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MONETARY DAMAGES AFTER TICOR
TITLE INSURANCE CO. v.
BROWN

LAWRENCE J. RESTIERI, JR.*

INTRODUCTION

When the Advisory Committee rewrote Federal Rule of Civil Procedure 23 in 1966, they sought to create a procedural device that could manage those situations that "naturally" or "necessarily" demand class-action treatment.1 As one member of the Committee stated shortly after the promulgation of the Rule, "Approaching Rule 23, . . . the Committee strove to sort out the factual situations or patterns that had recurred in class actions and appeared with varying degrees of convinciness to justify treatment of the class in solido."2 Rule 23(b) is thus divided into three categories under which a class may be certified,3 each indicative of functional occasions where class-action treat-

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* I would like to thank Professor Matthew Diller of Fordham University School of Law for his advice, encouragement, and guidance throughout the preparation of this Note.

1. See Benjamin Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 386 (1967) (commenting on the Advisory Committee's work in formulating the 1966 amendment to Fed. R. Civ. P. 23). Professor Kaplan was a reporter to the Advisory Committee on Civil Rules, the committee that framed the current version of Rule 23, from 1960 to 1966. He subsequently became a member of the Advisory Committee. Id. at 356.

2. Id. at 386.

3. Federal Rule of Civil Procedure 23(b) states:
   Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
   (1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
   (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
   (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of
Under Rules 23(b)(1) and (2), a class action is appropriate when claims require a single adjudication, for example, when individual suits by class members would produce incongruous results, or when a party has acted in a manner generally applicable to an entire class. Classes certified under these subdivisions often seek some form of equitable relief, such as an injunction or a declaratory judgment. In actions certified under Rule 23(b)(3), on the other hand, "class-action treatment is not as clearly called for as in [Rule 23(b)(1) and (2) actions], but it may nevertheless be convenient and desirable depending upon the particular facts." Rule 23(b)(3) classes typically seek some form of damage remedy. Because actions certified under 23(b)(3) do not as readily require a unitary adjudication as do those under (b)(1) or (2), the Rule allows class members of (b)(3) actions to exclude themselves from a suit so they may pursue individual litigations. Members of (b)(1) and (2) classes are not provided with this opportunity to “opt out” and are bound by a judgment for or against the

concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.


5. See infra part II.B.


9. Class members of (b)(3) suits are provided with an opt-out opportunity by Rule 23(c)(2). Fed. R. Civ. P. 23(c)(2) provides:

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

Fed. R. Civ. P. 23(c)(2). In commenting on the need for this notice and opt-out provision, the Advisory Committee stated that in (b)(3) actions, “the interests of the individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b)(3), this individual interest is respected.” Fed. R. Civ. P. 23(c)(2) advisory committee’s note to 1966 amendment.
Because members of classes certified under Rule 23(b)(3) have the opportunity to opt out of a suit and members of (b)(1) and (2) classes do not have this option, a proper determination by a court of a class certification is essential both for the protection of the right of individual class members to pursue their own litigations and for the ability of the court to issue a complete decree. If a class that should be certified under Rule 23(b)(3) is improperly certified under (b)(1) or (2), then absent class members will be bound by a judgment from which they should have had an opportunity to exclude themselves, whereas if a class that should be certified under Rules 23(b)(1) or (2) is certified under subdivision (b)(3), an action that requires a single adjudication may never be completely resolved, because class members can opt out of the suit and relitigate their individual claims in another court.

Proper certification of a class, however, has proven to be particularly problematic with classes that seek both equitable relief and monetary damages. Because classes seeking equitable relief are typically certified under (b)(1) or (2) and those seeking damages are normally certified under (b)(3), classes seeking both forms of relief do not fit easily into the paradigmatic class categories. To determine how such classes should be certified, many courts have employed a "predominance" test. The predominance test considers which type of relief is the primary one sought. If the equitable relief is the primary one sought, then certification under (b)(1) or (2) is proper. Any damage claim can thus be considered "incidental" or "ancillary" to the equitable relief. If damages, on the other hand, are the primary relief sought, then the class is certified under (b)(3).

10. See Newberg & Conte, supra note 4, § 4.01, at 4-6 (explaining the differences between class categories).


It should be noted that the "predominance" test that this Note discusses concerns the certification test courts have invoked to determine the primary relief a class seeks. Another "predominance" test is commonly used solely in (b)(3) actions to determine whether common questions of law or fact "predominate." This Note does not discuss the latter test.

12. Newberg & Conte, supra note 4, § 4.14, at 4-48. Compare Probe v. State Teachers' Retirement Sys., 780 F.2d 776, 780 (9th Cir.) (holding that plaintiffs' request for money damages was incidental to primary claim for injunctive relief to prohibit use of sex-based mortality tables; class certified under 23(b)(2), cert denied, 476 U.S. 1170 (1986) and Parker v. Local Union No. 1466, United Steelworkers of Am., AFL-CIO, 642 F.2d 104, 107 (5th Cir. 1981) (per curiam) (finding that in action under the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401, awards of punitive, compensatory, and nominal class damages not precluded for class certified under 23(b)(2), because primary relief sought was equitable) with Walsh v. Ford Motor Co.,
inance test, however, has resulted in considerable confusion. As one commentator stated: "Because the predominance test . . . is dependent on the exercise of sound discretion by the court, there is little doubt that reasonable courts can and do reach opposite results under similar circumstances." The class actions at issue in *Ticor Title Insurance Co. v. Brown* evidence the problems caused by classes seeking both equitable relief and monetary damages.

The class in *Ticor* was originally certified in 1986. The Federal Trade Commission had brought charges against six title insurance companies ("Ticor") for conspiring to fix prices on policies in thirteen states, including Arizona and Wisconsin. As a result, affected private parties initiated twelve different "tag-along" antitrust class actions in five district courts in four states. The classes sought treble damages and injunctive relief. The actions were consolidated as Multidistrict Litigation ("MDL") No. 633 in the Eastern District of Pennsylvania. After an intervening Supreme Court decision weakened the plaintiffs' claims, the class representatives dropped the damages portion of their claim and agreed to a settlement offer whereby the class was awarded injunctive relief, increased coverage

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130 F.R.D. 260, 266-67 (D.D.C. 1990) (holding that in automobile warranty action, Rule 23(b)(3) certification was proper because money damages would provide more adequate relief than would injunction) and Angelastro v. Prudential-Bache Sec., 113 F.R.D. 579, 583 (D.N.J. 1986) (holding that in securities fraud action, relief sought was predominantly monetary and not injunctive; therefore, Rule 23(b)(2) certification would be improper).

15. Id. at 1360-61.
16. The Court and this Note refer to all defendants as Ticor.
17. *Ticor*, 114 S. Ct. at 1360; see infra notes 24-28 and accompanying text (explaining the significance of the States of Arizona and Wisconsin in the *Ticor* litigation).
19. Id.
20. Id. at 1360. The private suits were consolidated pursuant to 28 U.S.C. § 1407 (1988).
21. See Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985). The Southern Motor Carriers decision substantially redefined the "state action doctrine," which was one of Ticor's defenses. The state action doctrine prevents the imposition of antitrust liability for activities that were conducted pursuant to state law. Ticor claimed that they had acted under state authority. After the Southern Motor Carriers decision, the FTC dropped charges against Ticor for their activities in seven of the thirteen affected states. The FTC, however, did not drop its claims against Ticor in the six remaining states, which included Arizona and Wisconsin. The FTC contended that those six states did not actively supervise Ticor's alleged price fixing, and therefore, the state action defense did not apply in those states. The Pennsylvania district court conducting the MDL No. 633 litigation, however, found the Southern Motor Carriers decision "possibly dispositive" on the *Ticor* litigation, and consequently, approved the settlement agreement. In re Real Estate Title and Settlement Servs. Antitrust Litig., 1986-1 Trade Cas. (CCH) ¶ 67,149 (E.D. Pa. 1986) (the original district court opinion in the *Ticor* litigation), aff'd, 815 F.2d 695 (3d Cir. 1987), cert. denied, 485 U.S. 909 (1988).
on title insurance, and attorney's fees.\(^{22}\) The district court certified the settlement class under Federal Rules of Civil Procedure 23(b)(1)(A) and (b)(2), thus binding the class to the terms of the settlement.\(^{23}\)

The States of Arizona and Wisconsin objected to the class certification under the settlement agreement because it bound them despite their request for money damages: the settlement included only injunctive relief and attorney's fees.\(^{24}\) The State of Wisconsin claimed the action could not be certified under Rule 23(b)(2) because the relief sought was primarily monetary and not injunctive, and both states claimed that due process required that class members be given the opportunity to opt out of the suit.\(^{25}\) Over these objections, the district court approved the settlement and certified the class under the "no opt out" subdivisions of (b)(1)(A) and (b)(2).\(^{26}\) The Third Circuit affirmed the district court's certification of the class without opinion, and the Supreme Court denied certiorari.\(^{27}\)

The case, however, did not end with the certiorari denial. In 1990, representatives of Arizona and Wisconsin title insurance consumers—the same plaintiffs who objected to the original settlement—brought an action against Ticor in federal district court in Arizona for Ticor's alleged price fixing. As in 1986, the class sought relief in the form of damages, attorney's fees, and an injunction. Ticor moved for summary judgment on all claims, based on \textit{res judicata}, citing the settlement that the Eastern District of Pennsylvania approved in the prior action. The Arizona district court granted Ticor's motion. The Ninth Circuit, however, reversed.\(^{28}\)

\(^{22}\) \textit{Ticor}, 114 S. Ct. at 1360-61.

\(^{23}\) Subdivision (c)(3) of Rule 23 provides that judgments in any class action are binding on the class members that the court includes in the class, except for those members of (b)(3) classes who opt out of the suit. Fed. R. Civ. P. 23(c)(3). Subdivision (c)(3) states:

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

Fed. R. Civ. P. 23(c)(3).

\(^{24}\) The States of Arizona and Wisconsin objected to the settlement both as class members and as \textit{parens patriae} for the class member residents of each state. \textit{Ticor}, 114 S. Ct. at 1361.

\(^{25}\) \textit{Id.} at 1361.


\(^{28}\) \textit{Brown v. Ticor Title Ins. Co.}, 982 F.2d 386, 387 (9th Cir. 1992).
The Ninth Circuit distinguished between the types of relief sought by the class. The court held that *res judicata* applied as to the injunction, but not as to the damage claims.\(^2\) *Res judicata*, the court held, did not apply to the damage claims because class members had been denied due process.\(^\text{30}\) According to longstanding precedent, the rules of *res judicata* do not apply if due process has been denied.\(^\text{31}\) Due process entitles individuals to notice and a hearing before they lose their rights.\(^\text{32}\) According to recent precedent involving class actions, due process requires that absent class plaintiffs be afforded the opportunity to opt out of suits primarily for monetary damages.\(^\text{33}\) The Ninth Circuit characterized the plaintiff class in the original MDL No. 633 litigation as seeking substantial damages; however, class members had not been given the opportunity to opt out of the suit because, under the settlement, the class had been certified under Rules 23(b)(1) and (2). Thus, the Ninth Circuit concluded that "there would be a violation of minimal due process if [the plaintiff class'] damage claims were held barred by *res judicata*."\(^\text{34}\)

Ticor appealed to the Supreme Court.

The Court granted certiorari to resolve the issue of whether due process requires that absent class plaintiffs be given the opportunity to opt out of any class action seeking money damages. Subsequently, however, the Court dismissed the writ as improvidently granted on the ground that there was a possibility that the issue could be resolved by the provisions of Rule 23 itself, rather than by the Constitution.\(^\text{35}\) Subdivision (c)(2) of Rule 23 mandates that absent members of classes certified under Rule 23(b)(3) be provided with notice and the opportunity to be excluded from the suit.\(^\text{36}\) Absent members of classes certified under Rules 23(b)(1) or (2) are not granted this notice and opt-out opportunity.\(^\text{37}\) The Court suggested that if classes seeking monetary damages could be certified only under Rule 23(b)(3) and not under Rules 23(b)(1) or (2), which the Court stated was at least a "substantial possibility," then the constitutional question would be "of no general consequence."\(^\text{38}\) The notice and opt-out provisions required by the Rule for (b)(3) actions would satisfy due process. The original certification of the class under (b)(1) and (2), however, was not subject to the appeal;\(^\text{39}\) the Court, therefore, dismissed the writ as

\(^{29}\) Id.

\(^{30}\) Id. at 390.


\(^{32}\) Pennoyer v. Neff, 95 U.S. 714, 733 (1877).

\(^{33}\) Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985); *see also* infra part III.C (discussing the *Shutts* decision).

\(^{34}\) Brown v. Ticor Title Ins. Co., 982 F.2d 386, 392 (9th Cir. 1992).


\(^{36}\) Fed. R. Civ. P. 23(c)(2); *see supra* note 9.

\(^{37}\) *See infra* parts II and III.

\(^{38}\) *Ticor*, 114 S. Ct. at 1361.

\(^{39}\) Id. at 1361-62. Because the certification of the class had been finally decided
improvidently granted rather than trying to resolve issues not properly before it.\textsuperscript{40}

Even though the Supreme Court in \textit{Ticor} did not conclusively decide the certified constitutional issue raised on appeal, the Court posed a nonconstitutional question and suggested its answer when it stated that there is a "substantial possibility"\textsuperscript{41} that classes seeking monetary damages can be certified only under Rule 23(b)(3). This suggested interpretation of Rule 23 is surprising because prior to \textit{Ticor} both courts and commentators generally agreed that in at least some circumstances, classes seeking both equitable relief and monetary damages—in some cases quite substantial damages—could be certified under Rules 23(b)(1) and (2).\textsuperscript{42} If, after \textit{Ticor}, classes that would have been certified under (b)(1) or (2) now must be certified under (b)(3) simply because of a claim for damages, these classes will have to shoulder the costs of notifying all identifiable class members of the suit at an early stage in the litigation because of the notice requirement imposed by the Rule on 23(b)(3) classes. In effect, this will preclude many types of suits that have utilized the class action as a means of redress, particularly suits in the civil rights and employment benefits areas where the class is large, the availability of funds is minimal, and the damages sought are incidental to the request for injunctive relief. Moreover, because class members would be allowed to opt out of what was formerly a (b)(1) or (b)(2) suit, the complete adjudication a court could once issue now could be defeated by class members who relitigate the same issues in a different court.

This Note contends that classes fulfilling the requirements of Rules 23(b)(1) or (2) should be certified under the applicable subsection despite the presence of a monetary claim. Requiring classes seeking both equitable relief and money damages to be certified under Rule 23(b)(3) solely because of the presence of a monetary claim places too much significance on the relief sought and not enough weight on the equitable considerations of the class action. This Note proposes a new test for determining the certification of classes where both equitable relief and monetary damages are sought. Rather than using a "predominance" test that weighs the relief sought, a "unity" test, derived

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\item in the MDL No. 633 litigation in 1986 and the Supreme Court declined review of that certification, \textit{res judicata} barred relitigation of the certification issue. The Court stated: "It was conclusively determined in the [original] litigation that respondents' class fit within Rules 23(b)(1)(A) and (b)(2); even though that determination may have been wrong, it is conclusive upon these parties . . . ." \textit{Id.}
\item \textsuperscript{40} \textit{Id.} at 1362.
\item \textsuperscript{41} \textit{See supra} note 38 and accompanying text.
\item \textsuperscript{42} \textit{See Newberg} \& Conte, \textit{supra} note 4, \textsection 4.14 (citing over 50 courts that have certified classes under Rule 23(b)(2) despite the existence of monetary damages); 7A Charles A. Wright et al., \textit{Federal Practice and Procedure} \textsection 1775 (1986 & Supp. 1994) [hereinafter Wright, \textit{Federal Practice and Procedure}] (citing lower court decisions where the presence of monetary damages did not preclude 23(b)(1)(A) and (b)(2) certification).
\end{itemize}
from the purposes of the class action and Rule 23 itself, should be employed. A unity test asks whether a class' claim calls for a unitary adjudication. If an affirmative answer is given, then certification under (b)(1) or (2) is proper; if a negative answer is given, then (b)(3) certification is appropriate. Such a test more accurately accounts for the equities of the class action, allowing claims that require unitary adjudication to be certified under the appropriate subdivision despite the existence of a monetary claim. This test also ensures that the due process rights of absent class members are protected through the class representative. Additionally, a unity test is simpler than the predominance test for judges to apply, because a unity test relies more on the nature of the claim rather than on factors a court must balance.

To illustrate that a unity test is more consistent with the principles behind the class-action device and Rule 23 than is either the predominance test or a test that automatically certifies classes seeking money damages under (b)(3), this Note takes an elementary look at the class action. By examining its history and purposes, this Note demonstrates that the concept of unity underlies the class-action device and that a unity test achieves the device's purpose of class-wide adjudication. Part I presents a background of the equitable considerations underlying the class action. Part II explores the structure of Rule 23 to demonstrate how the Rule achieves its equitable aims. Part III focuses on the due process implications of opt-out rights. Finally, part IV sets forth the basis for a unity test and applies it to different fact situations to demonstrate how the test functions. This Note concludes that the certification issues and due process concerns raised in Ticor can be resolved through a unity test, thus providing an answer to the issues that Ticor could not properly address.

I. An Invention of Equity

The purposes of the class-action device underlie the basis for a unity test. Class actions are often said to be "an invention of equity." This is because they were created to fill the practical need for a procedural device so that mere numbers would not disable large groups of individuals from either enforcing their rights or being held responsible for their wrongs. The equitable principles of class actions, however, are not limited to providing large groups of people with a means of legal redress. The principles of consistency, finality, and judicial economy also play a vital role in the class action. As Justice Story once commented, a court must be able to join large classes of people so that it "may be enabled to make a complete decree between the parties, may prevent future litigation by taking away the necessity of a multi-

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43. See infra part III.D.
44. "The class suit was an invention of equity ...." Hansberry v. Lee, 311 U.S. 32, 41 (1940).
45. Id.; see Montgomery Ward & Co. v. Langer, 168 F.2d 182, 187 (8th Cir. 1948).
plicity of suits, and may make it perfectly certain, that no injustice shall be done.\textsuperscript{46}

Despite their equitable goals, class actions tend to contradict a lawyer's sense of fundamental fairness.\textsuperscript{47} Lawyers are trained to be zealous advocates for the individual rights of their clients. Because courts in class actions decide the rights of vast numbers of individuals not before the court, they tend to strike a nerve in lawyers suggesting that something must be amiss. Therefore, understanding how class actions function requires a novel approach to legal thinking.\textsuperscript{48} As one commentator noted, "If we try to think of class suits as A v. B, plus A v. B, plus A v. B—single cases that have occurred simultaneously—we proceed on a wrong line of thought."\textsuperscript{49} Instead, adjudication in class actions must be conceived on a class-wide rather than on an individual scale, where the class is essentially a single unit composed of individuals who, at least in one relevant aspect of their legal status, are indistinguishable from one another.\textsuperscript{50} If class actions are perceived as dispensing justice to a class rather than to individuals, the fairness of the procedural device becomes evident. The class action under Rule 23 is a rather new development in the law; the notion of class-wide adjudication, on the other hand, has much deeper roots.\textsuperscript{51}

The concept of class-wide adjudication finds its ancestry in the rules of compulsory joinder and in the Bills of Peace issued by the English Courts of Chancery in the eighteenth century.\textsuperscript{52} Compulsory joinder was an invention of equity itself, created to ensure that a court issued a complete decree. Administrative problems, however, arose when a court tried to join parties in great numbers. When all parties could not be effectively joined, none could obtain relief.\textsuperscript{53} Thus, in the eighteenth century, as a matter of convenience and necessity, the Chancery courts created Bills of Peace to provide a class of individuals with a unitary adjudication.\textsuperscript{54} Representatives could then bring suits on behalf of others who were similarly situated. The ideal situation was where the resemblances among class members were strong and their differences were slight.\textsuperscript{55} The court could then issue Bills of Peace, and such decrees would bind an entire class.\textsuperscript{56}

The equitable legal notions of English law were eventually adopted

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\item \textsuperscript{46} West v. Randall, 29 F. Cas. 718, 721 (C.C.D.R.I. 1820) (No. 17,424).
\item \textsuperscript{47} See Zechariah Chafee, Jr., Some Problems of Equity 203 (1950).
\item \textsuperscript{48} Geoffrey B. Hazard, The Effect of the Class Action Device Upon the Substantial Law, 58 F.R.D. 307, 308 (1973).
\item \textsuperscript{49} Id. at 310.
\item \textsuperscript{50} Id. at 309-10.
\item \textsuperscript{51} See Stephen C. Yeazell, From Medieval Group Litigation to the Modern Class Action 24-26 (1987) (dating the origins of class actions back to medieval English law).
\item \textsuperscript{52} Chafee, supra note 47, at 201; Newberg & Conte, supra note 4, § 1.09, at 1-23.
\item \textsuperscript{53} Newberg & Conte, supra note 4, § 1.09, at 1-23.
\item \textsuperscript{54} Id.
\item \textsuperscript{55} Chafee, supra note 47, at 208.
\item \textsuperscript{56} Newberg & Conte, supra note 4, § 1.09, at 1-23.
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in American jurisprudence and statutory law in the nineteenth and early twentieth centuries. Compulsory joinder was codified in the United States under Federal Equity Rule 48 (1842) and in its successor, Federal Equity Rule 38 (1912). These statutes recognized certain types of class actions. While these actions enabled large groups of individuals to obtain relief, there was considerable confusion as to the binding effect of these judgments on absent class plaintiffs. For example, in 1921, the Supreme Court stated its belief in the desirability of binding absent class members in *Supreme Tribe of Ben-Hur v. Cauble*, but in a later case, without citing *Ben-Hur*, recast some doubt as to the binding effect of Equity Rule 38.

Finally, in 1938, class actions were officially codified in the United States with the enactment of the original Federal Rule of Civil Procedure 23, giving certain types of class actions binding effect, thus making unitary adjudication possible. The Rule created three class categories: true, hybrid, and spurious, with the former two binding an entire class. Fitting classes into one of these categories, however,

57. *Id.* at 1-24.
58. *Id.*
60. 255 U.S. 356 (1921). The Court stated:

> If the federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree when rendered must bind all of the class properly represented. The parties and the subject-matter are within the court's jurisdiction. It is impossible to name all of the class as parties, where, as here, its membership is too numerous to bring into court. The subject-matter included the control and disposition of the funds of a beneficial organization and was properly cognizable in a court of equity. The parties bringing the suit truly represented the interested class. If the decree is to be effective and conflicting judgments are to be avoided all of the class must be concluded by the decree.

*Id.* at 367.
63. The Advisory Committee to the 1966 Amendment of Rule 23 summarized the categories under the old rule as follows:

> The categories of class actions in the original rule were defined in terms of the abstract nature of the rights involved: the so-called "true" category was defined as involving "joint, common, or secondary rights"; the "hybrid" category, as involving "several" rights related to "specific property"; the "spurious" category, as involving "several" rights affected by a common question and related to common relief. It was thought that the definitions accurately described the situations amenable to the class-suit device, and also would indicate the proper extent of the judgment in each category, which would in turn help to determine the *res judicata* effect of the judgment if questioned in a later action. Thus the judgments in "true" and "hybrid" class actions would extend to the class (although in somewhat different ways); the judgment in a "spurious" class action would extend only to the parties including intervenors. . . . In practice the terms "joint," "common," etc., which were used as the basis of the Rule 23 classification proved obscure and uncertain.

immediately became a problem for district court judges. “True” actions were sometimes certified as “spurious,” and vice versa. Moreover, the spurious class action was little more than a device for permissive joinder, binding only on the original parties and those who intervened. The lack of binding effect permitted nonjoined class members in spurious actions to take a “wait and see” position; they could remain outside the litigation and intervene after the merits had been decided favorably or remain unbound in an adverse ruling. Thus, some of the purposes of the class action, like judicial economy and unitary adjudication, were defeated when unbound class members could relitigate the same issues in another court. Consequently, “under heavy criticism, original Rule 23 was completely rewritten, and sweeping innovations were introduced with the 1966 amendments.”

In rewriting Rule 23, the Advisory Committee sought to create an effective, functional procedural device that incorporated the principles of class-wide adjudication but avoided the difficulties that arose under the original Rule. The original Rule was overly technical and lacked the ability to bind class members of spurious actions. The Committee thus sought to “eliminate many of the legalistic but artificial restrictions” of the original Rule and “move closer to . . . ‘the aims of a liberal, nontechnical application’ of federal procedural rules, rules that are designed to place before the court the actual substantive issues in the case with the minimum amount of formal procedural restrictions needed to ensure fair and orderly proceedings.” Therefore, the 1966 Rule 23 eliminated the rigid true, hybrid, and spurious categorizations. The Committee put in their place a rule that could handle those situations that “naturally” or “necessarily” demanded unitary adjudication. Additionally, judgments were made binding on all members that the court included in the class: the new Rule replaced an opt-in feature with an opt-out rule, thus eliminating the problem of “wait and see” plaintiffs. Thus, with the adoption of the new Rule 23, large groups of individuals were enabled to obtain

64. Newberg & Conte, supra note 4, § 1.09, at 1-25; Wright, Federal Practice and Procedure, supra note 42, § 1752, at 16.
66. Id.; Newberg & Conte, supra note 4, § 1.09, at 1-25 to 1-26; Wright, Federal Practice and Procedure, supra note 42, § 1752, at 30-31.
67. See Kaplan, supra note 1, at 385.
68. Newberg & Conte, supra note 4, § 1.09, at 1-26.
71. Kaplan, supra note 1, at 386.
72. See Fed. R. Civ. P. 23(c)(3) advisory committee’s note to 1966 amendment.
redress while avoiding the pitfall of duplicative litigation.\footnote{73}{See Newberg \& Conte, supra note 4, § 1.10, at 1-26 to 1-27. The commentators state: By far the most controversial and dramatic innovation of amended Rule 23 is that all class actions which the court determines to be maintainable will result in a judgment binding on all class members, whether or not the judgment is favorable to the class. This binding effect of a class action judgment extends to class actions that were formerly known as spurious class actions under the original rule.}'}

\section*{II. Rule 23 Today}

To enable a court to dispense justice fairly to an entire class, Rule 23 is divided into five subsections: the first two deal with the factors necessary for the maintenance of a class action, the latter three concern a court's duties in administering the action. A thorough review of the nuances of Rule 23 is beyond the scope of this Note. Nonetheless, an elementary look at the Rule's basic structure illustrates that the notion of "unity" is inherent in the requirements of Rule 23.

\subsection*{A. Prerequisites for a Class Action}

Rule 23(a) provides four prerequisites for bringing a class action. Briefly stated, they are (1) numerosity, (2) commonality in questions of law or fact, (3) typicality, and (4) adequacy of representation.\footnote{74}{Fed. R. Civ. P. 23(a) states: Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.} The first two requirements concern the composition of the class; the latter two concern the class representative.

Although it may seem axiomatic, as an initial matter, there must be a class.\footnote{75}{Jack H. Friedenthal et al., Civil Procedure § 16.2, at 726 (2d ed. 1993).} The class must be large enough so as to demand class-action treatment, and the class members must be united in some way so as to call for a single adjudication. Rules 23(a)(1) and (2) ensure that these two essentials are met. Under the numerosity requirement, the class must be so numerous that joining all members of the class would be impractical under conventional joinder rules.\footnote{76}{Fed. R. Civ. P. 23(a)(1).} This does not mean that before an action can be brought every member of the class must be identified or be identifiable.\footnote{77}{Friedenthal, supra note 75, § 16.2, at 726; Wright, Federal Practice and Procedure, supra note 42, § 1761, at 137.} Nor does it mean that any magic
number satisfies this requirement. Rather, courts have looked to a variety of factors, ranging from the complexity of the action to the geographical location of unnamed class members, as potential reasons for holding conventional joinder impractical. To satisfy the commonality requirement, questions of law or fact must be common to the class. This requirement commands that the class must be bound together in some manner. The degree to which the class is united plays a role in determining under which of subsection (b)'s three categories the class will be certified. Practicality lies at the heart of the numerosity and commonality prerequisites. If a large group of individuals is united by common issues, then class-action treatment may be appropriate; however, if a conflict can be resolved through individual suits or the conventional rules of joinder, there is no reason to burden the court with the administrative workload of the class action.

Practicality, however, is not afforded a higher priority than the rights of class members:

Because considerations of efficiency and judicial economy have led to a relaxation in the class action context of the ordinary guarantee of a right to be present in the courtroom when one's rights or liabilities are adjudicated, courts are especially careful to ensure that the absent members have a suitable surrogate.

Subsection (a)'s latter two prerequisites help ensure that the class representative is such a "suitable surrogate." Under the typicality requirement, the class representative's claims or defenses must be typical of those of the entire class. To help ensure that the class representative has interests and aims in common with the remainder of the class, the class representative should be a member of the class.

Rule 23 tries to guarantee that this representative will "vigorously

78. "Groups of as many as 350 have been held too small for a class action, while groups of 25 or more have been held sufficient." Charles A. Wright, Law of Federal Courts, § 72, at 510 (5th ed. 1994) [hereinafter Wright, Federal Courts]. But see Arthur R. Miller, An Overview of Federal Class Actions: Past, Present, and Future 22-23 (2d ed. 1977) (stating that classes consisting of over 40 members are usually considered large enough whereas classes under 25 members are usually considered inadequate).

79. Friedenthal, supra note 75, § 16.2, at 728.


81. The commonality prerequisite does not require each class member's claims to be identical, nor does it require that they have multiple claims in common. To satisfy subdivision (a)(2), class members need have only one significant claim in common. Friedenthal, supra note 75, § 16.2, at 728.

82. See infra part II.B.


84. Id. at 729-30.


86. Friedenthal, supra note 75, § 16.2, at 727. Although being a member of the class is nowhere mentioned within the Rule as a requirement for being a class representative, it has been considered an unwritten requirement. Id.
prosecute the interests of the class through qualified counsel" \(^87\) by its adequacy of representation requirement in subsection (a)(4). \(^88\) The adequate representation requirement of Rule 23 is crucial to the due process analysis of class actions. In *Hansberry v. Lee*, \(^89\) the Supreme Court stated:

[W]here the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree. \(^90\)

Thus, *Hansberry* established adequate representation as a cornerstone of due process protection in class actions. \(^91\)

While the above requirements are necessary to maintain a class action, they are not by themselves sufficient to bring a class action. In addition, the requirements of one of subsection (b)'s three categories must be satisfied for a class to be certified. \(^92\)

### B. The Certification of Classes Under Rule 23

Rule 23(b) provides three subdivisions under which a class may be certified. Each subdivision reflects general types of claims that bring class members together such that there is a need for a unitary adjudication. How class members are bound together and the degree to which this tie demands class-action treatment help determine under which subdivision a class will be certified.

Rule 23(b)(1) essentially provides for classes where the prosecution of separate actions would lead to inequitable results either for individual class members or for the party opposing the class. \(^93\) As one of the framers of the Rule described, the key to Rule 23(b)(1) classes lies in "the difficulties that could arise if litigations were carried on, one by one, with individual members of the class. Depending on the circumstances, individual litigations will adversely affect either the individual plaintiffs or the defendant." \(^94\) To account for which party would be affected by the individual litigations, the class or the party opposing it, subsection (b)(1) is broken down into two subdivisions. In (b)(1)(A) actions, the party opposing the class is obligated to treat all class members alike, as in the case of an employer whose employment policies are at issue. \(^95\) In (b)(1)(B) actions, individual suits by class members

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\(^{87}\) Gonzales v. Cassidy, 474 F.2d 67, 72 (5th Cir. 1973).


\(^{89}\) 311 U.S. 32 (1940).

\(^{90}\) *Id.* at 41-42.

\(^{91}\) *See infra* part III.

\(^{92}\) Fed. R. Civ. P. 23(b).

\(^{93}\) *See* Fed. R. Civ. P. 23(b)(1).

\(^{94}\) Kaplan, *supra* note 1, at 388.

\(^{95}\) *See* White v. National Football League, 822 F. Supp. 1389, 1408 (D. Minn. 1993) (certifying a class under 23(b)(1)(A) in action challenging the league's employ-
would be conclusive on the rights of other class members, as in the instance of a "limited fund," where one action could deplete the resources available for satisfying other class members' suits.96

Rule 23(b)(2) is applicable "[w]hen the party opposing a class ha[s] acted on grounds apparently applying to the whole group."97 Classes certified under Rule 23(b)(2) typically consist of plaintiffs seeking relief that is primarily injunctive or declaratory in nature.98 Because an injunction or declaratory judgment may affect an entire class, there is often a need for a unitary adjudication. The most common 23(b)(2) suit involves civil rights actions.99 As one commentator noted: "The impact of class suits in civil rights cases is substantial. Precedent alone never has the effect of a judgment naming a particular class of which a person is a member. Very often, a class action permits the judge to get to the heart of an institutional problem."100 While the Advisory Committee suggested that civil rights cases are appropriate for (b)(2) certification, the Committee also stated that this "subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages."101 This statement is the source of the so-called "predominance" test.

The third and final category under which class actions may be certified is Rule 23(b)(3). Rule 23(b)(3) class actions are those in which common questions of law or fact predominate.102 The Advisory Committee notes that this type of class does not as readily call for class-action treatment as do those certified under Rules 23(b)(1) and (2). Nevertheless, class-action treatment is permitted because the facts of the case dictate that a class action is the most desirable procedural device.103 The Rule provides four factors for a court to weigh in deciding whether a case is suitable for certification under (b)(3).104 The
prototypical (b)(3) suit concerns numerous plaintiffs with small claims who bring a class action. The individual claims are so small that it would not be economical to bring suits individually, but as a class, the total damage claim makes a suit feasible. Rule 23(b)(3) actions are particularly suitable to antitrust and securities fraud cases because such suits often involve many plaintiffs with small claims.

Because the only element that (b)(3) class members have in common is the claim, (b)(3) classes are often said to be not as "cohesive" as those under (b)(1) or (2). As one commentator phrased it, "There typically is no ongoing association among [the claimants] and the members often have different remedial objectives." Because (b)(3) litigants are less tightly bound together than are (b)(1) or (2) class members, there is less of a need for a unitary adjudication. Whereas (b)(1) and (2) class actions seek to bind class members because of a need for a single adjudication, such as in a suit against a limited fund or a civil rights case, (b)(3) classes do not have the same compelling need for a single class-wide adjudication.

Therefore, a key distinction between the class categories is that (b)(1) and (2) claims litigated separately would create conflicting judgments whereas individual (b)(3) claims would not produce such incongruity. Because (b)(3) classes are less "united" and do not demand a "unitary" adjudication, the Advisory Committee incorporated an additional procedural safeguard to ensure that the interests of members of (b)(3) classes in pursuing individual litigations are protected: (b)(3) class members must be provided with notice that the class action concerns them and an opportunity to opt out of the suit.

C. Management of Class Actions

Subsections (c), (d), and (e) of Rule 23 provide guidelines for a court in managing a class action. This section highlights only those

versy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.


106. See, e.g., Ridings v. Canadian Imperial Bank, 94 F.R.D. 147, 150 (N.D. Ill. 1982) (certifying class with small claims arising from securities fraud under 23(b)(3)); Wright, Federal Courts, supra note 78, at 517.


109. See Friedenthal, supra note 75, at 737.

110. Fed. R. Civ. P. 23(c)(2) advisory committee's note to 1966 amendment.

111. Fed. R. Civ. P. 23(c)(2); Miller, supra note 108, at 315.
portions of these subsections that relate to the overall fairness of the class-action device.

Subsection (c) incorporates two major changes to eliminate difficulties that Rule 23 parties experienced between 1938 and 1966. These alterations relate to the binding effect of (b)(3) actions and to the rights of absent class members in such suits. The subsection provides that (b)(3) actions, which were essentially "spurious" actions under the old rule, are now binding on absent class members provided that the members do not exclude themselves from the suit. This opt-out provision for (b)(3) actions changed the old rule under which unnamed class members had to "opt in" through intervention. As mentioned in part I, it was the difficulties with "wait and see" plaintiffs that "spurious" actions encouraged that precipitated the Rules Advisory Committee to revisit Rule 23.

Rule 23(d) provides an important discretionary tool for district court judges. Subdivision (d)(2) allows a court to provide notice to the class even though the Rule does not require notice in all class actions. A limited fund case is an example where notice would be helpful to class members to allow them to present their individual damage claims after a class-wide decision regarding liability has been reached. Courts may also send notice to class members to determine if any of them oppose the representation or to poll members on a modification to a consent decree.

The final subsection of Rule 23 requires court approval of any settlement, dismissal, or compromise to the class action. Subdivision (e) is designed to prevent a settlement that is unfair or unjust. Such a settlement may result either from class representatives not fulfilling their duty to "vigorously pursue" the class' interest or from collusion between the plaintiffs' and defendant's lawyers. Neither scenario is
desired; therefore, Rule 23 provides an additional safeguard to ensure that a settlement is fair.

III. DUE PROCESS IN CLASS ACTIONS

Thus far, this Note has attempted to illustrate that the class action is at its core a fair procedural device and that Rule 23 achieves the class action’s just goals. Yet, no matter how equitable the aims of the class action, because the class action ultimately decides the rights of unnamed class members not before the court, it raises due process concerns. This section focuses on three seminal Supreme Court cases that are often cited with regard to the due process rights of absent members in class actions: Mullane v. Central Hanover Bank & Trust Co.,119 Eisen v. Carlisle & Jacquelin,120 and Philips Petroleum Co. v. Shutts.121 While all three of these cases addressed legitimate due process concerns, the holdings of these cases are only relevant to classes certified under Rule 23(b)(3). As the Supreme Court originally stated in Hansberry v. Lee:122 “[T]here has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it.”123 The notice and opt-out requirements for Rule 23(b)(3) classes are unnecessary for (b)(1) and (2) classes because Rule 23 already fairly protects the interests of (b)(1) and (2) class members representatively.

A. Mullane v. Central Hanover Bank & Trust Co.

Although not a class action, Mullane v. Central Hanover Bank & Trust Co.124 is considered the progenitor of the notice requirement.125 The case involved the potential effect of a statutorily required accounting by a state court for the beneficiaries of a trust fund.126 The issue before the Court was whether notice in a newspaper was sufficient to bind beneficiaries not before the court.127 The Court held that, at least for the known beneficiaries, due process required individual notice by first-class mail.128 For the beneficiaries that were un-

122. 311 U.S. 32 (1940).
123. Id. at 42.
125. See 7B Wright, Federal Practice and Procedure, supra note 42, § 1786, at 190.
127. Id. at 315.
128. Id. at 318.
known, publication in the newspaper might suffice. The Court stated:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice 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 must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied.\textsuperscript{130}

The notice provisions of Rule 23 were incorporated to satisfy the due process requirements established by the Court in \textit{Mullane}.\textsuperscript{131}

Rule 23 addresses notice in two subsections of the Rule: in subdivision (d)(2), where notice is encouraged in any type of class action where the judge deems it appropriate,\textsuperscript{132} and in subsection (c)(2), where notice is required for (b)(3) actions. Rule 23(c)(2) states: "[T]he court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."\textsuperscript{133} In \textit{Eisen v. Carlisle & Jacquelin},\textsuperscript{134} the Supreme Court addressed the issue of what constitutes "the best notice practicable."

B. \textit{Eisen v. Carlisle & Jacquelin}

\textit{Eisen} involved a suit brought by a private investor against two odd-lot trading firms.\textsuperscript{135} The firms were charging small fees on all trades through their virtual monopoly of the market. Morton Eisen, whose personal stake in the action was under one hundred dollars, brought a class action against the firms to recoup the fees on behalf of himself and the other six million odd-lot traders. The class was certified under 23(b)(3).\textsuperscript{136} A problem arose in the cost of notifying the absent class members individually. Postage costs to the two and one-quarter million class members already identifiable would total $225,000, whereas a specialized notification scheme through the New York Stock Exchange, commercial banks, and the \textit{Wall Street Journal} would have cost only $21,720.\textsuperscript{137} The district court allowed Eisen to notify class

\textsuperscript{129} See id. at 317.
\textsuperscript{130} Id. at 314-15 (citations omitted).
\textsuperscript{131} See Fed. R. Civ. P. 23(c)(2), (d)(2) advisory committee's note to 1966 amendment.
\textsuperscript{132} Fed. R. Civ. P. 23(d)(2).
\textsuperscript{133} Fed. R. Civ. P. 23(c)(2).
\textsuperscript{134} 417 U.S. 156, 173 (1974).
\textsuperscript{135} Id. at 160.
\textsuperscript{136} Id. at 160-66.
\textsuperscript{137} Id. at 167.
members via the latter approach. 138 Both the Second Circuit and the Supreme Court, however, disagreed. 139 The Supreme Court held that because the names and addresses of the absent class members were "easily ascertainable," they had to be given individual notice. 140

The Court, however, rested its opinion on the requirements of Rule 23, rather than on the Constitution. 141 According to the Court, the requirements of subdivision (c)(2) dictate that individual notice must be sent to all identifiable class members, despite the potential costs to the class representative. 142 Conversely, the Mullane Court held that due process does not mandate individual notice in all situations; the "practicalities and peculiarities" of the case can be weighed in determining adequate notice. 143 By requiring that notice be sent to class members individually, Eisen established a stricter standard for notice than was previously required to ensure due process. 144 Because the standard established in Eisen was based on Rule 23(c)(2), its notice standard applies only to (b)(3) classes.

C. Phillips Petroleum Co. v. Shutts

The Supreme Court revisited the due process requirements of notice in Phillips Petroleum Co. v. Shutts. 145 Shutts involved a suit to recover the interest on royalty payments of leases owed by the oil company to a class consisting of some 33,000 royalty owners. 146 The forum state sought to bind the class of plaintiffs, which was composed of residents from a number of different states. 147 The Court held that the state could bind the plaintiffs only if it provided them with minimal due process. The Court stated:

[W]e 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. 148

The Court, however, expressly limited its opinion to those class ac-

138. Id.
140. Eisen, 417 U.S. at 175.
141. Id. at 177 (stating "quite apart from what due process may require, the command of Rule 23 is clearly to the contrary"); see Friedenthal, supra note 75, § 16.6, at 751.
142. Eisen, 417 U.S. at 176.
144. Friedenthal, supra note 75, § 16.6, at 751.
146. Id. at 801.
147. Id. at 806.
148. Id. at 812 (citing Hansberry v. Lee, 311 U.S. 32, 42-43, 45 (1940)).
tions with claims "wholly or predominantly for money judgments." The Court specifically did not extend its holding to class actions "seeking equitable relief." Because of these limitations on the holding, one commentator stated that Shuts does "not apply to classes certified under Rule 23(b)(1) or (b)(2)."

D. Notice and Opt-Out Rights in Rule 23(b)(1) and (2) Classes: A Contradiction of Terms

The aforementioned cases have helped to establish the process that is due absent members of classes certified under Rule 23(b)(3). The question of what process is due absent members of (b)(1) and (b)(2) classes, however, remains undecided. Ticor logically appeared to be the next case that would decide the due process rights of absent class members. The Supreme Court, however, decided not to resolve the issue on constitutional grounds. This is so despite the fact that the Ninth Circuit dealt specifically with due process considerations in its Ticor decision. The Ninth Circuit held that the Shuts due process standard applied to (b)(1) and (2) classes seeking substantial monetary damages, hence requiring that absent members be provided with a right to opt out of the suit. Such an opt-out right, however, is unnecessary for classes properly certified under (b)(1) or (2). Whereas notice and the right to be excluded from a suit are essential to the rights of individual members of (b)(3) classes to pursue their own individual litigations, such requirements are unnecessary and counterproductive in (b)(1) and (2) actions. Due process is instead satisfied in (b)(1) and (2) actions by the Rule's certification requirements rather than by any individual opt-out right.

As mentioned above, in structuring Rule 23(b), the Advisory Committee sought to categorize the functional occasions that naturally call for class-action treatment. In (b)(1) and (2) actions, class-action treatment is called for because a single adjudication is required to fi-

149. Id. at 811 n.3.
150. Id. at 811-12 n.3.
151. Newberg, supra note 4, § 1.19, at 1-47; see also 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 (1986). Miller and Crump comment that the notice and opt-out requirements of Shutts do not necessarily apply to all (b)(1) and (b)(2) classes if Shutts is viewed as "a case about distant forum abuse." They state: The right to opt out is essential to the Supreme Court's inference of consent, and that reasoning, in turn, is essential to the Court's validation of jurisdiction over members who have no affiliation with a distant forum. If this reasoning is accepted, Shutts does not abolish all [Rule 23(b)(1) and (b)(2)] classes. Instead, it prohibits only those [(b)(1) and (b)(2)] actions that are brought in inappropriate forums.

Id. at 52.
152. See supra notes 35-40 and accompanying text.
153. See supra notes 31-34 and accompanying text.
155. See supra notes 1-4 and accompanying text.
nally and uniformly decide the issues common to a class. In such cases, individual suits by class members, the result of class members opting out, would defeat the finality of a court’s decree: in a limited fund case, an individual claim could deplete the resources necessary to satisfy other class members’ claims, or in an employment discrimination suit, an employer could be subject to incompatible standards of conduct if employees filed individual suits. Notice and opt-out rights are unnecessary to satisfy due process in (b)(1) and (2) actions because in such actions, class members are in so similar a position:

Often each member of a (b)(1) or (b)(2) class would be affected by a judgment obtained in an individual action instituted by another member of the class. Moreover, in those classes, there are fewer special defenses or issues relating to individual class members. Therefore, it is more likely that the named representatives, by presenting their own claims, will protect the interests of the absent members, and the courts need be less concerned about making certain that each member of the class is given notice and an opportunity to be present.

The homogenity of claims inherent in (b)(1) and (2) actions, however, is not present in (b)(3) suits. For example, in a securities fraud case, a typical (b)(3) action, an individual action by a class member would not be conclusive on the rights of other class members. This is because a (b)(3) action is not as natural a candidate for a class action’s unitary adjudication as are (b)(1) and (2) classes.

It is broadly implicit [in (b)(3) actions] that a single determination by representative parties alone cannot in itself decide the claims or defenses of all class members; it is assumed that individual questions peculiar to individual class members, but outweighed by the common questions, will or may remain after the common questions have been finally determined.

In the case of a securities fraud claim, a class member’s individual suit for damages would not affect other claimants because an award would only affect that particular plaintiff—provided that the case does not involve a limited fund. Because individual litigations are not conclusive on the rights of other class members, there is no need for a unitary adjudication binding on all class members.

Because classes certified under (b)(3) do not as readily demand class-action treatment, Rule 23 respects the individual interests of members of such actions by permitting them to exclude themselves

156. See supra notes 93-101 and accompanying text.
157. See supra note 96 and accompanying text.
158. See infra part IV.A.
159. Friedenthal, supra note 75, § 16.6, at 752.
160. See supra note 106 and accompanying text.
from a suit.\textsuperscript{162} Whereas in Rule 23(b)(3) actions notice and opt-out rights are necessary to protect the individual interests of class members in pursuing their own litigations and thereby satisfy due process, such procedural safeguards are unnecessary to satisfy due process in (b)(1) and (2) actions.\textsuperscript{163} Due process in (b)(1) and (2) actions is satisfied through adequate representation, and any marginal gains from permitting class members of (b)(1) and (2) classes to opt out of a suit would be completely outweighed by the "societal costs"\textsuperscript{164} such safeguards would impose: permitting an individual to opt out of a (b)(1) or (b)(2) suit could completely defeat the court's decree by allowing claims to be relitigated.\textsuperscript{165}

Because representatives of (b)(1) and (2) classes adequately protect the due process interests of absent class members, not only are the due process requirements originally set forth in \textit{Hansberry v. Lee}\textsuperscript{166} satisfied, but the current due process test established by the Supreme Court in \textit{Mathews v. Eldridge}\textsuperscript{167} is also satisfied. Briefly stated, the \textit{Mathews} test requires the analysis of three factors: (1) the private interest of the party asserting the claim; (2) the risk that such interest could be deprived through the proposed procedure and the probable value of any additional procedural safeguards; and (3) the effect on the interests of other parties in providing the additional safeguards.\textsuperscript{168} In Rule 23(b)(1) and (2) actions, the interest involved is that of absent

\begin{itemize}
  \item \textsuperscript{162} See supra notes 107-11.
  \item \textsuperscript{163} See Kenneth W. Dam, \textit{Class Action Notice: Who Needs It?}, 1974 Sup. Ct. Rev. 97, 120 (commenting on notice requirements after \textit{Eisen}). Professor Dam states: 
    \textit{Res judicata} operates against class members, and so they do not benefit directly. As for defendants, they will not normally place much value on binding class members. If a defendant loses, the merger effect of \textit{res judicata} is usually irrelevant. As for barring further actions by class members, it would be the rare class member who would attempt to tread the same ground as the unsuccessful representative plaintiff. To the extent that class actions are the result of a lawyer's entrepreneurship, second actions need hardly be feared, for what entrepreneur would invest time and money in a venture already demonstrated to be profitless? Since the absent class members would be asserting claims presumable identical in every substantive respect with those of the representative plaintiff, the doctrine of \textit{stare decisis} would apply in an uncommonly powerful way.
  \item \textsuperscript{164} The Supreme Court has acknowledged that "the marginal gains from affording an additional procedural safeguard often may be outweighed by the societal cost of providing such a safeguard." \textit{Walters v. National Ass'n of Radiation Survivors}, 473 U.S. 305, 320-21 (1985); see also Newberg, \textit{supra} note 4, § 1.22, at 1-51 (stating that the due process rights of class members of Rule 23(b)(1) and (2) classes are adequately protected through representation).
  \item \textsuperscript{165} For instance, in the case of a limited fund, if individuals were permitted to opt out of the suit and relitigate, they could obtain a judgment that would deplete the fund.
  \item \textsuperscript{166} 311 U.S. 32, 41-42 (1940); see \textit{supra} text accompanying notes 89-90.
  \item \textsuperscript{167} 424 U.S. 319 (1976).
  \item \textsuperscript{168} \textit{Id.} at 335; see also \textit{Connecticut v. Doehr}, 111 S. Ct. 2105, 2112 (1991) (modifying the test for procedures between private parties).\textsuperscript{169}
\end{itemize}
class members in pursuing individual actions. As illustrated above, absent members of (b)(1) and (2) classes are in virtually the identical position as the named representatives; therefore, because the representatives have the same claims and defenses as absent members, any judgment against the representatives will be conclusive on the rest of the class. An additional safeguard of an opt-out right would prove to be fruitless. Moreover, regarding the third prong of the Mathews test, an opt-out right could greatly interfere with the rights of class members or parties opposing the class, because individual class members could relitigate claims in other courts. Therefore, whereas notice and opt-out rights may be necessary procedural safeguards in (b)(3) actions, they are antithetical to (b)(1) and (2) actions because in (b)(1) and (2) actions, adequate representation satisfies due process.

IV. A Unity Test

When the Supreme Court suggested in Ticor Title Insurance Co. v. Brown that the constitutional question of what process is due absent members of (b)(1) and (2) classes could be resolved by Rule 23 itself, in a manner of speaking, the Court was correct. Due process may be satisfied through Rule 23's certification requirements. Due process can be satisfied representatively under Rules 23(b)(1) and (2) so long as the class is properly certified. Therefore, the key to the class action dilemma—guaranteeing that the due process rights of absent members of (b)(1) and (2) classes that seek both equitable relief and monetary damages are protected while enabling a court to issue the complete relief a complaint requires—is to ensure that the class is properly certified.

As mentioned above, the "predominance" test has been the approach most courts have traditionally used in determining how to certify classes seeking both equitable relief and money damages. The problem with the predominance test is that it places too much emphasis on the form of relief sought and not enough on the reasons behind why classes and class claims deserve class-action treatment. Additionally, a balancing test, such as the predominance test, can put the fate of a class' certification in the hands of the pleader. If a class that seeks equitable relief and money damages has a skilled lawyer as its counsel, the class' attorney may be able to tip the scales of the predominance test in favor of equity and get a class that should have been certified under Rule 23(b)(3) certified under (b)(1) or (2) by adding claims for injunctive relief when the class claim is primarily for damages. Such artful pleading improperly binds class members while

170. See supra notes 11-13 and accompanying text.
avoiding notification costs.\textsuperscript{172} The class action, the "invention of equity," demands a more equitable test than merely weighing which relief is the primary one sought or inflexibly forcing claims that include monetary damages to be certified under Rule 23(b)(3). Because the class action seeks to adjudicate disputes on a class-wide basis, class certification should depend more on the nature of the claim and the nature of the class than on the form of the relief sought. A test can be derived from the considerations already present in the Rule that would allow classes that require binding class-action treatment to be certified under (b)(1) or (2), but would prevent absent class members from being improperly bound in a class that should never have been certified under that subdivision. Such a test can be termed a "unity" test.

The test requires a court to inquire whether a class' claim calls for a "unitary" adjudication, a single determination of relief binding on an entire class. If the nature of the class' claim is such that it requires a court to issue a single decree, irrespective of whether the relief includes a damage remedy, then (b)(1) or (2) certification is proper. In making this determination, a court should consider whether separate litigations would defeat a court's adjudication or present the defendant with demands for relief that are inconsistent with one another. If separate litigations would produce such effects, then the class should be certified under Rule 23(b)(1) or (2). If separate litigations would not interfere with the rights of other class members or the party opposing the class, then (b)(3) certification is more appropriate because there is no need for a unitary adjudication. Additionally, a court should consider whether there is a unity of claims among the class members; to the degree that a class' claims are united, due process is more readily satisfied.

An advantage of the unity test is that it coincides with the phrasing of subsection (b) of Rule 23. Rule 23(b)(1) states that a class action is appropriate when "the prosecution of separate actions by or against individual members" could create "inconsistent or varying adjudications" for individual class members, could cause "incompatible standards of conduct of the party opposing the class," or could "as a practical matter be dispositive of the interests of the other members" of the class.\textsuperscript{173} These are all instances of occasions that require a unitary adjudication. Rule 23(b)(2) states that a class action is appropriate when "the party opposing the class has acted or refused to act on grounds generally applicable to the class."\textsuperscript{174} If a party has acted against a class in a manner that requires a unitary adjudication, then a court should have the power to issue complete relief to a class, even if it includes monetary damages, so long as the damages flow from the

\textsuperscript{172} Id.
\textsuperscript{173} Fed. R. Civ. P. 23(b)(1).
\textsuperscript{174} Fed. R. Civ. P. 23(b)(2).
When damages flow from the equitable relief, the damages and the relief are both part of a court’s unitary adjudication.

Although subsection (b)(2) states that certification under that subdivision is appropriate for “final injunctive relief or corresponding declaratory relief,” the Rule does not state that (b)(2) certification is appropriate whenever injunctive or declaratory relief is sought, nor does it state that injunctive relief need be binding on an entire class. The problem that arises with the predominance test is that once a party pleads for injunctive relief and money damages, a court is put in the position of having to weigh which relief is the primary one sought, thus opening the door for reasonable minds to differ. A unity test, on the other hand, avoids this difficulty. Rather than asking a court to look to the relief requested, it asks a court to focus on the overall nature of the claim and the class to determine the relief required. If a class’ claim calls for a single adjudication that binds all class members, certification under (b)(1) or (2) is proper regardless of the form of relief sought, because allowing class members to pursue individual actions would defeat a court’s judgment. Moreover, to the extent that class members claims are similar, due process is satisfied through adequate representation, thus defeating the need for an opt-out right.

Application of the unity test is simple because it only requires a court to test whether a class’ claim meets certain criteria, a task a court must already undertake in subsections (a) and (b) of Rule 23. Additionally, regardless of whether a court is determining a class’ preliminary certification or approving a settlement, a court can apply the unity test at any stage of a class action.

Some illustrations of how this unity test operates are helpful in demonstrating its benefits and its superiority over both the predominance test and the automatic certification of classes seeking both equitable and monetary relief under Rule 23(b)(3).

A. Certification of a Class Seeking Substantial Monetary Damages Under Rule 23(b)(1)

As an initial illustration, this Note offers as a case study a class that sought equitable relief and substantial money damages. In the actual case, the class was certified under Rule 23(b)(1)(A) despite the presence of a large monetary claim. This illustration is intended to demonstrate how the unity test produces fairer results than does automatically certifying classes seeking monetary damages under Rule 23(b)(3).

175. See infra part IV.B (offering an example of damages flowing from equitable relief).
177. See supra note 13 and accompanying text.
178. See supra part II.A-B.
In *White v. National Football League*,\textsuperscript{179} a class of football players sued the National Football League, challenging the league's employment practices. The class sought injunctive as well as substantial monetary relief. The players and the league reached a settlement that included new terms of employment for the class members and over $250 million in monetary relief.\textsuperscript{180} Notice of the settlement was provided to class members both individually and through newspaper publication. Although this notice gave unnamed class members an opportunity to be heard and to object to the settlement, the court denied the motions of objecting players to opt out of the settlement. The court concluded: "[T]he prosecution of separate actions by individual players would create the risk of judgments that may, as a practical matter, affect the rights of class members and impair their ability to protect their interests."\textsuperscript{181} The class was thus certified under Rule 23(b)(1)(A).\textsuperscript{182}

If this case were instead certified under the rule-based rationale suggested by Supreme Court in *Ticor*, certification under Rule 23(b)(3) would have been necessary because the class sought a substantial monetary award in addition to equitable relief. Because class members would have been permitted to opt out of the suit, the complete relief that the court and these parties agreed was a fair and reasonable settlement would have been defeated. Individual players could relitigate their claims, and the NFL would be faced with incompatible standards of conduct because each player could potentially be subject to a different set of employment rules. "[T]he objective of both the class and of the NFL to lay a firm foundation for peace for years to come"\textsuperscript{183} would be subverted through endless relitigation of the same issues.

If this case were instead certified following a unity analysis, the settlement reached by the parties involved would bind the class and thus provide a final resolution of the dispute. The class consisted of members with an ongoing relationship; they were all professional football players. Because this relationship helps to ensure that absent members' rights are protected representatively, due process concerns are minimal. Moreover, the class' claim demanded a unitary adjudication: the final resolution of the conflict required a restructuring of the NFL's employment practices, and any judgment against a class mem-

\textsuperscript{179} 822 F. Supp. 1389 (D. Minn. 1993), aff'd, 41 F.3d 402 (8th Cir. 1994).

\textsuperscript{180} The settlement covered free agency, minimum salaries, the college draft, and the salary cap, and provided $115 million to be paid to class members, $80 million as reimbursement costs, $30 million in back pay, $10 million to the NFL Players Association, $19 million in settlements of other preexisting cases, and $19 million in attorneys' fees. *White*, 822 F. Supp. at 1413-16.

\textsuperscript{181} *Id.* at 1409.

\textsuperscript{182} *Id.*

\textsuperscript{183} *Id.* at 1415.
ber would affect all class members; hence, a single resolution was required.

The unity test accounts for the need for finality, without denying plaintiffs the form of relief they seek. Therefore, under a unity test, when justice demands that relief be provided that includes equitable as well as fiscal considerations, a court can provide such relief. If, on the other hand, classes were to be automatically certified under Rule 23(b)(3) merely because the relief sought included a monetary claim, a court would be unable to provide the parties with complete relief.

B. Certification of a Class Seeking Equitable Relief and Damages Under Rule 23(b)(2)

As a second illustration, this Note offers a case where a class brought suit seeking both injunctive relief and the retroactive payment of pension benefits. In *Jansen v. Greyhound Corp.*, a class consisting of 5251 retirees brought suit against their former employers, Armour and Armour Food Company ("AFC"), under the Employee Retirement Income Security Act, seeking to clarify the class members' rights to future benefits and to recover benefits due under an employee welfare benefit plan. The district court judge certified the class under Rule 23(b)(2), despite the existence of a monetary claim. The district court stated: "The monetary relief requested in this action involves retroactive payment of welfare benefits to the class members, as well as costs and attorney fees incurred by the plaintiffs in prosecuting this action. Any monetary relief awarded will flow from the declaratory and injunctive relief requested . . . ." If this case were instead certified under Rule 23(b)(3) because the claim included a request for monetary relief, unnamed class members would be permitted to opt out of the suit. Regardless of whether any class members opt out, all class members will be affected by the relief the court issues. If Armour and AFC must restructure their retirement benefits system, all retirees would be affected by the new program because Armour and AFC are obligated to distribute the pension fund uniformly to their retired employees. Moreover, because all class members are in virtually an identical position—they are retirees of the same companies—due process concerns are allayed because if due process is satisfied as to one claimant, it is naturally satisfied as to the absent claimants. Additionally, certifying the class under Rule 23(b)(3) would only encourage absent class members to take a "wait and see" position, a posture the Advisory Committee specifically sought to avoid.

185. Id. at 1023.
186. Id. at 1028.
187. Id.
188. See supra note 72 and accompanying text.
A unity test, on the other hand, allows the class to be certified under Rule 23(b)(2). The monetary relief is part of the court's overall unitary adjudication: the court could not issue complete relief without including the retroactive welfare benefits. Therefore, under a unity test, a court is able to issue a complete decree.

C. The Improper Certification of a Class Seeking Equitable Relief and Monetary Damages

The above illustrations demonstrate that a unity test allows a court a fuller panoply of remedies than does automatically certifying classes seeking money damages under Rule 23(b)(3). The courts in White and Jansen, however, used a predominance test to certify their respective classes and, concededly, reached a correct result. Although the predominance test may produce fair results in certain situations, a unity test is superior because it avoids the contradictory verdicts that result from courts trying to weigh the relief sought.\textsuperscript{189} As a case study, this section turns to Ticor.

In the original Ticor litigation, the State of Wisconsin, as a class member and as parens patriae for its resident class members, objected to the proposed settlement that was before the district court on the ground that the relief the class sought was primarily monetary and not injunctive. Thus, Wisconsin argued, on the basis of the predominance test, that Rule 23(b)(2) certification was improper.\textsuperscript{190} The district court rejected the objection and certified the class under (b)(1)(A) and (b)(2).\textsuperscript{191} The Third Circuit affirmed this certification.\textsuperscript{192} When the class relitigated the case in a different court, however, the Ninth Circuit disagreed with the class certification by holding that the class was not bound by the judgment.\textsuperscript{193} This is prima facie evidence that reasonable minds can differ on the proper balancing of the predominance test. This inconsistency stems from the difficulties in placing a value on equitable relief. A unity test, on the other hand, avoids these difficulties.

Under a unity test, the Ticor class' claim does not demand a unitary adjudication. Although the action can be decided through a single adjudication, the claim does not call for a single verdict. Separate ac-

\textsuperscript{189} See supra note 13 and accompanying text.
\textsuperscript{190} See In re Real Estate and Settlement Servs. Antitrust Litig., 1986-1Trade Cas. (CCH) ¶ 67,149 (E.D. Pa. 1986).
\textsuperscript{191} Id.
\textsuperscript{192} In re Real Estate Title and Settlement Servs. Antitrust Litig., 815 F.2d 695 (3d Cir. 1987), cert. denied, 485 U.S. 909 (1988).
\textsuperscript{193} Brown v. Ticor Title Ins. Co., 982 F.2d 386, 392 (9th Cir. 1992); see also, Laurie Davison et al., Supreme Court Term 1993-94: Decisions Affecting Access to Federal Courts, 28 Clearinghouse Rev. 510, 513 (1994) ("Ticor has one immediate repercussion. It leaves intact in the Ninth Circuit—the largest circuit in the country—the rule that due process requires an opportunity to opt out when the damages sought in a Rule 23(b)(2) class action are 'substantial.'")


tions could have been pursued without creating inconsistent verdicts or different standards of conduct that the defendant would be unable to satisfy. Even if an injunction were granted against Ticor’s alleged price fixing, such a remedy need not bind all class members. If unnamed class members excluded themselves from the injunctive relief, Ticor, at worst, would have to issue title insurance policies under different terms to excluded class members. The issuance of such policies does not amount to facing incompatible standards of conduct. Ticor is not in the position of the NFL in White, where the league is obligated to employ its players under like terms, or Armour and AFC in Jansen, where the companies must distribute the pension fund evenly. Ticor, rather, is offering title insurance to consumers, essentially an arms-length business transaction where there is no relationship between the parties that would require a single adjudication binding on all purchasers of title insurance.

Additionally, as the Ninth Circuit concluded, the Ticor litigation suffered from due process deficiencies. The due process problem, however, arose not because the class sought “substantial” damages, but because the class lacked unity. The only aspect the class members had in common was the claim—a characteristic of a (b)(3) class. There was no ongoing relationship among class members, as in White and Jansen, to help ensure that the representative parties adequately represented the class and thereby satisfy due process to all. Therefore, because the class members should have been afforded an opt-out opportunity to pursue individual litigations, certification under (b)(1) and (2) was improper. Whereas the predominance test creates inconsistencies, a unity test provides a sounder guideline for the certification of classes and adequately addresses due process concerns through Rule 23’s certification requirements.

Conclusion

The class action is an equitable device, and Rule 23 provides a mechanism for classes to obtain relief, both equitable and monetary. If a court uses the unity test proposed above when certifying classes, the goals of finality, consistency, and judicial economy will be met. In Rule 23(b)(1) and (2) actions, due process will be satisfied through adequate representation, thereby avoiding the need for notice and opt-out rights. The class action’s purpose of creating a device whereby large numbers of individuals who are similarly situated can resolve disputes in a single adjudication will be achieved. In the spirit of the class-action device, the class and the claim will be the primary focus, rather than the relief requested. Classes that demand an adjudication that includes both equitable relief and money damages can be

194. See supra notes 31-34 and accompanying text.
195. See supra note 107 and accompanying text.
properly certified under Rules 23(b)(1) and (b)(2), and would not be required to be certified under Rule 23(b)(3), as the Supreme Court implied in *Ticor*. Thus, suits that require a single adjudication and demand equitable and monetary relief could find resolution.