Class Actions, Personal Jurisdiction, and Plaintiffs' Due Process: Implications for Mass Tort Litigation

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[T]his jurisprudence of jurisdictional due process has been developed in cases almost all of which involved one or a few parties on each side. The Supreme Court's two-pronged inquiry [sovereignty and fairness] has never been articulated in the context of a mass tort case arising out of the national (or international) marketing of a product. Only in Shutts *has the Court dealt with this type of case, and there it was prepared to stretch prevailing jurisdictional standards by reliance on implied consent theory.* [1]

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[1] *In re* DES Cases, 789 F. Supp. 552, 585 (E.D.N.Y. 1992), *appeal dismissed, In re* DES Litig., 7 F.3d 20, 25 (2d Cir. 1993); *see also* Grimes v. Vitalink Communications Corp., 17 F.3d 1553, 1567 (3d Cir. 1994) (Hutchinson, J., dissenting) (noting that cases involving jurisdiction over individual as opposed to class defendants have always set out general principles relating to minimum contacts due process jurisprudence).

For commentary on Judge Weinstein's reinterpretation of *International Shoe* personal jurisdiction requirements as applied to defendants in the mass tort context, see generally Julia Christine Bunting, Ashley v. Abbott Laboratories*: Reconfiguring the Personal Jurisdiction Analysis in Mass Tort Litigation*, 47 VAND. L. REV. 189 (1994); *see also* C. E. Erway, III, *Toss Your Old International Shoes Into the Common Economic Pond: Judge Weinstein Strikes Again — Novel "Mass Tort" Theory of Nationwide Personal Jurisdiction Applied in* In Re DES Cases, 4 PRODS. LIAB. L.J. 94 (1993); John Howard, Comment, *Adapting Due Process to Match Your Tort:* In Re DES*: A Novel Approach to Jurisdiction*, 67 ST. JOHN'S L. REV. 655 (1993); and Michael F. Marchetti, Comment, *Throwing Personal Jurisdiction Into the Pond: Mass-Tort Defendants' Rights Ripple Away in* Ashley v. Abbott Laboratories, 59 BROOK. L. REV. 1617 (1994).

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INTRODUCTION

One of the most overlooked but nonetheless enduring legacies of fifty years of *International Shoe* jurisprudence has been the almost obsessive judicial concern with defendants' due process. Certainly this is not surprising — Justice Stone's opinion focuses exclusively on the due process requirements for subjecting a nonresident corporate *defendant* to an in personam judgment.[2] In the half century since *International Shoe,* state and federal courts have busied themselves with delineating the contours of due process in relation to assertions of personal jurisdiction over nonresident defendants.

Essentially for nearly fifty years, state and federal courts have largely been unconcerned with plaintiffs' due process in relation to personal jurisdiction. The Supreme Court — on very few occasions — has offhandedly noted that *International Shoe* minimum contacts jurisprudence does not extend to plaintiffs.[3] It was not until 1985 that the Supreme Court, when directly confronted with the question in *Phillips Petroleum Co. v. Shutts,*[4] finally turned its attention to consideration of plaintiffs' due process.

Phillips Petroleum Co. v. Shutts is as important a progeny of *International Shoe* as the myriad decisions worrying over the elaboration of defendants' minimum contacts jurisprudence,[5] con-

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[2] *See* International Shoe Co. v. Washington, 326 U.S. 310, 316, 319 (1945). Although much of Justice Stone's analysis is couched in references to subjecting a nonresident corporation to personal jurisdiction, the Court's broader pronouncements refer to due process requirements relating to defendants: *e.g.*, "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 and substantial justice.'" *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)); *see also 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 . . . .").

[3] *See, e.g.*, Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 780 (1984); Calder v. Jones, 465 U.S. 783, 788 (1984); Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 412 n.5 (1984).

In addition, not until World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), did the Supreme Court even suggest that "the plaintiff's interest in obtaining convenient and effective relief" should enter into the calculus of personal jurisdiction. *Id.* at 292.

[4] 472 U.S. 797 (1985).

[5] This extensive doctrinal elaboration of minimum contacts jurisprudence has, in

fronting the issue whether considerations of plaintiffs' due process are equally as important as defendants'. While the Court in *Shutts* analyzed due process requirements for opt-out class actions, it left open the more troubling question of due process requirements for equitable, hybrid, mandatory class actions.[6] This issue resurfaced on the 1994 Supreme Court docket in *Ticor Title Insurance Co. v. Brown*,[7] but the Court cryptically declined to supply any answers to this difficult problem.[8]

Fifty years of *International Shoe* jurisprudence has intensively scrutinized nearly every conceivable wrinkle relating to defendants' due process. At the end of this century, however, the most compelling jurisdictional issue relates not to defendants' due process but rather to the requirements of plaintiffs' due process, especially in mass tort litigation.[9] The issue of plaintiffs' due process has become particularly compelling in those mass tort cases where the preferred procedural means is the mandatory settlement class.[10] In essence, mandato-

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turn, inspired the enormous corpus of academic commentary similarly fussing over every doctrinal irrationality and inconsistency.

[6] *World-Wide Volkswagen*, 472 U.S. at 811-12 n.3 ("Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments. We intimate no view concerning other types of class actions, such as those seeking equitable relief . . . .").

[7] 114 S. Ct. 1359 (1994) (per curiam); *see infra* notes 12-13 and accompanying text.

[8] *See* Linda S. Mullenix, *Supreme Court Review: Court Sets New Rules in Key Areas*, NAT'L L.J., Aug. 15, 1994, at C7 (discussing *Ticor Title Ins. Co. v. Brown*).

[9] *See, e.g.*, *In re* Agent Orange Prod. Liab. Litig., 996 F.2d 1425 (2d Cir. 1993) (rejecting personal jurisdiction challenge to Agent Orange class action settlement and declining to extend *Shutts* notice requirements to unknown plaintiffs); *In re* Joint E. & S. Dist. Asbestos Litig., 982 F.2d 721 (2d Cir. 1992) (upholding personal jurisdiction in diversity Rule 23 (b)(1)(B) limited fund bankruptcy trust under Bankruptcy Code protections rather than under *Shutts* or Hansberry v. Lee, 311 U.S. 32 (1940), due process requirements). *But see In re* DES Cases, 789 F. Supp. 552, 575-77 (E.D.N.Y. 1992) (Weinstein, J.) (asserting flexible personal jurisdictional requirements for mass tort cases based on model supplied by Keeton v. Hustler Magazine, 465 U.S. 770 (1984)), *appeal dismissed*, *In re* DES Litig., 7 F.3d 20, 25 (2d Cir. 1993); *see also infra* notes 59-63 (discussing *Keeton*).

Judge Weinstein's jurisdictional focus in the *In Re DES Cases* is much more in the tradition of defendant-oriented analyses in the fifty years following *International Shoe*, although an interesting departure from, or extension of, this doctrine. *See* commentary cited *supra* note 1. The purpose of this paper is not to discuss mass tort personal jurisdiction as it relates to the fairness of asserting jurisdiction over mass tort defendants. Rather, the purpose of this paper is to analyze the *Shutts* issues relating to the due process dimensions of mandatory mass tort class-action procedure over absent class members.

[10] *See, e.g.*, Notice of Class Action, Global Settlement and Third-Party Claimant Class Settlement and Hearing, Ahearn v. Fibreboard Corp., (E.D. Tex. 1995) (No. 6:93cv526)

ry mass tort settlement classes embody the problem presented in *Ticor Title*, and until the Supreme Court, Congress, or the Advisory Committee on Civil Rules[11] addresses the problem of the requirements of plaintiffs' due process, these settlement classes will remain vulnerable to due process challenge.

This Article sets forth the issues surrounding plaintiffs' due process, personal jurisdiction, and mandatory class actions, exploring the implications for mass tort litigation. Part I discusses these issues as manifested in *Ticor Title Insurance Co. v. Brown* against the backdrop of *Phillips Petroleum Co. v. Shutts* and *International Shoe* minimum contacts jurisprudence.[12] Part II briefly surveys the sparse judicial consideration of these problems, concluding that the Supreme Court seems to have suggested that the due process protections for nonresident class members are somehow different or significantly lower than those needed for defendants because of the inherent protections built into the class-action device.[13]

Part III then discusses possible analytical approaches to plaintiffs' due process concerns. The Article concludes that if the central due process concern of personal jurisdiction derives from the doctrine of res judicata and the binding effects of judgments, then the requirements of plaintiffs' due process in mandatory class actions ought to parallel those for defendants. Furthermore, the historical distinctions underlying the 1966 Rule 23 revision that resulted in mandatory and nonmandatory class actions may have decreasing relevance for late twentieth century complex litigation. Therefore, modern mixed-relief mandatory

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(on file with the *University of California at Davis Law Review*). The fairness hearing on this mandatory Rule 23 (B)(1)(b) class action settlement occurred in January 1995. *Id.*

[11] The Advisory Committee on Civil Rules has been considering possible revision of Rule 23, but has not yet acted on a draft proposal. *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Memorandum to Members of the Bench and Bar, Request for Comments on Preliminary Draft of Proposed Amendments to Rules 23 and 68 of the Federal Rules of Civil Procedure* (Feb. 4, 1993) (on file with *University of California at Davis Law Review*).

[12] The problem of plaintiffs' due process is a direct lineal descendant of the *International Shoe* minimum contacts jurisprudence, running from *International Shoe* through *Shutts* and the *Ticor Title* litigation. For an elaboration of these connections, see, *e.g.*, Grimes v. Vitalink Communications Corp., 17 F.3d 1553, 1558-61 (3d Cir. 1994).

[13] *See, e.g., Grimes*, 17 F.3d at 1560 (construing *Shutts* to require lower due process protections for absent class members and to require lower burden on plaintiffs than defendants).

class actions that do not provide absent class members with ample due process protections may be constitutionally deficient. Conversely, these class actions may be redeemed by use of alternative due process protections.

To satisfy constitutional requirements, mandatory class-action procedure needs to include, at a minimum, notice and an opportunity to be heard in the litigation.[14] Moreover, in the absence of a universal opt-out requirement for all class actions, courts might instead require procedures for mandatory classes that provide a substantial equivalent to an exclusion right. A more controversial notion is that complete due process for absent class members might require all class actions to provide an opt-out provision, a due process protection that would require the Advisory Committee on Civil Rules or Congress to reformulate the current class-action rule.[15]

Providing such a uniform opt-out rule for all class-action procedure, however, may subvert the goals and utility of this central aggregative litigation device. Hence, at the close of the twentieth century, the same sovereignty and fairness concerns that have animated *International Shoe* and its progeny for fifty years have now been recast in the compelling debate over individual versus aggregate justice.

I. *TICOR TITLE INSURANCE CO. V. BROWN*: THE LEGACY OF *PHILLIPS PETROLEUM CO. V. SHUTTS* AND *INTERNATIONAL SHOE*

Ticor Title Insurance Co. v. Brown, on the 1994 Supreme Court docket, was significant for two important reasons: first, the case squarely raised the question of plaintiffs' due process requirements in a non-opt-out class action, and second, the Supreme Court declined to answer what due process requires in such cases. Although *Ticor Title* was not a mass tort case, the Supreme Court's failure to address the due process issue was nonetheless important for mass tort litigation since *Ticor Title* involved a mandatory class, the procedural device that has become an in-

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[14] *Id.*

[15] Professors Arthur Miller and David Crump proposed this suggestion after the Supreme Court handed down the *Shutts* decision. *See generally* 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, 77 (1986).

creasingly important means of resolving mass tort litigation. This section explores *Ticor Title* in detail, including the Supreme Court's baffling behavior in insisting on the appeal and then cryptically refusing to decide it.

A. Ticor Title, *Plaintiffs' Due Process, and the Conflict Among the Circuits*

Ticor Title evolved from a complex litigation involving federal administrative procedure, federal multidistrict litigation, and parallel duplicative state class actions.[16] In the early 1980s, the Federal Trade Commission (FTC) began investigating insurance company title price-fixing. As a result of its investigation, the FTC began a civil action against Ticor Insurance Company. Subsequently, property purchasers instituted twelve private class actions in federal courts in California, Oregon, New York, and Pennsylvania.

These scattered class actions were consolidated into one multidistrict litigation in the Eastern District of Pennsylvania.[17] The plaintiffs sought injunctive relief against six insurance companies directing them to cease price-fixing practices. In addition, the lawsuit sought tens of millions of dollars in damages on behalf of 3.4 million consumers, who had purchased title search services and insurance from the defendant companies over a five-year period in thirteen states.

In June 1986, the Pennsylvania district court approved a mandatory class settlement.[18] The insurance companies agreed to provide enhanced policy coverage for current policyholders and reduced rates for class members who purchased new policies. In addition, the insurance companies agreed not to engage in the challenged practices for a specified time period. As part of the settlement, the class action was certified under Federal Rules of Civil Procedure 23(b)(1) and (b)(2), and the plaintiffs agreed

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[16] *See* Linda S. Mullenix, *Mandatory Class Actions That Include Monetary Claims: Does Due Process Require Absent Class Members to Opt Out?*, 5 PREVIEW OF U.S. SUPREME COURT CASES 157 (1994); *see also* Ticor Title Ins. Co. v. Brown, 114 S. Ct. 1359, 1360-61 (1994) (per curiam).

[17] *In re* Real Estate Title and Settlement Servs. Antitrust Litig., No. MDL 633, 1986 WL 6531, at *1 (E.D. Pa. June 10, 1986).

[18] *Id.* at *22.

to drop their damages claims, thereby avoiding certification under Rule 23(b)(3). Further, the class members relinquished all federal and state claims against the defendants arising from their price-fixing activities.

Prior to approving this agreement, a notice of the settlement was published on two occasions in thirty-six newspapers, reaching more than six million readers in the thirteen affected states. In response, several individuals filed objections, and the Attorneys General of Montana, New Jersey, Ohio, Pennsylvania, and Wisconsin, as representatives of the interests of their respective state governments and residents, collectively filed an objection to the settlement. In addition, Arizona asserted a right to opt out of the class settlement.

After a fairness hearing to assess the proposed settlement, the Pennsylvania district court approved the agreement, determined that the class met the four necessary prerequisites for class-action certification, and, finally, certified the class under Federal Rule of Civil Procedure 23 (b)(1)(A) and (b)(2). The court rejected Arizona's claim to opt out of the settlement, holding that Rule 23 (b)(1) and (b)(2) actions are mandatory and do not permit plaintiffs to opt out of the class. The court acknowledged that the consumers' claims involved tens of millions of dollars worth of overcharges, but held that a discretionary grant to opt out would undo the settlement and undermine the public policy in favor of settlements. The court also indicated that the rights of individual class members were protected by the Rule 23 requirements of adequate representation by qualified counsel and court scrutiny of the proposed settlement to ensure fairness.

The Arizona Attorney General appealed the district court's refusal to permit absent class members to opt out of the settlement on the ground that, because the case involved monetary claims, constitutional due process required that absent class members be permitted to opt out. The Third Circuit Court of Appeals affirmed without opinion.[19]

The Attorneys General of Arizona and Wisconsin did not give up, however, in their efforts to recover damages from the six

[19] *In re* Real Estate Title & Settlement Servs. Antitrust Litig., 815 F.2d 695 (3d Cir. 1987), *cert. denied*, 485 U.S. 909 (1988).

insurance companies for overcharging consumers. In the wake of the Pennsylvania class-action settlement, they filed various federal and state actions seeking injunctive relief and damages against the same insurance companies sued in MDL 633. The insurance companies responded that the settlement bound all class members and, therefore, the doctrine of res judicata barred these subsequent actions.

Agreeing with the companies' res judicata argument, the district court entered an injunction to enforce its judgment and prohibit further litigation of the claims settled in the class action. However, the Third Circuit vacated the enforcement injunction, suggesting that the due process rights of absent Arizona class members may not have been protected, and this due process issue could be properly raised in subsequent state or federal litigation.[20]

Armed with this decision, the Arizona Attorney General filed a complaint in Arizona federal court in April 1990 against the six title insurance companies on behalf of Arizona and Wisconsin title insurance purchasers. The insurance companies again invoked the doctrine of res judicata, and the Arizona district court dismissed the case. The court held that the plaintiffs in this new action were within the MDL 633 class, had been adequately represented in that action, and were bound by the judgment. Finally, the court held that the judgment did not violate due process.

On appeal, the Ninth Circuit Court of Appeals reversed and held that the plaintiffs' due process rights had been violated in the class-action settlement.[21] The Ninth Circuit held that the MDL class had been properly certified, that the class members were adequately represented and apprised of the settlement, and also had an opportunity to object. Nonetheless, the court held that the case was controlled by the Supreme Court's due process analysis in *Phillips Petroleum Co. v. Shutts*,[22] and read *Shutts* to require a due process right to opt out of a class action if mone-

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[20] *In re* Real Estate Title & Settlement Servs. Antitrust Litig., 869 F.2d 760 (3d Cir. 1989), *cert. denied sub nom.* Chicago Title Ins. Co. v. Tucson Unified Sch. Dist., 493 U.S. 821 (1989).

[21] Brown v. Ticor Title Ins. Co., 982 F.2d 386, 392 (9th Cir. 1992), *cert. granted*, 114 S. Ct. 56 (1993), *cert. dismissed per curiam*, 114 S. Ct. 1359 (1994).

[22] 472 U.S. 797 (1985).

tary claims are involved. As a hybrid action, the court found that the MDL 633 settlement foreclosed substantial damages. Thus, the Arizona and Wisconsin plaintiffs should be able to relitigate their monetary claims, although they were bound by the injunctive relief of the class-action settlement.

In the spring of 1993, the insurance companies requested that the Supreme Court review the Ninth Circuit's decision, but by fall, the parties became reluctant Supreme Court adversaries. In October, Ticor and the other insurance companies settled with the plaintiffs, agreeing to pay $2.8 million to Arizona and Wisconsin class members. Three days later, unaware of the settlement, the Supreme Court granted certiorari to hear the case. Even though the parties intended their settlement to moot their pending Supreme Court case, and despite requesting that the Court withdraw its grant of certiorari, the Court nonetheless asked the parties to brief and argue the merits, which they did in early 1994. The Third and Ninth Circuit decisions had created a conflict among the federal appellate courts concerning the due process requirements for class actions which the Court apparently sought to resolve.[23]

In the Supreme Court appeal, the litigants in *Ticor Title* disagreed over the relevancy and applicability of the *Shutts* decision, arguing that the Court's personal jurisdiction due process analysis in *Shutts* had only tangential bearing on a hybrid federal class action.[24] On behalf of the insurance companies, Ticor Title argued that federal courts had inherent nationwide jurisdiction over class actions and, therefore, due process concerns had to be measured by the requirements set forth in the Court's benchmark case relating to property deprivations, *Mathews v. Eldridge*,[25] rather than *Shutts*.[26]

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[23] The actual holding of the Third Circuit's decision has been subject to some dispute. *See* Grimes v. Vitalink Communications Corp., 17 F.3d 1553, 1561 (3d Cir. 1994) (questioning broad reading of *In re Real Estate Title* to deny personal jurisdiction over absent class members); *see also* Carlough v. Amchem Prods., Inc., 10 F.3d 189, 199 (3d Cir. 1993) ("[I]t would offend . . . due process for a federal court to enjoin an absentee class member whose minimum contacts with the forum have not been established or, in lieu of minimum contacts, who has not consented to the court's jurisdiction, explicitly or inferentially.").

[24] A hybrid federal class action is one that seeks both equitable and compensatory relief (as opposed to the notion of "hybrid" class actions under the old pre-1966 class action rule).

[25] 424 U.S. 319 (1976). In *Eldridge*, the Court looked to three factors to assess

The consumer class representatives also argued that the *Shutts* personal jurisdiction minimum contacts analysis was inapt for their situation, noting that nothing the Court decided with regard to personal jurisdiction in the class-action context undercut a separate due process right to opt out of damage class actions. They suggested that *Shutts* should be read to require an opt-out right in class actions that are wholly or predominantly for monetary claims, and this rule applied to the damages claims in their lawsuit.[27]

On April 4, 1994, the Court handed down a short per curiam opinion dismissing its own writ of certiorari in *Ticor* as improvidently granted.[28] Not only did the Supreme Court decline to resolve the due process issues raised on appeal, but the Court left a residual mystery concerning why the Court initially desired to hear the case but then declined to decide it.

B. The Supreme Court's Improvidently Granted Review

The Court's refusal to decide *Ticor Title* left federal litigants in the lurch concerning the due process requirements for non-opt-out hybrid class actions. The immediate implication of the Court's refusal to decide *Ticor Title* is that federal litigants in the Ninth Circuit, at least,[29] have a constitutional due process right to opt out of any monetary damage class action — a right that may well not be recognized in other federal circuits.[30]

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violations of procedural due process: (1) the interests of the person asserting a due process claim, (2) the likelihood that additional safeguards would reduce the risk of erroneously harming those interests, and (3) the impact on other parties, including the government, of providing additional safeguards. *Id.* at 335. *See generally* Harvey Rochman, Note, *Due Process: Accuracy or Opportunity?*, 65 S. CAL. L. REV. 2705, 2725-35 (1992) (discussing whether *Eldridge* supplies due process test for mass tort class-action litigation).

[26] Brief for Petitioners at 9-10, Ticor Title Ins. Co. v. Brown (No. 92-1988).

[27] Brief for Respondents at 6, Ticor Title Ins. Co. v. Brown (No. 92-1988).

[28] Ticor Title Ins. Co. v. Brown, 114 S. Ct. 1359 (1994) (per curiam).

[29] Federal litigants in the Third Circuit may also maintain this right. *See supra* notes 20, 23. In the dissent from the per curiam opinion, Justice O'Connor wrote: "Unless and until a contrary rule is adopted, courts will continue to certify classes under Rules 23(b)(1) and (b)(2) notwithstanding the presence of damage claims; the constitutional opt-out right announced by the court below will be implicated in every such action, at least in the Ninth Circuit." *Ticor Title*, 114 S. Ct. at 1363.

[30] As of this writing, there have been few reported federal decisions relying on *Ticor Title* or its related appellate decisions. *See, e.g.*, Silber v. Mabon, 18 F.3d 1449, 1454 (9th Cir. 1994) (distinguishing notice requirements in Rule 23 (b)(3) class actions from *Ticor*

The per curiam decision represented the votes of six Justices who apparently concluded belatedly that certiorari had been improvidently granted, on the ground that the *Ticor Title* appeal called for the resolution of a hypothetical constitutional question foreclosed by res judicata.[31] Justices O'Connor, Kennedy, and Chief Justice Rehnquist vehemently protested the court's withdrawal of certiorari.[32]

It is curious why the Court — beyond the proffered explanation — retreated from discussing and deciding the issue of the due process requirements in hybrid class actions. Perhaps after hearing the oral arguments some Justices concluded that the non-opt-out provisions of Federal Rule of Civil Procedure 23 indeed may be unconstitutional for failing to provide necessary or adequate due process safeguards to absent class members. Protective of the court's own rulemaking authority — and therefore chary of declaring, for the first time,[33] that portions of a Federal Rule of Civil Procedure were unconstitutional — the

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Title); Grimes v. Vitalink Communications Corp., 17 F.3d 1553, 1561 (3d Cir. 1994); White v. National Football League, 822 F. Supp. 1389, 1412 (D. Minn. 1993) (stating that due process does not require mandatory opt-out right). Consistent with past practice, many federal courts do not permit class members an opt-out right in Rule 23(b)(1) and (b)(2) class actions. *See, e.g.*, Robertson v. National Basketball Ass'n, 556 F.2d 682, 685 (2d Cir. 1977) (precluding opt-out right in Rule 23(b)(1) antitrust mixed damages and equitable relief class action); Avagliano v. Sumitomo Shoji Am., Inc., 107 F.R.D. 748, 749-50 (S.D.N.Y. 1985) (following *Shutts* in holding that nationwide civil rights (B)(2) class for combined equitable and back pay need not provide opt-out right to absent class members).

[31] *See Ticor Title*, 114 S. Ct. at 1361-62. Astonishingly, the per curiam decision noted, in conclusion, that the Court should not decide the case because it would not make any difference to the litigants, in light of the fact that they had entered into a settlement agreement designed to moot the certiorari petition. *Id.* at 1362.

[32] *Id.* at 1362-64. Given the Court's "Rule of Four" for granting certiorari, one may assume that one justice who had previously voted to grant certiorari got cold feet after the oral arguments and joined the per curiam majority. It is interesting to speculate which of the Justices changed his or her mind and decided to defer deciding the class action due process issue.

[33] Although several Federal Rules of Civil Procedure have been challenged as unconstitutionally transgressing the requirements of the Rules Enabling Act, 28 U.S.C. § 2072 (1988), the Supreme Court has never declared a Federal Rule of Civil Procedure as unconstitutionally enacted. *See generally* Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1327-29 (1993); Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 426-30 (1992). *See generally* Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991) (commenting on changes in Advisory Committee rulemaking authority).

Justices sensibly may have drawn back from this constitutional precipice.[34] It is equally likely that the Court was aware that the Advisory Committee on Civil Rules was contemporaneously considering possible revision of Rule 23. Thus, rather than judicially addressing the issue of Rule 23 procedural due process, the Court may have preferred to allow the federal rulemaking process, or even Congress, to go forward with a legislative approach to rethinking the due process requirements of class-action procedure.[35]

Ticor Title was a disappointment, because the Court had a good opportunity to evaluate the due process issue concerning the procedural requirements for hybrid class actions seeking both equitable and monetary relief left open after *Shutts*. The Court's failure to decide *Ticor Title* was especially significant because the Court had the opportunity to revisit its decision in *Shutts* and clarify the various strands of due process intertwined in class-action procedure: personal jurisdiction, fairness, and preclusive effects. *Shutts* did not abundantly distinguish these due process concerns, and the Court failed in *Ticor Title* to unravel and explain the relationship among due process concerns.

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[34] That the Court was concerned about its own rulemaking authority and the problem of declaring portions of Rule 23 as violative of due process is suggested by the Court's expressed worry about deciding this constitutional question:

> Another consequence, less apparent, is that resolving the constitutional question on the assumption of proper certification under the Rules may lead us to the wrong result. If the Federal Rules, which generally are not affirmatively enacted into law by Congress, see 28 U.S.C. §§ 2072(a), (b), 2074(a), are not entitled to that great deference as to constitutionality which we accord federal statutes, . . . they at least come with the *imprimatur* of the rulemaking authority of this Court. In deciding the present case, we must assume either the lack of opt-out opportunity in these circumstances was decreed by the Rules or that it was not (though the parties are bound by an erroneous holding that it was). If we make the former assumption we may approve, in mistaken deference to prior Supreme Court action and congressional acquiescence, action that neither we nor Congress would independently think constitutional. If we make the latter assumption, we may announce a constitutional rule that is good for no other federal class action. Neither option is attractive.

Ticor Title, 114 S. Ct. at 1362.

[35] *Id.*

C. The Shutts-Ticor Title *Due Process Problem*

It is hornbook law that class-action litigation is, by nature and definition, representational litigation. That is, numerous claimants join together to commonly assert their claims against one or more defendants. Each class member does not individually assert the legal claims; rather, class representatives assert any legal claims on behalf of all class members. To ensure the justice and efficiency of the class-action procedure, judgments reached through class-action litigation are binding on all class members.[36] Thus, once the court has achieved a judgment, the doctrine of res judicata operates to preclude any subsequent litigation of claims.[37]

In 1940, two years after the enactment of the Federal Rules of Civil Procedure, the Supreme Court, in *Hansberry v. Lee*, noted that the class-action mechanism was an exception to the traditional principle that one cannot be bound to a judgment unless one was a party to the lawsuit in the traditional sense.[38] To ensure procedural fairness, however, the Supreme Court recognized that absent or unnamed parties to a class-action litigation could be bound to the court's judgment only if the named class representatives adequately represented the common interest of the class (including actual and absent class members). Constitutional due process concerns, then, were satisfied by judicial scrutiny of the adequacy of class representation and certification of the common interest of class members.[39]

In 1985, in *Phillips Petroleum Co. v. Shutts*, the Supreme Court revisited the question of constitutional due process as it relates to class-action procedure. The Court held that due process is not violated when a state asserts personal jurisdiction over absent class members with minimal contacts to the state in which

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[36] *See* 7B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1789 (2d ed. 1986).

[37] *Id.*; *see, e.g.*, Grimes v. Vitalink Communications Corp., 17 F.3d 1553, 1558 (3d Cir. 1994) ("In effect, all ordinary class members are bound by the deal struck by their named representatives in the event the court determines that they were adequately and fairly represented during the course of the [settlement] negotiations.").

[38] 311 U.S. 32, 40-41 (1940).

[39] *See* 7A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 1759-71 (2d ed. 1986).

the litigation is conducted.[40] Though recognizing that res judicata applies to judgments rendered against plaintiffs and forecloses relitigation of previously litigated damage claims, the Court nonetheless held that due process concerns are satisfied by various procedural safeguards.[41]

After *Shutts*, before a class action may be certified, courts must determine whether the interests of plaintiffs are common and whether class counsel can adequately represent those common interests. In addition, absent plaintiffs are protected by various requirements that the action may not be dismissed or compromised without a notice, hearing, and approval of the court. Furthermore, in class actions seeking damages, the due process rights of absent class members are protected by the opportunity to opt out of the class and, thereby, preserve the subsequent right to litigate individual damage claims without being bound by the class judgment.[42]

The Court's focus in *Shutts* was on the requirements of constitutional due process as they relate to a state court's personal jurisdiction over nonresident class plaintiffs. Because the Court viewed the principles of personal jurisdiction as chiefly defendant-oriented, the Court concluded that constitutional due process does not require all class plaintiffs to have minimal contacts with the state in order for the class judgment to have binding effect. Nor did the Court view the lack of plaintiffs' minimal contacts with the state as subverting due process protections in the class-action context.

Although the Supreme Court in *Shutts* concluded that a state court could assert personal jurisdiction over absent class members constitutionally so long as class-certification requirements are satisfied, the Court also qualified its decision by limiting it to "those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judg-

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[40] *See* 472 U.S. 797, 814 (1985). *See generally id.* at 808-14.

[41] *Id.* at 807-09.

[42] *Id.* at 808-12 (rejecting carefully proposition that due process requires "opt in" procedure).

ments."[43] The Court further explained that it intimated "no view concerning other types of class actions, such as those seeking equitable relief."[44]

The Court's *Shutts* decision was distinguishable from the issues presented in *Ticor Title* in three ways. First, *Shutts* arose in state court, rather than in federal court, and, therefore, the Supreme Court's focus in *Shutts* predominantly was on due process as it relates to a state court's personal jurisdiction over absent class members.[45] Second, *Shutts* involved a class action for damages and, accordingly, included an opt-out right for plaintiffs, which *Ticor Title* did not. Third, the Court in *Shutts* expressly declined to give its opinion concerning any due process requirements for class actions seeking predominantly equitable remedies. *Ticor Title* was to have resolved this question left unanswered in *Shutts,* but it did not.

Hence, in the absence of a Supreme Court decision in *Ticor Title,* federal and state litigants are left with the Court's broad pronouncements in *Shutts* regarding the due process requirements for class-action procedure. What *Shutts* approves or commands for aggregate complex litigation, however, is not abundantly clear.[46]

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[43] *Id.* at 811 n.3.

[44] *Id.*

[45] The dissenters to the *Ticor Title* per curiam opinion noted the consequences of this difference:

> Moreover, because the decision below is based on the Due Process Clause, presumably it applies to the States; although we held in *Phillips Petroleum Co. v. Shutts,* . . . , that there is a constitutional right to opt out of class actions brought in state court, that holding was expressly "limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments." . . . The Ninth Circuit's rule, by contrast, applies whenever "substantial damage claims" are asserted. . . . The resolution of a constitutional issue with such broad-ranging consequences is both necessary and appropriate.

Ticor Title Ins. Co. v. Brown, 114 S. Ct. 1359, 1363 (1994) (O'Connor, J., dissenting).

There also is an academic debate whether *Shutts* applies at all in federal court to Rule 23 class actions. *See infra* note 81.

[46] *See* Grimes v. Vitalink Communications Corp., 17 F.2d 1553, 1568, 1572 (3d Cir. 1994) (Hutchinson, J., dissenting). *See generally* Miller & Crump, *supra* note 15; John E. Kennedy, *The Supreme Court Meets the Bride of Frankenstein:* Phillips Petroleum Co. v. Shutts *and the State Multistate Class Action,* 34 KAN. L. REV. 255 (1985); Kurt A. Schwarz, Note, *Due Process and Equitable Relief in State Multistate Class Actions After* Phillips Petroleum Co. v.

II. PLAINTIFFS' DUE PROCESS, PERSONAL JURISDICTION, AND CLASS-ACTION PROCEDURE: JUDICIAL PRONOUNCEMENTS

Perhaps because personal jurisdiction jurisprudence has, for fifty years, so exclusively focused on defendants' due process concerns, it is not surprising that judicial consideration of issues relating to plaintiffs' due process is somewhat sparse.[47] In simple litigation, judicial pronouncements regarding plaintiffs' due process have construed minimum contacts derived from *International Shoe* and its progeny. In class-action litigation, courts have evaluated due process requirements relying on *Shutts*.

A. Plaintiffs' Minimum Contacts Analysis Following International Shoe

In simple litigation the Supreme Court and lower federal courts largely have ignored the role of the plaintiff in delineating the criteria for assessing the fairness of asserting jurisdiction over a nonresident defendant. This seems highly appropriate, since the defendant typically raises objections to personal jurisdiction, usually with regard to unfairness to the defendant rather than the plaintiff. Since the plaintiff initially chooses the litigation forum and thereby consents to jurisdiction, and because courts give great deference to the plaintiff's choice, defendants ought to care little about a plaintiff's lack of ties to the litigation forum. Hence, it was not until the 1980s that defendants began to conceptualize an argument that

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Shutts, 68 TEX. L. REV. 415 (1989); Mark Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. MICH. J. L. REF. 347 (1988); Note, Phillips Petroleum Company v. Shutts, *Procedural Due Process and Absent Class Plaintiffs: Minimum Contacts Is Out — Is Individual Notice In?*, 13 HASTINGS CONST. L.Q. 817 (1986); Note, Phillips Petroleum Company v. Shutts: *Multistate Plaintiff Class Actions: A Definite Forum, But Is It Proper?*, 19 J. MARSHALL L. REV. 483 (1986); Barbara A. Winters, *Jurisdiction Over Unnamed Plaintiffs in Multistate Class Actions*, 73 CAL. L. REV. 181 (1985).

[47] This sparsity is not surprising because the personal jurisdiction inquiry does not generally focus on the plaintiff at all; courts routinely and traditionally give deference to the plaintiff's choice of forum. Hence, it would seem anomalous to challenge the plaintiff's choice of forum on insufficiency grounds. Indeed, in *Shutts* the defendants raised the jurisdictional challenge to the absent class members' lack of sufficient minimum contacts with Kansas — a jurisdictional challenge that inverts the usual posture of litigant jurisdictional challenges. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 802 (1985).

jurisdictional unfairness might arise from a plaintiff's slim connections with the forum state.

Prior to the Court's announcement of a multifactor jurisdictional test in *World-Wide Volkswagen*,[48] the Court made only a few oblique references to the plaintiff's role in personal jurisdictional analysis. In 1952, in *Perkins v. Benguet Consolidated Mining Co.*,[49] the Court confronted, apparently for the first time, the situation of a nonresident plaintiff[50] seeking to assert personal jurisdiction in Ohio over a foreign corporation "temporarily" doing business there during the Japanese occupation of the Philippines in World War II. Ignoring the anomalous fact of the nonresident plaintiff, the Justices deftly concluded that *International Shoe* due process jurisprudence neither prohibited "Ohio from opening its courts to the cause of action . . . [n]or compel[led] Ohio to so do."[51]

Similarly, in its 1958 decision in *Hanson v. Denkla*,[52] the Court tangentially referred to the plaintiff's role in jurisdictional analysis by suggesting, negatively, that a forum cannot acquire jurisdiction by being the "center of gravity" of a controversy, the domicile of the chief actors in the litigation, or the place where the plaintiff's crucial transaction (in this instance, the decedent's exercise of her power of appointment) occurred.[53] The Court refused to allow various plaintiffs' jurisdictional contacts to overcome defective personal jurisdiction over the nonresident trustees.[54] In dissent, Justices Black, Burton, and Brennan presaged *World-Wide Volkswagen* by suggesting that, under the circumstances surrounding the decedent's trust, a state court could acquire

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[48] 444 U.S. 286 (1980); *see infra* notes 56-57.

[49] 342 U.S. 437 (1952).

[50] The Court in *Perkins* only identified the plaintiff as a "nonresident of Ohio." *Id.* at 438.

[51] *Id.* at 446; *cf.* Insurance Corp. of Ir. v. Compagnie Des Bauxites de Guinee, 456 U.S. 694 (1982) (upholding, as discovery sanction under Rule 37(b)(2), federal jurisdiction over defendants in federal diversity action by Guinean corporate plaintiff in Pennsylvania federal court against various insurance companies).

[52] 357 U.S. 235 (1958).

[53] *Id.* at 254.

[54] *Id.* The Court viewed as a non sequitur the plaintiff's argument based on the domicile of the relevant parties. *Id.*

a sufficient interest stemming from the plaintiff's contacts as to confer proper jurisdiction over a nonresident defendant.[55]

Twenty-two years would pass after *Hanson* before the Supreme Court would again refer to a plaintiff's role in jurisdictional analysis. In 1980, the Court completely recalibrated *International Shoe* minimum contacts jurisprudence with the introduction of multifactor analysis in *World-Wide Volkswagen*.[56] For the first time, the Court moved beyond its exclusive defendant-oriented focus to countenance other variables in the personal jurisdiction calculus, including considerations relating to the plaintiff. The reformulated *International Shoe* reasonableness test required courts to consider the burdens on the defendant ("always a primary concern"), but in light of other relevant factors:

> including the forum State's interest in adjudicating the dispute . . . ; the plaintiff's interest in obtaining convenient and effective relief, . . . , at least when that interest is not adequately protected by the plaintiff's power to choose the forum, . . . ; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering substantive social policies . . . [57]

Although the Court in *World-Wide Volkswagen* for the first time even mentioned plaintiff interests in evaluating personal jurisdiction, arguably none of *World-Wide Volkswagen*'s factors were concerned with plaintiffs' due process rights. The additional factors presumably were to be considered in conjunction with traditional due process assessment of the defendant's forum contacts, and plaintiff contacts were subsumed as part of the state's interest in the litigation.

The Court's opinion in *World-Wide Volkswagen* prompted subsequent consideration of the plaintiffs' role in jurisdictional analysis, but the Court did not directly grapple with the problem of plaintiffs' minimum contacts until 1984[58] when it issued three

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[55] *See id.* at 258-59 (Black, Burton, and Brennan, JJ., dissenting).

[56] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

[57] *Id.* at 292. By the time the plaintiffs brought suit in Oklahoma state court, they were not domiciled in that state, having moved to Arizona. Arguably for some Supreme Court Justices, the plaintiffs' attenuated connection with Oklahoma (site of automobile accident) lessened Oklahoma's interest in the litigation and contributed to the Court's holding that personal jurisdiction over the defendants violated due process.

[58] A few lower federal courts considered the problem of plaintiffs' contacts prior to the

opinions: *Keeton v. Hustler,*[59] *Calder v. Jones,*[60] and *Helicopteros Nacionales de Colombia v. Hall.*[61] Collectively, these cases established the bare-bones principle that there is no parallel *International Shoe* plaintiffs' minimum contacts jurisprudence.

Keeton, the most significant of the cases, involved a New York resident who sued *Hustler* magazine in New Hampshire for libel. The plaintiff had no contacts with New Hampshire, the only remaining state where the statute of limitations had not run. Clearly, the plaintiff had engaged in blatant forum-shopping and the defendant challenged personal jurisdiction based in part on the plaintiff's complete lack of contacts with New Hampshire and the state's attenuated interest in the litigation. The Court rejected this argument, articulating two broad principles relating to plaintiffs' minimum contacts jurisprudence.

First, the Court stated that it had never required plaintiffs to have minimum contacts with a forum state before permitting assertion of personal jurisdiction over a nonresident defendant.[62] In essence, the Court simply announced that there was no such thing as a plaintiff's minimum contacts requirement. Second, the Court suggested that a "plaintiff's residence is not, of course, completely irrelevant to the jurisdictional inquiry," thereby indicating that it could be.[63] The Court reaffirmed this

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Court's 1984 decisions in *Keeton, Calder,* and *Helicopteros. See, e.g.,* Glater v. Eli Lilly & Co., 712 F.2d 735, 738 n.1 (1st Cir. 1983) (declining to address issue of plaintiff's lack of residence in forum, in anticipation of Supreme Court decision in *Keeton*); Wood v. Santa Barbara Chamber of Commerce, Inc., 705 F.2d 1515, 1523 (9th Cir. 1983) (finding lack of personal jurisdiction where plaintiff had no contacts at all with forum, but was engaged in blatant forum-shopping); Froning & Deppe, Inc. v. Continental Illinois Nat'l Bank & Trust Co., 695 F.2d 289, 294 (7th Cir. 1982) (mentioning plaintiff's interest in expedited relief as relevant factor in jurisdictional analysis); Seymour v. Parke, Davis & Co., 423 F.2d 584, 585-86 (1st Cir. 1970) (finding jurisdiction deficient where both plaintiff and defendant lacked affiliating contacts with forum state and discussing plaintiff's lack of contacts with forum).

[59] 465 U.S. 770 (1984).

[60] 465 U.S. 783 (1984).

[61] 466 U.S. 408 (1984).

[62] *Keeton,* 465 U.S. at 779 (citing Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952), and noting, "On the contrary, we have upheld the assertion of jurisdiction where such contacts were entirely lacking."); *see supra* text accompanying notes 49-51 (discussing *Perkins*).

[63] *Keeton,* 465 U.S. at 780. The Court apparently wished to establish that a plaintiff's residence or domicile in the forum state was not a requirement for the establishment of proper jurisdiction over a defendant, but could be a relevant factor in assessing the relationship among the defendant, the forum, and the litigation:

principle in the companion libel case, *Calder v. Jones*, where the Justices found that the plaintiff's California residence was "the focus of the activities of the defendants out of which the suit arises."[64]

Additionally, the Court declared that while a plaintiff's residence in the forum state was not a separate jurisdictional requirement, a plaintiff's lack of residence would not defeat jurisdiction established on the basis of the defendant's contacts.[65] The Court reiterated this principle in *Helicopteros Nacionales*, where the plaintiffs neither resided in nor had any other contacts with Texas,[66] but the defendant Helicol also lacked contacts sufficient to support jurisdiction.[67]

In 1984, then, after thirty-nine years of defendants' minimum contacts jurisprudence, the Court announced three times that there is no parallel plaintiffs' minimum contacts requirement. In none of these cases did the Court extensively consider the issue of plaintiff-side minimum contacts,[68] nor did the Court (or litigants) frame this issue in terms of due process concerns. Finally,

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> As noted, that [jurisdictional] inquiry focuses on the relations among the defendant, the forum, and the litigation. Plaintiff's residence may well play an important role in determining the propriety of entertaining a suit against the defendant in the forum. That is, plaintiff's residence in the forum may, because of defendant's relationship with the plaintiff, enhance defendant's contacts with the forum. Plaintiff's residence may be the focus of the activities out of which the suit arises.

Id.; *see* Calder v. Jones, 465 U.S. 783, 788-89 (1984); McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

[64] *Calder*, 465 U.S. at 788 (citing *Keeton* in support of proposition that: "The plaintiff's lack of 'contacts' will not defeat otherwise proper jurisdiction, . . . but they may be so manifold as to permit jurisdiction when it would not exist in their absence.")

[65] *Keeton*, 465 U.S. at 780.

[66] Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 412 n.5 (1984).

[67] *Id. Helicopteros* illustrated the relationship between plaintiff's lack of forum domicile and defendant's lack of forum contacts. *Id.*

> We mention respondents' lack of contacts merely to show that nothing in the nature of the relationship between the respondents and Helicol could possibly enhance Helicol's contacts with Texas. The harm suffered by the respondents did not occur in Texas. Nor is it alleged that any negligence on the part of Helicol took place in Texas."

Id.

[68] Indeed, the total text devoted to the problem of plaintiffs' minimum contacts collectively amounts to, at most, about three pages of the *United States Reports*.

the Court did not assess any theories that would tie plaintiffs' contacts, due process, and the res judicata effect of judgments — the theoretical linchpins of defendants' jurisdictional due process rights. These questions would only arise in the 1985 Term, in *Phillips Petroleum v. Shutts,* but instead in the context of class-action procedure.

Plaintiffs' minimum contacts theory has experienced a well-deserved undistinguished subsequent history, largely because *Keeton* rather definitively removed consideration of plaintiffs' contacts from jurisdictional analysis. In the few cases where plaintiffs' contacts have been challenged as vitiating personal jurisdiction, lower federal courts consistently have followed *Keeton* and *Calder*'s admonition that a plaintiff's lack of contacts will not undermine personal jurisdiction over a defendant with sufficient *International Shoe* minimum contacts.[69]

Other federal courts have expressed variations on the *Keeton-Calder* theme, to the effect that a plaintiff's contacts are not wholly irrelevant to jurisdictional analysis. For example, some courts have suggested that a plaintiff's complete lack of forum contacts may weigh against assertion of jurisdiction over a defendant who also lacks substantial forum contacts.[70] Yet other federal courts have construed *Keeton* and *Calder* to suggest that a plaintiff's forum contacts (or lack of contacts) may be relevant

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[69] *See, e.g.,* Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1492 (9th Cir. 1993) (Wallace, J., dissenting); Glater v. Eli Lily & Co., 744 F.2d 213, 217 (1st Cir. 1984) (citing *Calder* for proposition that plaintiff's lack of manifold contacts undermines jurisdiction); E.M. Radcliffe v. Founders Title Co., 720 F. Supp. 170, 172 (M.D. Ga. 1989) (stating that plaintiff's residence in forum is not separate jurisdictional requirement and that lack of residence will not defeat jurisdiction established on basis of defendant's contacts); Triple A Partnership v. MPL Communications, Inc., 629 F. Supp. 1520, 1525 (D. Kan. 1986) (same); Leab v. Streit, 584 F. Supp. 748, 755-56 (S.D.N.Y. 1984) (same).

But see Interface Biomedical Lab. Corp. v. Axiom Medical, Inc., 600 F. Supp. 731, 738 n.6 (E.D.N.Y. 1985) (stating that *Keeton* and *Calder* are inapplicable to specific jurisdiction determinations under New York long-arm statute providing that residence or domicile of plaintiff within state is not sufficient basis for asserting jurisdiction over nonresident defendant).

[70] *See* Palmer v. Kawaguchi Iron Works, Ltd., 644 F. Supp. 327, 331-32 (N.D. Ill. 1986) (finding no personal jurisdiction over Japanese corporation where plaintiff did not reside in Illinois, injury did not occur in Illinois, and defendant's contacts with Illinois were insubstantial); *see also* Bechard v. Constanzo, 810 F. Supp. 579, 585-86 (D. Vt. 1992) (stating that plaintiff's substantial contacts with forum may help to establish valid personal jurisdiction while plaintiff's lack of contacts may attenuate assertion of jurisdiction over defendant).

in a multifactor jurisdictional analysis.[71] And at least one court has read *Keeton* to foreclose analysis of a plaintiff's motivation for filing in a particular forum.[72]

In large measure, the extremely thin body of cases relying on *Keeton* and *Calder* merely recite in boilerplate fashion the simple plaintiffs' minimum contacts nonprinciples. Similar to the Supreme Court's cursory treatment of this issue, the lower federal courts also have not tarried to consider or explain the due process implications of plaintiffs' forum contacts, or the res judicata effects of judgments rendered under such circumstances.

B. Plaintiffs' Minimum Contacts Analysis Following Shutts

Only one year after the Supreme Court announced that plaintiffs' forum contacts effectively do not enter into the personal jurisdiction equation, the Court was asked to directly consider a collateral question: whether the complete absence of certain class members' contacts with a forum offended *International Shoe* due process requirements. The *Shutts* question represented a subtle variation of *Keeton*, but one that is extremely important for class-action litigants.

Prior to *Shutts*, defendants predicated challenges to plaintiff contacts essentially on the theory that it would be unfair to subject a defendant to a state's jurisdiction where the state had little interest in either the plaintiff or the litigation. Hence, plaintiffs' contacts were only viewed through the lens of defendants' procedural due process rights. In *Shutts*, the defendant raised a somewhat novel minimum contacts challenge not with reference to an insufficiency of its own minimum contacts, but with reference to those of absent class plaintiffs. Thus, Phillips Petroleum found itself in the anomalous situation of raising

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[71] *See, e.g.*, Jones v. North Am. Aerodynamics, Inc., 594 F. Supp. 657, 660-62 (D. Me. 1984) (dismissing, for lack of personal jurisdiction in Maine, case where plaintiff resided in Louisiana at time of mail-order purchase of defective parachuting equipment from Illinois or Texas); *see also* Helitzer v. Helitzer, 761 F.2d 582, 585 (10th Cir. 1985) (upholding jurisdiction and stating that plaintiff's residence in forum may, because of relationship with defendant, enhance defendant's contacts with forum); Portnoy v. Cessna Aircraft Co., 603 F. Supp. 285, 294 (S.D. Miss. 1985) (upholding jurisdiction and observing that plaintiff's residence is relevant in considering state's interest in providing forum).

[72] *See* Simpson v. Quality Oil Co., 723 F. Supp. 382, 392 (S.D. Ind. 1989).

a jurisdictional challenge seemingly not on its own behalf, but rather on behalf of its adversaries.[73]

As a consequence of this unusual procedural posture, Phillips's fairness argument in *Shutts* developed two related, but distinct tacks. First, Phillips argued that it would be unfair for the Kansas state court to assert personal jurisdiction over the unnamed class plaintiffs and subject them to a binding judgment, in absence of contacts with the forum. Essentially, this plaintiffs' minimum contacts argument embodied the converse of defendant-oriented *International Shoe* principles. Coming hard on the heels of *Keeton,* the structure of this argument seemed a losing proposition. But second, Phillips argued that it would be unfair to the defendant to subject it to a binding judgment that might be less than binding against all class claimants. In other words, the defendant's due process rights would be violated if the court lacked the power to bind all class members.

Thus, the defendant in *Shutts* recast and extended the personal jurisdiction due process issue to both plaintiffs and defendants, tying procedural fairness to the mutual preclusive effects of judgments. In all previous cases, courts had evaluated due process only with regard to the preclusive effects of judgments rendered in the absence of the nonresident defendant. In *Shutts,* however, the Court was confronted with the converse proposition — the binding nature of judgments on nonresident plaintiffs.

The *Shutts* Court did not speak to the requirements of plaintiffs' due process and preclusion doctrine in all types of litigation; rather, the Court only considered the narrow issue of procedural due process in the context of the Rule 23(b)(3) opt-out class action.[74] As such, *Shutts* seemingly adds little to *Keeton* and *Calder,*[75] although it is not clear why *Keeton* and *Calder*

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[73] Noting the unusual procedural posture of the appeal in *Shutts* at the outset, the Supreme Court first considered the anomaly of the defendants' asserting a procedural due process right on behalf of the unnamed class plaintiffs. The Court held that the defendants did have standing to sue on behalf of the class members because it would be injured if the class action judgment became final without binding the plaintiff class. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 804-06 (1985).

[74] *See supra* notes 40-46 and accompanying text (discussing *Shutts*).

[75] Oddly, *Shutts* only mentions *Keeton* in passing while rejecting Phillips's contention that absent class members need to affirmatively opt-in to class actions. *See Shutts,* 472 U.S. at

ought not to be read in conjunction with *Shutts'* due process pronouncements.[76] Consequently, subsequent cases dealing with plaintiffs' minimum contacts have continued to be decided under these different litigation models and jurisprudential approaches.[77]

1. The Aftermath of *Shutts* in Class-Action Procedure

The Court's *Shutts* opinion, as it relates to due process and personal jurisdiction over absent class members, has inspired various lower court interpretations generally in class-action litigation. With the advent of mass tort litigation in the mid-1980s, the issue of plaintiffs' due process rights in class-action litigation has resurfaced with some urgency. This section briefly canvasses post-*Shutts* class-action decisional law, and the following section focuses on applications of *Shutts* in mass tort litigation.

*a. Post-*Shutts *Interpretations in Class Actions Generally*

In the ten years since the Supreme Court decided *Shutts*, lower federal courts have largely followed the decision's holding and reasoning as it relates to personal jurisdiction over absent class members, as well as protection of their due process rights. Courts carefully distinguish among types of class actions, focusing on the differences between mandatory (b)(1) and (b)(2) classes, as opposed to (b)(3) opt-out classes.[78] In general, the

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812 (citing *Keeton* for proposition that "[a]ny plaintiff may consent to jurisdiction"). Nowhere in the eight pages that the Court devotes to an analysis of plaintiff's minimum contacts does the Court otherwise refer to *Keeton*, *Calder*, or *Helicopteros*, each of which the Court decided the immediate previous term. *See id.* at 806-14.

[76] Presumably this distinction arises in part from the fact that the actual plaintiffs in the *Keeton* and *Calder* litigations represented themselves and therefore did not need surrogate due process protections. However, the class representatives virtually represented the absent class members in *Shutts*, and therefore the class members needed enhanced due process protection of their interests in the litigation.

[77] *See, e.g.*, Carlough v. Amchem Prods., Inc., 10 F.3d 189, 199 (3d Cir. 1993). *But see* Grimes v. Vitalink Communications Corp., 17 F.3d 1553, 1556 (3d Cir. 1994) (demonstrating that under Delaware long-arm statute, plaintiff's minimum contacts analyzed in fashion similar to that of defendant's contacts under *International Shoe* and its progeny); *In re* DES Cases, 789 F. Supp. 552, 585 (E.D.N.Y. 1992) (applying *International Shoe* minimum contacts jurisprudence and relying heavily on *Keeton*), *appeal dismissed, In re* DES Litig., 7 F.3d 20, 25 (2d Cir. 1993).

[78] *See, e.g.*, Durrett v. John Deere Co., 150 F.R.D. 555, 561-63 (N.D. Tex. 1993) (certify-

courts have hewed to a general *Shutts* gloss that (b)(3) opt-out classes do not violate due process,[79] extending this principle in many instances to include (b)(1) and (b)(2) mandatory non-opt-out classes.[80] In addition, 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.[81]

Some lower federal courts also have considered the central unsolved *Shutts* problem, namely, the due process requirements for hybrid class actions seeking combined equitable and compensatory relief. With regard to such hybrid actions, these courts

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ing (b)(3) opt-out class for state usury claims; discussing differences between (b)(1), (b)(2), and (b)(3) classes and *Shutts* due process requirements; and stating reasons why courts need not afford opt-out protections in (b)(1) and (b)(2) class actions); Avagliano v. Sumitomo Shoji Am., Inc., 107 F.R.D. 748, 749-50 (S.D.N.Y. 1985) (following *Shutts*; failing to require opt-out provisions in nationwide civil rights (b)(2) class action for combined equitable and back pay where relief sought is not wholly or predominantly monetary damages).

For pre-*Shutts* decisions setting forth the differences among types of class actions and the related due process requirements, see Holmes v. Continental Can Co., 706 F.2d 1144, 1153-55 (11th Cir. 1983) (discussing differences between (b)(2) and (b)(3) classes and policy reasons for non-opt out mandatory classes, and split among circuits whether opt-out provision for (b)(2) classes is necessary); *see also* Penson v. Terminal Transp. Co., 634 F.2d 989, 993-94 (5th Cir. 1981) (holding that plaintiffs not entitled to opt-out right in Rule 23(b)(2) class action, but district court has discretion to allow plaintiff to opt out).

[79] Silber v. Mabon, 18 F.3d 1449, 1453-55 (9th Cir. 1994) (holding that failure of Rule 23(b)(3) class member to receive notice of settlement and opt-out date in time to opt out of class does not violate due process; construing narrowly *Shutts* notice requirement and having limited reading of *Brown v. Ticor Title*). *But see* Besinga v. United States, 923 F.2d 133, 136-37 n.6 (9th Cir. 1991) (holding that due process violated where no notice given in (b)(3) class action; relying in part on *Shutts*, but questioning whether *Shutts* due process analysis applies under Rule 23).

[80] *See, e.g.*, Williams v. Lane, 129 F.R.D. 636, 638-43 (N.D. Ill. 1990) (upholding inmate Rule 23(b)(2) civil rights class action which also sought compensatory damages; citing split among federal circuit courts relating to notice and opt-out requirements in hybrid class actions). In the wake of *Shutts*, however, there is some controversy among lower federal courts concerning whether Rule 23(b)(2) hybrid class actions require notice and opt-out provisions. *See, e.g.*, Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992), *cert. granted*, 114 S. Ct. 56 (1993), *cert. dismissed per curiam*, 114 S. Ct. 1359 (1994).

[81] *See, e.g., In re* Real Estate Title & Settlement Servs. Antitrust Litig., 869 F.2d 760, 766 n.6 (3d Cir. 1989) (distinguishing between *International Shoe* minimum contacts due process requirements under the Fourteenth Amendment and due process guarantees under Fifth Amendment as applied to Federal Rule 23 class actions; noting other possible basis in federal nationwide service of process provisions); *Besinga*, 923 F.2d at 136 n.6 (questioning whether *Shutts* due process analysis applies under Rule 23).

generally have reiterated the pre-*Shutts* principle that in cases where equitable or injunctive claims predominate, the mandatory non-opt-out class is proper.[82] After *Shutts*, some courts additionally have read that opinion as holding that mandatory non-opt-out classes are constitutional.[83] In reaching this conclusion, these courts have explained that where the litigants (or the court) employ sufficient alternative procedural safeguards to protect the interests of absent class members, then *Shutts* does not constitutionally compel provision of an opt-out right in the hybrid class action.[84]

Notwithstanding this consensus, the Third and Ninth Circuits have somewhat parted company with other appellate courts in construing *Shutts* to bar subsequent injunctive relief following hybrid mandatory class settlements where certain due process

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[82] *See, e.g.*, White v. National Football League, 822 F. Supp. 1389, 1410-12 (D. Minn. 1993) (holding that where equitable or injunctive claims predominate, mandatory non-opt-out class is proper; stating that *Shutts* does not render every mandatory non-opt-out class unconstitutional), *aff'd*, 836 F. Supp. 1458, 1471-73 (D. Minn. 1994) (holding that due process does not require mandatory opt-out right and distinguishing Ninth Circuit's decision in *Brown v. Ticor Title*). *But cf. Williams*, 129 F.R.D. at 641 (citing split in circuits concerning due process requirements in Rule 23(b)(2) mandatory hybrid class actions).

For pre-*Shutts* cases considering due process requirements of hybrid class actions, see Kyriazi v. Western Electric Co., 647 F.2d 388, 393-96 (3d Cir. 1981) (explaining due process does not require notice in hybrid class actions); *see also Penson*, 634 F.2d at 994 (discussing hybrid class actions as inroads on concept of mandatory non-opt-out class actions); Robertson v. National Basketball Ass'n, 556 F.2d 682, 685-86 (2d Cir. 1977) (certifying Rule 23(b)(1) antitrust class action as proper for mixed damages and equitable relief and as precluding opt-out right).

[83] *See White*, 836 F. Supp. at 1458.

[84] *See id.* at 1471-73 (granting final approval to amended settlement agreement in (b)(1) antitrust class actions; holding that opt-out procedure not required where sufficient alternative procedures employed to safeguard due process; distinguishing Ninth Circuit's holding in *Brown v. Ticor Title*); *see also White*, 822 F. Supp. at 1411-12 (holding that due process does not require mandatory opt-out right in (b)(1) class where sufficient procedural due process safeguards afforded litigants); Williams v. Burlington N., Inc., 832 F.2d 100, 103-04 (7th Cir. 1987) (approving Rule 23(b)(2) mandatory consent decree for employment discrimination settlement class; holding that use of equivalent due process protections satisfy fairness concerns for lack of opt-out provision); *cf. Robertson*, 556 F.2d at 686 (upholding pre-*Shutts* mixed equitable and damages class action without opt-out right; stating that appropriate notice and other due process protections preserved Hansberry v. Lee, 311 U.S. 32 (1940), due process concerns). *See generally* Bryant B. Edwards et al., *Mandatory Class Action Lawsuits As a Restructuring Technique*, 19 PEPP. L. REV. 875, 895-911 (1992) (arguing in favor of mandatory class action procedure for lawsuits by bondholders; concluding that *Shutts* should not affect most mandatory class actions brought by security holders to restructure debt securities).

protections were lacking.[85] Thus, in 1989 the Third Circuit in *In re Real Estate Title* overturned a district court's injunction against subsequent state lawsuits instituted by absent class members, on the broad grounds that the absent members did not have minimum contacts with the Pennsylvania forum, nor had they consented to the court's jurisdiction in approving the underlying class-action settlement.[86] The court more narrowly found that the consequences of enjoining the absent class members from subsequent compensatory damage actions were more severe, and the procedural protections afforded the class members in the settlement fewer, than the due process protections delineated in *Shutts*.[87]

Although the Third Circuit's decision in *In re Real Estate Title* refused to give judicial force to subsequent injunctive relief where due process was lacking, the court — in reaching this result — drew a highly subtle distinction between plaintiffs' lack of sufficient contacts in the underlying class settlement and the effect of this insufficiency on subsequent injunctive proceedings. In drawing this distinction, the court failed to resolve the fundamental *Shutts* issue relating to the due process requirements in mandatory hybrid class actions. Thus the court explained:

> We need not reach the issue, left open by *Shutts*, . . . , whether an absent plaintiff can be bound to the judgment in a hybrid (damage and injunctive) class action if it was not afforded the opportunity to opt out. The foregoing discussion does not decide the question because an absent plaintiff is not subject to the burdens of distant forum litigation when it is bound to a class action settlement, as long as it can challenge the adequacy of representation in the forum of its choice. The only issue we address is whether an absent class member can be *enjoined* from relitigation if the member does not have minimum contacts with the forum. And on that

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[85] Brown v. Ticor Title Ins. Co., 982 F.2d 386, 392 (9th Cir. 1992) (following *In re* Real Estate Title & Settlement Servs. Antitrust Litig., 869 F.2d 760, 768 (3d Cir.), *cert. denied sub nom.* Chicago Title Ins. Co. v. Tucson Unified Sch. Dist., 493 U.S. 821 (1989)), *cert. granted*, 114 S. Ct. 56 (1993), *cert. dismissed per curiam*, 114 S. Ct. 1359 (1994).

[86] *In re Real Estate Title*, 869 F.2d at 762-63. The Third Circuit also held that the school boards did not consent to personal jurisdiction in the injunction proceeding by appearing to move to opt out in the initial class action. *Id.* at 763 ("That is because we believe that a party does not consent to having the full power of the court levied against it by merely attempting to extricate itself from the court's jurisdiction through an opt-out motion.").

[87] *Id.* at 768-69.

> issue, we hold that, given that the absent member in this case loses more than the plaintiffs lost in *Shutts*, if the member has not been given the opportunity to opt out in a class involving both important injunctive relief and damages claims, the member must either have minimum contacts with the forum or consent to jurisdiction in order to be enjoined by the district court that entertained the class action.[88]

Moreover, in *In re Real Estate Title*, the Third Circuit also declined to address the implications of its holding for Rule 23(b)(1) limited fund class actions, an important procedural vehicle for mass tort settlement classes.[89] Most significantly, however, while the Third Circuit seemed on the verge of suggesting an opt-out requirement for hybrid class actions, it instead indicated that defendants in hybrid class actions could avoid the subsequent injunction problem by consenting to an opt-out provision in the underlying class settlement.[90] Thus, without having to reinterpret *Shutts* or legislatively impose due process requirements on the hybrid class action, the Third Circuit cleverly shifted the burden of plaintiffs' due process

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[88] *Id.*

[89] *Id.* at 768 n.8 ("Neither do we address the due process requirements in a class action certified under Rule 23(b)(1) in which there is only a limited common fund from which the plaintiffs can obtain relief."). For a discussion of the relevance of *Shutts* and *In re Real Estate* to limited fund mass tort settlement classes, see *infra* notes 117-35 and accompanying text.

[90] *In re Real Estate Title*, 869 F.2d at 770. The court again revisited with some care what it was actually deciding and not deciding in the case:

> In order to put the matter in perspective, it is important to emphasize that we are not reaching the question whether it is permissible to enjoin an absent plaintiff from relitigation if the absent plaintiff were afforded an opportunity to opt out of the class action. It may be that, in a hybrid class action that involves important injunctive and damage components, a defendant need only consent to a class certification that allows for opt outs in order to avoid due process challenges to the settlement in multiple fora, as long as the court approves that certification. If this is true, creating a minimum contacts requirement that applies to enjoining a plaintiff who was *not* allowed to opt out of a class action could make it more likely that, as part of the settlement of a hybrid class action, absent plaintiffs will be given an opportunity to opt out, but it is unlikely to discourage defendants from settling class actions in appropriate cases.

Id.

protections onto defendants, couching provision of these protections as in the defendants' self-interest.[91]

Subsequent Third Circuit examination of the requirements relating to plaintiffs' due process in a federal securities class action in *Grimes v. Vitalink Communications Corp.*[92] reaffirmed the very limited reading of *In re Real Estate Title.* In so doing, the court further refused to decide whether a court constitutionally could bind a nonresident, nonconsenting member of a non-opt-out class with insufficient contacts with the forum.[93] But regarding class members with sufficient contacts with the forum, the Third Circuit indicated that *Shutts*-style due process did not require an opt-out right in (b)(1) or (b)(2) class actions.[94]

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[91] *Id.*

> Moreover, as the Court explains in *Shutts*, it is partly up to the defendant to safeguard the interest of the absent plaintiffs. . . . If the defendant wishes to achieve maximum preclusive effect, it is up to the defendant to ensure that the class is appropriately certified, and the absent members are adequately represented. Far from wreaking havoc on the class action mechanism, we believe our holding will foster results that most fairly balance the interests of absent class members and defendants alike.

Id.

[92] *See* Grimes v. Vitalink Communications Corp., 17 F.3d 1553, 1561 (3d Cir. 1994) (re-emphasizing that *In re Real Estate Title* only stands for limited principle that court cannot enjoin absent class member from relitigating case if that "member [did] not have minimum contacts with forum or [did] not consent to jurisdiction.").

[93] *Id.* at 1560 n.7 (indicating that this issue was beyond scope of court's decision and that because plaintiffs had sufficient contacts with the forum, they were bound by settlement). *But cf. In re* Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 292 (2d Cir. 1992) (reading *Shutts* to mandate that plaintiff has right to opt out of proposed class when court does not have jurisdiction over plaintiff).

The Third Circuit decided an interesting variation on this theme in Carlough v. Amchem Products, 10 F.3d 189, 199-201 (3d Cir. 1993) (holding that, prior to running of opt-out period and absent consent, it would offend *International Shoe* due process requirements to enjoin absentee class members lacking sufficient minimum contacts with forum).

[94] *Grimes*, 17 F.3d at 1560 n.8

> We recognize that in *Shutts* the Supreme Court addressed the minimal due process requirements to bind absent members of a plaintiff class who had an opportunity to opt out. . . . Although the present case involves a class action in which the absent plaintiffs were not given the additional procedural protection of an opportunity to opt out, we conclude that the due process protections as articulated in *Shutts* are sufficient to bind absent class members who had sufficient minimum contacts with the forum.

Id.

The Ninth Circuit, in *Brown v. Ticor Title,*[95] engrafted the Third Circuit's broad dicta regarding the due process requirements of hybrid class actions in the analogous context of subsequent invocation of res judicata. Relying in part on *In re Real Estate Title* and *Shutts,* the Ninth Circuit more directly held that in absence of an opt-out right in a hybrid class settlement, "there would be a violation of minimal due process if [the absent class member's] damage claims were held barred by res judicata."[96] These combined Third and Ninth Circuit holdings in *In re Real Estate Title* and *Brown v. Ticor Title,* replete with their suggestive dicta, inspired the futile Supreme Court appeal for definitive guidance concerning the due process requirements in hybrid class actions.[97]

*b. Post-*Shutts *Interpretations in Mass Tort Litigation*

Phillips Petroleum Co. v. Shutts was decided at a pivotal moment in the history of mass tort litigation because the phenomenon of mass torts was just beginning to emerge in the mid-1980s.[98] *Shutts* involved a class action for recovery of oil and gas royalties; it did not involve underlying tortious litigation. Nonetheless, *Shutts* has important implications for mass tort litigation. In the decade since *Shutts* was decided, many mature mass torts — at least those that have progressed towards some aggregative resolution — have been resolved through the class-action device. Even more important, a preferred method for globally resolving mass torts has become the (b)(1)(B) limited fund class action.[99]

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[95] *See* Brown v. Ticor Title Ins. Co., 982 F.2d 386, 392 (9th Cir. 1992), *cert. granted,* 114 S. Ct. 56 (1993), *cert. dismissed per curiam,* 114 S. Ct. 1359 (1994).

[96] *Id.*

[97] *See supra* notes 16-28 and accompanying text (discussing Supreme Court's failure to provide clear guidance on due process issues).

[98] *See generally* Linda S. Mullenix, *Problems in Complex Litigation,* 10 REV. LITIG. 213 (1991) (describing emergence of mass tort litigation phenomenon and citation to literature on mass tort litigation); Bruce H. Nielson, Note, *Was the 1966 Advisory Committee Right?: Suggested Revisions of Rule 23 to Allow More Frequent Use of Class Actions in Mass Tort Litigation,* 25 HARV. J. ON LEGIS. 461 (1988) (reviewing disinclination of federal courts to certify mass tort class actions and reviewing proposals for revising Rule 23 to accommodate mass tort litigation).

[99] *See, e.g.,* Notice of Class Action, Global Settlement and Third-Party Claimant Class Settlement and Hearing, Ahearn v. Fibreboard Corp., (E.D. Tex. 1995) (No. 6:93cv526). *See generally* Kevin H. Hudson, *Catch-23(b)(1)(B): The Dilemma of Using the Mandatory Class Action*

Hence, the need for some guidance on the issue of plaintiffs' due process requirements in both the hybrid class action as well as the limited fund class action has become acute for the enforceability of mass tort settlement classes.

At least one lower federal court in the mid-1980s had the prescience to discern the important relationship of *Shutts* to the developing phenomenon of mass tort litigation.[100] A Michigan district judge was confronted with an early prototypical hybrid mass tort in *In re Jackson Lockdown/MCO Cases*,[101] a (b)(2) class action seeking declaratory, injunctive, and compensatory damage relief arising out of a prison riot.[102] As was true at that time, the court initially noted the reluctance of federal courts to certify mandatory classes in mass tort litigation.[103] Nonetheless, the court approved this (b)(2) non-opt-out mass tort, indicating that due process was satisfied by the class notice provisions and the opportunity to be heard.[104]

The court further distinguished *Shutts* as inapplicable on the facts: *Shutts* had been concerned with the problem of binding nonresident absent class members residing in many states, whereas the prisoner victims all were centrally located and jurisdictionally before the court.[105] Even though it found *Shutts* factually inapposite, the court nonetheless read *Shutts* broadly as not intending to bar every mandatory class action lacking an

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to Resolve the Problem of the Mass Tort Case, 40 EMORY L.J. 665 (1991) (favoring public litigation model enabling federal courts to more flexibly approve use of limited fund class action in mass tort litigation).

[100] *See In re* Jackson Lockdown/MCO Cases, 107 F.R.D. 703 (E.D. Mich. 1985); *see also In re* A.H. Robins Co., 828 F.2d 1023, 1027 (4th Cir. 1987) (failing to state whether *Shutts* requires that court provide timely alternative for class plaintiffs to opt out).

[101] *In re Jackson*, 107 F.R.D. at 704-07.

[102] *Id.* Although certifying the class under (b)(2), the court also recognized that the damages portion of its relief implicated (b)(1)(A) and (b)(1)(B) class actions. The fund set up to pay riot victims resembled a limited fund, which the court discussed extensively. *Id.* at 711-12.

[103] *Id.* at 711 (citing cases); *see also* Linda S. Mullenix, *Class Resolution of the Mass Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039, 1039-60 (1986) (describing same phenomenon and citing cases).

[104] *In re Jackson*, 107 F.R.D. at 711.

[105] *Id.* at 714. The court also noted the reluctance of courts to certify non-opt-out mass tort classes that might preclude future claims by potential plaintiffs with latent injuries. *See id.* at 711. The court indicated that the case before it, consisting of known prisoner claimants with known injuries, was therefore distinguishable from other latent-injury mass torts. *Id.*

opt-out right.[106] Further, the court suggested in dicta that "*Phillips Petroleum* does not appear to mandate exclusion rights in limited fund cases,"[107] on the ground that the Supreme Court had not reached the issue of what process was due for monetary claimants to a limited fund.[108]

Apart from this early foray interpreting *Shutts* in a prototypical mass tort context, some courts subsequently have applied the *Shutts* principles in a straightforward manner in mass tort cases, distinguishing among types of class actions.[109] Thus, following *Shutts*, in compensatory mass tort class actions certified under Rule 23(b)(3), federal courts have held that such opt-out classes do not violate personal jurisdiction requirements.[110]

However, the Third Circuit, in its most recent revisitation of the *Shutts* problem in a Rule 23(b)(3) mass tort settlement class, held that a district court injunction against absent class members who had instituted a parallel state court action was premature where the federal class-action opt-out period had not yet run.[111] Reviewing both *Shutts* and its own previous decision in *In re Real Estate Title,* the court in *Carlough v. Amchem Products, Inc.* concluded that it would offend *International Shoe* due process requirements to enjoin absentee class members from pursuing state litigation, where the class members lacked sufficient mini-

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[106] *Id.* at 714 (*Shutts* "does not rule that the opt-out right must accompany class actions seeking injunctive or equitable relief."). *But see* Elizabeth R. Kaczynski, *The Inclusion of Future Members in Rule 23(b)(2) Class Actions,* 85 COLUM. L. REV. 397 (1985) (stating that inclusion of future claimants in Rule 23(b)(2) class actions violates their due process rights).

[107] *In re Jackson,* 107 F.R.D. at 714.

[108] *Id.*

[109] Judge Jack Weinstein, in the *DES Cases,* has construed *Shutts* as using a "time-honored jurisdiction-stretching technique of implied consent to cope with the special problem of jurisdiction in mass class actions." *In re* DES Cases, 789 F. Supp. 552, 585-86 (E.D.N.Y. 1992), *appeal dismissed, In re* DES Litig., 7 F.3d 20, 25 (2d Cir. 1993). Judge Weinstein's lengthy discussion of personal jurisdiction in mass tort litigation, while fascinating, is concerned with the traditional problem of jurisdiction over nonresident defendants and therefore does not focus on the issue central to this Article, namely due process requirements over nonresident plaintiffs.

[110] *See, e.g., In re* Asbestos Sch. Litig., 620 F. Supp. 873, 876-77 (E.D. Pa. 1985) (stating that compensatory damages portion of class action provides all safeguards required by *Shutts*); Ikonen v. Hartz Mountain Corp., 122 F.R.D. 258, 261 (S.D. Cal. 1988) (following *Shutts* and holding that no personal jurisdiction problems existed for Rule 23(b)(3) absent class members in mass tort arising in poisonous flea and tick spray case).

[111] Carlough v. Amchem Prods., Inc., 10 F.3d 189, 198-201 (3d Cir. 1993).

mum contacts with the forum, and the injunction was imposed prior to the notice and opt-out period.[112]

Although the court's decision in *Carlough* seemed to verge on stating a rule vitiating mass tort settlement classes where absentee plaintiffs lack sufficient minimum contacts with the forum, it did not. *Carlough* represents nothing so much as a timing problem: the rule of *Carlough* is that prior to notice and the opt-out period, and absent minimum contacts with the forum or consent to its jurisdiction, a federal injunction enjoining state litigation by absentee class plaintiffs would violate their due process.[113]

With regard to mandatory class actions, several lower federal courts have variously interpreted the *Shutts* due process requirements for absentee class members. Thus, in the *School Asbestos Litigation*, the Eastern District of Pennsylvania held that due process was satisfied in a Rule 23(b)(1) punitive damages class where the court provided notice and adequate representation of the plaintiffs' case for punitive damages. The court reasoned that where it was the defendants' rights which were subject to the punitive damage claims, this was all due process required.[114] The Second Circuit rejected a personal jurisdiction challenge to the *Agent Orange* class-action settlement, declining to extend *Shutts'* notice requirements to unknown plaintiffs.[115] And the Fourth Circuit, reviewing the Dalkon Shield mandatory

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[112] *Id.* at 199-200. The court also found that prior to the running of the opt-out period, the court could not assume consent to jurisdiction on the part of the absentee plaintiffs. However, the court further stated that where an absent class member receives notice of a class action settlement and fails to exercise the opt-out prerogative, this inaction allows an inference of consent to personal jurisdiction consistent with *Shutts* and other precedent. *Id.* at 200 n.8.

[113] *Id.* at 201.

[114] *In re* Asbestos Sch. Litig., 620 F. Supp. at 877; *see also Ikonen*, 122 F.R.D. at 261 (reading *Shutts* as not requiring actual notice for all members of class in every class action).

[115] *In re* Agent Orange Prod. Liab. Litig., 996 F.2d 1425, 1434-36 (2d Cir. 1993).

> In the instant case, society's interest in the efficient and fair resolution of large-scale litigation outweighs the gains from individual notice and opt-out rights, whose benefits are conjectural at best. As appellants correctly note, providing individual notice and opt-out rights to person who are unaware of an injury would probably do little good. Their rights are better served, we think, by requiring that "fair and just recovery procedures be[] made available to these claimants[]" . . . and by ensuring that they receive vigorous and faithful vicarious representation.

Id. at 1435 (first alteration in original) (citation omitted).

class-action settlement, held that the non-opt-out settlement trust plan satisfied *Shutts'* due process requirements by providing a due process equivalent in the form of a subsequent jury trial right.[116]

The implications of *Shutts* for the limited fund mass tort settlement class, however, have proved highly problematic, embodying the most challenging issue for the courts and law reformers. The Second Circuit, in the *Joint Eastern and Southern District Asbestos Litigation,*[117] evaded the personal jurisdiction issue in a Rule 23(b)(1)(B) limited fund bankruptcy trust by concluding that the peculiar procedural posture of the settlement was not governed either by the due process requirements of *Hansberry v. Lee* or *Shutts.*[118] The court instead found that bankruptcy law afforded class members numerous safeguards not contained in class-action procedure, and these bankruptcy protections lessened the risk of unfair compromises detrimental to absentees.[119]

Nevertheless, the court would not sanction the (b)(1)(B) limited fund non-opt-out class without further class-action proce-

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[116] *In re* A.H. Robins Co., 880 F.2d 709, 744-46 (4th Cir. 1989):

> In this case the Trust created by the parties for the resolution of all Class A claims on individual causation and damages does not in express terms include an opt-out provision but in effect it does. The Plan gives every such class member the right to elect to have her claim settled in a trial with all the procedural rights normally attaching to a jury trial. That is everything that an express opt-out provision could give a class member if such a right is required under due process.

Id. at 745. *See generally* Ralph R. Mabey & Jamie Andra Gavrin, *Constitutional Limitations on the Discharge of Future Claims in Bankruptcy,* 44 S.C. L. REV. 745 (1993) (discussing Fifth Amendment due process limitations on discharge of future claims, especially with reference to Dalkon Shield and asbestos mass tort bankruptcy trust settlements); Georgene M. Vairo, Essay, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?,* 61 FORDHAM L. REV. 617, 629-30 (1992) (describing Dalkon Shield bankruptcy trust litigation and "global peace" achieved through use of Rule 23(b)(1) settlement class as well as subsequent Fourth Circuit approval).

[117] *In re* Joint E. and S. Dist. Asbestos Litig., 982 F.2d 721, 734-35 (2d Cir. 1992).

[118] *Id.* at 735. Interestingly enough, because the court found that the litigation concerned a trust, in rem and quasi in rem jurisdiction was available and the New York trial courts could exercise jurisdiction over the beneficiaries of the trust created there, pursuant to the authority of the southern district federal bankruptcy court. *Id.* (relying on Shaffer v. Heitner, 433 U.S. 186 (1977) and Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)).

[119] *Id.* at 736.

dural safeguards. Thus the court indicated that it would permit the limited fund action only if the litigants designated appropriate subclasses "to provide assurance that the consent of groups of claimants who are being treated differently by the settlement is being given by those who fairly and adequately represent only the members of each group."[120]

At least two federal courts have expressed extreme distaste for limited fund mandatory mass tort class actions. For instance, the Eleventh Circuit in a Rule 23(b)(1) asbestos class action flatly held that the class violated due process where class members did not receive notice of the certification hearing.[121] In dicta, the court suggested that the absent class members "may also have the right to opt out of even a mandatory class action where the predominant issue is money damages."[122] However, the court carefully noted that no appellate court had yet read *Shutts* to require an opt-out right for mandatory mass tort class actions.[123]

And, precisely where no federal appellate court has dared venture, a Georgia district court construed *Shutts*[124] to invalidate a mandatory Rule 23(b)(1)(B) asbestos class action on the ground that the class violated the constitutional rights of absentee plaintiffs with insufficient jurisdictional contacts to permit exercise of personal jurisdiction over them.[125] In reaching this conclusion, the court repudiated the Eleventh Circuit's suggestion that *Shutts* might require an opt-out right even in a mandatory class action:

> The idea of a mandatory class with opt out rights, besides being oxymoronic, is contrary to the very purpose for which

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[120] *Id.* at 739 (relying on *In re* Drexel Burnham Lambert Group, Inc., 960 F.2d 285 (2d Cir. 1992)). *See generally* Mabey & Gavrin, *supra* note 116, at 755-59, 775-84; Steven J. Parent, *Judicial Creativity in Dealing With Mass Torts in Bankruptcy*, 13 GEO. MASON U. L. REV. 381, 397-404 (1990) (discussing use of limited fund class action procedure to resolve asbestos litigation crisis through bankruptcy auspices; suggesting that such class actions may not withstand challenges by plaintiff class members).

[121] *In re* Temple, 851 F.2d 1269, 1272-73 (11th Cir. 1988).

[122] *Id.* at 1272 n.5 (citing *Shutts*) ("A literal reading of *Shutts* would provide another basis for vacating the district court's order.").

[123] *Id.* ("However, no federal appellate court has yet so held, and we need not reach this issue in the present case.").

[124] *See* Waldron v. Raymark Indus., 124 F.R.D. 235, 238 (N.D. Ga. 1989). The court suggested that while *Shutts* was not directly on point, it was "instructive on this point." *Id.*

[125] *Id.* at 237-38.

> a Rule 23(b)(1)(B) class action is meant to serve. A Rule 23(b)(1)(B) class action is designed to preserve the limited fund for the entire class against the individual claims of class members prosecuted through separate suits. Allowing plaintiffs to opt out of a Rule 23(b)(1)(B) class action would defeat this purpose. This court's research has revealed no case wherein parties were allowed to opt out of a mandatory class.[126]

Thus, the Georgia court's decision nicely captured the fundamental tension between mandatory limited fund mass tort classes and due process concerns. In the court's view, there is no halfway ground between the mandatory class and a due process opt-out right. Either Rule 23(b)(1)(B) class members must have sufficient contacts with the forum, or the class must be invalidated on due process grounds. Hence, lack of personal jurisdiction in a limited fund class action cannot be cured with an opt-out right, because such an exclusion provision subverts the very purpose of this form of mandatory aggregate justice.

Until the Supreme Court, the Advisory Committee on Civil Rules, or Congress modify current class-action procedure, the conundrum of the mandatory class action in relation to plaintiffs' due process rights will continue to bedevil mass tort settlement classes. This problem is present in every hybrid mass tort class action, and is especially true for limited fund classes. The limited fund mass tort settlement class has evolved as the procedural mechanism of choice for mass tort litigants, because it is the one means of providing aggregate justice for both plaintiffs and defendants. The limited fund settlement class is attractive to mass tort plaintiffs because it provides a pool of compensatory damages through which to administer class members' claims. The limited fund settlement class is attractive to mass tort defendants (both manufacturers and their insurers) because it brings closure to the mass tort: the mandatory, non-opt-out character precludes endless subsequent litigation.

The issue of absent class plaintiffs' due process rights in the (b)(1)(B) class action is involved in one of the largest limited fund asbestos settlements ever, *Ahearn v. Fibreboard.*[127] To ad-

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[126] *Id.* at 238 n.1

[127] *See* Notice of Class Action, Global Settlement and Third-Party Claimant Class Settlement and Hearing, Ahearn v. Fibreboard Corp., (E.D. Tex. 1995) (No. 6:93cv526). If ap-

dress this problem, the *Ahearn* global settlement agreement incorporates numerous procedural protections to counterbalance the non-opt-out nature of the mandatory class. The agreement provides for classwide notice of the settlement and fairness hearing,[128] opportunity to appear and oppose the settlement,[129] and opportunity to intervene.[130] Moreover, it allows for postsettlement rights to various alternative dispute resolution auspices,[131] including an ultimate right to exit to the tort system.[132] In addition to the class counsel, the court appointed a guardian ad litem for the global health claimant class,[133] separate counsel for trust beneficiaries,[134] and a legal advisor to the court on the settlement agreement.[135] It remains to be seen whether this panoply of due process surrogates will resolve the *Shutts-Ticor Title* due process problem for the mass tort limited fund settlement class. No doubt, someone will challenge the *Ahearn* settlement on these grounds, and the Supreme Court soon may have yet another chance to decide the issue it evaded in *Ticor Title.*

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proved by the court, approximately $1.5 billion will be placed in trust for asbestos claimants by various defendant insurance companies and Fibreboard Corporation to pay for claims brought since August 26, 1993, as well as future claims. *See id.* at 2.

[128] *Id.* at 46. *See generally* Marjorie A. Silver, *Giving Notice: An Argument for Notification of Putative Plaintiffs in Complex Litigation*, 66 WASH. L. REV. 775 (1991) (favoring expansive view of judiciary's role in providing notice to putative plaintiffs in Rule 23 and other complex litigation). *But cf.* Note, *Notice in Rule 23(b)(2) Class Actions For Monetary Relief:* Johnson v. General Motors Corp., 128 U. PA. L. REV. 1236 (1980) (arguing notice not constitutionally required in all (b)(2) class actions seeking monetary as well as injunctive or declaratory relief).

[129] Notice of Class Action at 3, 46, *Ahearn* (No. 6:93cv526).

[130] *Id.* at 3, 34, 46.

[131] *Id.* at 40-41.

[132] *Id.* at 41.

[133] *Id.* at 32, 46. *See generally* Sylvia R. Lazos, Note, *Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations*, 84 MICH. L. REV. 308 (1985) (arguing that appointment of neutral third-party guardian to oversee pretrial negotiation process furthers judicial policy of encouraging settlements while protecting interests of absentee class members).

[134] Notice of Class Action at 37, *Ahearn* (No. 6:93cv526).

[135] *See generally* John C. Coffee Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625 (1987) (discussing economic incentives driving conflicts of interest in class action settlements); Note, *Conflicts in Class Actions and Protection of Absent Class Members*, 91 YALE L.J. 590 (1982) (proposing regulated system of precomplaint attorney-client communication to encourage class attorneys to solicit information necessary for informed class decision).

III. PLAINTIFFS' DUE PROCESS AND MASS TORT SETTLEMENT CLASSES: ADDRESSING FAIRNESS CONCERNS[136]

A. Restating the Problem of Plaintiffs' Due Process

For fifty years, federal and state courts largely have ignored issues relating to plaintiffs' due process in relation to assertions of personal jurisdiction. This doctrinal lacunae has great intuitive appeal; in a litigation system where the plaintiff chooses and consents to the forum, and the defendant (especially the nonresident defendant) is unwillingly "haled" into court, it seems logical that courts should not care about a plaintiff's contacts with the forum. It is the defendant, after all, and not the plaintiff, who needs protection against the illegitimate assertion of a state's power over the nonresident.

With one or two exceptions — inspired by rather blatant plaintiff forum-shopping (such as that in *Keeton*) — courts have been totally unconcerned with plaintiffs' contacts with the forum state. Not until 1985 in *Shutts* did the judicial system begin to

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[136] Several commentators recently have challenged the appropriateness of analyzing personal jurisdiction in the context of a due process paradigm. *See, e.g.*, 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, 20 (1990) (Supreme Court should abandon notion that personal jurisdiction is matter of constitutional law); Jay Conison, *What Does Due Process Have to Do with Jurisdiction?*, 46 RUTGERS L. REV. 1071, 1076 (1994) (constitutional law of personal jurisdiction resembles neither procedural nor substantive due process and therefore ought to be abandoned as reigning jurisprudential model; "the law of jurisdiction is spurious due process jurisprudence."); Mabey & Gavrin, *supra* note 116 (discussing confusion of substantive and procedural due process models as applied to personal jurisdiction jurisprudence); Rochman, *supra* note 25, at 273-77 (discussing applicability of *Mathews* test as appropriate due process paradigm applying to exercise of personal jurisdiction); Kenneth J. Vandevelde, *Ideology, Due Process and Civil Procedure*, 67 ST. JOHN'S L. REV. 265 (1993) (discussing personal jurisdiction due process jurisprudence as historical reflection of prevailing ideologies).

The author concedes that these recent attacks on the constitutional due process basis for personal jurisdiction carry great force; the Supreme Court and lower state and federal courts have not done an especially capable job of articulating the precise interests constitutionally protected by due process. Although the Supreme Court has located this as a "liberty interest," see, *e.g.*, World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980), an equally persuasive argument could be made that personal jurisdiction due process is intended to protect defendant's (and plaintiff's) property interests. However, it is beyond the scope of this paper to engage in the debate over the constitutional basis for appropriate assertions of personal jurisdiction. For the purposes of discussing the problem of plaintiffs' due process, the author accepts the Court's nearly fifty years of locating personal jurisdiction within a due process model.

rethink the problem of plaintiffs' minimum contacts, but only where absent class members putatively were placed in a situation not unlike nonresident defendants. Thus, it took an inversion of the usual procedural posture of plaintiffs and defendants to cause the judiciary to reexamine plaintiffs'-side due process issues.

The Court's answer in *Shutts* to the problem of plaintiffs' due process issues is unsatisfying, for several reasons. First, the Court's conclusion that Rule 23(b)(3) class actions need not satisfy traditional minimum contacts analysis was predicated on the theory that as a representational litigation, due process could be protected by other procedural safeguards. The unstated assumption was that the plaintiff in simple litigation is actually represented, and therefore, has absolutely no need for due process protection. These distinctions and assumptions make little sense, however, if a court's judgment preclusively binds the plaintiffs as well as the defendants.

Second, the Court's silence is troubling with regard to mandatory class actions that do not provide absent class members the array of due process protections available in (b)(3) opt-out actions. If (b)(3) class actions are constitutionally sustainable because of due process surrogates, then their absence in mandatory classes supports the argument that these actions are at least constitutionally vulnerable. Only one federal district court has so held;[137] the remainder of the federal judiciary has become paralyzed in the absence of Supreme Court guidance. Moreover, many federal courts clearly recognize the tension between policy reasons favoring the mandatory class and fairness concerns to absentee class members disfavoring the mandatory class.

The courts, then, have not separated defendant-oriented personal jurisdiction due process concerns as contrasted with the plaintiff-oriented fairness due process concerns in class-action representational litigation. In any litigation context, however, the central question should ask why a state has authority to bind either a defendant or plaintiff conclusively, in absence of sufficient minimum contacts with the forum. In answering this question, it should not matter whether the litigant is actually or

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[137] *See* Waldron v. Raymark Indus., 124 F.R.D. 235, 237-38 (N.D. Ga. 1989); *see also supra* notes 124-26 and accompanying text (discussing *Waldron*).

virtually represented in the litigation.[138] There are few sound reasons why plaintiffs' due process rights ought not be symmetrical with those of a defendant with regard to a state's assertion of personal jurisdiction. Fifty years of disregard of plaintiffs' due process concerns have been predicated on the assumption that plaintiffs have significant litigation advantages and due process protections by virtue of initiating the litigation. This assumption may not be true,[139] either in simple or complex litigation.

B. The Historical Bases for Class-Action Due Process Distinctions

The federal judiciary is in a *Shutts* due process quandary partially because of adherence to the historical distinctions undergirding the 1966 revised class-action categories.[140] In construing

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[138] *See generally* Jack L. Johnson, Comment, *Due Or VooDoo Process: Virtual Representation as a Justification for the Preclusion of a Nonparty's Claim*, 68 TUL. L. REV. 1303 (1994).

> Whereas the convenient Rule 23(b)(3) class action recognizes and accommodates the due process rights of the individual litigant, a broad interpretation of virtual representation violates these rights by ignoring the requirement of notice and opt out and the preference for participation. Most importantly, virtual representation differs from the class action by failing to consider representation adequacy at the outset; it works retroactively to bind absentees.

Id. at 1335; Weber, *supra* note 46, at 349 (arguing that Rule 23(b)(2) classes violate procedural due process rights of absent class members by binding them to judgment in class case without notice of suit; recommending revision of rule or judicial interpretation to eliminate binding effect on class members and thereby preserve due process interests of absent class members).

[139] *See* Robert D. Brussack, *Political Legitimacy and State Court Jurisdiction: A Critique of the Public Law Paradigm*, 72 NEB. L. REV. 1082, 1110 (1993).

> Perhaps the most powerful rhetorical ally of the minimum contacts doctrine is the almost visceral conviction of many American lawyers and judges that there is a critical difference between being forced to litigate in a particular forum and choosing to litigate in the forum. The defendant is forced; the plaintiff chooses. The reality, however, is that the resolution of a jurisdictional dispute between a plaintiff and a defendant always entails coercion. If the plaintiff's forum choice is upheld, then the defendant is coerced. If the defendant's jurisdictional objection is sustained, then the plaintiff as a practical matter is forced either to give up the litigation altogether or to litigate in some forum more to the defendant's liking. The dichotomy is not between coercion and choice, but between brands of coercion.

Id. For an analogous argument made with reference to the effects of forum selection clauses on inverting the coercive power of forum choice, see Linda S. Mullenix, *Another Easy Case, Some More Bad Law:* Carnival Cruise Lines *and Contractual Personal Jurisdiction*, 27 TEX. INT'L L.J. 323, 363-67 (1992).

[140] *See generally* Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the*

this legislative history, many federal courts have felt compelled to deny expansive due process protections to mandatory class actions because historically, these classes conceptually contemplated cohesiveness and closure. Thus, as the Georgia district court aptly noted, the notion of an opt-out mandatory class action is oxymoronic.[141]

According to this view, the 1966 Rule 23 revisions recategorized the old "true" and "hybrid" class actions as the new (b)(1) and (b)(2) mandatory classes. Prior to 1966, true class actions involved joint or common interests, while hybrid class actions involved claims against limited pools of property or cash. Res judicata wholly bound true class-action members; hybrid class members were bound to the extent of their claim in the fund before the court.[142] In post-1966 class-action procedure, courts generally have agreed that (b)(1) and (b)(2) classes require fewer individual due process rights because of the more "cohesive, interdependent" nature of members' claims in these classes.[143]

In contrast, the modern (b)(3) class action derives from the old "spurious" class action, which captured class members with separate claims involving only common questions of law of fact.[144] Thus, because (b)(3) classes lack the homogeneous in-

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History of Adjudicative Representation, 70 B.U. L. REV. 213, 287-304 (1990) (reviewing STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987); discussing development of modern class action device); 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 (1993) (history of class action device and due process as applied to class actions).

[141] Waldron v. Raymark Indus., 124 F.R.D. 235 (N.D. Ga. 1989).

[142] *See* Grimes v. Vitalink Communications Corp., 17 F.3d 1553, 1570-71 (3d Cir. 1994) (Hutchinson, J., dissenting).

[143] *See, e.g.*, White v. National Football League, 822 F. Supp. 1389, 1412 (D. Minn. 1993) (citing 1 HERBERT NEWBERG & ALDA CONTE, NEWBERG ON CLASS ACTIONS § 1.20, at 1-48 (3d ed. 1992)); *see also* Holmes v. Continental Can Co., 706 F.2d 1144, 1155 (11th Cir. 1983) ("The very nature of a (b)(2) class is that it is homogeneous without any conflicting interests between the members of the class."); Durrett v. John Deere Co., 150 F.R.D. 555, 562 (N.D. Tex. 1993) (positing that (b)(1) and (b)(2) class members have "interests more closely aligned" than class members in (b)(3) actions, and "this means that there is less reason to be concerned about each member of the class having an opportunity to be present" (citing 7B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1786 (2d ed. 1986))).

[144] *Grimes*, 17 F.3d at 1570 (Hutchinson, J., dissenting); *Durrett*, 150 F.R.D. at 562.

terests characteristic of mandatory class actions, (b)(3) class members require additional procedural safeguards to protect their individualized interests in the action.[145]

Thus, the courts' faithful allegiance to this legislative history has driven the conclusion that the modern mandatory class actions cannot possibly require or incorporate an array of due process protections. *Shutts* first revealed the due process faultlines in this rigid construction of the Rule 23(b) categories; the modern mass tort litigation has exacerbated the tensions inherent in these distinctions. The most challenging issue confronting courts and law reformers, then, is whether the 1966 class-action categories can further survive the imperatives of the modern mass tort class action.[146]

C. Due Process and Mass Tort Class Actions: Possibilities for Reform

It is highly ironic that while over the last decade federal courts have become much more receptive to certifying mass tort cases (whereas prior to 1986 they were highly resistant), this trend has only served to further highlight the deficiencies in the

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> As several courts have noted, the critical problem raising due process concerns in actions under subdivision (b)(3) is not simply notice of the institution of the action, but whether the absent members actually are adequately represented. Effective representation is especially important in Rule 23(b)(3) actions because the class members are only loosely associated by common questions of law or fact, rather than by any pre-existing or continuing legal relationship.

Durrett, 150 F.R.D. at 562.

[145] *Durrett*, 150 F.R.D. at 562.

[146] *See Grimes*, 17 F.3d at 1572 (Hutchinson, J., dissenting).

> I do not think the distinction between cases seeking equitable relief as opposed to money damages has any logical relation either to Fourteenth Amendment or Fifth Amendment concepts of due process's requirement of personal jurisdiction. Rather, it seems to me only a vestigial reminder of the different ways in which the law relating to joinder of parties evolved in courts of equity as opposed to courts of law . . . .
>
> Accordingly, I am unable to conclude that the arcane distinction between equitable jurisdiction based on multiplicity of parties (Rule 23(b)(3)) and equitable jurisdiction in cases involving multiple parties where multiplicity was coupled with an independent basis of equitable jurisdiction, *e.g.*, injunction, interpleader, etc. (Rule 23(b)(1) & (2)) affects the restrictions due process places on a court's exercise of personal jurisdiction in personam.

Id.

class-action rule as a vehicle for resolving mass tort cases. Once a mass tort class action is certified, the class-action rule (across all categories) in many instances fails to adequately protect the interests of both defendants and plaintiffs. Hence, if the class-action rule is to be of any utility in helping to resolve the mass tort litigation crisis, it either needs to be reformulated with the experience of mass torts in mind, or flexibly interpreted with enhanced due process protections for current and future litigants.

In general, mass tort cases resolved under Rule 23(b)(3) come within the *Shutts* holding and therefore raise few constitutional problems. As *Shutts* suggested, notice requirements, the opt-out provision, Rule 23 fairness hearings, and other procedural safeguards protect absent class members. However, over the last decade the trend has been away from resolving mass tort litigation under Rule 23(b)(3). There are good reasons for this; defendants dislike opt-out classes because this subjects them to future claimant litigation virtually in perpetuity. Thus, for defendants, there is no closure with the (b)(3) opt-out class.

Hybrid mass tort classes, in contrast, sit uneasily astride *Shutts* and *Ticor Title*. When mass tort litigants seek both equitable and compensatory relief — and all mass tort claimants seek some compensatory relief — courts have uncomfortably attempted to mediate the *Shutts* holdings by splitting the difference between the adversaries: plaintiffs receive some additional due process protections (such as notice, opportunity to be heard, adequacy hearings), while the defendant preserves the non-opt-out binding feature of the mandatory class. In essence, federal courts already have considerably stretched due process protections in the mandatory hybrid mass tort case by providing supplemental due process surrogates not contemplated by the current rule or its precursors.

Similarly, the mandatory limited fund mass tort presents the greatest jurisprudential challenge for courts. The (b)(1)(B) mass tort is exclusively concerned with the distribution of compensatory damages; for defendants, binding all current and future claimants is the essence — the *raison d'être* — for this class action. Clearly, then, the purpose and the utility of the (b)(1)(B) limited fund would be fatally subverted by requiring or providing an opt-out right to class members. On the other hand, there

is great force to the argument that binding absentee or future class members to a limited fund settlement, where the plaintiff lacked sufficient minimum contacts with the forum, denies those claimants due process.

There are three ways to address this crisis of class-action procedure as it relates to the resolution of mass tort litigation. First, the Supreme Court might agree to hear another appeal in a hybrid or limited fund mass tort class settlement, such as *Ahearn v. Fibreboard,*[147] to offer some guidance concerning the constitutional due process requirements for plaintiffs in such class actions. In other words, the Supreme Court might agree to decide the issues it evaded when it declined to issue an opinion in *Ticor Title.* Given the Court's cryptic pronouncements in that case, it seems unlikely that the Court will seize another opportunity to revisit the implications of *Shutts* for equitable and mandatory class actions. If the Court is sending signals, it seems the Court prefers the rulemaking authorities or Congress to determine the contours of plaintiffs' due process in class-action procedure.

Second, the Advisory Committee on Civil Rules could, as part of its current reevaluation of the class-action rule, determine to revisit and revamp the 1966 Rule 23 (b) categorization of class actions, along with consideration of the attributes and requirements of these classes. The Advisory Committee might very well decide that at least with respect to mass tort litigation, these cases have strained categorical boundaries and imperatives. Moreover, in advance of the rulemakers, the federal judiciary already has been busy substantially rewriting the due process protections necessary in hybrid and limited fund mass tort cases. Thus, the Advisory Committee has the opportunity to codify the incremental adjustments in class-action due process requirements that several lower federal courts have implemented already.

Finally, Congress independently could decide to draft its own version of a modernized class-action rule, with or without reference to mass tort litigation. There is little indication that Congress independently intends to fashion a new aggregative litiga-

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[147] *See supra* notes 128-34 and accompanying text.

tion device; but there also is sufficient recent precedent for congressional intervention in the rulemaking process.[148]

CONCLUSION

The purpose of this paper has not been to prescribe the requirements of plaintiffs' due process in class-action procedure generally, or in mass tort litigation particularly. Rather, the purpose is to focus attention on the central fact that due process considerations in mass tort class-action litigation strain existing procedural rules and doctrine. The past decade has demonstrated that mass tort cases entail a significant due process conundrum, pitting the instrumental value of aggregative efficiency against the normative value of individualized fairness.[149]

These cases also have demonstrated that plaintiffs' due process and fairness concerns — as they relate to the binding and preclusive effects of judgments — are just as compelling as those of defendants. For fifty years since *International Shoe,* courts and commentators have struggled to supply some structured (although concededly imperfect) ways of thinking about defendants' due process rights. In this same period, courts have been virtually silent, and largely unhelpful, regarding plaintiffs' jurisdictional due process requirements. In the next century, the issue of plaintiffs' due process should receive deserved attention.

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[148] *See* Charles A. Wright, *Foreword: The Malaise of Federal Rulemaking,* 14 REV. LITIG. 1, 1 n.1 (1994) (discussing congressional attempt to override Advisory Committee discovery revisions); *see also* Linda S. Mullenix, *Adversarial Justice, Professional Responsibility, and the New Federal Discovery Rules,* 14 REV. LITIG. 13, 15-16 nn.3-4 (1994) (same).

[149] *See Grimes,* 17 F.3d at 1572 (Hutchinson, J., dissenting) (concluding that "the magnitude of that concern [loss of efficiency] has been seriously questioned"); *cf.* Williams v. Lane, 129 F.R.D. 636, 642 (N.D. Ill. 1990) (describing dilemma raised by due process requirements in hybrid class actions and dilemma's potential to destroy utility of class action device).