, at 4–71 (“[S]ubdivision (b)(3) is general so that it comprehends all class actions . . .”). Rule 23(b)(3) lists four non-exhaustive factors for the court to consider in determining whether class action treatment would be superior: (1) the interest of class members in individually controlling the litigation; (2) the extent and nature of any ongoing litigation; (3) the desirability of concentrating litigation in a particular forum; and (4) the difficulties in managing a class action. *Id.*

98. *Shutts*, 472 U.S. at 799. Although the *Shutts* class action clearly encompassed class members from other countries, the Supreme Court did not discuss the due process implications of having non-U.S. citizens among the class members. Indeed, this particular quote is the only place in the *Shutts* opinion at which the Court

The defendant, whose loss in the Kansas trial court was affirmed by the Kansas Supreme Court, challenged the judgment on due process and choice of law grounds before the United States Supreme Court.¹⁰⁰ The Court rejected the defendant's due process contention, which is the issue of particular interest for this Article, but sustained the defendant's choice of law argument.¹⁰¹

Phillips Petroleum had argued that out-of-state class members could not be deemed to have consented to jurisdiction merely by their failure to opt out of the class, and therefore personal jurisdiction existed over those out-of-state plaintiffs only if they had minimum contacts with the State of Kansas.¹⁰² Without those minimum contacts, the defendant argued, Kansas had "exceeded its jurisdictional reach and thereby violated the due process rights of the absent plaintiffs."¹⁰³ Approximately ninety-seven percent of the class had no pre-litigation nexus with Kansas.¹⁰⁴

A unanimous Court first held that Phillips Petroleum had standing to raise the jurisdictional issue with respect to the out-of-state class members.

As a class-action defendant petitioner is in a unique predicament. If Kansas does not possess jurisdiction over this plaintiff class, petitioner will be bound to 28,100 judgment holders scattered across the globe, but none of these will be bound by the Kansas decree. Petitioner could be subject to numerous later individual suits by these class members because a judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit elsewhere and thus has no res judicata effect as to that party. Whether it wins or loses on the merits, petitioner has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as petitioner is bound. The only way a class action defendant like petitioner can assure itself of this binding effect of the judgment is to ascertain that the forum court has jurisdiction over every plaintiff whose claim it seeks to adjudicate, sufficient to support a defense of res judicata in a later suit for damages by class members.¹⁰⁵

The Court went on to distinguish the kinds of concerns necessitating a minimum contacts analysis with respect to defendants, from the situation presented by absent plaintiffs in a class action. The Court observed that absent class members are "not haled anywhere to

referred to the existence of non-U.S. class members.

99. *Id.* at 801.

100. *Id.* at 799.

101. *Id.* The Kansas court had held that Kansas law applied to all of the transactions, and as to this point the Supreme Court reversed and remanded for further proceedings. *Id.* at 799, 823.

102. *Id.* at 806.

103. *Id.*

104. *See id.* at 801.

105. *Id.* at 805.

defend themselves upon pain of a default judgment."¹⁰⁶ Instead, the court and the class representatives protect the interests of absent class members.¹⁰⁷

[Absent class members] need not hire counsel or appear. They are almost never subject to counterclaims or cross-claims, or liability for fees or costs. Absent plaintiff class members are not subject to coercive or punitive remedies. Nor will an adverse judgment typically bind an absent plaintiff for any damages, although a valid adverse judgment may extinguish any of the plaintiff's claims which were litigated.¹⁰⁸

Accordingly, the Court found that absent class plaintiffs, while entitled to "some" Fourteenth Amendment protection,¹⁰⁹ are not necessarily entitled to as much protection as a defendant.¹¹⁰

Limiting its holding to class actions involving "known plaintiffs" seeking "wholly or predominantly . . . money judgments,"¹¹¹ the Court stated that in order to bind such an absent plaintiff, "minimal procedural due process protection" must have been provided.¹¹² This "minimal" protection mirrors the prerequisites already established by Rule 23 for (b)(3) classes—notice, an opportunity to be heard, an opportunity to opt out, and interests adequately represented by the named plaintiff.¹¹³

106. *Id.* at 809.

107. *Id.*

108. *Id.* at 810.

109. *Id.* at 811 ("The Fourteenth Amendment does protect 'persons,' not 'defendants,' . . . so absent plaintiffs as well as absent defendants are entitled to some protection from the jurisdiction of a forum State which seeks to adjudicate their claims.").

110. *Id.* ("Because States place fewer burdens upon absent class plaintiffs than they do upon absent defendants in nonclass suits, the Due Process Clause need not and does not afford the former as much protection from state-court jurisdiction as it does the latter.").

111. *Id.* at 811 n.3 ("Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments. We intimate no view concerning other types of class actions, such as those seeking equitable relief . . .").

112. *Id.* at 811–12.

113. *Id.* at 812. The court stated:

The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." . . . The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.

Id. (citations omitted).

If the district court determines that the lawsuit should proceed as a Rule 23(b)(3)

Thus, *Shutts* effectively concluded that the procedural safeguards built into the federal class action device under Rule 23 already afforded sufficient due process protections for (b)(3) class actions. Since a finding that all absent plaintiff class members would be subject to the same minimum contacts test as defendants would effectively have eliminated nationwide class actions, the result in *Shutts* was an eminently practical one.¹¹⁴

Accordingly, plaintiff class members, like individual plaintiffs generally, are not necessarily required to demonstrate the existence of "minimum contacts" with the forum.¹¹⁵ In *Shutts*, there was no minimum contacts basis for personal jurisdiction over the absent plaintiff class members. However, by providing absent class members with the opportunity to opt out of (b)(3) class litigation, the *Shutts* decision essentially premised personal jurisdiction upon the consent of class members¹¹⁶—the corollary of plaintiff consent in traditional

class action and certifies the class as such, the court must then direct to the potential class members "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2). The class representatives bear the expense of providing this notice. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172 (1974). The cost of providing individual notice can be great indeed when the proposed class is large. See *id.* at 167 (noting that "individual notice to all identifiable class members would cost \$225,000, and additional expense would be incurred for suitable publication notice designed to reach the other four million class members"). The notice must inform (b)(3) class members that they may request exclusion from the class and that the class action judgment will bind them if they do not request exclusion. Fed. R. Civ. P. 23(c)(2). Providing this notice and opportunity to "opt out" of the class action is mandatory for classes certified under subdivision (b)(3). Classes certified under subdivisions (b)(1) or (b)(2), however, usually are not provided the option of excluding themselves from the lawsuit. See 7B Wright & Miller, *supra* note 97, § 1793, at 295 ("[I]n these cases notice by the court theoretically is discretionary only."). The court may elect, in its discretion, to direct notice to subdivision (b)(1) or (b)(2) class members "for the protection of the members of the class or otherwise for the fair conduct of the action." Fed. R. Civ. P. 23(d)(2). Similarly, Rule 23(d)(5) provides discretionary authority for the court to afford (b)(1) and (b)(2) class members with the opportunity to opt out "when necessary to facilitate the fair and efficient conduct of the litigation." *Eubanks v. Billington*, 110 F.3d 87, 96 (D.C. Cir. 1997). The Kansas state rule differed, however, from Federal Rule 23—under the Kansas class action rule, opt-out rights were discretionary. See Kan. Stat. Ann. § 60-223(c)(2) (1994).

114. The Court rejected the defendant's argument that due process required absent class plaintiffs to affirmatively opt into the class, making the practical observation that such a requirement would invalidate "scores of state statutes [as well as] the class-action provision of the Federal Rules of Civil Procedure." *Shutts*, 472 U.S. at 813.

115. See *id.* at 811 ("[W]e hold that a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant.").

116. See *id.* at 813-14; see also Kahan & Silberman, *supra* note 40, at 766 n.3 ("Shutts itself discussed the opt out requirement in a situation where there was no basis for personal jurisdiction over absent class members and construed a failure to opt out of a class suit as consent to personal jurisdiction."); Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 Tex. L. Rev. 571, 580 n.38

non-class lawsuits. In providing an opt-out option, *Shutts* concluded that absent plaintiff class members who do not elect to opt out have, in essence, consented to participate in the class litigation.¹¹⁷

The issues left unresolved by *Shutts*—the due process requirements when class plaintiffs are unknown or when the action is not “wholly or predominantly” seeking monetary damages—remain unresolved.¹¹⁸ Subsequent federal courts have concluded that *Shutts* applies to federal actions based on Rule 23 as well as state actions.¹¹⁹ Absent additional guidance, some courts have concluded that (b)(1) and (b)(2) classes, even without opt out provisions, do not violate due process.¹²⁰ Hybrid class actions seeking both equitable and monetary relief have caused more consternation, but courts generally have applied a literal reading of *Shutts*, focusing on whether the relief sought involved wholly or predominately money damages; and if so,

(1997) [hereinafter Woolley, *Rethinking Adequate Representation*] (“*Shutts* construes a failure to opt out of a class suit as consent to personal jurisdiction. Thus, the right to opt out may be limited to absent class members who do not have minimum contacts with the forum.”).

117. *Shutts*, 472 U.S. at 813 (absent plaintiff class members are “presumed to consent” to jurisdiction if they do not opt out of the class); 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, 16 (1986) (stating that the reasoning in *Shutts* “was based upon the inference of consent from class members’ failure to opt out”); 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) [hereinafter Kennedy, *Bride of Frankenstein*] (analyzing the consent theory presented in *Shutts*); see also 3 Newberg & Conte, *supra* note 25, § 13.37, at 13–105 (stating that the “suggest[ion] that the failure of class members to opt out of the suit equals consent to jurisdiction . . . does not withstand analysis”).

118. The Supreme Court has declined recent opportunities to provide additional guidance with respect to due process and the right to opt out of class litigation. See *Adams v. Robertson*, 520 U.S. 83 (1997) (dismissing writ of certiorari as improvidently granted because the federal constitutional issue was not properly presented to the state supreme court); *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 118 (1994) (dismissing writ of certiorari as improvidently granted because the case “would require [the Court] to resolve a constitutional question that may be entirely hypothetical”).

119. See, e.g., *In re Asbestos Litig.*, 90 F.3d 963, 1002 n.19 (5th Cir. 1996) (Smith, J., dissenting) (collecting cases), *rev’d on other grounds sub nom. Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); see also Mullenix, *Mass Tort*, *supra* note 37, at 896 (noting that “the lower federal courts have grappled with the applicability of *Shutts* in federal as opposed to state actions, generally concluding the *Shutts* due process pronouncements apply equally in federally based Rule 23 class actions, although on various grounds”); see also Miller & Crump, *supra* note 117, at 31 (“It seems doubtful . . . that federal courts should be excused from requirements that *Shutts* declares fundamental to due process.”).

120. See, e.g., *In re Louisiana-Pacific Corp. Derivative Litig.*, 705 A.2d 238, 240 (Del. Ch. 1997) (“[U]nder Rule 23(b)(1) or (2) the close identity of interests of the absent class members with those of the members before the court and satisfaction of the Subsection 23(a) criteria are sufficient to satisfy due process of law . . .”); *Williams v. Lane*, 129 F.R.D. 636, 638–43 (N.D. Ill. 1990) (upholding (b)(2) class).

requiring an opt out opportunity, and if not, finding an opportunity to opt out was not required.¹²¹

Commentators have been more difficult to placate. Reactions to the unresolved due process issues have ranged from acceptance of adequate representation alone as providing due process in (b)(1) and (b)(2) classes,¹²² to insistence that all class members in any type of class litigation have a right to notice and an opportunity to be heard,¹²³ to assertions of a right to opt out from mandatory classes.¹²⁴ The next section addresses *Shutts*' shortcomings in providing due process guidance in the transnational class action context.

II. DUE PROCESS IN THE TRANSNATIONAL CLASS ACTION CONTEXT UNDER *SHUTTS*

The Supreme Court's guidance in *Shutts* with respect to personal jurisdiction in class actions tends to fall short in a number of respects. Rule 23 of the Federal Rules of Civil Procedure authorizes both plaintiff classes and defendant classes,¹²⁵ which raise different personal jurisdiction concerns.¹²⁶ Yet *Shutts* expressly declined to provide any guidance for defendant classes, or, for that matter, (b)(1) or (b)(2) classes.¹²⁷ Moreover, a transnational class raises any number of specialized due process concerns, as contrasted with a class comprised solely of U.S. citizens. However, despite facing a class with foreign claimants, *Shutts* completely ignored the impact of their presence.¹²⁸ This Section addresses *Shutts*' various shortcomings in analyzing personal jurisdiction concerns in transnational class actions.

121. See, e.g., *White v. Nat'l Football League*, 836 F. Supp. 1458, 1471–73 (D. Minn. 1993) (approving (b)(1) settlement); *Williams v. Burlington N., Inc.*, 832 F.2d 100, 103–04 (7th Cir. 1987) (approving (b)(2) consent decree).

122. See, e.g., Douglas Laycock, *Due Process of Law in Trilateral Disputes*, 78 Iowa L. Rev. 1011 (1993) (accepting the proposition that class members are bound if adequate representation has been accorded).

123. See, e.g., Woolley, *Rethinking Adequate Representation*, *supra* note 116, at 573 (“[E]very class member whose whereabouts or identity can be reasonably ascertained has a constitutionally protected right to prosecute his cause of action by presenting evidence and making legal arguments not otherwise before the court.”).

124. See Steven T.O. Cottreau, *The Due Process Right to Opt Out of Class Actions*, 73 N.Y.U. L. Rev. 480 (1998).

125. Fed. R. Civ. P. 23(a) (“One or more members of a class may sue or be sued as representative parties on behalf of all . . .”) (emphasis added).

126. 1 Newberg & Conte, *supra* note 25, § 4.46, at 4–183 (“What constitutes procedural fairness necessarily varies in different litigation contexts, so that procedure required by due process will vary in traditional non-class litigation, in plaintiff class actions, and in defendant class suits.”).

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

128. See *supra* note 98 and accompanying text (discussing *Shutts*' failure to address due process implications for non-U.S. claimants).

A. Plaintiff Classes

With respect to plaintiff classes, the *Shutts* Court provided guidance for determining whether sufficient due process protections exist to bind absent class members in a single context: For known plaintiff class members seeking wholly or predominantly monetary relief, there must be notice, an opportunity to be heard, an opportunity to opt out, and adequate representation in order to satisfy the minimum due process requirements.¹²⁹

However, due process raises particular challenges when absent class members are not just outside the state, but instead are from outside the nation. The notion of fundamental fairness sufficient to bind non-citizens in another country to a U.S. judgment is one warranting careful examination. A transnational class implicates the laws and legal systems of two or more different nations, and each nation has its own distinct legal system and procedures.¹³⁰ In particular, the class action device is unique; most foreign nations do not have a similar procedure.¹³¹ In addition, other countries' notions of personal jurisdiction often differ from that of the United States.¹³²

129. *Shutts*, 472 U.S. at 811–12 & n.3.

130. See William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 La. L. Rev. 677, 681 (2000) (“[T]here are one federal and fifty state legal systems in the United States, separate legal systems in each of the other nations, and still other distinct legal systems in such organizations as the European Economic Community and the United Nations.”).

131. See Mauro Cappelletti & Bryant Garth, *Finding an Appropriate Compromise: A Comparative Study of Individualistic Models and Group Rights in Civil Procedure*, 2 Civ. Just. Q. 111, 134 (1983) (class actions are not found outside of common law countries); Richard O. Faulk, *Armageddon Through Aggregation? The Use and Abuse of Class Actions in International Dispute Resolution*, 10 Mich. St. U.-DCL J. Int'l L. 205, 229 n.84 (2001) (summarizing class action and group action laws and initiatives in the European Commission); Linda S. Mullenix, *Lessons from Abroad: Complexity and Convergence*, 46 Vill. L. Rev. 1, 7 (2001) (“Almost all civil law countries, as well as England (a common law country), do not have a class action procedure.”); Thomas D. Rowe, Jr., *Debates Over Group Litigation in Comparative Perspective: What Can We Learn From Each Other?*, 11 Duke J. Comp. & Int'l L. 157, 157–58 (2001) (“Only a few other nations have adopted the class action device even to a limited extent; and in many countries, particularly the civil law systems of continental Europe, resistance to the class action is strong, and responses to widespread-injury problems are sometimes limited.”); *id.* at 159 (“Some forms of class action have been adopted in a few Canadian provinces, in Australia, and in Brazil.”); see also S. Stuart Clark & Christina Harris, *Multi-Plaintiff Litigation in Australia: A Comparative Perspective*, 11 Duke J. Comp. & Int'l L. 289 (2001) (discussing Australia's system). See generally *supra* note 5 (discussing unique nature of class action device).

132. See, e.g., Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 Am. J. Comp. L. 121, 133–36 (1992) (analyzing Brussels Convention and concluding that European countries do not permit personal jurisdiction based on continuous and systematic business contacts with the forum); Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 Cornell L. Rev. 89, 114–16 (1999) (noting that most other countries do not respect a U.S. judgment that was based on broad notions of personal jurisdiction, such as general jurisdiction); Jason Farber, *NAFTA and Personal*

Accordingly, from the very outset of the litigation, there must be an awareness of the international component and the concomitant implications.

Assuming a (b)(3) plaintiff class, thus governed by *Shutts*, absent class members whose identities are known would be entitled to notice and an opportunity to be heard, an opportunity to opt out, and interests adequately represented by the named plaintiff.¹³³ All of these protections, however, require additional precautions in transnational class actions.¹³⁴ Assuming a (b)(1) or (b)(2) class, the only mandatory due process protection currently afforded is that of

Jurisdiction: A Look at the Requirements for Obtaining Personal Jurisdiction in the Three Signatory Nations, 19 Loy. L.A. Int'l & Comp. L.J. 449, 456-65 (1997) (explaining differences in bases for personal jurisdiction in Mexico and Canada); Walter W. Heiser, A "Minimum Interest" Approach to Personal Jurisdiction, 35 Wake Forest L. Rev. 915, 957 n.205 (2000) ("[T]he United States and Europe have very different views as to the proper exercise of personal jurisdiction."); *id.* (noting that the United States is "more expansive with respect to assertions [of personal jurisdiction] based on general jurisdiction and transient jurisdiction"). For a discussion of every country's judicial system and personal jurisdiction requirements, see 1 Modern Legal System Cyclopedia (Kenneth Robert Redden ed., 1989).

133. *Shutts*, 472 U.S. at 812.

134. In other contexts, foreign citizens have been subject to reduced due process protections. See, e.g., *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (nonresident aliens seeking admittance to the United States are not entitled to the procedural protections of the Due Process Clause); *Fierro v. INS*, 81 F. Supp. 2d 167, 168 (D. Mass. 1999) ("In recent years, Congress has been busily 'cutting down' the procedural protections of our laws as they may relate to resident aliens, the better swiftly to deport those whom it considers undesirable due to certain prior criminal convictions."). However, reduced constitutional protection

is plainly inappropriate when determining limits on the exercise of judicial jurisdiction. As most courts have concluded, the full protection of the Due Process Clause should be available to foreign citizens summoned to defend themselves in United States courts. It would be unfair and ironic to hale an alien into an unfamiliar United States court, forcing him to litigate according to our procedures and laws, yet deny him the protections of the Due Process Clause on the grounds that he is an alien.

Born, *Reflections*, *supra* note 7, at 21-22.

In the context of personal jurisdiction, Professor Brilmayer has noted that the petition for certiorari in *Helicopteros* "specifically presented the question of whether the due process clause afforded less protection to alien nonresident defendants than to domestic ones. In ignoring that question completely, the [Supreme] Court implicitly answered it in the negative." Brilmayer, *American Federal System*, *supra* note 29, at 291 (emphasis omitted). In light of the host of issues implicated by the presence of non-U.S. claimants in class litigation, including the potential loss of property rights, see *infra* notes 195-220 and accompanying text, non-U.S. claimants necessarily are entitled to the same general due process protections as U.S. claimants—including notice, the opportunity to be heard, and adequacy of representation. See *Shutts*, 472 U.S. at 811-12. In addition, this Article asserts that non-U.S. claimants should be required to affirmatively opt into class litigation—rather than construing the failure to opt out as constituting consent—due to the unique concerns arising when non-U.S. claimants participate in class litigation. See *infra* notes 226-41 and accompanying text (discussing consent and the necessity of permitting non-U.S. claimants to affirmatively opt into class litigation).

adequate representation,¹³⁵ which, as one of the protections just noted, also presents additional considerations in the transnational context. Moreover, in transnational class litigation, additional legal, geographical, language, cultural, or logistical factors—including time differences, mail delays, and transportation difficulty and expense—may impact upon the practical realities of due process.

1. Notice

Due process requires that the class action notice “be the best practicable, ‘reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action The notice should describe the action and the plaintiffs’ rights in it.”¹³⁶ As a practical matter, notice consists of a legal notice mailed to potential class members. However,

[t]he Court’s inference of consent in *Shutts* depended upon the assumption that notice would communicate effectively to claimants their rights and options. Much of what lawyers write, however, including many class action notices, is incomprehensible to average citizens. The lawyerly concern for completeness and accuracy may conflict with the objective of intelligibility.¹³⁷

The notice usually is in small print, and typically is lengthy and detailed, often containing legal jargon and always containing legal references.¹³⁸ The notice is, in short, overwhelming, intimidating, and incomprehensible to many, perhaps most, of its recipients.¹³⁹

135. See *In re Louisiana-Pacific Corp. Derivative Litig.*, 705 A.2d 238, 240 (Del. Ch. 1997) (in (b)(1) and (b)(2) class actions, “the close identity of interests of the absent class members with those of the members before the court and satisfaction of the Subsection 23(a) criteria are sufficient to satisfy due process of law”).

136. *Shutts*, 472 U.S. at 812.

137. Miller & Crump, *supra* note 117, at 22.

138. See Judith Resnik, *Litigating and Settling Class Actions: The Prerequisites of Entry and Exit*, 30 U.C. Davis L. Rev. 835, 855 (1997) (“In the set of class actions the *F[federal] J[judicial] C[enter] Class Action Study* considered, . . . the notices that were provided often lacked important information and were jargon-filled . . .”). As this Article was going to press, proposed amendments to Rule 23 of the Federal Rules of Civil Procedure were pending and the “Class Action Fairness Act of 2003” had passed the House of Representatives. See *House Passes Class Action Fairness Act, Bill Would Expand Federal Court Jurisdiction*, 71 U.S.L.W. 2789, 2789–90 (June 17, 2003). One of the proposed amendments to Rule 23(c) would require “plain, easily understood language” in the class notice. See <http://www.uscourts.gov/rules/comment2002/8-01CV.pdf>, at 9 (last visited July 19, 2003). The proposed Class Action Fairness Act would create, among other provisions, 28 U.S.C. § 1715, which would require clearer and simpler language in any written notice concerning a proposed class action settlement. H.R. 1115, 108th Cong., 1st Sess. (June 12, 2003). Even if these proposals take effect, however, the problems for non-U.S. claimants concerning language and unfamiliarity with the class action device discussed *infra* will remain. See *infra* notes 142–45 and accompanying text (discussing language and unfamiliarity issues for non-U.S. claimants).

139. See Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under*

Faced with a piece of paper they do not understand, the vast majority of the recipients are not going to consult an attorney for advice. Nor are they going to take the time and effort to draft a letter opting out of the litigation. They are simply going to set the notice aside or throw it away without realizing the consequences of their inaction.¹⁴⁰ Indeed, it is

beyond the experience or expectation of reasonable citizens that the failure to respond to what looks like a slightly unusual piece of junk mail constitutes assent to the solicitation . . . by self-selected counsel desiring to represent the recipient If implied consent is to be derived solely from failure to respond to class notices, courts will have to be a good deal more vigilant than they have been in scrutinizing the content of these notices.¹⁴¹

As unintelligible as a legal notice may seem to a U.S. citizen, a foreign citizen is likely to find it even more so. Language issues can

Federal Rule 23, 39 Ariz. L. Rev. 461, 466 n.35 (1997) ("The likelihood that a class member will actually receive and comprehend the notice of the action is in every case very small."); Arthur R. Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 321 (1973) ("The sad truth is that notices issued by courts or attorneys typically are much too larded with legal jargon to be understood by the average citizen."); Miller & Crump, *supra* note 117, at 17 (observing that class action notices "are notoriously poorly understood"); Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 Colum. L. Rev. 1148, 1185 (1998) ("Class notices are complex, all too often uninformative, and misleading."); *id.* at 1186 (describing class action notices as "baroquely written"); Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. Rev. 74, 134 (1996) ("Our impression is that most [class action] notices are not comprehensible to the lay reader.").

A good illustration of this . . . is offered by the tetracycline cases. The Attorney General of North Carolina sent notice of the action to citizens of his state who had paid income taxes during a particular period. The theory underlying this procedure was sound enough. Given the wide use of the medication it was important to send notice to a broadly based list of citizens. Some of the responses are worth reading because they are symptomatic of the difficulty with the wording of most notices and reflect the problem of communicating to lay people about legal matters.

Dear Mr. Clerk: I have your notice that I owe you \$300 for selling drugs. I have never sold any drugs, especially those you have listed; but I have sold a little whiskey once in a while.

Dear Sir: I received this paper from you. I guess I really don't understand it, but if I have been given one of those drugs, nobody told me why. If it means what I think it does, I have not been with a man in nine years.

Dear Sir: I received your pamphlet on drugs, which I think will be of great value to me in the future. I am unable to attend your class, however.

Dear Mr. Attorney General: I am sorry to say this, but you have the wrong John Doe, because in 1954, I wasn't but three years old and didn't even have a name. Mother named me when I got my driver's license. Up to then, they just called me Baby Doe.

Miller, *supra*, at 321-22.

140. See Miller & Crump, *supra* note 117, at 17 ("[L]ay recipients [of class action notices] may be tempted to throw them away because they give the false impression that legal effects can be avoided by inaction.").

141. Monaghan, *supra* note 139, at 1185-86.

arise when a non-English speaker receives a class action notice printed in English.¹⁴² Language issues can also arise even when the class action notice is printed in the foreign claimant's native language. "As anyone who has ever tried to translate a document from a foreign language knows, a literal word-by-word, or even sentence-by-sentence, translation of a foreign document will at best confuse . . . and at worst produce nonsense."¹⁴³

Unfamiliarity with the legal system generally, and with class actions in particular, can also interfere with the foreign claimant's comprehension of the class action notice.¹⁴⁴ Class actions exist in few jurisdictions outside the United States, so the class action concept may be unknown to the foreign claimant.¹⁴⁵ Thus, potential language issues, unfamiliarity with the U.S. legal system, and the natural human tendency to ignore that which we do not understand, all combine to render notice potentially ineffectual for foreign claimants.

142. Indeed, confusion can result even when all are speaking the same language: Notwithstanding the fact that Americans, Australians and the British think they speak the same language, some interesting problems can arise before it is realised [*sic*] that there are some very important differences. Some words have a different meaning, some words are simply not understood, and some expressions or language considered acceptable in one country may be absolutely taboo in another.

S. Stuart Clark, *Viewing the Global Attack on the Global Economy from Australia*, 69 Def. Couns. J. 185, 192 (2002).

143. James A. Fanto, *The Absence of Cross-Cultural Communication: SEC Mandatory Disclosure and Foreign Corporate Governance*, 17 Nw. J. Int'l L. & Bus. 119, 186 (1996); see also Kizuki Kuzuhara, *Contracting Between a Japanese Enterprise and an American Enterprise: The Differences in the Importance of Written Documents as the Final Agreement in the United States and Japan*, 3 ILSA J. Int'l & Comp. L. 57, 64-65 (1996).

[G]iven the hierarchy of languages in the context of international business transactions, those who have English as the native language would have an advantage over other parties unless the courts are willing to consider the cultural differences in societies. What is also troublesome, is that in the language context, some English words are used *as is* in Japanese which do not have precisely the same meaning. For example, the word *mansion* in English would describe a large expensive home. On the other hand, the word *mansion* used *as is* in Japanese would describe something close to an apartment house or a tenement house.

Id.

144. See John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 Am. U. L. Rev. 1567, 1604 (1993) (noting that in England, "[i]njured people, viewed as a group, are inexperienced in all aspects of formal and informal legal proceedings"); see also *id.* at 1601-13, 1613-17 (discussing differences between the U.S. legal system and the legal systems of England and Australia, respectively).

145. See Richard H. Dreyfuss, *Class Action Judgment Enforcement in Italy: Procedural "Due Process" Requirements*, 10 Tul. J. Int'l & Comp. L. 5, 7-8 (2002) ("[C]lass action devices can be found in very few foreign jurisdictions."); see also *supra* notes 5, 131 (same).

2. Opportunity to be Heard

"The plaintiff must receive . . . an opportunity to be heard and participate in the litigation, whether in person or through counsel."¹⁴⁶ However, even for those recipients who are able to decipher the class action notice, providing a foreign claimant with notice of the pending class litigation does not immediately translate into an opportunity to be heard. Retaining counsel in the location where the class litigation is proceeding can be both difficult and expensive for a U.S. citizen living within the country, but handling such a matter from outside the U.S. is exponentially more so.¹⁴⁷ Geographical distance from the courthouse, perhaps measured by oceans and continents—as well as time zone differences, transportation expense, communication delays, and other difficulties¹⁴⁸—may render the ability to monitor and participate in the class litigation nearly impossible. Attending court proceedings, raising potential objections, consulting with local counsel—even simply trying to stay informed of the litigation's progress—are all particularly burdensome for foreign class members.¹⁴⁹

The opportunity to opt out and adequacy of representation are interrelated. In the class action context, the opportunity to opt out protects a plaintiff's interest in the individual control of his or her litigation,¹⁵⁰ as well as protecting against distant forum abuse.¹⁵¹

146. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

147. *See Born*, International Civil Litigation, *supra* note 6, at 93.

Assertions of jurisdiction over foreign defendants often raise different issues than assertions of jurisdiction over U.S. defendants from other states of the Union. The inconvenience that results from requiring a defendant (or plaintiff) to litigate in a foreign country is often greater than that resulting from requiring an American to litigate in another part of the United States. Major differences in procedural and substantive rules—such as the scope of discovery, the existence of fee-shifting provisions or contingent fee arrangements, and the right to a jury trial—are also more likely in the international context. Moreover, a state court's assertion of judicial jurisdiction over residents of another U.S. state virtually never provokes retaliatory measures; in contrast, assertions of jurisdiction over *foreign* defendants can result in retaliation from foreign nations.

Id.

148. *See, e.g., Clark*, *supra* note 142, at 191 (noting "the extraordinary distances involved and the time zone differences" between the United States and Australia).

149. *See id.* at 192.

Time is always a problem. Not just a lack of time to do what must be done but a lack of a common time to have a telephone conference. It is bad enough when only two cities are involved, say New York and Sydney. At least, this telephone conference can be scheduled at the beginning and the end of each participant's day. Add a participant in Europe, however, and someone will be out of bed very early or have [to] stay up very late . . .

Id.

150. Fed. R. Civ. P. 23(c)(2) (Advisory Committee Note) (characterizing the right to opt out as reflecting the strong interest of individuals in pursuing their own litigation); *see John E. Kennedy, Class Actions: The Right to Opt Out*, 25 *Ariz. L. Rev.*

Adequate representation goes to the protection of a plaintiff's interest in this particular class litigation should the plaintiff elect not to opt out but instead to remain in the class. Thus, adequate representation protects the plaintiff who elects to remain in the class, while opting out protects the plaintiff who would prefer not to remain in the class.

3. Adequate Representation

"[T]he Due Process Clause . . . requires that the named plaintiff at all times adequately represent the interests of the absent class members."¹⁵² Indeed, "[a]dequacy of representation, rather than notice, is the touchstone of due process in a class action, especially one seeking primarily injunctive or declaratory relief for the class."¹⁵³ This benchmark protection¹⁵⁴ is the protection least likely to exist when class actions include citizens of other countries. The problems inherent in adequacy of representation¹⁵⁵ are exacerbated when class actions cross national borders.

Adequacy of representation bears heavy burdens in class litigation. To satisfy due process, the named class representatives and class counsel must adequately represent the absent class members.¹⁵⁶ If

3, 79 (1983) ("The creation of the class member's power—duty of exclusion, or right to opt out, is a formal recognition of a person's interest in selecting counsel and through this choice, in controlling one's own litigation.").

151. See Miller & Crump, *supra* note 117, at 52.

152. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985).

153. 2 Newberg & Conte, *supra* note 25, § 11.53, at 11-127.

154. See *Hansberry v. Lee*, 311 U.S. 32, 43 (1940).

[S]o far as it can be said that the members of the class who are present are, by generally recognized rules of law, entitled to stand in judgment for those who are not, we may assume for present purposes that such procedure affords a protection to the parties who are represented though absent, which would satisfy the requirements of due process and full faith and credit.

Id. at 43.

155. See, e.g., Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 Ind. L.J. 597, 600-01 (1987).

Whenever a self-designated class representative appears before a court, there is a risk that the court will permit the action to proceed as a class action even though significant differences remain between the representative and the unnamed class members. There is also a danger that the person with the greatest stake in the litigation will not be a class member at all, but will be instead the class lawyer.

Id.

156. See *Hansberry*, 311 U.S. at 43-44 (finding lack of due process due to inadequacy of representation); see also Howard M. Downs, *Federal Class Actions: Due Process by Adequacy of Representation (Identity of Claims) and the Impact of General Telephone v. Falcon*, 54 Ohio St. L.J. 607, 635 (1993) (noting that adequacy of representation serves to provide due process protection for absent class members); Elizabeth R. Kaczynski, *The Inclusion of Future Members in Rule 23(b)(2) Class Actions*, 85 Colum. L. Rev. 397, 400 (1985) (adequacy of representation and other Rule 23(a) requirements "are considered an adequate substitute for . . . traditional due process safeguards"); Nancy Morawetz, *Underinclusive Class Actions*, 71 N.Y.U. L. Rev. 402, 424 (1996) ("[Rule 23] reflects due-process concerns through its

absent class members have not been adequately represented, they have been denied due process and cannot be bound by the class judgment. Although “the two factors that are now predominantly recognized as the basic guidelines for the Rule 23(a)(4) prerequisite are (1) absence of conflict and (2) assurance of vigorous prosecution,”¹⁵⁷ the “satisfaction of the typicality test is [also] an integral element of adequate representation.”¹⁵⁸

The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest.¹⁵⁹

Similar to the overlapping of the Rule 23(a) prerequisites of typicality and adequate representation is the approach described by one prominent commentator as “resembl[ing] the *lack of conflict* approach.”¹⁶⁰

Courts have required “identity of interests,” “coextensive interests,” “coincidence of interests,” “common interests,” “compatible interests” and “shared issues and interests.” . . . To some extent, however, terms such as *identity*, *coextensiveness*, and *coincidence* may imply too strict a standard. *Identity* certainly goes too far, as does *coincidence*, which is nearly synonymous with *identity*, and *coextensiveness* which merely adds to the confusion with the Rule 23(a)(3) and (a)(4) prerequisites because it has sometimes been used as a test for typicality. *Shared interests*, on the other hand, does not go far enough, because it fails to account for a plaintiff who shares some interests with the class (typicality) but nevertheless has conflicts with class members. Moreover, a shared interest automatically results from satisfaction of the Rule 23(a)(3) typicality prerequisite. Adequate representation demands more. Lack of conflict remains the most direct approach for determining whether a plaintiff is an adequate representative for the class.¹⁶¹

Looking initially at the “vigorous prosecution” component, which is one of the basic guidelines in evaluating the adequacy of

requirement of adequacy of representation.”); Alan B. Morrison, *The Inadequate Search for “Adequacy” in Class Actions: A Brief Reply to Professors Kahan and Silberman*, 73 N.Y.U. L. Rev. 1179, 1179 (1998) (adequacy of representation is an essential element of due process).

157. 1 Newberg & Conte, *supra* note 25, § 3.22, at 3–126.

158. *Id.* at 3–128.

159. General Tel. Co. v. Falcon, 457 U.S. 147, 157 n.13 (1982).

160. 1 Newberg & Conte, *supra* note 25, § 3.23, at 3–131.

161. *Id.* at 3–131 to 3–132.

representation,¹⁶² the shortcomings become apparent. Two factors that courts commonly consider are class counsel's experience and the existence of conflicts of interest.¹⁶³ Turning first to class counsel's experience, this very factor would tend to preclude the appointment of a Canadian attorney as one of the class counsel, because class actions have existed in Canada for a relatively short period.¹⁶⁴ The experience factor is even more problematic if the foreign counsel practices in a country with no class action device. Yet there is a very real danger that if all class counsel are U.S. attorneys, class counsel will not fight hard enough for non-U.S. interests.

This danger is not merely hypothetical. A \$3 billion global class action settlement initially announced in 1994 for damages suffered from silicone breast implants allocated only *three* percent of the settlement fund to non-U.S. citizens—who constituted *fifty* percent of the class.¹⁶⁵ After this initial settlement fell through, a subsequent settlement was reached, which although better, still gave non-U.S. claimants only *half* of that awarded to U.S. claimants.¹⁶⁶ Thus, the

162. See *supra* note 157 and accompanying text (describing adequacy of representation).

163. See, e.g., *Malchman v. Davis*, 706 F.2d 426, 433 (2d Cir. 1983) (considering experience and any "coercion or collusion"); see also Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 Ariz. L. Rev. 615, 638 (1997) (noting that in class litigation, courts examine whether class counsel is experienced and free of conflicts of interest). Proposed amendments to Rule 23 of the Federal Rules of Civil Procedure would add a new subsection (g), which would require a court to consider, among other things, an attorney's experience in appointing class counsel, as well as any other matter pertinent to counsel's ability to "fairly and adequately represent the interests of the class." See <http://www.uscourts.gov/rules/comment2002/8-01CV.pdf>, at 13 (last visited July 19, 2003).

164. *Class Proceedings Act*, R.S.B.C. 1996, c. 50; see also David A. Klein, *Class Action Litigation: Handling Cases Where the Wrong Crosses National Boundaries*, 1 ATLA Annual Convention Reference Materials 253, 265 (2001) (noting that one method for "dealing with cross-border class action litigation is for Canadian plaintiffs' counsel to collaborate with U.S. counsel").

165. See Klein, *supra* note 164, at 259.

Even when Canadians are successful in obtaining inclusion in a U.S. class action, the results may be less than Canadian class members were hoping for. In 1994, a \$3 billion global class action settlement was announced for silicone breast implant victims. Unfortunately, only 3 percent of the settlement fund had been allocated for the 50 percent of class members who resided outside the United States.

Id.; see also Mike McKee, *Complaints Threaten Settlement: Foreigners Feel Cheated by Breast-Implant Deal*, Legal Times, Aug. 29, 1994, at 2 (noting that "the settlement allocates foreign claimants only 3 percent"); Mike McKee, *Judge Modifies Breast-Implant Settlement*, Legal Times, Sept. 12, 1994, at 14 (reporting that a proposed settlement in the breast-implant case imposed a cap of 3 percent of the settlement funds for damages caused to non-U.S. claimants); *id.* ("[The Alabama federal judge approving a subsequent breast-implant settlement] said that while foreign women might not receive as much compensation as Americans, they would be guaranteed no less than 40 percent of the amount given U.S. claimants, but no more than 90 percent.").

166. See Klein, *supra* note 164, at 259.

notion that adequacy of representation, with respect to class counsel, is satisfied by experience alone is erroneous.

With respect to the second factor, that of conflicts of interest, many would argue that conflicts of interest are inherent in class litigation.¹⁶⁷ Typically, class members know little about, and have little control over, the decision-making process whereby an attorney is selected as class counsel. Moreover, once appointed, absent class members cannot discharge class counsel. Indeed, even the class representatives cannot unilaterally fire class counsel; only the court may discharge class counsel.¹⁶⁸

Similarly, the factors courts evaluate with respect to the adequacy of the named class representative—typicality and conflicts of interest—tend to fall short when the class is transnational. When evaluating typicality, courts tend to focus on claim-based factors, such as whether the claims are similar in fact, in legal theory, and in the resulting harm.¹⁶⁹ Although an appropriate starting point, this

In the end, the settlement collapsed as a result of being overwhelmed with claims for compensation and the largest defendant, Dow Corning Corporation, went into Chapter 11 bankruptcy protection. The remaining defendants created a new settlement package that gave foreign claimants about half of the amounts paid to U.S. residents.

Id.

The proposed Class Action Fairness Act of 2003, discussed in note 138, would create a new section, 28 U.S.C. § 1713, prohibiting courts from approving a proposed settlement “that provides for the payment of greater sums to some class members than to others solely on the basis that the class members to whom the greater sums are to be paid are located in closer geographic proximity to the court.” H.R. 1115, 108th Cong., 1st Sess. (June 12, 2003). Although the provision appears drafted with U.S. claimants in mind, the provision, if it becomes law, could be used in a manner that might prevent the kind of unfairness to non-U.S. claimants that occurred in the silicone breast implant settlement.

167. See, e.g., John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1367–83 (1995) (identifying potential conflicts of interest between class counsel and class members); Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 Brook. L. Rev. 961, 1048–50 (1993) (discussing conflicting interests in mass personal injury litigation); Kahan & Silberman, *supra* note 40, at 775 (“[T]he danger of abuse in class actions cannot be eliminated without eliminating class actions themselves.”); Mary Kay Kane, *Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer*, 66 Tex. L. Rev. 385, 395–96 (1987) (identifying conflicts between counsel and class members); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 Cornell L. Rev. 1045, 1123–27 (1995) (discussing conflicts and collusive settlements).

168. See, e.g., *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1077–79 (2d Cir. 1995) (decision to discharge class counsel rests with the court, not with the class representatives); see also Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 Duke J. Comp. & Int’l L. 179, 189 (2001) [hereinafter Hensler, *Revisiting the Monster*] (noting that “[p]laintiffs have little control over their lawyer-agents”).

169. See *Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996). [Typicality is] fairly easily met so long as other class members have claims similar to the named plaintiff. . . . Factual variations in the individual claims will not normally preclude class certification if the claim arises from the

analysis does not encompass the full range of considerations necessary when the wrong has crossed national boundaries. Indeed, the existence of different legal regimes alone can destroy typicality. The presence of class members who are merely from different states can create typicality problems, much less class members from different countries.¹⁷⁰ The perspective of the claimant is also important to a typicality determination. Cultural mores, for example, differ among nations generally,¹⁷¹ and may specifically have an impact on a foreign claimant's reaction to litigation.¹⁷²

As is evident from the initial global settlement involving silicone breast implants,¹⁷³ there is a danger that the voices and interests of non-U.S. class members can be largely overlooked. In addition to the natural tendency to look out for one's own interests,¹⁷⁴ there is a potential for prejudices or biases against "foreigners,"¹⁷⁵ leading to the

same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory.

Id. (internal citations and quotation marks omitted); see also R. Chris Heck, Comment, *Conflict and Aggregation: Appointing Individual Investors as Sole Lead Plaintiffs Under the PSLRA*, 66 U. Chi. L. Rev. 1199, 1208 (1999) ("Typicality requires that the class representative have claims based on the same legal theories as those of the class . . .").

170. See, e.g., *In re Paxil Litig.*, 212 F.R.D. 539, 542 (C.D. Cal. 2003) (finding plaintiffs failed to show that differences in state laws within each subclass was nonmaterial); *Coca-Cola Bottling Co. of Elizabethtown v. Coca-Cola Co.*, 98 F.R.D. 254, 266 (D. Del. 1983) (finding no typicality where all claims involved the same legal theory, but the claims implicated the contract laws of 30 different states); Layne S. Kruse & Joy M. Soloway, *Should a Court Certify Class of Foreign Residents Seeking Damages in U.S.?*, N.Y.L.J., Nov. 8, 1999, at S7 (approaching the issue from the perspective of predominance rather than typicality, reporting that "[i]f nationwide classes give rise to choice of law issues that defeat the predominance requirement, then the effect of choice of law issues is most surely exacerbated in a multi-national class").

171. See, e.g., Clark, *supra* note 142, at 191 ("For those who are lucky . . . enough to become involved in multinational litigation . . . , a number of non-legal issues will soon arise, among them: (1) time and distance and (2) language and culture."); Fanto, *supra* note 143, at 123-24 ("[A]n outsider may find cultural differences, characteristics and pressures often difficult to understand and sometimes even to recognize as differences."); Kuzuhara, *supra* note 143, at 89-90 (discussing differences between the cultures of Japan and the United States).

172. See, e.g., Kuzuhara, *supra* note 143, at 58 ("[T]he typical American business person says the Japanese approach to business negotiations wastes time. Conversely, the Japanese complain about the American dry approach to business deals."); Seymour J. Rubin, *The Interest Group on Avoidance and Resolution of International Economic Disputes*, 83 Am. Soc'y Int'l L. Proc. 152, 153 (1989) (noting that many non-U.S. cultures, including European cultures, "prefer that disputes be settled without recourse to litigation, by discussion seeking to reach agreement").

173. See *supra* notes 165-66 and accompanying text (discussing disparities in proposed silicone breast implant settlement in awards to U.S. and non-U.S. claimants).

174. See John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 Harv. L. Rev. 511, 585 (2000) ("We have reason to suspect that citizens are more likely to protect their own interests than those of foreigners . . .").

175. See Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and*

likelihood that non-U.S. claimants' interests will be discounted or disregarded.¹⁷⁶ This difference in perspective may both affect the typicality determination and present the opportunity for a conflict of interest. Class representatives must thus recognize, and compensate for, this disparity in bargaining power in order to achieve adequacy of representation.

In addition to concerns about the adequacy of representation, the presence of foreign claimants in a class action lawsuit also raises concerns with respect to opting out of the class litigation.

4. Opportunity to Opt Out

"[D]ue process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court."¹⁷⁷ Providing an opportunity to opt out of class litigation is meant to accord two mutually exclusive protections: (1) the ability to withdraw from the class litigation and thereby retain individual control, and (2) the ability to decline the opportunity for exclusion and thereby impliedly consent to personal jurisdiction.¹⁷⁸ However, both of these protections falter for absent class members in another country.

Representative litigation is a relatively new development in Canada,¹⁷⁹ and does not exist at all in many other countries.¹⁸⁰ Thus, as an initial matter, the wording of an opt out notice should be

Modern Justifications for Federal Jurisdiction Over Disputes Involving Noncitizens, 21 Yale J. Int'l L. 1, 35 (1996) ("Bias against noncitizens unfortunately remains to this day."); Guadalupe T. Luna, *LatCrit VI, America Latina and Jurisprudential Associations*, 54 Rutgers L. Rev. 803, 814 (2002) ("Border issues and xenophobia . . . are difficult to reconcile with declarations that the various nations are in parity with the United States."); Anthony D. Romero, *In Defense of Liberty at a Time of National Emergency*, 29 Hum. Rts. 16, 17 (2002) (noting the "popular fear of foreigners").

176. See Julie Roin, *Competition and Evasion: Another Perspective on International Tax Competition*, 89 Geo. L.J. 543, 581 (2001) (noting foreigners' "status as outsiders"); see also *id.* at 583 ("Whether conscious or not, xenophobia is a widespread trait; aliens are generally regarded as sufficiently 'other' that their interests are not accorded the same degree of respect as those of most nationals. These disregarded interests include financial interests . . ."); Ann Davis, *Perceptions Integral Part of Death Suits*, Nat'l L.J., Oct. 12, 1992, at 8 (reporting that plaintiffs' attorneys in one lawsuit complained, "[t]he Defendant mistakenly believes the value of [the decedent's] life must be discounted because he was not a natural born U.S. citizen").

177. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

178. *But see* Miller & Crump, *supra* note 117, at 17 (noting that a court lacking power over an individual should not have the power to attach adverse legal consequences to that individual's failure to answer a communication from that court).

179. *Class Proceedings Act*, R.S.B.C. 1996, c. 50; see Garry D. Watson, *Class Actions: The Canadian Experience*, 11 Duke J. Comp. & Int'l L. 269 (2001).

180. See *supra* note 131 and accompanying text (discussing the unique nature of the class action device).

especially clear and straightforward when any absent class members are citizens of another country due to the likely unfamiliarity of such persons with the concept of class action litigation. Without careful and clear language, the non-U.S. recipient is unlikely to understand its significance, and therefore is more likely merely to discard it, thus frustrating both purposes of the opt out notice. If the notice is not understood, an absent class member will not be able to opt out from the existing class litigation, thereby remaining in the class, although not necessarily by choice, which foils the notion of implied consent to the court's jurisdiction.¹⁸¹

It is with respect to the failure to opt out as constituting consent that an even greater danger lies for non-U.S. absent class members. Consent to personal jurisdiction is often a legal fiction under the best of circumstances. The hapless defendant who answers a complaint without challenging personal jurisdiction has consented to such jurisdiction without knowing he has done so—a far cry from an affirmative agreement.¹⁸² When consent is predicated upon a claimant's failure to respond to a lengthy legal notice generated by a far-away foreign court in connection with a potentially unfamiliar type of legal proceeding, the unfairness is apparent.¹⁸³

A nationwide class raises interstate comity concerns, but at least all of the claimants are from the United States, and are bound by the same federal Constitution and the same federal legal system. In reaching across national boundaries and attempting to bind foreign claimants, U.S. courts potentially take away legal rights from foreign claimants. Under such circumstances—with claimants from another country, who may speak another language, who may be unfamiliar with the U.S. legal system, and who, depending on the country, may

181. The involuntary plaintiff doctrine permits the joinder of a party over whom there is otherwise no personal jurisdiction, and binds that party under principles of *res judicata*. See Fed. R. Civ. P. 19(a) ("If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff."). The involuntary plaintiff doctrine does not apply to bind absent plaintiff class members for two reasons. First, the doctrine is largely restricted to patent claims. See June F. Entman, *Compulsory Joinder of Compensating Insurers: Federal Rule of Civil Procedure 19 and the Role of Substantive Law*, 45 Case W. Res. L. Rev. 1, 27 n.108 (1994) (involuntary plaintiff doctrine has been applied in patent claims brought by a licensee). Second, and more importantly, the involuntary plaintiff doctrine is applied only where the party seeking to invoke the doctrine is entitled to use the non-party's name to prosecute the action. See *id.* (noting "patent claims brought by a licensee, in which the absentee (owner of the patent) has a duty to join in the suit or to permit use of his name"); see also *Indep. Wireless Tel. Co. v. Radio Corp. of Am.*, 269 U.S. 459, 467 (1926) (noting that "[a]ny rights of the licensee must be enforced through or in the name of the owner of the patent"). The class action context presents no similar class entitlement to use the absentees' names in order to pursue the class litigation.

182. See *infra* notes 226–32 and accompanying text (discussing inadvertent consent to personal jurisdiction).

183. See Monaghan, *supra* note 139, at 1154 ("Indeed, as a factual matter, [class action] notices are consciously designed to encourage nonappearance.").

have had less formal schooling than most U.S. citizens¹⁸⁴—the notion of failing to respond to a lengthy legal notice as constituting consent falls.

Different issues arise when the class is one of defendants rather than plaintiffs.

B. Defendant Classes

In authorizing both plaintiff and defendant classes, Rule 23 does not create any differentiations between the two.¹⁸⁵ Defendant class actions are relatively uncommon,¹⁸⁶ but pose unusual due process concerns in that the plaintiffs select the representative for the defendant class.¹⁸⁷ This creates an opportunity for collusion as well as a temptation to select a weak defendant as the representative.¹⁸⁸

One prominent commentator has asserted that due process concerns arise in a more limited fashion in defendant class actions, and moreover, personal jurisdiction issues tend to be of lesser moment because individual issues typically remain, requiring collateral proceedings.

[T]he determination of the amount of monetary relief against each class member [usually] will raise some individual issues that cannot be resolved on a common basis in a class proceeding. In addition, the defendant must be afforded an opportunity to present unique defenses. Thus, independent proceedings will be required to establish the amount of monetary relief to which the plaintiff is entitled to recover against any particular defendant class member. A specific monetary judgment against individual defendant class members is not available on a class action basis, except to the limited extent of developing a common formula or guideline that will serve as the measure of damages in proceedings against individual class members. Personal jurisdiction over each member is required before an effective personal judgment can be reached against that member individually, so that collateral proceedings potentially in a variety of forums will generally be required

184. See, e.g., Barbara Ferguson, Comment, *The Legal and Political Challenges to Academic Eligibility Requirements*, 2 Marq. Sports L.J. 103, 105 (1991) (noting that America traditionally has had a higher educational attainment than most other countries).

185. Fed. R. Civ. P. 23; see also Debra J. Gross, Comment, *Mandatory Notice and Defendant Class Actions: Resolving the Paradox of Identity Between Plaintiffs and Defendants*, 40 Emory L.J. 611, 615 (1991) ("It is clear that Rule 23 both contemplates and permits defendant class actions. Unfortunately, the rule does not differentiate between plaintiff and defendant classes in terms of application or treatment . . .").

186. See Simpson & Perra, *supra* note 34, at 1319 (noting "the sparse law governing defendant class action lawsuits"); Wood, *supra* note 155, at 608 ("Common question class actions for damages against defendant classes are exceedingly rare, for obvious reasons.").

187. See Note, *Defendant Class Actions*, 91 Harv. L. Rev. 630, 640 (1978).

188. 1 Newberg & Conte, *supra* note 25, § 4.59, at 4-223 to 4-227.

subsequent to a finding of liability against a class of defendants in order for the plaintiff to realize any judgment for monetary relief against any particular member of a defendant class. An aggregate monetary judgment against a defendant class is theoretically possible, but the plaintiff cannot execute on even that aggregate judgment except in individual proceedings against each class member in a forum that has personal jurisdiction over the particular class member involved and where each class member will be given an opportunity to raise any unique defenses it has to avoid liability or damages in whole or in part.¹⁸⁹

Shutts expressly declined to address personal jurisdiction issues in the context of defendant class actions.¹⁹⁰ As noted previously, defendant class actions are rare, and typically would involve a more discrete number of class members.¹⁹¹ However, there is no reason to believe that a court has the power to issue a binding judgment upon a defendant—even if that defendant is part of a defendant class—where that defendant has no nexus to the forum and her purported consent to suit is based on her failure to opt out of the class. Accordingly, there is no reason to treat members of a defendant class any differently than a defendant in a non-class lawsuit—meaning that minimum contacts with the forum state would be necessary in order to bind the defendant class member to the judgment, and if minimum contacts were not established, the class judgment would be unenforceable with respect to that defendant.¹⁹² This conclusion is consistent with the Supreme Court's approach to foreign litigants in non-class litigation in *Asahi Metal Industry Co. v. Superior Court*,¹⁹³ discussed in the next section.

189. *Id.* § 4.48, at 4-193 to 4-194 (citations omitted); see also Faulk, *supra* note 131, at 227.

[Although i]t is questionable whether American class action judgments are actually enforceable against defendants' assets located outside of the United States, the adoption of American-style class action rules by other nations . . . may render such judgments enforceable, at least in part. If such rules are adopted, foreign defendants may no longer be able to resist enforcement by arguing that the American class action is fatally dissimilar and fundamentally contrary to their homeland's judicial procedures and public policies. Indeed, even without formal adoption of class action principles in other nations, American class action awards may soon be rendered enforceable by treaty. For example, enforcement might ultimately be permitted by the Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters—a critical agreement that has, to date, not yet been approved.

Id.

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

191. See *supra* note 186 and accompanying text (discussing the paucity of defendant class actions).

192. See Wood, *supra* note 155, at 608 (“[The Supreme Court in *Shutts*] left the strong impression that nothing less than a full ‘minimum contacts’ showing (or unambiguous consent) plus notice would be required to support a valid exercise of adjudicatory jurisdiction over defendant class members.”).

193. 480 U.S. 102 (1987).

III. A JURISDICTIONAL ANALYSIS FOR TRANSNATIONAL CLASS ACTIONS

Having identified some of the concerns inherent in transnational class actions, this section proposes a jurisdictional analysis for such class litigation, as well as some practical considerations. This proposal maintains the distinction created in *Shutts* between (b)(3) classes as contrasted with (b)(1) or (b)(2) classes. Moreover, this proposal is aimed primarily at trial judges overseeing class litigation, rather than counsel, because the procedural validity of class action litigation largely rests with the level of oversight provided by the trial court.¹⁹⁴

A. Personal Jurisdiction in Transnational Class Actions

Phillips Petroleum Co. v. Shutts did not discuss potential cautions in asserting personal jurisdiction over a non-U.S. entity, and apparently this issue was not raised by the parties, despite the existence of foreign claimants within the class.¹⁹⁵ After noting the presence of class members from "several foreign countries" in the opening paragraph,¹⁹⁶ the Court never again mentioned the foreign claimants. Instead, *Shutts* focused on the prerequisites for personal jurisdiction over absent plaintiff class members without distinguishing among or between U.S. states and foreign nations, or between U.S. claimants and non-U.S. claimants. Claimants from Oklahoma and claimants from Canada were treated in exactly the same manner. Although the Supreme Court's failure to discuss this issue could be construed as meaning that no due process distinctions exist between U.S. and non-U.S. claimants, the Court's narrow and potentially misleading view of class actions demands further examination. Whatever the rationalization for viewing the failure to opt out as constructive consent, and whatever the benefits to a maximum aggregation of claims and parties, the justifications for substituted consent in a U.S. class action do not hold in class actions involving non-U.S. citizens.

The United States Supreme Court has noted that a party's status as a non-U.S. entity is a factor in determining whether the exercise of personal jurisdiction is reasonable, although, in general, "the same limitations on personal jurisdiction . . . apply to foreigners as are applied to U.S. citizens."¹⁹⁷ Eight Justices in *Asahi Metal Industry Co.*

194. See Kahan & Silberman, *supra* note 40, at 781–82 ("[T]he principal burden to monitor class counsel falls on the court considering the settlement. The judge . . . who approves a settlement and makes a finding of adequate representation (as well as substantive fairness), will be in a position—in fact, is required—to find out whether class counsel up to this point adequately represented the class members.").

195. *Shutts*, 472 U.S. at 799.

196. *Id.* at 799.

197. Gary B. Born & David Westin, *International Civil Litigation in United States Courts* 92 (2d ed. 1992); see also Brilmayer, *American Federal System*, *supra* note 29, at 290 (noting that under *Helicopteros*, "nonresident alien defendants receive the

*v. Superior Court*¹⁹⁸ agreed that "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders."¹⁹⁹ Although the Court left the impact of the participation of a non-U.S. entity in a lawsuit to a case by case determination, the Court left no doubt that crossing national borders introduces the necessity for additional caution in the assertion of personal jurisdiction:

[A] court [must] consider the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by the [forum state]. The procedural and substantive interests of other nations in a state court's assertion of jurisdiction over an alien defendant will differ from case to case. In every case, however, those interests, as well as the Federal Government's interest in its foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State. "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."²⁰⁰

Thus, in evaluating minimum contacts sufficient for personal jurisdiction in a context involving non-U.S. entities, none of the Justices in *Asahi* was willing to assert personal jurisdiction over the non-U.S. defendant, although for different reasons.²⁰¹ Of course, such a reluctance to find jurisdiction would not exist in all cases involving a foreign defendant—*Asahi* presented the unusual situation of a cross-complaint for indemnification remaining after the U.S. plaintiff had settled and dismissed all of his original claims against all of the original defendants, where the parties to the cross-complaint were both non-U.S. corporations.²⁰²

same protection from the long arm of a state court as residents of other states do").

198. 480 U.S. 102 (1987).

199. *Id.* at 114.

200. *Asahi*, 480 U.S. at 115 (quoting *United States v. First Nat'l City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)).

201. See *Asahi*, 480 U.S. at 116 (four Justices conclude that the non-U.S. defendant did not have sufficient minimum contacts with the forum state); *id.* (four Justices conclude that although the non-U.S. defendant had minimum contacts with the forum state, exercising personal jurisdiction would not comport with fair play and substantial justice); *id.* at 121–22 (three Justices state that because exercising personal jurisdiction over the non-U.S. defendant in this case would be "unreasonable and unfair," it was unnecessary to examine the defendant's contacts with the forum state).

202. *Id.* at 106; see also *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982) (upholding assertion of personal jurisdiction over fourteen foreign defendants); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952) (applying *International Shoe*'s minimum contacts test to a Philippines corporation and concluding that asserting personal jurisdiction over the corporation would not violate due process).

The Supreme Court has amply illustrated that in non-class litigation, traditional notions of personal jurisdiction, as manifested through minimum contacts with the forum state, govern cases involving foreign, as well as domestic, litigants.²⁰³ In light of the additional concerns articulated in *Asahi* regarding reasonableness when personal jurisdiction is asserted over a foreign defendant, similar concerns should hold in class actions involving foreign claimants, whether plaintiffs or defendants.²⁰⁴

If a foreign claimant has minimum contacts with the forum state, and if the court concludes that exercising personal jurisdiction over the foreign claimant is reasonable, the court would have the power in a traditional non-class lawsuit to enter a binding judgment with respect to that claimant (assuming, of course, that the claimant was provided with notice and an opportunity to be heard). Some commentators have suggested that, in the class action context, if traditional minimum contacts exist, the court need not provide an opportunity to opt out because personal jurisdiction thereby exists, and consent is thus unnecessary.²⁰⁵ This Article disagrees with such an approach, at least when the class action includes class members from other nations.

If the class action includes foreign claimants, additional due process protections may be necessary as a means of ensuring that the assertion

203. See, e.g., *Perkins*, 342 U.S. at 444–45.

[I]f an authorized representative of a foreign corporation be physically present in the state of the forum and be there engaged in activities appropriate to accepting service or receiving notice on its behalf, we recognize that there is no unfairness in subjecting that corporation to the jurisdiction of the courts of that state through such service of process upon that representative. This has been squarely held to be so in a proceeding *in personam* against such a corporation, at least in relation to a cause of action arising out of the corporation's activities within the state of the forum. . . . The essence of the issue here, at the constitutional level, is a like one of general fairness to the corporation. Appropriate tests for that are discussed in *International Shoe* The amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of that state are to be determined in each case.

Id.

For an argument that international law should apply to assertions of personal jurisdiction over a foreign litigant, see Strauss, *supra* note 7, at 373; see also Born, *Reflections*, *supra* note 7, at 1 (arguing for a modification of due process limitations on personal jurisdiction in cases involving foreign defendants).

204. See Wood, *supra* note 155, at 605.

There should be nothing shocking about suggesting that the way in which the due process rights of the absentees will be protected will vary from case to case, and from class type to class type. The court's judicial jurisdiction will also vary, depending on the relationship between the adjudicating state and the class that the representative is proposing to bring before the court.

Id.

205. See, e.g., Miller & Crump, *supra* note 117, at 31–32.

of personal jurisdiction is reasonable.²⁰⁶ In traditional non-class litigation, a foreign defendant's minimum contacts would be supplemented by service of the summons and complaint in accordance with Rule 4(f).²⁰⁷ Notice pursuant to Rule 4 is different from notice pursuant to Rule 23(c)(2): a class action notice is not the legal equivalent of a summons.²⁰⁸ Not only do a summons and complaint

206. Differences in the treatment of jurisdiction when a foreign litigant is involved, as contrasted with solely domestic litigants, is authorized not only by *Asahi*, but also by constitutional and common law doctrine in other areas. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981) ("a foreign plaintiff's choice [of forum] deserves less deference [in forum non conveniens analysis]"); *Barcelona Traction, Light & Power Co. (Belg. v. Spain)* 1970 I.C.J. 3, 164 (1970) (Jessup, J.) (noting that rules that are "valid enough for interstate conflicts within the constitutional system of the United States may be improper when placing a burden on international commerce").

207. Federal Rule of Civil Procedure 4(f) provides:

Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in a place not within any judicial district of the United States:

(1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or

(B) as directed by the foreign authority in response to a letter rogatory or letter of request; or

(C) unless prohibited by the law of the foreign country, by

(i) delivery to the individual personally of a copy of the summons and the complaint; or

(ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(3) by other means not prohibited by international agreement as may be directed by the court.

Fed. R. Civ. P. 4(f); see also *The Hague Convention, Multilateral Service Abroad of Judicial and Extrajudicial Documents*, Nov. 15, 1965, art. 1, 20 U.S.T. 361, T.I.A.S. No. 6638 (prescribing, "in civil or commercial matters," methods for service of "a judicial or extrajudicial document for service abroad"); *id.* at art. 5 (noting that acceptable methods of service include a "method prescribed by [the Central Authority of the State's] internal law for the service of documents in domestic actions upon persons who are within its territory," or a "particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed," and that "the document may always be served by delivery to an addressee who accepts it voluntarily").

208. Monaghan, *supra* note 139, at 1154 n.23 ("A class action notice is not equivalent to a summons under Rule 4 . . . or its state law counterparts."); see *Martin v. Wilks*, 490 U.S. 755, 763 (1989) ("Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights." (internal citation omitted)); see also *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808, 810 (1985) (whereas a "defendant summoned by a plaintiff is faced with the full powers of the forum State to render judgment against it," an absent plaintiff class member, "[u]nlike a defendant in a normal civil suit . . . is not required to do anything." (emphasis omitted)).

command more attention from the recipient because they are official in appearance and contain the imprimatur of the court,²⁰⁹ but Rule 4 notice will sometimes require personal service rather than mailing.²¹⁰ Moreover, in traditional non-class litigation, “[d]ue process requires that the defendant be given adequate notice of the suit . . . and be subject to the personal jurisdiction of the court.”²¹¹ Thus, it is improper to assume that minimum contacts alone, without the other concomitant protections accompanying those contacts in non-class litigation, are a sufficient basis for issuing a binding judgment against a foreign claimant in class litigation.

In addition, among the practical reasons commanding a closer evaluation of the assertion of personal jurisdiction over foreign claimants is the potential impact on foreign relations. Carelessness and overreaching in asserting jurisdiction over foreign citizens may cause offense or resentment in foreign countries.²¹²

209. See Monaghan, *supra* note 139, at 1154 n.24 (noting that “the distinction between formal process and notice reflects an important reality.”).

210. See generally Wood, *supra* note 155, at 620–21.

The standards for service under Rule 4 and its state counterparts are significantly different from the notices required by the class action rules. Although service by first-class mail is an option under Rule 4(c)(2)(C)(ii), if no acknowledgement of service is returned, personal service or service at the individual’s dwelling house (for an individual) is then required. This initial safeguard of the absentee’s interest is precisely what justifies a finding of waiver with respect to personal jurisdiction objections (the equivalent of jurisdiction by consent) when the defendant appears and is silent, and it is lacking in Rule 23(c)(2).

Id.; see also Fed. R. Civ. P. 4(f)(2)(C)(i) (providing for personal service for foreign citizens under some circumstances).

211. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 291 (1980) (emphasis added).

212. See generally Born, *Reflections*, *supra* note 7, at 28–29.

[A]ssertions of United States judicial jurisdiction over foreigners can readily arouse foreign resentment. This risk is heightened because, although United States principles of judicial jurisdiction are generally consistent with international law, they are not always so. . . . Because exorbitant assertions of judicial jurisdiction by United States courts may offend foreign sovereigns, these claims can provoke diplomatic protests, trigger commercial or judicial retaliation, and threaten friendly relations in unrelated fields. . . . Most significantly, these claims can interfere with United States efforts to conclude international agreements providing for mutual recognition and enforcement of judgments or restricting exorbitant jurisdictional claims by foreign states.

Id.; see also Raymond Paretzky, *A New Approach to Jurisdictional Questions in Transnational Litigation in U.S. Courts*, 10 U. Pa. J. Int’l Bus. L. 663, 682 (1988).

Foreign states justifiably resent overly expansive U.S. assertions of personal jurisdiction and unduly jingoistic U.S. choice of law determinations. In the area of jurisdiction, the aggressive practices of U.S. courts have had tangible negative effects on foreign policy. In the 1970s, the United States and the United Kingdom negotiated on a proposed bilateral convention liberalizing the laws of enforcement of judgments between the two countries. However, the United Kingdom withdrew from the negotiations after British industry claimed that the Convention would require recognition by British courts of

Phillips Petroleum Co. v. Shutts reflected a one-sided, distorted, and misleading view of class actions. This view helped to justify the Court's result in *Shutts*, but the Court's perspective obscures the potential dangers for foreign claimants. In *Shutts*, the Court assumed that class litigation will always benefit absent class members, without recognizing the potential harms. For example, the Court stated that: "An out-of-state defendant summoned by a plaintiff is faced with the full powers of the forum State to render judgment *against* it."²¹³ In practice, of course, the plaintiff class will not always prevail—and a subsequent judgment for the defendant will extinguish the claims of the participating class members, without regard to whether class members' claims are large or small. The loss of valid monetary claims due to a judgment against the class surely harms class members, just as a class action judgment creating an obligation to pay harms defendants. In either example, the parties lose money to which they otherwise are entitled.

The *Shutts* Court further observed that plaintiff class members are "not haled anywhere to defend themselves upon pain of a default judgment."²¹⁴ Indeed, however, in this respect the potential ramifications are much worse for some plaintiff class members than for defendants. Because *Shutts* did not address the due process concerns arising in the peculiar context of transnational class actions, the Court ignored the possibility that an absent class member from another country suffers the equivalent of a default judgment if she receives inadequate notice regarding the class proceedings and the class does not prevail at trial.

The Court assumed that absent class members needed fewer due process protections than defendants because "[t]he court and named plaintiffs protect [absent class members'] interests. . . . [An absent class action plaintiff] may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection."²¹⁵ As an initial matter, "sit[ting] back and allow[ing] the litigation to run its course" assumes that the class member wishes to participate in the class litigation as a plaintiff. If this assumption is

exorbitant jurisdictional claims by U.S. courts. Thus, a treaty beneficial to the nation was lost because of the federal failure to check the jurisdictional excesses of some U.S. courts.

Id.

Professor Brilmayer has also noted the political difficulties when a dispute implicates other countries. Brilmayer, *American Federal System*, *supra* note 29, at 289 ("The resolution of [conflicts with an international component] is a particularly delicate matter because the confrontation between laws and policies of the United States and foreign states are often sharper and more complex than any analogous showdown between two states. Simply put, overly aggressive adjudication can disrupt commerce and peace between nations much more than it can between states.").

213. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808 (1985).

214. *Id.* at 809.

215. *Id.* at 809–10.

incorrect—if the class member does not wish to participate in the class litigation—she may not sit back, but instead must affirmatively opt out or she will be bound by a result she neither sought nor desired.²¹⁶ “Once enmeshed in a class action, class members cannot shape their own claims, and their individual rights to participate in the class proceeding are quite limited.”²¹⁷ Moreover, subsequent cases have illustrated the frequent inadequacy of class representatives and class counsel to protect the interests of absent class members who are U.S. citizens, much less to protect the interests of absent class members from foreign countries.²¹⁸

Class actions adjudicate the claims of all class members in a single proceeding; a binding adjudication extinguishes all class members’ claims. Some class members will have claims of little value, which do not merit individual litigation. But it cannot be assumed that all claims are of little value. Moreover, whatever a claim’s value, it remains a property right.²¹⁹

To foreclose the interests and claims of an indeterminate number of persons is operationally no different than to do so vis-à-vis one or more specified persons That an . . . absentee’s claims are foreclosed . . . does not alter the fact that the absentee, whoever and wherever he may be, is having his rights to the property adjudicated. That being so, the exercise of jurisdiction in such a proceeding is not without legal consequence to persons elsewhere²²⁰

The binding effect of the class judgment affects class members regardless of whether they win or lose. In either event, the class judgment terminates their rights. In essence, class actions involving foreign claimants often extinguish a non-U.S. citizen’s property rights in order to facilitate judicial expediency, which is an unjustifiable practice.

216. See Kennedy, *Bride of Frankenstein*, *supra* note 117, at 270; Monaghan, *supra* note 139, at 1170 (“*Shutts* announced a rule of forfeiture (i.e., ‘you are precluded if you do not take affirmative step X.’)”).

217. Monaghan, *supra* note 139, at 1149 n.1.

218. See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (class decertified where proposed class had exposure to different asbestos products, for varying amounts of time, and over different periods, and where proposed settlement fixed the range of damages available for future claimants with no adjustments for inflation, in situation where named representatives were currently injured and thus had interests conflicting with those exposed to asbestos but currently asymptomatic); see also Faulk, *supra* note 131, at 206 (“Settlements achieved in mass tort cases are fraught with potential conflicts of interest between individual plaintiffs and their counsel. Moreover, the potential for collusive settlements, settlements that end the controversy, compensate plaintiffs’ counsel highly, and under-compensate individual plaintiffs cannot be disregarded.”); Koniak, *supra* note 167, at 1048–56 (discussing alleged collusion between class counsel and defendants in reaching settlement agreement).

219. See *Shutts*, 472 U.S. at 807.

220. Hazard, *supra* note 79, at 267 (discussing in rem and in personam jurisdiction).

1. The Exclusion Solution?

One potential approach to the due process concerns implicated by the presence of foreign claimants within the class is to exclude non-U.S. claimants from the class definition. This approach is simple and easy to implement. By defining the class as all those U.S. residents suffering a particular harm, the due process problems for foreign claimants will not, and indeed cannot, arise.

Despite its ease of application, however, routinely excluding all foreign claimants from class actions is not the best solution. There will be circumstances where the inclusion of citizens from other countries is desirable from all perspectives—desirable for the defendant because it provides the opportunity to resolve additional potential claims,²²¹ desirable for the court for reasons of judicial economy,²²² and desirable for the foreign claimants, particularly if they would not otherwise be able to obtain redress.²²³ Accordingly, although exclusion of foreign claimants from the class definition could be a potential solution in some instances, it will not always be a desirable solution.

2. The Foreign Claimant Subclass

Another potential approach to foreign claimants and due process concerns is the use of a separate subclass for foreign claimants.²²⁴

221. See Hensler & Peterson, *supra* note 167, at 1050 ("For defendants, aggregating cases and arriving at a global resolution of mass litigation offers a means of capping their exposure. . . . [G]lobal settlements are attractive even when the price is high, because they offer the opportunity to reduce uncertainty and limit transaction costs.").

222. See Deborah R. Hensler, *A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 Tex. L. Rev. 1587, 1606 (1995) ("Over time, courts, and some attorneys, appear to have developed a preference for collective mechanisms, such as consolidation and aggregate settlements, over streamlining individual case disposition, and for global settlements resolving all current and future cases."). But see Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374, 445 (1982) ("Seduced by controlled calendars, disposition statistics, and other trappings of the efficiency era and the high-tech age, managerial judges are changing the nature of their work. . . . I want judges to balance the scales, not abandon them altogether in the press to dispose of cases quickly.").

223. See Hensler, *Revisiting the Monster*, *supra* note 168, at 182.

[A] typical damage class action might arise when representative plaintiffs allege that a defendant acting illegally has imposed small losses on a large number of people or entities. No single individual would find it worthwhile to pursue a lawsuit independently, . . . [b]ut collectively, class members can—if the suit is successful—force the defendant to disgorge its ill-gotten gains.

Id.

224. Rule 23 authorizes subclasses "[w]hen appropriate." See Fed. R. Civ. P. 23(c)(4) ("When appropriate . . . a class may be divided into subclasses and each subclass treated as a class . . ."); see also Note, *Developments in the Law: Class Actions*, 89 Harv. L. Rev. 1318, 1479 (1976) ("Subclassing provides the trial judge with a means of increasing the reliability of party representation of absentee interests

Again, this approach is relatively straightforward and easy to implement. However, subclasses increase class litigation complexity and may invoke potential manageability issues.²²⁵ Moreover, creating a foreign claimant subclass may not work well when the foreign claimants share a non-U.S. nationality, but do not share common legal issues, common injuries, or similar damages. In addition, when foreign claimants are from several other nations, the potential necessity for numerous foreign claimant subclasses arises. Thus, subclassing is an option, but again will not always be the best solution for a particular case.

3. Consent

Personal jurisdiction over the parties is a prerequisite to a binding judgment. Consent is an effective conferral of personal jurisdiction,²²⁶ but consent, as applied to a non-citizen, is more accurately described as a waiver—a waiver of any challenges to the court's power to render a valid judgment affecting the non-citizen's property rights. Waiver, as the intentional or voluntary relinquishment of a known right, requires that the non-citizen both know of the class action and of her right to opt out, and that the non-citizen intentionally give up her right to opt out of the class litigation.

Shutts' reasoning with respect to consent is based on potentially invalid assumptions.

The *Shutts* Court's consent reasoning . . . is based on a vision of a plaintiff with a small claim that would not be adjudicated but for the inference of consent through silence. Its holding, however, also may affect the rights of a large claimant. A class member with a large claim may fail to opt out, and thus may evidence consent, because she has misplaced a class notice or failed to receive it. If the class member then fails to file a claim at the damage or settlement stage because of lack of actual notice, her nonresponsiveness not only signals consent but forecloses her from sharing in the award.²²⁷

The notion of failing to opt out as constituting consent²²⁸ is largely

by, in effect, adding additional parties to the lawsuit who more accurately reflect in their own interests the interests of discrete groups of absentees.”).

225. Subclasses have the capacity both to increase the manageability of the class action, and to create manageability concerns. Compare *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 135 (3d Cir. 1998) (noting that “the class will be splintered into various subclasses—creating manageability concerns”) with *Dore v. Kleppe*, 522 F.2d 1369, 1375 (5th Cir. 1975) (noting that subclasses can enhance the manageability of the class action).

226. See *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982) (“Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.”).

227. *Miller & Crump*, *supra* note 117, at 18 (citations omitted).

228. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813 (1985) (a class member is “presumed to consent” if she fails to opt out of the class litigation).

fictitious.²²⁹ A class member's failure to opt out of class litigation can be the result of not receiving the class notice, receiving but not understanding the class notice, setting the notice aside and losing it, completing but then forgetting to mail the opt out form, and variants on these themes. Accordingly, the failure to opt out can be the result of any number of things. The failure to opt out may result from laziness, procrastination, or actual consent—or from confusion and lack of comprehension.²³⁰ Thus, in the transnational context, where confusion and unfamiliarity are much more likely to exist, it is inappropriate to assume that silence constitutes assent in class actions.²³¹ Moreover, silence is not always construed as agreement in other cultures:

A good example of the problems that can arise . . . occurred during a period of tension between Egypt and Greece a number of years ago. Egyptian pilots radioed their intention to land their plane at a Cypriot airbase, and the Greek air traffic controllers responded with silence. While the Greeks intended their silence to indicate refusal of the permission to land, the Egyptians interpreted the silence as assent. When the plane landed, the Greeks fired on the plane, resulting in the loss of several lives.²³²

As the Supreme Court has noted, "great caution should be used not to let fiction deny the fair play that can be secured only by a pretty

229. See Wood, *supra* note 155, at 609–10 (discussing defendant class actions).

An inference of consent to be sued from a failure to return an opt-out form is so far from the knowing, voluntary type of consent that the Court usually requires to support adjudicatory jurisdiction, and so contrary to normal assumptions about human nature in lawsuits, that an argument to the contrary is close to absurd.

Id.; see also *id.* at 620 ("The *Shutts* consent finesse, whereby consent can be inferred from a failure to opt out, does violence to the general theory of consent."); Monaghan, *supra* note 139, at 1170 n.95 ("Even ordinary contract law does not ascribe a binding effect to an offeree's failure to respond to an offer. More importantly, in dealing with constitutional guarantees, consent or waiver . . . is not usually ascribed to inaction. This should be especially clear where the 'consent'-inducing notices are written obscurely and are designed by counsel to encourage inaction." (emphasis omitted)).

230. Miller & Crump, *supra* note 117, at 17; Monaghan, *supra* note 139, at 1185–86; Wood, *supra* note 155, at 620. See generally Stefan H. Krieger, *A Time to Keep Silent and a Time to Speak: The Functions of Silence in the Lawyering Process*, 80 Or. L. Rev. 199, 202 (2001) ("By its very nature, silence is ambiguous and therefore messy.").

231. See Krieger, *supra* note 230, at 233–34 (noting that "cultural context can . . . have a significant bearing on . . . silence's meaning," and that "a number of studies have been conducted on the meaning of silence in different cultures"); see also *id.* at 244 (noting that treating silence as agreement is a "popular notion in American society, and especially the talkative legal culture"). This same American notion of silence as agreement is also seen in evidence law. See *id.* at 247 (discussing adoptive admissions). However, other cultures do not always assume that silence indicates assent. See *infra* note 232 and accompanying text (discussing incident between Egypt and Greece involving different interpretations of silence).

232. Krieger, *supra* note 230, at 233–34.

close adhesion to fact.”²³³ Accordingly, for class actions involving foreign claimants, such foreign claimants should be provided with the opportunity to affirmatively opt into the class litigation in order to be bound by the resulting judgment. In *Shutts*, the Supreme Court rejected the suggestion that due process required an affirmative opting-in procedure for all Rule 23(b)(3) class actions.²³⁴ However, potential language barriers, unfamiliar legal procedures, and potential intimidation in dealing with the courts and lawyers of another country all tend to increase the risks of fear, confusion, and misunderstandings by foreign claimants. Requiring foreign claimants to affirmatively opt in, rather than absurdly construing their silence as an agreement to be bound by the class litigation,²³⁵ will ensure that their consent is genuine.

The opting in procedure is not unknown to the class action process.²³⁶ Prior to 1966, in non-mandatory class actions, class members could only participate in the class litigation if they affirmatively opted into the lawsuit.²³⁷ The 1966 amendments, in creating a duty to opt out, helped to facilitate the ultimate purposes of class litigation by reducing the potential for individual lawsuits due to the creation of consent as the default position. The articulated purpose of changing the “opt-in” provision to an “opt-out” provision “was to negate the unfairness of possible ‘one-way intervention.’ This procedure allows a potential class member, who does not join before trial and therefore is not bound by an adverse judgment, to intervene after a favorable judgment to invoke its benefit.”²³⁸ This expressed

233. *McDonald v. Mabee*, 243 U.S. 90, 91 (1917).

234. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

235. See Wood, *supra* note 155, at 620 (noting that “silence is a notoriously weak expression of consent”).

A putative customer’s failure to object, after all, is not even sufficient to support a mail order merchandiser’s claim to be paid for unordered goods. Although the [Supreme] Court [in *Shutts*] technically did not reach the counterclaim issue, it seems clear that it would not treat the absentees’ failure to opt out as “real” consent, if the tables were turned and the defendant tried to file a counterclaim against the plaintiff class. In short, under normal standards for showing consent, the failure to opt out cannot pass muster. The Court’s only expressed justifications for allowing it to do so here—that many states have been allowing opt-out multistate class actions, and that this form of litigation seems desirable—do not seem strong enough to override a right as fundamental as the right not to be deprived of property by a forum lacking jurisdiction.

Id.

236. See, e.g., Fair Labor Standards Act, 29 U.S.C. § 216(b) (1992); Pa. R. Civ. P. 1711(b) (optional opt-in classes for large claim groups or other special circumstances).

237. See Kennedy, *Bride of Frankenstein*, *supra* note 117, at 256 (“[P]ermissive class members prior to 1966 had the duty affirmatively to ‘opt in.’”).

238. *Id.*; see also Note, *Multistate Plaintiff Class Actions*, *supra* note 93, at 735–37 (discussing the practice of “one-way intervention” and lack of mutuality).

concern, however, was subsequently reduced in light of modifications to the law of collateral estoppel.²³⁹

The potential risks of requiring foreign claimants to opt into the class lawsuit include the possibility that many will not elect to do so, and thus the class litigation will bind few foreign claimants. However, it is not intrinsically unfair to expect a defendant to defend in more than one country if the harm allegedly caused by the defendant crosses national borders. Moreover, if the other country affected does not offer a class action procedure,²⁴⁰ foreign class members with modest claims may be more motivated to opt into the class litigation, while foreign claimants who do not opt into the U.S. class litigation may have larger claims that would warrant individual litigation. Although there remains the risk that some foreign claimants will not understand the notice, and that some will fail to opt in due to confusion or procrastination, the opt-in procedure is a superior device from a due process perspective.

In *Shutts*, the Supreme Court emphasized its previous assertion that due process protects personal liberty interests.²⁴¹ In the context of a

239. See Kennedy, *Bride of Frankenstein*, *supra* note 117, at 257.

[T]he Supreme Court made two major movements in directions that were somewhat inconsistent with the announced and the unannounced goals of the opt-out device. In *Parklane Hosiery Co. v. Shore*, the Supreme Court eliminated the strict common-law requirement of mutuality from the doctrine of collateral estoppel. Because the [1966 Rules] Committee's announced premise for the opt-out device had been the unfair lack of mutuality contained in one-way intervention, the subsequent decision in *Parklane* partially undercut the originally announced premise for creating the opt-out device.

Id.

240. The availability, or non-availability, of a class action device in the foreign claimant's home country has no impact on the due process analysis. A court may not justify lesser due process protections for a foreign claimant based on the fact that the claimant is a citizen of a country that does not have a class action procedure. The reason is, hopefully, obvious. Class litigation binding a foreign claimant thereby extinguishes her claim. Without proper due process protections, the foreign claimant has lost individual control over her claim, regardless of whether the class wins or loses. Even if the foreign claimant's home country does not authorize class actions, the bound foreign claimant has thereby lost the ability to bring an individual lawsuit, and, without appropriate due process safeguards, has lost the potential of actively participating in (including potentially objecting to) various aspects of the class proceedings. Even if the foreign claimant could not recover on her claim in her home country due to the lack of any legal remedy for that type of claim, this cannot justify depriving the claimant of the potential for shaping relief in the U.S. class action—such as by objecting to a proposed settlement—by failing to provide adequate due process protections in the class litigation.

241. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985); see *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 n.10 (1982) ("The restriction on state sovereign power described in *World-Wide Volkswagen* . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause."); see also *Miller & Crump*, *supra* note 117, at 54 ("[T]he right to opt out not only is a check against distant forum abuse, but it also protects the claimant's right to control her litigation.").

transnational class action, the default result in the opt-out procedure is to include the foreign class members in the existing class litigation, thereby extinguishing their ability to take any other course of action, including individual litigation. The default result in the opt-in procedure, by contrast, is to exclude the foreign class members from the existing class litigation, thereby leaving the foreign class members with three potential options: (1) instituting a class action in their home country (if a class action device exists); (2) instituting individual lawsuits if claims are sufficiently large to warrant the expense of individual actions; or (3) declining to seek legal relief. There can be no question that the opt-in procedure affords more individual control.

When an opt-in procedure is provided, consent is no longer implied or fictitious. In order to bind foreign claimants in a class action, those claimants must affirmatively elect to join the existing class litigation, which eliminates the possibility of fictitious consent. This provides superior due process protections, and avoids the loss of individual rights under circumstances where neither minimum contacts nor genuine consent exist.

B. Practical Considerations for Transnational Class Actions

In addition to concerns specific to personal jurisdiction, transnational class actions implicate other practical considerations relevant to due process, including concerns related to adequate representation, notice, and court oversight.

1. For All Class Actions: Adequate Representation

In order to satisfy the Rule 23(a) prerequisite of adequate representation for a multi-national class, a non-U.S. class representative should be a presumptive requirement. This non-U.S. class representative may be either a named representative or a class counsel. If the factual circumstances indicate disparities in interests among various non-U.S. class members, it may become necessary to have more than one non-U.S. representative in order to provide adequate representation.

The court also should review the class carefully to determine whether adequate representation impacts other areas. For example, sufficient differences in U.S. versus non-U.S. class members' factual circumstances, legal theories, or desired relief may introduce a commonality issue requiring the establishment of a subclass for foreign claimants.

2. For All Class Actions: Focused Court Review

In addition to the due process protections provided through adequacy of representation, trial courts overseeing class litigation involving transnational class members should undertake review of

each stage of the class proceedings with the multi-national flavor of the action firmly in mind. The trial court is the ultimate protector of the rights of the class. A court might ensure that a foreign claimant is appointed as one of the class representatives, but then that foreign class representative may be too timid or too self-interested to follow through in protecting the interests of other foreign class members. Similarly, a court might ensure that a non-U.S. attorney is appointed as one of the class counsel, but then that non-U.S. attorney may be too timid or too self-interested to follow through in protecting the interests of the foreign class members. Accordingly, the trial judge should watch the proceedings with his or her usual care, and should keep in mind the special circumstances that may be encountered when foreign claimants have a stake in the proceedings, especially at the settlement stage.

3. For Mandatory Notice Class Actions: Cover Letters

The confusing nature of a class action notice²⁴² requires additional care when the recipient resides in a foreign country. To facilitate the recipient's comprehension, notice under such circumstances should include a cover letter, in the language of the recipient's home country, addressed to the specific individual recipient, explaining the purpose of the notice in a straightforward manner without legal jargon. Although the cover letter would necessarily need to tell the recipient to read the actual legal notice in full, the cover letter would provide an introduction to the notice and would help the recipient to understand its significance.

These additional practical steps, together with an opt-in procedure, will help to ensure that the assertion of personal jurisdiction over foreign claimants by United States courts provides full due process protections.

CONCLUSION

The United States Supreme Court has noted that "there has been a failure of due process . . . in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it."²⁴³ In *Shutts*, the Court provided guidelines for addressing due process and personal jurisdiction issues in the class action context. Unaddressed, however,

242. See Monaghan, *supra* note 139, at 1185 ("[Class action notices] are designed to encourage inaction; and they are frequently 'incomprehensible to average citizens.'" (citation omitted)); Wood, *supra* note 155, at 606-07 ("When a purported notice does not adequately inform the recipient of what is at stake, or when it does not reach the recipient sufficiently in advance of the hearing, it cannot serve its intended function of making the opportunity to be heard count."); see also *supra* notes 138-41 and accompanying text (describing intimidating nature of class action notices).

243. *Hansberry v. Lee*, 311 U.S. 32, 42 (1940).

were the considerations that a trial judge must take into account when the putative class includes citizens from another country. This Article proposes that the presence of non-U.S. claimants in class litigation requires careful attention to due process protections if the class judgment is to have a binding effect on those foreign claimants. These precautions include the appointment of a foreign claimant as a class representative or as a class counsel; attention by the trial court to the non-U.S. interests at stake; the use of a cover letter to accompany the class notice to provide an explanation of the significance of the class notice in the recipient's native language; and, in class litigation involving monetary relief, the requirement that foreign claimants affirmatively opt into the class action.

Notes & Observations