No Exit: Mandatory Class Actions in the New Millennium and the Blurring of Categorical Imperatives

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With the recent approval of the proposed amendments to Federal Rule of Civil Procedure 23 ("Rule 23"), the Advisory Committee on Civil Rules and the Judicial Conference of the United States have taken a major step towards substantially revising the class action rule. Among the federal rules, the class action rule is unique in that it is one of the few original 1938 rules to have been completely re-written in 1966. Thus, the 2002 amendments reflect the second major substantial overhaul of the class action rule since 1966.1

Although the rule amendments at first seem like a sweeping overhaul, in reality the revisions embody the codification of class action practice over the past thirty-six years.2 Rather than forging new principles, the class action amendments instead delineate rules and principles that federal appellate courts have articulated in the large body of class action jurisprudence in this period.3

1 Morris and Rita Atlas Chair in Advocacy, The University of Texas School of Law.
2 The class action rule was amended in 1998 to add the new subsection (f), authorizing appellate review of class certification orders. See Linda S. Mullenix, Some Joy in Whoville: Rule 23(f), A Good Rulemaking, 69 U Tenn L Rev 97 (2001). The process leading to this rule amendment was commenced by the Advisory Committee on Civil Rules in 1991. See David Levi, Memorandum to the Civil Rules Advisory Committee: Perspectives on Rule 23 Including the Problem of Overlapping Classes (Ap 24, 2002), available online http://www.lfcj.com/articles/display.asp?artnum=70 (visited Oct 22, 2003). The Advisory Committee on Civil Rules has studied and made recommendations for amendments to Rule 23 for more than a decade, and this process will continue even after final approval of the 2002 Rule 23 amendment package.
3 The 2002 amendments revise certain provisions of Rule 23(c) and 23(e), and add new subsections Rule 23(g) (appointment of class counsel) and Rule 23(h) (attorney fee awards). See Levi, Report of the Civil Rules Advisory Committee (cited in note 1).
4 See id at 1–3. This is especially true for the new proposed subsections (g) and (h) relating to the appointment of counsel and the determination of attorneys' fees in class actions. Subsection (g) relating to appointment of counsel reflects principles developed by federal courts over several years, and subsection (h) relating to the determination of attorneys' fees reflects and codifies principles relating to attorneys' fees extant in federal class action jurisprudence.
The Advisory Committee on Civil Rules has been able to accomplish this current revision of Rule 23 in no small measure by avoiding controversy. During the decade in which the Advisory Committee has floated various proposals to amend Rule 23 to deal with pressing issues of class action jurisprudence, the Advisory Committee has consistently retreated in the face of strenuous, vocal criticisms from the bench, bar, and the academy.

The Advisory Committee has been able to achieve consensus on Rule 23 revisions only when the Committee proposed "least common denominator" or "least objectionable" revisions. In essence, any Rule 23 proposals that were innovative or that dealt with cutting edge class action issues were swiftly banished from the drafting table or consigned to rule-making limbo.

Consequently, we now have a Rule 23 revision that codifies long-established class action principles, that offends no one, and that does not deal with the truly pressing class action issues that have developed in the past thirty-six years. The 2002 amendments largely address the appointment of class counsel and the awarding of attorney fees. Included in the universe of class action problems most likely to give offense—and therefore least likely to

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* The Advisory Committee, since it first began considering revision of Rule 23 in 1991, has retreated from every radical proposal to overhaul the class action rule. In 1992, the Advisory Committee decided not to completely revise the entire Rule 23 (as it did in the 1966 revision). After extensive hearings during 1997, the Advisory Committee decided not to go forward with a proposed new settlement class that would have added a new Rule 23(b)(4) class category for "settlement classes." In the face of extreme controversy, the Advisory Committee relegated the settlement class proposal to rulemaking limbo after the Supreme Court's 1997 decision in *Amchem Products, Inc v Windsor*, 527 US 591 (1997), where this proposal subsequently languished and expired. For the debate surrounding the proposed settlement class, see Paul D. Carrington and Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 Ariz L Rev 461 (1997); Linda S. Mullenix, *The Constiutionality of the Proposed Rule 23 Class Action Amendments*, 39 Ariz L Rev 615 (1997).


* See notes 5–6. See also Levi, *Report of the Civil Rules Advisory Committee* (cited in note 1). The Advisory Committee identified numerous other problem areas relating to class action litigation, including problems relating to duplicative, overlapping class actions. However, after consideration, the Advisory Committee determined not to deal with these problems through a rule revision. Id.
be addressed—are problems relating to the mandatory Rule 23(b)(1) and (b)(2) classes.\footnote{The revisions to Rule 23 that have been effected since 1991 do not include any revisions to Rule 23(a) or Rule 23(b). Although the Advisory Committee's first round of Rule 23 revisions included a proposal to amend Rule 23(b) to add a new Rule 23(b)(4) for settlement classes, this proposal died in Committee. See note 5. The very first proposals to amend Rule 23, first floated in 1991, included provisions to amend Rule 23(b), and included recommendations to create “opt-in” classes for all the Rule 23(b) categories. See \textit{Proposed Amendments to Federal Rule of Civil Procedure 23} (cited in note 5). These radical suggestions were swiftly abandoned after massive negative reaction by interested commentators to this set of initial trial proposals.}

When the Advisory Committee on Civil Rules began its Rule 23 project in 1991, the possibility of wholesale revision of the mandatory classes was proposed.\footnote{See \textit{Proposed Amendments to Federal Rule of Civil Procedure 23} (cited in note 5).} This trial balloon was quickly deflated and never seriously reconsidered. The major focus of the Advisory Committee's concerns shifted to revision of other sections of the rule.\footnote{As indicated above, the only revision resulting from the Advisory Committee's efforts between 1991–97 was the new Rule 23(f) providing for interlocutory review of class certification orders. See note 3. The only attempt to deal with the Rule 23(b) categories was the aborted attempt to add a new class category for settlement classes, which effectively was defeated by default. See notes 5 and 8.}

The current 2002 revision package does include a provision to provide permissive notice to the mandatory Rule 23(b)(1) and (b)(2) classes.\footnote{See proposed Rule 23(c)(2) ("For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class."), in Levi, \textit{Report of the Civil Rules Advisory Committee} 96 (cited in note 1). The Advisory Committee originally proposed that notice be mandatory in (b)(1) and (b)(2) classes. After publication of the proposed rule for notice and comment, the Advisory Committee retreated from this mandatory proposal. Judge Levi's report indicated that “The most important change since publication [of the proposed amendments] is to modify the proposal that notice be required in (b)(1) and (b)(2) class actions. Comments from many civil rights groups urged that mandatory notice, even if by relatively inexpensive means, could cripple many class actions.” Id at 2.} It also includes provisions for a double opt-out option in Rule 23(b)(3) classes,\footnote{See proposed Rule 23(e)(3) ("In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so."). Levi, \textit{Report of the Civil Rules Advisory Committee} 102 (cited in note 1). The Advisory Committee originally had proposed two alternative versions for a double opt-out opportunity, and chose the “restyled” second version. Id at 123.} suggesting that the Advisory Committee believes that opt out rights are important enough to provide two opportunities for exclusion from damage class actions. But the permissive band-aid notice relief for mandatory classes does not address nor resolve the fundamental problems that adhere in mandatory classes. The Advisory Committee, consistent with its political “give no offense” approach to rule revision, has...
evaded and avoided grappling with and resolving the major problems of mandatory classes.

Against this backdrop of rule reform, the various problems of mandatory classes remain. Mandatory classes will be problematic until the Advisory Committee on Civil Rules, the Supreme Court, or Congress steps in and brings order to this universe. As things now stand, the so-called "Shutts problem" remains unresolved, the Supreme Court views mandatory classes through a lens refracted in the eighteenth and nineteenth centuries, and the strategic deployment of mandatory classes contributes to litigant unfairness. Moreover, the strategic possibilities offered by mandatory classes encourage gaming the system, with consequent cynical appreciation of the justice system, on a grand scale.

This Article argues that the concept and use of the mandatory class has changed considerably during the last fifty years, which fact is largely under-appreciated by the Supreme Court. Thus, the mandatory class in the twenty-first century bears only remote resemblance to the archetypal illustrations in the Advisory Committee's 1966 Note. Nonetheless, as the mandatory class has evolved, the federal appellate courts have not offered a coherent structure for explaining and dealing with the mandatory class, a failure that continues into the twenty-first century.

Moreover, the courts' doctrinal incoherence has blurred the categorical distinctions among class categories that the Advisory Committee carefully promulgated in 1966. Therefore the entire class action rule has been rendered analytically incoherent. It has become increasingly difficult to distinguish among the 23(b)(1), (b)(2), and (b)(3) class categories in any meaningful way.

The very vocabulary of class action litigation has, over time, been debased and distorted to permit litigation results that are analytically incoherent. Thus, core concepts of homogeneity and heterogeneity of interests that once were integral to the 23(b)(1), (b)(2), and (b)(3) classes have been rendered malleable in all but label. Concepts of "predominance" are used loosely, and often interchangeably, among the mandatory and opt-out classes. The concept of the "hybrid" class—one a distinct analytical category under the original 1938 rule—now describes various types of proposed class actions, and has assumed many meanings, depending on the setting.

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12 FRCP 23, Advisory Committee Notes, 1966 Amendment, Subdivision (b)(1) and Subdivision (b)(2).
Moreover, while many courts pay lip service to old rhetorical constructs, decisions often avoid the practical implications of those categories. Loose labeling, result-oriented accommodations, creative innovations, and doctrinal incoherence all have contributed to uncertainties relating to due process and fairness. These factors also have maximized opportunities for gaming the system; that is, to obtain strategic litigation advantage through manipulating the rule and class action jurisprudence in ways not contemplated by the rulemakers or the courts. This Article concludes by suggesting the Supreme Court, the rulemaking bodies, or Congress need to bring analytical coherence to the mandatory classes in the new millennium. These bodies must pursue an analytically sound appreciation of mandatory classes that ensures due process protections to all class litigants, and that eliminates opportunities for the strategic deployment of the mandatory class. Moreover, we need an explanation of the mandatory class that makes sense in the overall scheme of the class action rule, including the Rule 23(b)(3) class.

Part I of this Article canvasses the various discussions that attempt to conceptualize the problem relating to the right to opt out of class action lawsuits. In this Part I suggest that commentators, including the scholars in the University of Chicago Legal Forum Symposium, view the opt-out problem as one adhering in the 23(b)(3) damage class only. I suggest that these discussions of the opt-out question truncate a full consideration of the right to opt out, which must be viewed in the context of all the class categories and not only the 23(b)(3) class. Stated differently, I argue that any consideration of the right to opt out must take into account the countervailing consideration that the mandatory classes permit no exit from the class, or no right to opt out.

In Part II, I survey the problems relating opt-outs in the context of the mandatory classes, and the sources of these problems. In this Part, I briefly canvass the evolution of the mandatory class since 1966. This Part summarizes the due process underpinnings of the class action rule, as the basis for discussing the serious due process problems that inhere in the mandatory class categories. Part III canvasses the Supreme Court's continuing failure to address due process concerns in the mandatory classes, and how this failure has inspired divergent views among the lower federal courts. This Part concludes with an analysis of the
Supreme Court's decision in *Ortiz v Fibreboard Corp.*,\(^{13}\) which contains the Court's most recent, yet brief and unenlightening, comments on the due process dimensions of mandatory classes.

Part III also briefly comments on the continuing development of a theory of mandatory classes in the post-*Ortiz* era, and traces the doctrinal split in thinking about due process concerns. One branch of decisions has developed in relation to Rule 23(b)(1)(B) mandatory classes (following *Ortiz*); while a second branch has developed regarding Rule 23(b)(2) classes that include mixed forms of relief. In this second cluster of cases, federal courts have further split, with some following the Fifth Circuit's decision in *Allison v Citgo Petroleum Corp.*,\(^{14}\) and other courts following the Seventh Circuit's lead in *Jefferson v Ingersoll International, Inc.*\(^{15}\) This Part discusses and critiques the emergence of the new concept of the hybrid class action as a consequence of these decisions. This Part also briefly comments on the implications of the new mandatory class concepts in relationship to the Rule 23(b)(1)(A) class.

Part III also explores the unsettled and unsettling universe of mandatory classes in the post-*Ortiz* era, discussing the new uses of mandatory classes that have developed in the past decade and their uncomfortable fit with the old, pre-existing class action categories. New cases are pushing old categories, resulting in a complete analytical blurring of class action categories.

In Part III, I further demonstrate through four illustrations how these problems have manifested in various ways that encourage attorneys to "game the system" for strategic advantage. This Part analyzes the resulting opportunities for class action attorneys to creatively "game" the system in pleading and litigating their class action cases. I argue that systemic incentives encourage actors within the justice system to care about opt-out claimants in ways that have nothing to do with justice or fairness, or, alternatively, that a lack of systemic incentives discourages actors from caring about opt-out claimants. In essence, I argue that opt-outs in reality are pawns in the class action game, or are hostages to various actors' interests.

In the Conclusion, I discuss the implications and consequences of the current incoherence concerning the right to opt out in class action jurisprudence and practice. I suggest that plain-

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\(^{13}\) 527 US 815 (1999).

\(^{14}\) 151 F3d 402 (5th Cir 1998).

\(^{15}\) 195 F3d 894 (7th Cir 1999).
tiffs' attorneys, defense counsel, and the judiciary all have incentives to maintain the status quo, and why proposals at either end of the opt-out spectrum will not likely be adopted. While the academic debate concerning opt-out rights is interesting, it fails to account for the true role that opt-outs play in the disposition of class action litigation. The Article concludes with various approaches to thinking about the problems of mandatory classes, and possible ways to preserve the concept of the mandatory class, ensure due process and fairness, and eliminate opportunities for gaming the class action system.

I. CONCEPTUALIZING THE OPT-OUT PROBLEM

Scholars have conceptualized the problem of the right to opt out of a class action in several different ways, although almost all considerations of the problem are grounded in Rule 23(b)(3), the so-called "opt-out" class. As will be described below, the three papers presented at the University of Chicago Legal Forum Symposium by Professors Nagareda, Redish, and Rosenberg on the topic of the right to opt out, all conceptualize the opt-out problem differently.

The Rule 23(b)(1) and (b)(2) class categories are "mandatory." Class actions certified under these provisions do not allow for a claimant to opt out of the class. Thus, discussions of the

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17 See Parts I B-D.

18 See FRCP 23(b)(1)(A) and 23(b)(1)(B). There are two different types of mandatory classes, with different criteria. See generally Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, Federal Practice and Procedure §§1772-76 at 421-516 (West 2d ed 1986).

19 Wright, Miller, and Kane, Federal Practice and Procedure at 421-516 (cited in note 18). The plain language of these subsections also does not permit claimants to opt out of the class. Although the mandatory classes have no provision to permit class members to exclude themselves, FRCP 23(d)(2) currently does allow a federal judge to notify class members of the pending action. See FRCP 23(d)(2) ("In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be
right to opt out of the 23(b)(3) class have focused on issues such as the rationales for permitting exclusion from the Rule 23(b)(3) damage class; whether the right to opt out is a due process right; the timing of the right to opt out; the methodologies for notifying class claimants of the right to opt out; the knowledge, understanding, and consent of those who choose to opt out; the effects of opt-out claimants on class settlements; and whether the opt-out mechanism serves the underlying purposes of the class action rule.

In addition, the discussion of the right to opt out encompasses the debate whether the alternative procedure—to require putative class members affirmatively to "opt in"—ought to replace the current opt-out regime. The debate over "opting-in" captures many, if not most, of the same issues involved in the core debates concerning the right to opt out.

A. The Untidy Universe of the Rule 23(b) Classes: Present at the Creation

The original class action rule had no opt-out provision. Although the original Rule 23 also contained three class categories, there was no right of exclusion because the original class categories all contemplated certain juridical relationships among class members, such that their interests were common or united. The possibility of a damage class action was severely limited, if not impossible, because the claims of individual class members in a damage class were not sufficiently united or common to meet the requirements of the original rule's three categories.

The 1966 amendments to the class action rule eliminated the problematic (and difficult-to-apply) original three class categories and created three new class categories. The new subdivision (b) categories were intended to provide functional descriptions of
types of class actions, rather than to prescribe juridical relationships necessary for certification.\textsuperscript{22}

The innovative creation of the 1966 amendments was the creation of the Rule 23(b)(3) class, commonly known as the “damage” class action.\textsuperscript{23} Unlike the 23(b)(1) and (b)(2) classes, which were intended to capture class claimants with homogenous interests,\textsuperscript{24} the 23(b)(3) class action was conceived as a possible class vehicle for claimants with heterogeneous interests. In recognition of the heterogeneous nature of the new 23(b)(3) class category, the 23(b)(3) class further, and innovatively, provided for notice and a right to opt out.

In creating three entirely new class categories, two of which were mandatory and binding on all class claimants and one class category that was not, the Advisory Committee inadvertently created internal tension among the class categories that has yet to be resolved and has become increasingly befuddled over time.

Although the 1966 rule reformers had the good intention of clarifying the class categories and creating simple, functional class descriptions, they actually set the stage for doctrinal confusion among these class categories. This confusion has resulted in a downward spiral of analytical incoherence that has led to a complete blurring of class categories. In short, the 1966 class categories no longer make sense, and are subject to manipulation by litigants and the courts alike.\textsuperscript{25}

Rule 23(b)(3), by its own terms, does not provide for the right to opt out.\textsuperscript{26} Rather, the right to opt out is derived from Rule 23(c)(2)(A), which provides that the court will exclude a member from the class if the member requests by a specified date,\textsuperscript{27} as well as from Rule 23(c)(2)(B) which indicates that a class action judgment will include all members who do not request exclusion.\textsuperscript{28}

\begin{itemize}
\item \textsuperscript{22} Id at 563–64.
\item \textsuperscript{23} See id (detailing the mandates of the 1966 Rule 23).
\item \textsuperscript{24} The amended Rule 23(b)(1) and (b)(2) class actions were conceptually derived from the original class categories, based on classes consisting of claimants with homogeneous interests.
\item \textsuperscript{25} This is discussed and analyzed in greater detail in Part III.
\item \textsuperscript{26} See FRCP 23(b)(3). The plain language of this subsection merely sets forth the criteria that a proponent seeking certification must satisfy, and which a court must find, in order for the court to determine that a class may be maintained as a (b)(3) class.
\item \textsuperscript{27} See FRCP 23(c)(2)(A).
\item \textsuperscript{28} See FRCP 23(c)(2)(B). Rule 23(c)(2)(C) also inferentially supports the right to opt out by indicating that any class member who does not request exclusion may enter an appearance through counsel.
\end{itemize}
The Advisory Committee Note to Rule 23(c)(2)(A) indicates that the rule "makes special provision for class actions maintained under subdivision (b)(3)," for the right of individual class members to be excluded from the class. Thus, putative members of proposed 23(b)(3) classes are afforded this special opportunity out of respect for the possible strong interests of individuals in pursuing their own litigation. Embedded in this concept is the notion that 23(b)(3) classes are heterogeneous, and that if individual interests are strong enough, the class may lack sufficient cohesion to warrant certification.

Problems relating to the right to opt out have been apparent since the enactment of the 1966 amendments, especially as a consequence of the simultaneous provision for mandatory and opt-out classes. The class action universe would have been tidy if class proponents conceptualized their claims neatly within the functional categories, and pleaded their claims pursuant to one category.

The rule reformers did not sufficiently anticipate the implications of an amended rule with three different class categories, two of which were mandatory and one that was not. In particular, the rule reformers did not sufficiently anticipate the possibility that class proponents might plead a proposed class action under multiple provisions of Rule 23(b). Thus, from 1966 forward, courts have been faced with the practical and conceptual implications of class actions pled pursuant to more than one subdivision (b) class category, where class claimants have the ability to exclude themselves from a class-wide judgment under one category, but are bound under two other class categories (and without notice of the action). Into this breach, therefore, courts have developed principles governing class certification when pleaders in-

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29 FRCP 23, Advisory Committee Notes, 1966 Amendment, Subdivision (c)(2).
30 Id. The Advisory Committee Notes indicate that the individuals' interests in pursuing their own litigations may be so strong as to defeat class certification altogether. See also FRCP 23(b)(3) (stating predominance requirement); FRCP 23(b)(3)(A) (noting that interests of members of the class in individually controlling the prosecution or defense of separate actions is one factor in determining predominance).
31 FRCP 23, Advisory Committee Notes, 1966 Amendment, Subdivision (b)(3).
32 Ironically, the centerpiece of the 1966 Rule 23 reform was to replace the difficult-to-apply class categories in the original Rule 23 with more descriptive, functional class categories in the amended rule. See James, Hazard, and Leubsdorf, Civil Procedure 363-64 (cited in note 21).
33 The Advisory Committee Notes to the 1966 amendments provide no guidance to courts concerning how to evaluate class complaints seeking certification simultaneously under multiple subdivisions of Rule 23(b).
voke multiple subsections of Rule 23(b). Notwithstanding the Advisory Committee's admonition that the Rule 23(b)(3) opt-out class is intended to respect the rights of individuals with strong interests to pursue their own litigation, courts have nonetheless indicated a preference for certifying classes under the mandatory 23(b)(1) or (b)(2) provisions when presented with a motion for class certification under the mandatory and opt-out provisions.34

The purported rationale for favoring mandatory 23(b)(1) certification is to avoid separate litigation that would unduly burden the judicial system, to protect defendants from the risks of inconsistent judgments, and to protect plaintiffs from the impairment of their interests.35 The leading federal practice treatise also has endorsed this principle favoring certification of mandatory classes, based on the additional rationale that Rule 23(b)(3) classes require both notice and the opportunity to opt out, and therefore impose additional financial burdens and constraints on the litigants.36

Apart from expressing a judicial preference for mandatory classes, these boilerplate rules make little sense. Nor do these rules mitigate the inherent tension that exists between two categories of classes that permit no exit from the class, and a third category that does. A court's decision to certify under the mandatory (b) subdivisions, as opposed to the 23(b)(3) provision, has severe due process consequences for class members. When a court elects to certify a class under one of the mandatory (b) subdivisions, this decision sacrifices the class claimants' rights to notice and the opportunity to exclude themselves from the class.

Courts have failed to sufficiently explain why class claimants who satisfy the requirements of Rule 23(b)(3) should preferentially have their class certified as a mandatory (b)(1) class, if counsel pleads both subdivisions. Courts have failed to recognize that mandatory 23(b)(1) and (b)(2) classes are conceptually different than the 23(b)(3) class, in that the former are intended to embrace homogeneous classes, while the latter is not.37 Hence, it is

34 See Wright, Miller, and Kane, Federal Practice and Procedure §§1772, 1775, 1777 (cited in note 18). This preference for a mandatory class certification applies when a class proposed under both 23(b)(3) and (b)(1) satisfies the requirements for certification under all provisions.
35 Id at 421–26 (citing cases).
36 Id (citing cases).
37 Unlike the 23(b)(3) class with a presumption of heterogeneity among class members, the presumed homogeneity of the mandatory classes explains why there are no no-
difficult to understand how courts can blithely announce that a class that satisfies the Rule 23(b)(3) criteria may simultaneously satisfy the mandatory class criteria, and prefer certification under the mandatory provisions.

Furthermore, many courts' purported justifications for a mandatory class preference merely recite the language of the 23(b)(1) and (b)(2) classes in conclusory fashion, without providing any analytical content justifying the result. Nor do these decisions account for the due process considerations that undergird the 23(b)(3) class, as well as the presumed heterogeneous nature of the 23(b)(3) class. Finally, prudential considerations such as the additional financial burden of providing notice and the opt-out right ought not outweigh due process considerations in denying putative class members these rights through a mandatory class certification.

B. Professor Nagareda’s Deterrence of Opt-Outs Perspective

Professor Richard Nagareda has located the opt-out problem in the context of Rule 23(b)(3) damage class settlements, an approach that excludes consideration of claims against Rule 23(b)(1)(B) limited fund settlement classes. He justifies this focus on the opt-out problem in the settlement context (as opposed to the opt-out problem after certification of a litigation class), on the ground that most class actions settle, rather than undergo litigation. Therefore, for Professor Nagareda, concerns about opt-

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38 See, for example, Reynolds v National Football League, 584 F2d 280, 284 (8th Cir 1978) ("[W]hen the choice exists between (b)(1) and (b)(3) certification, generally it is proper to proceed under (b)(1) exclusively in order to avoid inconsistent adjudication or a compromise of class interests."). See also Van Gemert v Boeing Co, 259 F Supp 125, 130 (S D NY 1966) (citing exact language of Rule 23(b)(1)(A) and 23(b)(1)(B) as justification for preference for certification under mandatory provisions).


40 Id at 146, citing Ortiz v Fibreboard Corp, 527 US 815 (1999). Professor Nagareda excludes limited fund settlement classes from his purview because, by definition, membership in Rule 23(b)(1)(B) classes is mandatory and does not permit opt-outs. Therefore, the types of coercive/deterrent techniques to induce claimants not to opt-out of the damage class settlement are not relevant to his analysis. Inferentially, Professor Nagareda’s approach to the opt-out problem ignores the possibility of an opt-out problem adhering in the mandatory classes (that is, the negative opt-out problem: that there is no exit from the class).
outs ought to focus on the back end settlement process, rather than the front-end certification process.\textsuperscript{41}

Professor Nagareda's focus on the right to opt out of the back-end settlement process is justified to the extent that most class actions are, indeed, settled rather than litigated.\textsuperscript{42} And, the recent proposed amendments to Rule 23 provide additional support for Professor Nagareda's focus on settlement opt-outs, in that the Advisory Committee ultimately provided a second opportunity to class claimants to opt out of the class after the class members have received notice of the actual terms of a proposed class settlement.\textsuperscript{43} Thus, the Advisory Committee recognized that class claimants possibly ought to have another chance to opt out of a class at the point at which they have additional or better information concerning the actual terms of a class settlement.

Professor Nagareda's concern with opt-out rights in the context of settlement classes focuses chiefly on the behavior of attorneys involved in the settlement process, to the detriment of the class members' interests.\textsuperscript{44}

\textsuperscript{41} As will be seen, Professor Nagareda is more concerned with the "back-end" of the class litigation process (that is, settlement), rather than the "front-end" of the class litigation process (certification of the litigation class). Professor Nagareda's concern for the back-end opt-out process places him in contrast to Professor Redish, who ultimately argues in favor of fixing the "front-end" opt-out regime. See discussion of Professor Redish's argument in Part I C.

\textsuperscript{42} Professor Nagareda's empirical support for this proposition is Thomas E. Willging, Laural L. Hooper, and Robert J. Niemic, \textit{An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges}, 71 NYU L Rev 74, 143–51 (1996). Generalizations from this report should be approached with some caution, however, as this study reviewed docket records from only four federal district courts.

\textsuperscript{43} See Levi, \textit{Report of the Civil Rules Advisory Committee}, at 105–06 (establishing a discretionary opportunity to opt-out of a (b)(3) class settlement after expiration of the initial opt-out period, without establishing any presumption in favor of providing that opportunity) (cited in note 1).

He essentially argues that because defense counsel desire to achieve maximum or optimal "closure" through the class action device, they will deploy an array of devices to deter class claimants from exercising their rights to opt out. In a clever analytical set-piece, Professor Nagareda rhetorically suggests that the various techniques that attorneys use to deter opt-outs run parallel to the plotline and coercive methods used by the Mafia dons and thugs in the movie *The Godfather*. He is especially critical of settlement deals that make class claimants an offer that they "can't refuse," by artificially making the settlement terms more attractive than the litigation alternative.46

Basically, Professor Nagareda attacks any means—or combination of means—by which attorneys implicitly or explicitly induce claimants from opting-out of the class, including anti-competitive agreements.46 While he does not eschew all attempts to deter opt-outs, he argues that any justification for the legitimacy of an opt-out deterrence strategy must be based on the "preexistence" principle.47 According to Professor Nagareda, the "preexistence" principle governing class action jurisprudence is the proposition that the class action enjoys no mandate to alter pre-existing rights.48

Although Professor Nagareda makes a normative claim for eschewing coercive attempts to deter opt-out claimants (based on the preexistence principle), to his credit he realistically understands that practicing attorneys are and will continue to be endlessly inventive in designing new means to deter opt-outs.49 In light of this reality, Professor Nagareda comes up somewhat

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46 Nagareda, 2003 U Chi Legal F at 143-45 (cited in note 39). Apart from the class action context, he is critical of the structure of the federal 9/11 Victims Compensation Fund legislation, which he believes proffers claimants a similar coercive choice. See Enabling legislation, September 11th Victim Compensation Fund of 2001, Title IV of Public Law 107-42 ("Victim Compensation Law"). In the class action realm, he is highly critical of the recent Sulzer hip implant settlement, which he criticizes for similar deterrence mechanisms. See *In re Inter-Op Hip Prosthesis Liability Litigation*, 204 FRD 330 (N D Ohio 2001).

47 Id at 174-75.


short in the prescriptive “what should we do about it?” department.

Regarding anti-competition agreements, Professor Nagareda suggests that the full brunt of the antitrust laws ought to be leveled against class attorneys who build such anti-competitive agreements into class settlements.50 Regarding all other objectionable Godfather-like behavior, Professor Nagareda merely suggests that “the law of class actions must maintain a steady vigilance toward those innovations.”51 That is, in effect, the equivalent of asking the courts to be vigilant against the delivery of horses’ heads to bedrooms, or fish wrapped in newspapers. What he doesn’t tell us is what a real judge in a real court ought to do when presented with illegitimate (in Nagareda’s view) opt-out deterrent strategy.

The fact that the 2002 amendments to Rule 23(e) offer the possibility of a second opt-out will not cure Professor Nagareda’s concerns, either. Rather, the second opportunity for opting-out merely enhances the scenarios for objectionable attorney conduct in deterring the opt-outs. Thus, if claimants in the future get two bites at the opt-out apple, attorneys who wish to deter opt-outs will get two bites, as well (and even more horses’ heads).

While Professor Nagareda’s perspectives on the opt-out problem are interesting and compelling, he isolates and tills the opt-out problem in one small corner of the class action garden. Mixing metaphors, his opt-out analysis focuses on one tree (that is, the 23(b)(3) damage settlement class), while he chooses not to survey the entire forest (all of Rule 23, litigation and settlement classes combined). While he is concerned about potentially coercive behaviors intended to discourage opt-outs from Rule 23(b)(3) damage settlement classes, his narrow scope does not embrace the equally compelling (if not more compelling) problem of the coercive nature of the mandatory 23(b)(1) and (b)(2) classes, which offer no opt-outs.

If Professor Nagareda is disturbed by the thought of attorneys using illegitimate techniques to discourage opt-outs in (b)(3) damage classes, he ought to be equally disturbed at the very real possibility of awarding damages in mandatory (b)(1) and (b)(2) classes.52 Arguably, under Professor Nagareda’s theory, manda-

50 Id at 172–74.
51 Id at 175.
52 See generally the discussion of mandatory classes that include the possibility of recovery for damages at Part II C.
tory classes embody the ultimate illegitimate, coercive settlement opt-out deterrent strategy (for plaintiffs, defendants, and the judicial system). Because there is no exit from the mandatory classes, class members are never even confronted with coercive Godfather-like choices; the mandatory class is itself the horse’s head in the bed.

C. Professor Redish’s Democratic Opt-In Theory

Professor Martin Redish, in contrast to Professor Nagareda, has located the opt-out problem in the context of a grand, overarching theory of class actions grounded in his particular understanding of democratic theory. In Professor Redish’s conceptualization of the opt-out problem, therefore, focuses neither on a particular class action tree, nor the entire Rule 23 forest. Rather, Professor Redish chooses to view the class action rule in relation to the entire jurisprudential ecosystem.

Professor Redish first attempts to demystify and de-glorify the class action as the great modern vindicator of substantive rights—which he thinks is decidedly wrong. For Professor Redish, the class action attorney is not the modern white knight on the grand steed, wielding the class action broad-sword to slay the ghastly corporate dragon. Instead, Professor Redish reminds us that the class action rule is a procedural housekeeping rule, which as such ought to be demoted from its glorious broadsword role to a more mundane broom-like status.

Central to Professor Redish’s thinking about the class action as a component of the entire jurisprudential ecosystem are a few simple propositions. First, the class action “was never designed to serve as a free-standing legal device for the purpose of ‘doing justice,’ nor is it a mechanism intended to serve as a roving policeman of corporate misdeeds or as a mechanism by which to redistribute wealth.” In this regard Professor Redish seems to be at loggerheads with Professor Rosenberg, who conceptualizes the class action as the chief means for achieving optimal deterrence of corporate misdeeds. See discussion of Professor Rosenberg’s paper at Part I D.

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54 Id at 74-75.
55 In this regard Professor Redish seems to be at loggerheads with Professor Rosenberg, who conceptualizes the class action as the chief means for achieving optimal deterrence of corporate misdeeds. See discussion of Professor Rosenberg’s paper at Part I D.
56 Redish, 2003 U Chi Legal F at 74 (cited in note 53). To the extent that this is the same argument as Professor Nagareda’s “preexistence principle,” Professors Redish and Nagareda are on the same Rules Enabling Act page. See discussion of Nagareda’s preexistence principle at Part I B.
an elaborate procedural device designed to facilitate the enforcement of pre-existing substantive law.”

Third, the substantive law vests enforcement of compensatory rights in individual victims, and no person is ever required to exercise that right of enforcement. It therefore follows that “any incidental benefit to the public interest is wholly contingent upon the private victim’s decision to seek to judicially enforce her substantively created remedy.”

Professor Redish recognizes that governments may desire to punish or deter unlawful behavior through criminal enforcement, civil penalties, and administrative regulation, in addition to or instead of private compensatory relief. However, he argues that when a statute exclusively provides for enforcement of norms by means of victim compensation, then enforcement by any other method “profoundly alters the statute’s substantive directives.”

The thrust of these propositions is twofold. First, Professor Redish would restore the class action to the status of a merely procedural device enabling the collective vindication of individual compensatory claims. Second, he would not permit class actions to take on an independent life as the vindicator of goals or ends that are not contemplated by the underlying substantive law, such as punishment or deterrence. Thus, where the underlying law provides exclusively for compensatory relief, he would diminish or simply not recognize the much vaunted deterrence rationale for class actions.

Professor Redish then argues, at length, that the central problem with the modern class action rule, in both structure and practice, is that the rule permits the compensatory enforcement model to be transformed into other remedial models that are not contemplated by the underlying substantive law. Professor Redish argues that these faux class actions constitute “a wholly improper and unacceptable departure from the fundamental precepts of American democracy, and thus give rise to what can be described as ‘the democratic difficulty.’”

He is particularly aggrieved by “faux” class actions pursued by opportunistic bounty hunters—class actions that are not in any realistic sense brought by or on behalf of class members, but

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58 Id at 76.
59 Id at 77.
60 Id at 72–79.
instead by free-ranging class counsel motivated by substantial attorneys’ fees to ferret out corporate misbehavior. In addition, Professor Redish is troubled that most faux class actions wind up being class actions by default, as a consequence of class members not exercising their right to opt out.

Thus, for Professor Redish, faux class actions give rise to two fatal problems of democratic theory: (1) Such class actions are not compensatory damage classes as they purport to be; and (2) the disguised bounty hunters—class action counsel—have not been authorized by the underlying substantive law to enforce other remedial models. Redish notes, “[s]uch a dramatic modification of the substantive law through resort to an avowedly procedural device contravenes the fundamental democratic notions of representation and accountability, because the process effectively deceives the electorate.”

In order to alter this “intolerable” affront to the normative precepts of American democracy, Professor Redish urges the Advisory Committee on Civil Rules, and the Supreme Court, to substantially alter Rule 23. In essence, Professor Redish argues that both “front-end” and “back-end” reforms are necessary to make Rule 23 comport with notions of democratic theory. At the front-end of class litigation, Professor Redish would have the Advisory Committee modify the current opt-out regime in Rule 23(b)(3) actions to be replaced with an affirmative opt-in re-

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Id at 77. The poster children for Professor Redish’s “faux” class actions are those that result in coupon settlements. See id at 78. For an extensive analysis of problems relating to coupon settlements, see Christopher R. Leslie, A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation, 49 UCLA L Rev 991 (2002). The brouhaha over coupon settlements came into focus in the mid-1990s, with the Third Circuit’s repudiation of the coupon settlement in In re General Motors Corp Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F3d 768 (3d Cir 1995). Notwithstanding the Third Circuit’s decision, coupon settlements (in more sophisticated versions) continue to be a favored means for resolving many small claims consumer class actions.

Professor Redish’s diatribe against faux class actions, however, is based in his core theory:

The point, rather, is that these faux class actions seek to advance and protect the substantive law’s behavioral norms by resort to a ‘bounty hunter’ remedial model that is very different from the one established in the substantive law being enforced in the class action.

Id at 82.
Id.
quirement. At the back-end settlement stage, Professor Redish would amend Rule 23(e) to put more teeth into judicial supervision over settlement agreements, and prevent rubber-stamp approval of undemocratic settlements.

Professor Redish's appreciation of the opt-out problem (similar to Professor Nagareda's) is primarily conceptualized in light of the current Rule 23(b)(3) opt-out class. However, Professor Redish does opine about possible implications for the mandatory classes. He suggests that his democratic thesis compels the result that the mandatory feature of the current 23(b)(1) classes be eliminated; that is, 23(b)(1) compensatory damage classes must be conceived on the same basis as the 23(b)(3) classes. Hence, Rule 23(b)(1) classes, like the new Redish 23(b)(3) class, would bind only those persons who affirmatively opted into the class.

Finally, Professor Redish concedes that pure 23(b)(2) injunctive classes might be the exception to his opt-in regime, and therefore the Advisory Committee arguably might "leave the procedure for the initiation of 23(b)(2) classes unchanged."

In summary, Professor Redish would have the Advisory Committee and the Supreme Court amend Rule 23 so that Rule 23(b)(1)(A), (b)(1)(B), and (b)(3) classes all required class claimants to opt-in. He would eliminate the opt-out option, leave Rule 23(b)(2) unchanged, and further modify Rule 23(e) to provide required criteria for judicial settlement approvals.

Professor Redish is to be highly commended for elevating the class action reform debate to a higher analytical plane. He is to be commended for supplying an underlying political theory for a procedural rule that is sorely deficient in theoretical underpinnings. He is to be further commended for clearly explaining how that democratic political theory compels amendment of Rule 23 to require an opt-in procedure, rather than an opt-out procedure.

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66 Id at 130–32. Professor Redish also would restrict class certifications where there exists doubt that truly compensatory relief could ever be fashioned. Redish, 2003 U Chi Legal F at 133.


68 Id at 131.

69 Id at 132.

70 The class action literature is largely bereft of grand theoretical speculation, let alone political theory of any sort. For a recent attempt to conceptualize the class action rule, see David L. Shapiro, Class Actions: The Class as Party and Client, 73 Notre Dame L Rev 913, 918 (1998) (articulating the "entity" theory of class actions). Professor Redish takes Professor Shapiro to task for this "entity" theory of class actions. See Redish, 2003 U Chi Legal F at 97 (cited in note 53).
However, two practical points nag. First, either Professor Redish's Article is highly timely, or if not, there is an element of barn door closing after the horse is out, as a consequence of the 2002 Rule 23 revision package—which includes no change to the opt-out regime. As Professor Redish realizes, the Advisory Committee initially considered changing the opt-out regime to an opt-in regime during its first round of Rule 23 revisions in 1992, at which time the proposal was withdrawn. Professor Redish entertains the hope that Rule 23 revisions have not been put to bed with the 2002 revision package, but that the opt-out/opt-in debate may live to see another day.

Second, even Professor Redish's highly developed and persuasive presentation leaves some untidy ends in the context of existing class action jurisprudence. His proposal would leave the current 23(b)(2) class action intact, with no opt-in requirement. But, as class action jurisprudence has developed, it is possible to seek compensatory damages in 23(b)(2) actions. Would he require opt-ins in such situations, or eliminate the possibility of hybrid class actions? Indeed, do Professor Redish's proposals eliminate the need for gerrry-built hybrid class actions? That might be an unintended benefit of his proposed reforms. But we will still need to know what to do with 23(b)(2) class actions that seek compensatory damages.

Further, the current 23(b)(3) action requires satisfaction of the additional elements of predominance and superiority, evaluated in part by the factors listed in Rule 23(b)(3)(A) through (D). Would the opt-in regime render these additional requirements for the 23(b)(3) class unnecessary? And, if Rule 23(b)(1)(A) and (B) compensatory classes are no longer mandatory, but require the same opt-in procedure as 23(b)(3) classes, what purpose exists for delineating separate classes anymore? Do Professor Redish's proposals essentially flatten the class action rule into one big indistinguishable class action procedure? Post-Redish reform, why should Rule 23 delineate different class categories, at all—except for the anomalous injunctive relief class?

In addition to the practical implications of Professor Redish's proposals, one wonders whether his analysis gives insufficient consideration to the fact that the underlying substantive law for many claims incorporates not only compensatory relief, but also deterrence, as enforcement goals. One wonders whether his preference for an opt-in regime applies equally to enforcement of claims that incorporate the goals of compensation, punishment, and deterrence.

See note 21.
Thus, if Professor Redish is correct, the ultimate implications of his theoretical model as well as his proposed solutions go a long way towards supporting my thesis: that the current Rule 23 class categories have been hopelessly blurred and rendered functionally meaningless, in all but label and historical curiosity. Professor Redish's proposed solutions, then, would deliver the final coup de grace to current fantastical class action concoctions, and render this practical reality—there is but one class action and it shall be an opt-in class action—as the rule.

D. Professor Rosenberg's Optimal Deterrence,
   No Opt-Out Theory

If Professor Redish is maniacal on the point that class actions should embody democratic theory, then Professor David Rosenberg is equally maniacal that they should not: he is the arch anti-democrat. Where Professor Redish would require everybody to opt in, Professor Rosenberg would prohibit anyone from opting out. Moreover, Professor Rosenberg seemingly cares less about the compensatory model of class actions that are the lynchpin for Professor Redish's theory. Instead, Professor Rosenberg focuses his discussion on the deterrence theory, insurance, and individual welfare benefits as the centerpieces for his argument against opt-outs from any form of class action.

To his credit, Professor Rosenberg's proposed vision of the ideal class action rule does follow ineluctably from his preference for the optimal deterrence/insurance model. In highly colorful


74 I do not purport to understand exactly what is it that Professor Rosenberg has written or argued in his paper. Professor Rosenberg's Article is the most abstruse of the three pieces relating to the opt-out problem, characterized at times by impenetrable jargon. In reading through Professor Rosenberg's Article, one is reminded of the requirement in the original Field Code that complaints shall contain "[a] statement of facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended." See NY Laws 1849 c 379 at § 142, 2 (1849 amendments to the original 1848 New York Field code). All law review articles ought to adopt the Field Code's pleading prescription and be written in such manner as to enable a person of common understanding to know what is intended. Having said this, however difficult Professor Rosenberg's Article, the failings are
prose, Professor Rosenberg faults the Judicial Conference and the Advisory Committee for missing their great opportunity to punch-up the class action rule to enable the civil justice system to punish and deter corporate malfeasors.76 Professor Rosenberg believes this end can only be accomplished by exponentially increasing the size of the aggregate litigation threat by forcing everyone into the class action.76

The Judicial Conference’s failure, he claims, results from the Conference’s narrow-minded perspectives as “myopic proceduralists.”77 A myopic proceduralist, in Professor Rosenberg’s view, is a rulemaker who lacks an underlying theoretical appreciation of the goals of the civil justice system, and who ignores the deterrence, compensation, and welfare effects of the substantive law. Instead, this simple-minded proceduralist engages in “shoddy cost-benefit analysis,” generally disregards “pre-suit, ex ante conditions,” and relies on “vacuous and question-begging moralisms.”78

As a result of its myopic approach, the Judicial Conference’s choice of an opt-out regime for the Rule 23(b)(3) class was based purely on instrumental but misguided rationales.79 In addition, the Judicial Conference’s creation of a second opportunity for opting out at the time of settlement is similarly flawed and analytically weak. Professor Rosenberg argues that not only does an opt-out not substantially improve class members’ information, but it is not needed to prevent sweetheart settlement deals.80

Professor Rosenberg is not content to fault just the rulemakers. He also takes to task the Supreme Court and federal judici-
ary, in decisions interpreting and applying Rule 23, for similarly constraining the deterrence and insurance benefits that might be achieved through the class action device. He is highly critical of what he characterizes as the post-Amchem Rule 23 default position, which he suggests is grounded in an "anti-redistribution principle" as the test for fairness in class action recoveries.81 The problem with this default position, Rosenberg argues, is that it "implies the general subordination, if not irrelevance, of insurance theory and objectives in the allocation of damages among class members."82

Professor Rosenberg further argues that the Judicial Conference was misguided in believing that an opt-out provision would effectuate the anti-redistribution principle (and by extension, the double-opt-out provision).83 He suggests that the redistribution principle does not require opt-out prior to certification, at settlement, or at any other point. "Rather, providing any opportunity for exit from the class action will undermine not only the anti-redistribution principle . . . but also the basic deterrence objective of collective adjudication together with any insurance benefit."84

Professor Rosenberg’s argument proceeds from a general normative theory of collectivized adjudication, through a law and economics analysis of the potential for market regulation of mass production risks. He concludes that well known market failures impel regulation to override the market. Further, to achieve the optimal deterrent effect, Professor Rosenberg would “decouple” liability determinations from damage calculation and distribution.85

Finally, Professor Rosenberg addresses possible critics by arguing that an opt-out is not needed to satisfy the desire of any class member for individualized recovery based on a separate trial, because the provisions for intervention or issue-classing can accommodate such interests without allowing opt-out.86

81 Id at 21–22.
82 Id at 22.
83 Rosenberg, 2003 U Chi Legal F at 22–23 (cited in note 73). To the contrary, Professor Rosenberg argues that the double-opt-out provision embodied in the 2002 amendments defeats whatever benefits a settlement class might provide, is unnecessary, and also is destructive of the anti-redistribution principle. Id.
84 Id at 23.
85 Id at 31.
86 Rosenberg, 2003 U Chi Legal F at 48–49 (cited in note 73). Professor Rosenberg argues that the central point is that so long as class-wide aggregation and optimal investment on the common questions achieves optimal deterrence goals, determining and distributing recoveries are wholly independent, secondary matters. We are therefore free
It is somewhat difficult to critique Professor Rosenberg's arguments without falling into the error of myopic proceduralism. While Professor Rosenberg's arguments are both intuitively and logically persuasive, there is something disquieting about a set of recommendations that places the judicial system in the position of free-ranging regulator. It is even more disconcerting that Professor Rosenberg's vision of aggregative justice permits, encourages, or requires courts on their own initiative to institute class action procedures to regulate perceived defects in the marketplace. Surely this is a version of judicial activism run amok, and one that is antithetical to the American model of adversary justice.

Finally, Professor Rosenberg seemingly glosses over individual justice issues, justifying the lack of an opt-out procedure with two classic, class action band-aids: the suggestion of possible subclassing or intervention. This is the most under-developed portion of Professor Rosenberg's thesis, and there is little empirical support for the suggestion that these two devices actually do alleviate the concerns of individualized justice. Nonetheless, Professor Rosenberg invokes these possible procedures in mantra-like fashion as the remedies for forced collective justice.

E. The Opt-Out Problem Viewed on a Continuum

In summary, Professors Nagareda, Redish, and Rosenberg have viewed the opt-out problem as a problem of political theory and collective justice. Professor Nagareda's and Redish's conclusions are animated by a theory of participatory democracy. Thus, in their constructs, coercion is bad and voluntary assent through opting in is good. Professor Redish, in particular, has a kind of bottoms-up view for legitimating class action practice.

At the other end of the continuum, Professor Rosenberg is seemingly the anti-democrat: he envisions a universe of mandatory-only class actions, with no opt-out option, whether voluntary or not. In contrast to Professor Redish's construct, Professor Rosenberg's vision is a top-down autocratic view of justice. It posits an actor who seemingly knows what is best for society, and what wrongs require punishment or redress. Professor

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87 One might argue that some state and federal courts, which conduct less than "rigorous" class certification scrutiny, are already functioning in this capacity.
Rosenberg's vision utilizes mandatory collective procedure to remedy and punish for designated wrongs. Of the three approaches, Professor Rosenberg's critique sets forth a free-standing vision that is the most removed from historical, current, and practical class action jurisprudence.

II. THE OPT-OUT PROBLEM THROUGH ANOTHER LENS: THE EVOLUTION OF THE MANDATORY CLASS SINCE 1966

In truth, class action jurisprudence historically has treated the problem of opt-outs as one of myopic proceduralism. However, neither the Supreme Court, the lower federal appellate courts, nor the advisory civil rules committees should be faulted for this myopia. Concrete and particular issues relating to class action practice and procedure arise in typically narrow rule contexts, and the courts have generally eschewed grand theoretical pronouncements—let alone discussions of political theory—in their analyses of class action problems. Theorists searching for collective justice theory are bound for disappointment.

There are a number of reasons why federal courts have not articulated grand, sweeping theories undergirding the class action rule. Generally, the federal courts have adhered to well-known canons of judicial construction and therefore when presented with class action issues on appeal, the courts have tended to resolve the issues on narrow Rule 23 constructions, rather than on more sweeping constitutional or theoretical grounds. The Supreme Court, most recently in both Amchem and Ortiz, declined to address an array of constitutional issues raised by those cases, but instead chose to decide the appeals based on Rule 23 grounds alone. 8

In addition, the federal courts' broadest considerations of the class action rule have been limited to considerations of the rule's due process underpinnings. To the extent that any federal courts have considered the broader meanings of the class action rule, such discussions merely have reflected careful readings of the historical antecedents of contemporary class actions, as illuminated by the Advisory Committee's Notes.

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A. The Due Process Implications of the Class Action Rule

If the Supreme Court has ever grounded any consideration of the class action rule in theoretical understanding, that discussion is located in the Court's appreciation of the representational nature of the class action, and the consequent due process implications of the class action rule.

In 1940, two years after the enactment of the Federal Rules of Civil Procedure, the Supreme Court noted that the class action mechanism is 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. To ensure procedural fairness, however, the Supreme Court recognized that absent or unnamed parties to a class action litigation could be bound to a court's judgment only if the named class representatives adequately represented the common interest of the class. Constitutional due process concerns, then, are satisfied by judicial scrutiny of the adequacy of class representation and certification of the common interests and typicality of class members.

As is well known, the Advisory Committee on Civil Rules completely revamped Rule 23 during the early 1960s, culminating in the 1966 revision to the class action rule that has been in place until the 2002 amendments. The centerpiece of this revision of Rule 23 was the creation of the new 23(b) class action categories.

The purpose of completely re-writing the class action categories was to eliminate uncertainties that had developed regarding the application of the original rule's classifications. The new Rule 23(b) categories also were intended to be "functional" categories, and to relate to types of class actions known to exist at the time the Advisory Committee undertook its rule revision project.

These endeavors resulted in the creation of two "mandatory" class action categories: the new Rule 23(b)(1) and (b)(2) categories. The great innovative contribution of the 1966 rule revision, however, was the creation of the new (b)(3) class category—a class action for damages that included the claimant's right to be excluded from the class action upon "opting out." The mandatory classes included no such provision for opting out of the class.

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89 Id at 41–43.
90 See FRCP 23(b)(1)(A), 23(b)(1)(B), and 23(b)(2).
91 See FRCP 23(b)(3) and 23(c)(2).
In the class action arena, the decade following the 1966 revision to the class action rule was largely the great era of public interest law litigation, or institutional reform litigation. This era was characterized chiefly by aggressive use of the Rule 23(b)(2) injunctive relief class, and decisional law in this period was pre-occupied chiefly with certification questions relating to (b)(2) classes. Rule 23(b)(1) or (b)(3) classes played a less obviously pre-dominant role.

B. Phillips Petroleum Co v Shutts: The Focus on Opt-Out Rights

Significantly, it would take almost twenty years after the 1966 rule revision for the Supreme Court to focus on due process concerns relating to class action procedure—and forty-five years after the Supreme Court’s oblique reference to due process and fairness concerns in *Hansberry v Lee.* In 1985, the Supreme Court finally focused the class action conversation on the due process concerns of absent class members in *Phillips Petroleum Co v Shutts.*

In *Shutts,* the Supreme Court revisited the question of constitutional due process as it relates to class action procedure, holding that due process is not violated when a state court asserts personal jurisdiction over absent class members who have minimal contacts with the state in which the litigation is conducted. Though the Court recognized that res judicata applies to judgments rendered against plaintiffs and forecloses relitigation of actually litigated damage claims, the Court held that due process concerns are satisfied by various procedural safeguards in the class action rule. Thus, before a class action may be certified, courts must determine whether the interests of plaintiffs are common and typical, and whether class counsel and class representatives 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 and approval of the court. Furthermore, in class actions seeking damages, the due process rights of absent class

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84 311 US 32, 41–43 (1940).
86 *Shutts,* 472 US at 811–12.
87 Id at 812–13.
members are protected by the opportunity to opt out of the class and, thereby, preserve the right to subsequently litigate individual damage claims without being bound by the class judgment.

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 non-resident class plaintiffs. Because the Court viewed the principles of personal jurisdiction as chiefly defendant-oriented—that is, protecting non-resident defendants—the Court held that due process did not require all class plaintiffs to have minimal contacts with the state for the class judgment to have binding effect.\(^9\) Nor did the Court believe that certain plaintiffs' lack of minimal contacts with the state subverted due process protections in the class-action context.

In essence, the Court concluded that the various due process protections of the class-action rule sufficiently protected absent class members, and that in 23(b)(3) opt-out classes especially, the ability to opt out enhanced that due process protection. Thus, a class member's failure to exclude himself or herself from the class, after receiving adequate notice of the action, constituted consent to the action, consent to the court's jurisdiction, and consent to be bound by the class judgment.\(^9\)

Although the Supreme Court in *Shutts* concluded that a state court constitutionally could assert personal jurisdiction over absent class members in 23(b)(3) opt-out classes, as long as class certification requirements were satisfied, the Court qualified its decision by limiting it to "those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments."\(^10\) In its famous footnote 3, the Court further explained that it intimated "no view concerning other types of class actions, such as those seeking equitable relief."\(^10\)

While affirming the binding effect of class judgments on absent class members who do not opt out of Rule 23(b)(3) class actions, the enduring legacy of the *Shutts* decision, it turned out, was that of the Court's footnote 3. This footnote left open the problem concerning what process, if any, is due to class members in the so-called mandatory classes.

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\(^9\) See id at 807, 811.


\(^10\) Id at 811 n 3.

\(^10\) Id at 811–12 n 3.
C. The Post-Shutts Era: The Persistent Problem of Mandatory Classes

The Court's vague and somewhat cryptic suggestion in footnote 3 subsequently gave rise to what is commonly referred to as the "Shutts" problem: namely, what due process is required in class actions that are not predominantly for damages, presumably the 23(b)(1) and (b)(2) classes. Between 1985 and the early 1990s, lower federal courts split regarding whether mandatory non-opt-out classes were illegitimate in the absence of due process protections, or whether mandatory classes could be sustained provided certain due process protections.\footnote{See generally Linda S. Mullenix, \textit{Class Actions, Personal Jurisdiction, and Plaintiffs' Due Process: Implications for Mass Tort Litigation}, 28 U C Davis L Rev 871 (1995) (discussing split among courts in post-Shutts era).}

The Supreme Court had two separate opportunities during the 1990s to directly address and resolve the Shutts problem, in \textit{Ticor Title Insurance Co v Brown}\footnote{511 US 117 (1994).} and \textit{Adams v Robertson}.* On both occasions, the Court granted certorari to review appeals raising the Shutts issue, but in both instances (after briefing and oral argument), the Court determined that it had improvidently granted certorari.\footnote{520 US 87 (1997).}

During the post-Shutts decade, the Shutts decision caused mischief in 23(b)(1) and (b)(2) class actions that also included claims for monetary damages, sometimes called "hybrid" class actions because of the mixed nature of the relief, both equitable and legal, that the claimants seek. Lower federal and state courts responded differently to the due process problems raised by mandatory mixed-relief or hybrid class actions. Most courts followed the hornbook rule for 23(b)(2) injunctive and declaratory classes, which is to look to the predominant relief sought in the complaint. If the class seeks predominantly equitable relief, then the court may certify a 23(b)(2) non-opt-out action that also may include "incidental" damage claims, without violating the due process clause. The most prominent illustrations of this approach are (b)(2) employment discrimination class actions under the federal civil rights statutes for injunctive and declaratory relief, but which also seek incidental damages in the form of backpay.

Other courts have permitted and certified mandatory hybrid class actions that include monetary damage claims, provided that
the class claimants were provided with additional due process protections not specifically required by the rule, such as notice or appointment of a guardian ad litem to represent the interests of the absent class members. As long as the court ensured that the due process rights of absent class members with monetary claims were not violated, several lower federal courts have held that mandatory classes do not require an opt-out right to comport with due process. This approach has been extended to mass tort settlement classes, allowing at least one federal circuit to uphold certification and approval of a mandatory settlement class resolving compensatory claims that did not include an opt-out right.

Still other courts have refused to certify mandatory mixed-relief class actions. Instead, these courts require claimants to separate their monetary damage claims from their equitable relief claims, and to seek certification under Rule 23(b)(3) to afford class members with monetary damage claims the additional due process protections of notice and the right to opt out. Finally, the Ninth Circuit has refused to give binding, preclusive effect to mandatory 23(b)(1) and (b)(2) class settlements that forfeited class members' compensatory damage claims, where the absent class members lacked contacts with the forum approving the settlement and the class members had no right to opt out of the class.

The persistent due process issue engendered by the Shutts problem again came before the Supreme Court in Ortiz. This case dealt with a nationwide asbestos settlement certified under Rule 23(b)(1)(B), the so-called limited fund provision. It cannot be doubted that the Ortiz settlement was a settlement for damages, and not a mandatory class for injunctive or declaratory relief. As such, the Ortiz settlement squarely raised the problem of what due process requires in a mandatory class that is predominantly for monetary damages.

In Ortiz, however, the Shutts problem inherent in the Ortiz mandatory 23(b)(1)(B) settlement class was not the major focus of the litigants' arguments, and the Court dealt summarily with

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106 See Flanagan v Ahearn, 90 F3d 963 (5th Cir 1996). The Fifth Circuit's approval of the Ahearn settlement was subsequently disapproved and reversed by the Supreme Court in its 1999 decision in Ortiz.
108 The Court instead focused on the requirements for certification of a Rule 23(b)(1)(A) limited fund, the criteria for proof of the limited fund class, and other threshold class certification problems, such as Rule 23(a)(4) adequacy and conflict of interest problems. See generally id.
Nonetheless, the Court in *Ortiz* recognized the existence of a *Shutts* problem, and expressed concern over the due process issues inherent in 23(b)(1)(B) classes. Although the Court had the opportunity to elucidate the due process requirements for mandatory, non-opt-out classes, the Supreme Court did not resolve the *Shutts* problem that was presented in the facts of that case.

D. Reflections on the *Shutts* Problem Post-*Ortiz*

With the advent of the new millennium, the scorecard on the *Shutts* problem reflects the following: (1) the Supreme Court has yet to definitively rule on the *Shutts* problem; (2) the Court has expressed unease and concern over the due process implications of mandatory 23(b)(1)(B) classes, and (3) the federal courts are all over the map concerning what due process requires for mandatory classes.

Added to this mix is the fact that the Advisory Committee on Civil Rules, in its revision of Rule 23 over the past decade, has declined to take on and resolve the due process problems, particularly concerning opt-out rights in its rule revisions. Approximately eighteen years after *Shutts*, the *Shutts* problem still exists, and in this doctrinal void, court decisions have grown conceptually more murky.

Moreover, in the post-*Ortiz* era, the *Shutts* problem has given rise to two conceptually distinct modes of analysis, with one approach for 23(b)(1)(B) mandatory classes and another approach for 23(b)(2) mandatory classes. The *Ortiz* branch has addressed due process concerns related to mandatory Rule 23(b)(1)(B) limited fund classes. A second branch, derivative of the Fifth Circuit's decisions in *Allison v Citgo* and *Bolin v Sears, Roebuck & Co*, and the Seventh Circuit's decision in *Jefferson v Ingersoll*

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109 See id at 838–41.

110 See id at 847 ("And in settlement-only class actions the procedural protections built into the Rule to protect the rights of absent class members during litigation are never invoked in an adversarial setting . . . In related circumstances, we raised the flag on this issue of due process more than a decade ago in *Phillips Petroleum Co v Shutts* . . ."). Although the Court described the *Shutts* case and holdings, the Court failed to apply the *Shutts* principles, or the implications of footnote 3, to the *Ortiz* 23(b)(1)(B) settlement class. See *Ortiz*, 527 US at 848 n 24.

111 See discussion at notes 5–6.

112 151 F3d 402 (5th Cir 1998).

113 231 F3d 970 (5th Cir 2000).
International, Inc\textsuperscript{114} has given rise to a separate analytical approach for 23(b)(2) classes and has created yet another new concept of “hybrid” certification.

The Ortiz, Allison, and Jefferson branches of the due process argument, as they relate to mandatory classes, are unsatisfying. Taken together, the principles these cases set forth are doctrinally and analytically inconsistent. Rather than making progress in resolving the due process conundrums of the mandatory class, the decisional law has further muddied the class action terrain. Thus, it is well overdue for the Supreme Court to resolve the Shutts issue. The Court needs to providently grant proper certiorari in a Shutts problem case, and move beyond expressing constitutional concern for class members captured in mandatory classes.

E. Mandatory Classes in the Post-Ortiz Era

1. Mandatory Rule 23(b)(1)(B) limited fund classes and Ortiz due process concerns.

There can be little doubt that the Ortiz limited fund settlement class implicated a Shutts problem. The settlement was a nationwide class settlement. Because the settlement created a monetary fund for class claimants, there can be little doubt that Ortiz was a settlement class predominantly for damages. And, as a 23(b)(1)(B) mandatory class, class members were not afforded an opt-out right.\textsuperscript{115} Clearly, the Ortiz settlement raised the question whether such a mandatory class that was predominantly for damages could satisfy due process where the class claimants could not meaningfully opt out of the class, or by implication render consent to be bound by the judgment.\textsuperscript{116}

Throughout the extended Ortiz litigation and on appeal to the Supreme Court, the litigants recognized the existence of a

\textsuperscript{114} 195 F3d 894 (7th Cir 1999).

\textsuperscript{115} The settlement contained a so-called “back-end” opt-out right, which the Petitioners contended was a meaningless opt-out provision affording no meaningful due process to class claimants. See Brief for Petitioners, Ortiz v. Fibreboard Corp, 1997 US Briefs 1704, at *13, 39 n 37 (“The ‘back-end’ exit provided in the settlement is mere ‘window dressing,’ not a meaningful opt-out right . . . , in large part because the settlement’s multiple limits on recovery restrict even jury awards.”).

\textsuperscript{116} The Fifth Circuit Court of Appeals, in upholding the original Ahearn settlement class that subsequently was denominated the Ortiz settlement class, had held that Phillips Petroleum Co v Shutts did not require that class members be afforded an opportunity to opt out of the class. See Ahearn, 90 F3d at 986–87.
Shutts problem. However, because of the extensive and complex array of issues raised by the novel Ortiz limited fund settlement, scant briefing and argument was devoted to the Shutts issue.117

In turn, the Court in its lengthy Ortiz opinion, made only passing reference to the Shutts problem.118 However, the Court did recognize the problems inherent in mandatory damage classes, and the due process significance of the lack of an opt-out opportunity for class members captured in a damage class action.

The Court emphasized the fact that mandatory class actions magnified the problems of achieving collective justice, because class members had no inherent right to opt out of the class:

The inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damages claims gathered in a mandatory class. Unlike Rule 23(b)(3) class members, objectors to the collectivism of a mandatory subdivision (b)(1)(B) action have no inherent right to abstain. The legal rights of absent class members (which in a class like this one would include claimants who by definition may be unidentifiable when the class is certified) are resolved regardless of either their consent, or, in a class with objectors, their express wish to the contrary.119

The Court further noted that, “[i]n related circumstances, we raised the flag on this issue of due process more than a decade ago,”120 describing the Shutts case and its holdings. Noting that the Shutts holdings were limited to class actions “wholly or predominantly for money judgments,”121 the Court reiterated its concern that before a class member’s rights could be extinguished, due process required notice, an opportunity to be heard, and the opportunity to exclude one’s self from the class.122

However, notwithstanding the Court’s reflections on Shutts in Ortiz, the Court did not resolve the Shutts issue present on the

117 See Brief for Petitioners, Ortiz v Fibreboard Corp, 1997 US Briefs 1704 at *13, 39–42 (cited in note 115) (arguing the existence of the Shutts problem by virtue of the inability of class claimants to opt-out of the settlement); Brief of Respondents, Ortiz v Fibreboard Corp, 1997 US Briefs 1704, at *13, 42–44 (contending no Shutts problem at all and inapplicability of Shutts to federal class actions); Reply Brief of Petitioners, Ortiz v Fibreboard Corp, 1997 US Briefs 1704, at *13, 18–19.
119 Id at 846–47.
120 Id at 847.
121 Id at 848 n 24.
122 Ortiz, 527 US at 848.
facts. Instead, the Court cryptically raised another due process flag. The Court's failure to squarely address the Shutts issue in Ortiz has again left the lower federal courts in the lurch concerning what due process requires in mandatory 23(b)(1)(B) or (b)(2) classes for damages with no opt-out right. At best, the courts have agreed that while Ortiz adopted no per se rule regarding opt-out rights for mandatory class action, the courts have nonetheless recognized the Court's "growing concern regarding the constitutionality of certifying mandatory classes when monetary damages are at issue."  

2. Mandatory Rule 23(b)(2) classes and the emergence of the new "hybrid" class action.

The problems relating to mandatory classes have been further muddied by a series of lower federal court decisions that disagree about whether claimants may seek damages through a 23(b)(2) mandatory class. This split has been engendered by the Fifth Circuit's decision in Allison, which repudiated the ability of a class to recover damages in a 23(b)(2) Title VII case, and the Seventh Circuit's decision in Jefferson, which has created a new "hybrid" action that would permit simultaneous prosecution of a class action for equitable relief and legal damages.

a) Allison and the new predominance requirement. In Allison, the Fifth Circuit repudiated the ability of class claimants to

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123 See, for example, Molski v Gleich, 307 F3d 1155, 1164-67 (9th Cir 2002)(noting that the Ortiz court expressed concern about certifying mandatory classes with monetary damages but did not adopt a per se rule); In re Telectronics Pacing Systems, Inc, 221 F3d 870, 881 (6th Cir 2000) ("Certification under subsection (b)(1)(B), which does not include these protections, must be carefully scrutinized and sparingly utilized."); Jefferson, 195 F3d at 897 (noting that whether Rule 23(b)(2) can be used to certify a "no-notice, no-opt-out class when compensatory or punitive damages are in issue" is an open question in the Seventh Circuit). But see In re American Family Enterprises, 256 BR 377, 416 (D NJ 2000) (finding no constitutional or other right to opt-out of a 23(b)(1)(B) or 23(b)(2) mandatory class, citing numerous cases).
124 Molski, 307 F3d at 1166.
125 See, for example, Taylor v District of Columbia Water & Sewer Authority, 205 FRD 43, 48-51 (D DC 2002) (describing conflict among the Circuits concerning the split between the Fifth Circuit's Allison decision and the Seventh Circuit's Jefferson decision); Robinson v Metro-North Commuter Railroad Co, 267 F3d 147, 165-66 (2d Cir 2001) (declining to adopt Allison approach); Reeb v Ohio Department of Rehabilitation, 203 FRD 315, 323 (S D Ohio 2001) (rejecting Allison principles and describing conflict among the federal courts); Robertson v Sikorsky Aircraft Corp, 2000 WL 33381019, *8 (D Conn) (describing conflict among courts concerning Allison precedent).
126 151 F3d 402 (5th Cir 1998).
127 195 F3d 894 (7th Cir 1999).
128 Jefferson, 195 F3d at 898.
seek and recover monetary damages through the auspices of a mandatory 23(b)(2) class. Perhaps the major question surrounding the *Allison* decision concerns whether the Fifth's Circuit's bright line rules apply only to the Title VII context, or have more far-reaching implications for any class that seeks monetary damages under one of the mandatory classes. Nonetheless, defense attorneys broadly invoke the *Allison* decision for the proposition that claimants may not seek damage class actions under the mandatory class provisions.

At any rate, the *Allison* decision, rather than articulating new concepts, based its conclusions on the established precept that plaintiffs may recover monetary damages in a 23(b)(2) action only if those damages are "incidental" to the predominant form of declaratory or injunctive relief. Conversely, if monetary damages are the predominant form of relief, then the class may not be certified as a 23(b)(2) mandatory class.

The Fifth Circuit's *Allison* decision attempted to provide some clarity to the concept of predominance of claims and remedies in mandatory classes. In particular, the decision attempted to set forth rules by which courts may determine when money damages predominate. It declared that monetary relief predominates unless it is incidental to the declaratory or injunctive relief. Incidental monetary relief flows "directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief."

The Fifth Circuit, in describing the predominance test for 23(b)(2) classes, also embraced the underlying concept of homogeneity of claims and damages among class members. Thus, in order for damages to be incidental to a 23(b)(2) class claim, the damages should at least be capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances. Liability for incidental damages should not require additional hearings to resolve the disparate merits of each individual's case.

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129 See, for example, *Coleman v GMAC*, 296 F3d 443 (6th Cir 2002) (applying and extending *Allison* principles to action brought under the Equal Credit Opportunity Act and vacating and remanding certification of a mandatory 23(b)(2) damage class action).

130 *Allison*, 151 F3d at 415.

131 Id.

132 Id. See also *Miller v Hygrade Food Products Corp*, 198 FRD 638, 641–42 (E D Pa 2001) (adopting these standards).
In applying these principles to the facts in Allison, the Fifth Circuit noted that claims for back pay in employment discrimination cases traditionally were viewed as incidental because back pay constitutes an equitable remedy. However, the kinds of compensatory damages sought in Allison, by claimants alleging disparate treatment in violation of the 1991 amendments to Title VII, were clearly different, and not incidental damages.

Again, in reaching this conclusion, the court viewed the individualized nature of each claimant's damages as fatal to the requisite predominance requirement for determining damages to be incidental: "The very nature of [compensatory] damages, compensating plaintiffs for emotional and other intangible injuries, necessarily implicates the subjective differences of each plaintiff's circumstances."

The consequences of the Allison principles can be somewhat severe. If a court determines that a class plaintiff has improperly pleaded an action that is predominantly for damages under the 23(b)(2) provision, the class may not be certified. The case either may be dismissed outright, or remanded for a determination on whether the class may proceed as a 23(b)(3) action. In Allison, the Fifth Circuit found that the Title VII claims seeking compensatory, monetary relief could not be certified under a hybrid 23(b)(2)/(b)(3) combination approach. Finally, the court rejected partial certification under the 23(b)(3) provision because the class damage claims could not satisfy the additional requirements of predominance and superiority, for a 23(b)(3) class.

b) Jefferson and the new hybrid class action. The Allison decision, and its predominance test, effectively functions as an on-off switch: if equitable relief predominates, the class may be certified as a mandatory 23(b)(2) class, but if monetary damages predominate, the class may not be certified as a 23(b)(2) class. Under Allison, the pleader often is impaled on the predominance irony: if monetary damages predominate to defeat certification under the 23(b)(2) provision, then it is more likely than not that the independent predominance requirement for the 23(b)(3) class will not be satisfied. Thus, to prove predominance in the

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133 See 151 F3d at 417.

134 See, for example, Murray v Auslander, 244 F3d 807, 812–13 (11th Cir 2001) (rejecting a 23(b)(2) certification and remanding for consideration of a 23(b)(3) class certification). See also Hoffman v Honda of America Manufacturing, Inc, 191 FRD 530, 531 n 4 (S D Ohio 1999) (plaintiffs had not sought leave to replead damage action as a (b)(3) action).

135 See, for example, Osgood v Harrah's Entertainment, Inc, 202 FRD 115, 129–31 (D NJ 2001).
23(b)(2) class is to simultaneously defeat the predominance necessary for the 23(b)(3) class.

The Seventh Circuit, in its Jefferson decision, sought to reject these bright line rules and permit certification of both the equitable and damage remedies, however pleaded. The court created three possible options for handling such proposed classes. First, a court could certify a class under Rule 23(b)(3) for all proceedings. Second, the court could approve a divided certification. Third, the court could certify a class under 23(b)(2) for both monetary and equitable relief and then exercise its plenary authority under Rule 23(d)(2) and (d)(5) to order notice and opt-out allowances, as though the class were certified under the 23(b)(3) provision.

Of the three possible options, the Seventh Circuit's suggestion of the "hybrid" class action, that would embrace both types of claims and remedies, has proved the most mischievous. However, the Jefferson hybrid approach is a much more forgiving though analytically incoherent approach to solving the problem of mixed equitable and damage class actions.

The Seventh Circuit, in reviewing the Fifth Circuit's series of Allison decisions, could not definitively determine whether the Fifth Circuit authorized the possibility of split or partial class certifications, but read the Fifth Circuit's order on the denial of rehearing as suggesting the possibility for split classes. Therefore, the Seventh Circuit stepped into this doctrinal void by approving just such combined, hybrid class certifications:

Divided certification is also worth consideration. It is possible to certify the injunctive aspects of the suit under Rule 23(b)(2) and the damages aspects under Rule 23(b)(3), achieving both consistent treatment of class-wide equitable relief and an opportunity for each affected person to exercise control over the damages aspects.

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137 Id. See also Jefferson, 195 F3d at 899 (noting that if the district found that the damages sought were more than incidental, it should certify the class under 23(b)(3)(B)).
138 Lemon, 216 F3d at 581. See also Jefferson, 195 F3d at 898–99 (finding that “hybrid” class as an option if the district court believed the damages sought were not incidental to the equitable relief.).
139 Lemon, 216 F3d at 582. See also Jefferson, 185 F3d at 898.
140 Jefferson, 195 F3d at 898.
141 Id.
In approving such hybrid class certifications, the Seventh Circuit indicated that the Rule 23(b)(2) class could seek injunctive relief, while the notice and opt out rights could be preserved for the damages issues. Ironically, the Seventh Circuit based its approval of the hybrid class action on its reading of the *Ortiz* decision:

But no matter what the panel in *Allison* may have meant by its order, the controlling authority today is *Ortiz*, which says in no uncertain terms that class members' right to notice and an opportunity to opt out should be preserved whenever possible. It is possible to preserve those rights in this case.\footnote{Id at 898–99.}

As indicated above, the possibility of the *Jefferson* hybrid option has had great appeal among class litigants. This approach is not as draconian as the *Allison* principles, which often serve to defeat class certification outright.

III. GAMING THE SYSTEM: THE PRACTICAL CONSEQUENCES OF DOCTRINAL INCOHERENCE AND THE BLURRING OF CLASS CATEGORICAL IMPERATIVES

As indicated above, courts progressively have engaged in a kind of doctrinal drift among class categories. Thus, courts have eroded or blurred principled distinctions among class categories that used to embody meaningful distinctions and practical implications. The significance of this doctrinal drift has been to render the separate class categories virtually meaningless, giving rise to a kind of Uber-class that embraces all claims, remedies, and class members.

As a consequence, practicing class action attorneys—who read and pay attention to these decisions—have strategically deployed this confused jurisprudence to great effect. In short, counsel from both the plaintiffs’ and defense bars have created arguments and artful pleadings to exploit class action procedure, in ways never intended by the rulemakers.

On the one hand, some may view these new creative approaches to class action procedure as evidence of the evolving brilliance of the common law and the ready adaptability of the practicing bar to new challenges. On the other hand, some may
view the blurring of class action categories, and the pleadings and practice built upon this incoherence, as opportunistic gaming of the judicial system. The following four illustrations explain the ways in which class categories have been blurred, and the methods by which attorneys have adapted evolving jurisprudence to achieve their litigation goals.

These illustrations proceed from a basic assumption that also has evolved during the last decade. Since the mid-1990s, federal courts have engaged in more rigorous scrutiny of motions for class certification. As it has become increasingly difficult to pursue and certify Rule 23(b)(3) opt-out classes, the plaintiffs' bar has instead turned to pleading mandatory 23(b)(1) or 23(b)(2) classes for certification. Because the Rule 23(b)(1) and (b)(2) classes do not need to meet the more stringent 23(b)(3) requirements of predominance and superiority, certification under the mandatory classes is viewed as easier, and more desirable. Thus, certification of a mandatory class will not incur the additional expense of notice, or the complications of an opt-out procedure.

Somewhat similarly, the mandatory class categories have enjoyed a resurgence of popularity among defense attorneys when the proceedings are on the verge of settlement. While the defense bar will aggressively defend against certification of litigation classes, the preferred mode of class-wide settlement for defendants is through a mandatory settlement class.

Thus, strategic pleading of mandatory classes has now become the handmaiden of blurred class categories, which in turn is aided and abetted by evolving jurisprudence.

A. Illustration 1: The New Hybrid Class Action

The Seventh Circuit's recognition and creation of the new "hybrid" class in Jefferson seems to be one of the most insidious inroads on clear thinking, let alone clear pleading. It is an open invitation to game the system. The Jefferson option represents the ultimate assault on distinct class action categories, and is a boon to lazy, imprecise, or overly clever pleaders.

In essence, the Jefferson option permits the class action plaintiff to plead a Rule 23(b)(2) injunctive relief class action that also seeks damages, with the failsafe option in which the court will create a combined 23(b)(2) and (b)(3) class to deal with and encompass the different remedies that otherwise might not be
permissible under a strictly-construed and rigorously-analyzed 23(b)(2) class.

There are a number of reasons why the Jefferson option is highly advantageous to the plaintiffs' bar. Damage class actions normally must be pleaded as 23(b)(3) opt-out classes, and must meet the additional requirements of predominance and superiority. To avoid the additional burdens of proof, class counsel post-Jefferson may plead a damage action as a 23(b)(2) injunctive or declaratory class, with an incidental request for damages. There is no harm in so pleading, and in fact, there is great advantage.

In this scenario, there is no downside risk to the pleader for the failure to clearly understand or define the true nature of the claims and remedies. The pleader never has to fish or cut bait. If the court determines that the class seeks a damage remedy that is not available under the 23(b)(2) category, the court will "fix" this problem by concurrently certifying both a 23(b)(2) and (b)(3) action. This possibility rewards the lazy, imprecise, or overly clever pleader, allows the plaintiff to have his cake and eat it too, and puts the court in the role of pleading or redefining the class.

The Jefferson decision informs us that it is perfectly legitimate to create and certify such "hybrid" 23(b)(2) and (b)(3) classes. However, the Jefferson decision, and its progeny, have provided little or no guidance concerning the actual implementation of such a hybrid class action. The Jefferson line of cases does not inform us how notice is to be effectuated in a combined 23(b)(2) and (b)(3) class action. Will the class members for the 23(b)(2) and (b)(3) classes overlap, or not? Is notice only to be given to the 23(b)(3) class? If the classes do overlap, will the 23(b)(3) notice to class members describe and inform class members of the parallel 23(b)(2) class and relief?

The Jefferson line of cases similarly do not inform us how the opt-out procedure will work in the new hybrid class action, which is a problem tied to that of notice, and the possible overlapping membership of the 23(b)(2) and (b)(3) classes. One may assume that 23(b)(3) class members who receive notice will be informed of their right to opt out; but what of 23(b)(2) class members, who will have no such right? Will the 23(b)(2) class members receive notice of the hybrid nature of the class, only to be informed that they have no concomitant right to opt out? Can notice be drafted that will be intelligible to all hybrid class members?

In addition, the Jefferson line of cases sheds absolutely no light on how a Jefferson-style hybrid case is actually to be tried.
The hybrid 23(b)(2) and (b)(3) class action raises Seventh Amendment right to jury trial problems, requiring *Beacon Theatre* sequential staging of legal and equitable claims. Yet the *Jefferson* line of cases has not analytically progressed to the point of considering how an actual hybrid class action would be staged, and at what cost to litigant rights.

Finally, the *Jefferson* line of cases has also not considered the claim-splitting, res judicata, or preclusive effects of hybrid class actions that are certified as combined 23(b)(2) and (b)(3) class actions. It is entirely possible that claims certified in a *Jefferson* hybrid 23(b)(2) class could create a res judicata effect that would not be cured by claims captured by the 23(b)(3) part of the action. In other words, the mandatory nature of the 23(b)(2) part of the class could serve as a bar to the pursuit of future claims, which preclusive effect might not be ameliorated by the 23(b)(3) presence of an opt-out right.

While the possibility of the new *Jefferson* hybrid is plagued with instrumental problems, it is more broadly objectionable because it blurs the distinction between classes that are wholly or predominantly for compensatory damages, and those that are not. The *Jefferson* hybrid effectively undercuts the *Allison* inquiry of "predominance" for 23(b)(2) actions: predominance in the *Allison* sense meaning whether damages or injunctive relief predominates in the action.

Lastly, the *Jefferson* hybrid also makes no sense in light of the prevailing—and often quoted hornbook rule—that if a class action is pleaded under multiple provisions of Rule 23, including the 23(b)(3) provision, then the preference is to certify the class under the 23(b)(1) or 23(b)(2) provision. What the *Jefferson* court seems to be signaling is, if the plaintiff pleads his case under multiple provisions of Rule 23, including the 23(b)(2) and 23(b)(3) provisions, then the court can and should certify under them all.

B. Illustration 2: Recasting Damage Class Actions as Mandatory Class Actions.

The second means by which litigants have exploited the emerging jurisprudence of blurred class action categories occurs when plaintiffs simply recast damage class actions as injunctive or declaratory relief class actions. Hence, rather than pleading a contract cause of action for damages under the 23(b)(3) provisions, as such a class properly should be brought, class counsel
instead will plead a 23(b)(2) claim for declaratory or injunctive relief on the same contract claim. For example, on an alleged breach of an insurance contract the plaintiff will ask the court for an injunction requiring the defendant to interpret and apply policy terms in a certain way, or for a declaratory judgment declaring that the ways in which a defendant has been acting violates the contract. Sometimes the pleading of such 23(b)(2) claims will be coupled with a request for "incidental damages," with the pleader characterizing contract damages as incidental to the injunctive or declaratory relief.\footnote{143}

The obvious purpose of pleading what is properly a damage class action as mandatory 23(b)(2) injunctive or declaratory relief class is to avoid having to satisfy the additional 23(b)(3) certification requirements of predominance and superiority. In the more extreme versions of this type of strategic pleading, when plaintiffs’ counsel become aware of the difficulties of satisfying the predominance and superiority requirements for 23(b)(3) damage classes, counsel begin to abandon legal claims and remedies through successive amended pleadings.

In recent years, it has become common practice for class counsel originally to plead a class complaint with multiple legal claims and damages, but then use the liberal amendment provisions to systematically strip the complaint of problematic legal claims that cannot possibly satisfy the predominance and superiority requirements.\footnote{144} In this scenario, a class action that starts out as an opt-out class with multiple claims for damages is converted into a mandatory, non-opt-out class seeking either declaratory or injunctive relief only.

The question is, can class counsel do this? There are countervailing arguments that suggest that while various rules of civil procedure may countenance such maneuvers, such strategic recasting of damage class actions seriously threatens the due process concerns inherent in the class action rule. While plaintiffs’ attorneys laud such practices as effective representation, there are several good reasons why the development of this trend is particularly troubling in the class action context. And, to the ex-

\footnote{143} This variation of artful pleading then brings the complaint within the purview of the \textit{Allison/Jefferson} body of cases.

\footnote{144} This is a kind of class action version of the plaintiffs’ lawyers throwing deck chairs off the Titanic as the ship is going down. Often, the jettisoning of claims and legal remedies is accompanied by successive re-deictions of the class itself, with the effect of throwing class claimants overboard, as well.
tent that courts have engaged in blurring class categories to the point of rendering the class categories meaningless, the courts have aided, abetted, and encouraged such pleading practices, as well as due process violations.

Class counsel who engage in such strategic recasting of damage class actions as mandatory 23(b)(2) actions make at least three arguments. First, class counsel suggest that the Federal Rules of Civil Procedure require only notice pleading, and therefore class counsel is obligated only to provide notice of the action at the outset of the litigation. Hence, as the class action progresses and discovery develops, class counsel subsequently may discover that certain claims or remedies are not supported by the facts.

The notice theory of federal pleading, in turn, supports class counsel’s second argument, which is that the federal rules provide for liberal amendment of pleadings and thus the systematic jettisoning of claims, or the complete recasting of a complaint from a 23(b)(3) class for legal damages to a 23(b)(2) mandatory class for injunctive or declaratory relief. Thus, the plaintiffs’ bar argues that these techniques are entirely justified and supported by the federal rules. The corollary to this argument, based on widely practiced realities, is that it is not uncommon for class counsel to amend a class complaint several times on the road to class certification (and settlement), and that the class complaint is a fluid document, subject to conditional and provisional certification and revision, even by the court itself.

The third argument class counsel advance in support of recasting of damage class actions as mandatory 23(b)(2) classes is that such strategic pleading and repleading is a good thing; indeed, it demonstrates the adequacy of class counsel in vigorously representing the interests of class members in fashioning the class complaint in a way that will support class certification. Thus, to fail to amend a class complaint that includes legal damage claims that cannot satisfy the predominance and superiority requirements, does not serve the class well.

For the most part, courts have not seriously considered the implications of the recent spate of strategic recasting of 23(b)(3) damage class actions as 23(b)(2) mandatory classes. The trend

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145 This is the “everyone does it so it must be right” theory. The argument is typically based on plaintiffs’ counsel’s assertions that multiple amendments to class complaints are a very common practice, that everyone (including the courts) knows and accepts the practice.
among courts has been simply to ratify such maneuvers, or to look the other way—to the extent the court is even aware of the strategic pleading. Notwithstanding the plaintiffs’ arguments in support of recasting 23(b)(3) damage class actions as mandatory 23(b)(2) injunctive or declaratory relief classes, courts should more rigorously analyze and consider the development of the class pleadings and the totality of the action, rather than whatever amended pleading is last furnished to the court in isolation. There are several rule-based, as well as due process and fairness concerns, that impel such vigorous scrutiny of artful pleading of class complaints.

First, courts generally should bring more rigorous scrutiny, analysis, and considered jurisprudence to the problem of multiple, repetitive class action pleadings. In current practice, it is not uncommon for class counsel to endlessly submit multiple amended class action complaints to the court, up to and after the class certification hearing. This makes the class action a kind of moving, variable target. In the class action universe, the class complaint is tantamount to an evolving work of art, somewhat like an unfinished symphony or an incomplete Renaissance painting that is perpetually subject to further touching up, even centuries later. There is something seriously wrong when a court permits the submission of fourteen amended complaints in the same class action.¹⁴⁶

Typically in class action practice the submission of multiple, successive amended complaints is not based on the discovery of new facts or evidence. Rather, class counsel file amended complaints when counsel become aware that there are problems with the class definition, or that the legal claims and remedies they have pleaded will be exceedingly difficult to certify as a 23(b)(3) damage action because of lack of predominance or superiority. Class counsels’ realization of such problems usually are in response to the defendants’ pleadings or motions.

Indeed, the defense bar plays the unusual role of educating the plaintiff concerning defects in the class pleading, and each successive round of filings prior to certification inspires the filing of an amended class complaint. Class complaints undergo a highly predictable metamorphosis. Thus, through successive rounds of pleading, class counsel tend to narrow the class defini-

¹⁴⁶ I have worked on just such a class action in the Texas state courts. See Farmers Insurance Exchange v Leonard, 2003 WL 1831928 (Tex App).
tion, eliminate claimants or entire categories of claimants, reduce nationwide classes down to statewide classes, and eliminate multiple claims and remedies. It is not unusual, over multiple class complaints, for class counsel to abandon a nationwide class of claimants in a twelve count damage action, in favor of a state-based class only seeking a declaratory judgment. At some point—even in the class action context—there must be some serious, principled limits even to the notion of liberal amendment of pleadings.

While class counsel characterize such conduct as constituting effective representation, courts ought to recognize this behavior for what it is: the object of this exercise is not to serve the interests of class members, but rather to serve the interests of class counsel. Thus, class counsel game the liberal system created by the Federal Rules of Civil Procedure, extrapolated onto class action practice. Hence, class counsel creatively invoke both notice pleading and the liberal amendment policy to justify abandoning class members' interests in their own self-interests, and to righteously justify the crafting or distilling of the narrowest possible class that is certifiable under Rule 23.

Second, courts have uncritically accepted the idea that class counsel can simply re-plead any 23(b)(3) legal damage claim as a 23(b)(2) action for declaratory judgment or injunctive relief. This is wrong, and a misuse of the declaratory judgment and injunctive relief action. Neither declaratory judgments nor injunctions were intended to provide judicial determinations on ultimate liability issues.

Nevertheless, it is not uncommon to see class complaints in which the legal liability theory is simply asserted as, or converted into, a request for declaratory judgment or injunctive relief. Thus, class counsel may take a breach of contract claim and recast the class complaint as a request for a declaration from the court that the defendants have breached the contract. There are endless variations on this theme over an array of legal theories sounding in tort, contract, and statutory claims. As my colleague Professor Redish rightly suggests, the class action rule, as a procedural form or mechanism, was never intended to alter substantive law. The class action rule cannot possibly be used to modify the concepts underlying the appropriate use of the declaratory judgment action or injunctive relief.

Third, class counsel should not be permitted to avoid the additional requirements of predominance and superiority simply by
the expedient of converting a 23(b)(3) damage claim into a mandatory 23(b)(2) declaratory judgment or injunctive relief action. Mandatory classes require cohesion among class members, and plaintiffs cannot manufacture the requisite cohesion by converting a heterogeneous damage class action into a declaratory judgment action. A class that could not otherwise be certified as a 23(b)(3) damage class because of lack of predominance and superiority ought not to be certifiable as 23(b)(2) action simply by re-pleading it as something else. In such instances, courts ought to seriously "pierce the veil" of the 23(b)(2) pleading to discern the true nature of the case.

Fourth, the strategic pleading of a 23(b)(3) damage class action as a 23(b)(2) mandatory action invariably raises serious res judicata, claim-splitting problems, where the only relief sought is a declaratory judgment or injunction. The conventional understanding of res judicata principles requires a claimant to bring all claims that the pleader could have, or should have, brought in the first action. The prohibition against claim splitting will bar a claimant from subsequently pursuing claims not brought in the first action. The res judicata problem obviously is exacerbated when class counsel plead a mandatory 23(b)(2) action, which does not permit a class claimant to opt out and therefore avoid any possible res judicata bar.

Hence, when class counsel strategically plead (or re-plead) a damage class action as a declaratory judgment action, the class may win the declaratory judgment, but the effect of that judgment may bar class claimants from pursuing relief under legal theories that class counsel abandoned in favor of the 23(b)(2) class. The potential res judicata effects of the mandatory class action are even more insidious in the scenario where class counsel originally pleads multiple legal claims and damages, only to abandon all those claims and damages in favor of a narrow declaratory judgment action. In such cases, the pleadings themselves make manifest the array of claims that could have or should have been pursued in the action, but were instead jettisoned in favor of the expediency of narrowing the complaint to

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145 This has indeed been the chief reason why courts have rejected certification of numerous proposed medical monitoring classes. See Part III C.
146 General Telephone Co of Southwest v Falcon, 457 US 147, 160 (1982) (allowing courts to probe behind the pleadings when necessary to make an informed certification decision.)
the smallest possible acceptable unit that a court may reasonably certify.

Fifth, the strategic pleading or re-pleading of a 23(b)(3) damage class action as 23(b)(2) declaratory or injunctive relief class creates a *Shutts* problem in nationwide or multistate action, especially where class counsel "incidentally" seek damages. This scenario directly implicates the due process problem inherent in *Shutts* footnote 3. Because class members cannot opt out, they cannot give consent by virtue of their failure to exclude themselves from the class.

Finally, the pleading or re-pleading of a 23(b)(3) damage class as a mandatory 23(b)(2) class raises problems concerning the adequacy of both the class representative and class counsel. Regarding the class representative, class complaints often plead individual claims on behalf of the class representative, as well as class claims on behalf of the class. When class counsel amend a class complaint to recast a 23(b)(3) damage class as a mandatory 23(b)(2) declaratory judgment or injunctive class, but the representative retains all individual claims, this creates a conflict of interest between the class representative and the class members.

In this scenario the class representative will be able to pursue all individual claims in addition to the class 23(b)(2) claim, and will have the opportunity to be afforded relief different from, and in addition to, that of the class members. Moreover, the class representative will not suffer the consequences of a possible res judicata bar of such individual claims, which the mandatory class sacrifices for class members.

Regarding class counsel, arguably the jettisoning of 23(b)(3) legal claims and damages embodies the self-serving interests of class counsel, rather than the vigorous protection of class members’ interests. This strategic pleading is especially suspect when class counsel narrows the class definition, abandons large segments of a previously represented class, abandons a long laundry list of legal claims and damages, and re-tailors the complaint to state solely an action for declaratory relief. In such actions, class members stand to recover a declaration from the court, but nothing else. Class counsel stand to benefit from some formulation of negotiated attorneys’ fees.

Hence, courts should be encouraged to more carefully evaluate the nature and context of plaintiffs’ strategic pleading, especially in the class action context. The ordinary rules relating to notice pleading and liberal amendments may have some rele-
vance in the class action context, but the way in which these
rules are deployed in the class action context cannot possibly be
the same because of the due process underpinnings of class litiga-
tion.

Class counsel’s invocation of the liberal amendment rule is
an excellent example of how application of this principle in the
class action context can undermine the due process rights of ab-
sent class members. In ordinary, two-party litigation, a plaintiff’s
rights are not sacrificed when the plaintiff can confer with coun-
sel on the decision whether to pursue or abandon legal claims,
theories, or remedies. It is something else, however, in a class
action, for class counsel to successively amend a class complaint
several times to eliminate large numbers of class members,
claims, and remedies. In this instance, absent class members
have no knowledge that their legal representatives—both the des-
ignated class representative and class counsel—are jettisoning
their legal rights in the interests of obtaining any class certifica-
tion of a narrow class that may not redound to the class members’
benefit and may even be detrimental.

C. Illustration 3: Inventing New Claims for Mandatory Class
   Treatment: The Medical Monitoring Example

Perhaps one of the most graphic illustrations of class action
category blurring has occurred during the past decade with the
development of jurisprudence relating to medical monitoring
classes. In this arena, both plaintiffs as well as defense attor-
neys have strategically deployed the class action categories, ei-
ther to seek or defeat class certification. And, both plaintiffs and
defense counsel have massaged the concepts, and terminology, of
cohesion, predominance, and superiority, to interesting ends.

The era of mass tort litigation has largely been responsible
for the creation of the “medical monitoring” class. One explana-
tion for the development of the medical monitoring phenomenon
is that medical monitoring claims are the result of the increased
difficulty in certifying mass tort litigation classes in federal
court. During the mid-1990s, as federal courts frequently de-
nied or reversed certifications of various proposed nationwide mass tort litigation classes, plaintiffs' counsel regrouped and developed the theory of the medical monitoring class. Class complaints for medical monitoring increasingly appeared on the litigation landscape. In turn, the demand for medical monitoring classes in mass tort cases inspired a body of unsettled, perplexing law that dramatically embodies the blurring of class categories and concepts.

Plaintiffs typically seek certification of a medical monitoring class when claimants have been exposed to a toxic substance or have used a medical device, but may not manifest a medical condition until years later. Plaintiffs have sought medical monitoring in various mass tort cases, including cases of exposure to radioactive nuclear substances, polychlorinated biphenyls (PCBs), asbestos, lead paint, and chemical contamination. Plaintiffs also have sought medical monitoring in actions related to heart valves, pacemakers, and tampons. In seeking a medical monitoring class, plaintiffs request that the defendant create a fund to bear the expense of future medical monitoring of class members' conditions.

The medical monitoring class, however, has carved out an unusual jurisprudential niche, roosting uneasily between substantive and procedural law. Thus, courts have disagreed over whether medical monitoring actions present a substantive legal claim, a request for equitable relief, or merely embody a procedural device or administrative mechanism. Because medical monitoring classes involve a fund, courts have reached different conclusions on whether medical monitoring classes seek equitable or legal relief. Additionally, because medical monitoring classes embody a hybrid of legal and equitable elements, such classes implicate difficult Seventh Amendment right to jury problems, concerning the staging of a class action trial involving both legal and equitable claims, or whether the claimants are entitled to a jury trial at all.

Medical monitoring class actions are a relatively new and recent phenomenon that has engendered a body of unsettled and perplexing law. There is no general trend among federal or state courts favoring certification of medical monitoring classes. On the contrary, medical monitoring classes present a novel form of action entailing substantive and procedural difficulties, and courts disagree whether such classes should be certified. Courts that have addressed medical monitoring have taken a cautious ap-
proach to such proposed classes, and in the majority of cases, courts generally have refused to certify such classes,\(^1\) have rejected such classes on motions to dismiss,\(^2\) or at summary judgment,\(^3\) or have reversed certifications.\(^4\)

Courts disagree whether medical monitoring cases present a substantive legal claim, a means to equitable relief, a procedural device, or an administrative mechanism.\(^5\) Plaintiffs usually seek certification of a medical monitoring class under Rule 23(b)(2) or its state equivalent, the class action category for injunctive or declaratory relief. However, because medical monitoring classes typically involve creation of a fund, courts have reached different conclusions on whether medical monitoring classes constitute equitable or legal relief.\(^6\)

In a seminal decision concerning medical monitoring claims, Judge S. Arthur Spiegel, of the United States District Court for the Southern District of Ohio, explained that a medical monitoring claim may be satisfied in different ways.\(^7\) For example, a court may order a defendant to pay the plaintiffs money, and the plaintiffs may or may not choose to use the money to have their medical condition monitored. Alternatively, a court might order the defendant to pay the plaintiffs' medical expenses directly, so

\(^{152}\) See, for example, Zinser v Accufix Research Institute, Inc, 253 F3d 1180 (9th Cir 2001) (affirming denial of class certification); Boughton v Cotter Corp, 65 F3d 823 (10th Cir 1995) (affirming denial of class certification in a case involving claims of exposure to hazardous emissions from a uranium mill); Badillo v The American Tobacco Co, 202 FRD 261, 265 (D Nev 2001) (class certification denied); Guillory v The American Tobacco Co, 2001 WL 290603 (N D Ill) (class certification denied); O'Connor v Boeing North American, Inc, 197 FRD 404 (C D Cal 2000) (class certification denied); Harding v Tambrands, Inc, 165 FRD 623 (D Kan 1996) (class certification denied); Thomas v FAG Bearings Corp, 846 F Supp 1400, 1410 (W D Mo 1994) (class certification denied).

\(^{153}\) See, for example, Trimble v Asarco, Inc, 232 F3d 946 (8th Cir 2000) (affirming grant of motion to dismiss medical monitoring class); Hinton v Monsanto Co, 2001 WL 1073699 (Ala) (granting motion to dismiss medical monitoring class); Badillo v American Brands, Inc, 2001 WL 79884 (Nev) (granting motion to dismiss medical monitoring class); McGeehan v Becton-Dickinson & Co, 2000 WL 33128993 (Pa Coin Fl) (same).

\(^{154}\) See, for example, In re Marine Asbestos Cases, 2001 WL 1028293 (9th Cir) (affirming grant of defendant's motion for summary judgment on medical monitoring class); Abuau v General Electric Co, 3 F3d 329 (9th Cir 1993) (affirming grant of defendant's motion for summary judgment on medical monitoring class); In re Paoli Railroad Yard PCB Litigation, 2000 WL 1279922 (E D Pa) (granting defendant's summary judgment motion on medical monitoring class); Purjet v Hess Oil Virgin Islands Corp, 1986 WL 1200 (D VI) (same); Bowerman v United Illuminating, 1998 WL 910271 (Conn Super 1998) (same).

\(^{155}\) See, for example, In re Telecommunications Pacing Systems, Inc, 221 F3d 870 (6th Cir 2000) (reversing class certification).

\(^{156}\) Mullenix, Natl L J at B17 (cited in note 150).

that the plaintiffs might be monitored by a physician of the plaintiffs' choice. Neither of these forms of relief constitutes equitable or injunctive relief under Rule 23(b)(2).

If, however, the court established a medical monitoring program of its own, financed by the defendant but managed by court-appointed or supervised trustees, in which the plaintiffs were monitored by particular physicians and medical data were used for group studies, this program would constitute injunctive relief under Rule 23(b)(2). Thus, the use of a medical monitoring fund to administer medical surveillance payments would be an exercise of the court's equitable powers. In the wake of Judge Spiegel's distinction in Day v NLO, federal courts have indicated that the dispositive factor in assessing whether a medical monitoring claim can be certified as a Rule 23(b)(2) class is to determine what type of relief the plaintiffs actually are seeking. Thus:

[i]f plaintiffs seek relief that is a disguised request for compensatory damages, then the medical monitoring claim can only be characterized as a claim for monetary damages. In contrast, if plaintiffs seek the establishment of a court-supervised medical monitoring program through which the class members will receive periodic examinations, then the plaintiffs' medical monitoring claim can be properly characterized as a claim seeking injunctive relief.

Whether proponents may seek certification of a medical monitoring class depends on whether the state recognizes a claim for medical monitoring. The possibility for the establishment of a medical monitoring class differs greatly among state and federal courts. At the threshold, state and federal courts disagree about whether plaintiffs seeking a medical monitoring class must establish physical injuries in order to certify a medical monitoring class. Several states, such as California, Louisiana, New Jersey, Pennsylvania, and Utah have recognized recovery for medical monitoring in the absence of physical injury. Some federal courts, predicting state law—for example, in Colorado—have reached the

159 Id.
160 144 FRD 330 (SD Ohio 1992).
same conclusion. Other federal courts, however, construing Virginia and West Virginia law, have held that medical monitoring expenses are only available if a plaintiff has sustained a physical injury. 6

The Pennsylvania Supreme Court has led the way among states in setting forth the elements for stating a claim for medical monitoring. Pennsylvania's standards have been repeated in modified forms in other states that have recognized a claim for medical monitoring. Hence, in order for a court to certify a medical monitoring class, a plaintiff must show: (1) that exposure exceeds normal background levels; (2) that the substance in question has been proven hazardous; (3) that the exposure was caused by the defendant's negligence; (4) that as a proximate result of the exposure, the plaintiffs' risk of contracting a serious latent disease has significantly increased; (5) that a monitoring procedure exists to make early detection of the disease possible; (6) that the prescribed monitoring regime is different from that normally recommended in the absence of the exposure; and (7) that the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles. 6

Similarly, Florida courts have recognized that a trial court may use its equitable powers to create and supervise a fund for medical monitoring purposes if the plaintiff proves the following elements: (1) exposure greater than normal background levels; (2) to a proven hazardous substance; (3) caused by the defendant's negligence; (4) as a proximate result of the exposure, plaintiff has a significantly increased risk of contracting a serious latent disease; (5) a monitoring program procedure exists that makes the early detection of the disease possible; (6) the prescribed monitoring program regime is different from that normally recommended in the absence of the exposure; and (7) that the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles. 6

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6 Redland Soccer Club Inc v Department of the Army, 696 A2d 137, 144-46 (Pa 1997).
6 Id. The Redland court also indicated four policy reasons for recognizing a cause of action for medical monitoring. First, medical monitoring promotes the "early diagnosis and treatment of disease" resulting from exposure caused by a tortfeasor's negligence. Second, "[a]llowing recovery for such expenses avoids the potential injustice of forcing an economically disadvantaged person to pay for expensive diagnostic examinations necessitated by another's negligence" and "affords toxic-tort victims, for whom other sorts of recovery may prove difficult, immediate compensation for medical monitoring needed as a result of exposure." Third, medical monitoring "furthers the deterrent function of the tort system by compelling those who expose others to toxic substances to minimize risks and costs of exposure." Finally, medical monitoring is in harmony with "the important public health interest in fostering access to medical testing for individuals whose exposure to toxic chemicals creates an enhanced risk of disease." Id at 145 (quoting Hansen v Mountain Fuel Supply Co, 858 P2d 970, 976-77 (Utah 1993)).
ing regime is different from that normally recommended in the absence of the exposure; and (7) the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles.\textsuperscript{165}

In Pennsylvania, Florida, and other states, the criteria for establishing a medical monitoring claim incorporate elements of common law negligence. Generally, courts have rejected attempts to certify medical monitoring classes where the medical monitoring class is merely a disguised attempt to seek legal relief, because medical monitoring closely resembles a negligence-based claim for future medical expenses. If a medical monitoring class is merely a disguised attempt to recover compensatory damages, then courts have held that certification of such a proposed class is not permissible under Rule 23(b)(2), or analogous state provisions.\textsuperscript{166}

In considering whether to certify a proposed medical monitoring class, federal and state courts have required the proponents to demonstrate that the proposed class satisfies the threshold requirements of numerosity, commonality, typicality, and adequacy. If the threshold requirements are satisfied, then the class proponents must demonstrate that the proposed class may be maintained under one or more of the 23(b) categories.

However, when plaintiffs seek to certify a medical monitoring class under the 23(b)(2) provision, class proponents must demonstrate that the members of the class share the requisite cohesiveness and homogeneity required for mandatory 23(b)(2) class actions. The plaintiff carries the burden of demonstrating the requisite class cohesiveness among claimants, and the presence of individualized facts, claims, and defenses will serve to undermine and defeat certifiability.

In this fashion, the cohesiveness requirement for proposed 23(b)(2) medical monitoring classes has come to mimic the predominance requirement for 23(b)(3) classes: hence, the array of factors that will defeat the predominance for a 23(b)(3) class will now serve to defeat the cohesiveness requirement for a proposed 23(b)(2) medical monitoring class.


\textsuperscript{166} Mullenix, Natl L J at B17 (cited in note 153). See also Zinser v Accufix Research Institute, Inc, 253 F3d 1180, 1195–96 (9th Cir 2001); Dhamer v Bristol-Myers Squibb Co, 183 FRD 520, 528–29 (N D Ill 1998); Cook v Rockwell International Corp, 181 FRD 473, 480 (D Colo 1998).
Alternatively, in those cases where plaintiffs have sought to certify a 23(b)(3) medical monitoring class, the proponents must demonstrate that common questions predominate and that a class action is a superior means for resolving the dispute. Again, the presence of individualized facts or issues undermines the necessary requirements for predominance and superiority in a 23(b)(3) class.

The general class action principles of cohesiveness of a 23(b)(2) class, and predominance and superiority for a 23(b)(3) class, apply with equal force to proposed medical monitoring classes. In addition, in order to satisfy the rigorous analysis test, the court must examine the underlying substantive law that constitutes a medical monitoring claim. Hence, the proponents must demonstrate to the court that the various elements that constitute a medical monitoring claim may be tried and proven on a class-wide basis. To the extent that the medical monitoring claim includes a factor sounding in common law negligence, this may also serve to undermine certifiability.

A further complicating issue in medical monitoring classes is whether such claims require a jury trial. Under prevailing Seventh Amendment jurisprudence, if a medical monitoring claim is deemed equitable in nature, then there is no right to a jury trial. On the contrary, if the medical monitoring claim is deemed legal, then the defendant is entitled to a jury trial.

Because classes typically seek to certify medical monitoring claims under Rule 23(b)(2), it would seem that such claims would not go to the jury, but some federal courts have concluded otherwise. Thus, several federal courts have indicated that a jury must determine the issue of liability or the plaintiffs’ need for medical monitoring. As the theory of medical monitoring claims has developed, the medical monitoring class has come to present a vexing conundrum. The way in which a plaintiff pleads the medical monitoring claim often is critical to class certification.

If the plaintiffs seek a lump sum award for the medical monitoring claim, then the class would be barred from seeking injunctive relief. In theory, the plaintiffs have an alternative adequate remedy at law—the lump sum of compensatory damages to pay for future medical expenses. If the plaintiffs seek relief in the

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167 See, for example, In re Paoli Railroad Yard PCB Litigation, 35 F3d 717, 795 (3d Cir 1994); Herber v Johns-Manville Corp, 785 F2d 79, 83 (3d Cir 1986); Fried v Sungard Recovery Services Inc, 925 F Supp 372, 374 (E D Pa 1996) (reserving the power to structure the medical monitoring fund); Day v NLO Inc, 851 F Supp 869 (S D Ohio 1994).
form of a medical monitoring fund, however, such a remedy invokes the equitable powers of the court, and a plaintiff is not required to show an inadequate remedy at law.

In analyzing the tension between the Seventh Amendment and Rule 23(b)(2) medical monitoring classes, a Pennsylvania district court—in a tobacco medical monitoring class subsequently decertified—held that “the nature of the relief sought under plaintiffs' medical monitoring fund, for the purposes of the Seventh Amendment analysis, is inherently both legal and equitable.” The court, citing Dairy Queen Inc v Wood, concluded that the constitutional right to a jury trial could not be made to depend upon the choice of words used in the pleadings. The court reconciled the apparent conflict between a Rule 23(b)(2) equitable medical monitoring class and providing a jury trial:

Thus, in order to establish a right to a Rule 23(b)(2) certification, it need only be shown that the relief requested is not predominantly for damages. This inquiry has nothing to do with whether one's constitutional right to a jury trial has been implicated by the underlying nature of the claim. Indeed, the bar for determining whether the nature of a claim is equitable or legal for Seventh Amendment purposes is much higher than it is under Rule 23(b)(2) analysis.

In the court's view,

[ under Seventh Amendment analysis, the right to a jury trial must be upheld even if the legal issues are characterized as 'incidental' to equitable issues . . . . For this reason, decisions holding that medical monitoring claims may be certified under Rule 23(b)(2) are not dispositive for purposes of the right to a jury trial. In theory and practice, courts can certify a class pursuant to Rule 23(b)(2) and yet find the parties are entitled to a jury under the Seventh Amendment.

The development of the medical monitoring class has accompanied and paralleled the general blurring of class categories

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168 Barnes, 989 F Supp at 668.
170 Barnes, 989 F Supp at 668.
171 Id.
during the past decade. The novel theory of the medical monitoring class, and the doctrinal confusion it has inspired, has fostered interesting strategic pleading by both plaintiffs' and defense counsel. The illustration of the medical monitoring class also demonstrates the synergy between judicial decisions and the plaintiffs' and defense bars' ability to adapt litigation strategy in an ever-changing legal environment.

Hence, in the seminal days of medical monitoring class complaints, plaintiffs originally sought certification of medical monitoring classes under both the 23(b)(2) and (b)(3) categories. The courts quickly rejected the possibility of certifying medical monitoring classes under the 23(b)(3) provision, because these medical monitoring classes were viewed as disguised attempts to receive damages, or because the proposed 23(b)(3) medical monitoring classes were infused with individualized facts and issues that defeated predominance. Defendants, of course, exploited the 23(b)(3) predominance and superiority requirements to defeat proposed 23(b)(3) medical monitoring classes, successfully arguing on the same grounds that defendants have used to defeat mass tort litigation classes.

As plaintiffs' counsel became increasingly aware of the lack of viability of certifying medical monitoring classes under the 23(b)(3) provision, the plaintiffs' bar regrouped and creatively recast medical monitoring classes under the 23(b)(2) provision. Courts next rejected the plaintiffs' attempts to repackage 23(b)(3) medical monitoring classes as 23(b)(2) equitable classes, holding that many of these proposed medical monitoring classes were actually damage class actions in disguise. At this juncture, plaintiffs' class counsel again regrouped, and learned to carefully plead medical monitoring actions to seek only a "court supervised fund," and no other form of relief.

Although the plaintiffs—at this juncture—seemed to have resolved the conundrum of the medical monitoring action by precise pleading under the 23(b)(2) provision, the defense bar responded by breathing new life into the concepts of homogeneity and cohesion. Hence, the defense bar resuscitated the fundamental principle that the mandatory 23(b)(1) and (b)(2) class actions require homogeneity and cohesion among class members, in order for a court to sustain a proposed class under these mandatory categories. In revitalizing this fundamental categorical imperative, the defense bar successfully re-introduced, in mirror image, the 23(b)(3) concept of lack of predominance back into the 23(b)(2)
analysis. Thus, the defense bar has been able to defeat class certification of proposed 23(b)(2) medical monitoring classes for the same array of arguments that have defeated proposed 23(b)(3) mass tort litigation classes.

D. Illustration 4: Using the Rule 23(b)(1)(A) Class for Compensatory Damages

The fourth and final illustration of class category blurring that has evolved, to unfortunate effects, stems from a peculiarity among state jurisdictions that permit damage class actions under the 23(b)(1)(A) provision. Since my state of Texas currently permits this, my discussion of this problem is based on Texas jurisprudence.  

The endorsement of the 23(b)(1)(A) damage class action truly embodies the complete blurring of class categories and a total judicial disregard for the basis, meaning, rationale, and due process concerns that animated the creation of different class categories. Once courts have moved to the position of endorsing non-opt-out damage class actions under the 23(b)(1)(A) provision, it hardly can be argued that any meaningful distinctions remain among class categories. Under these circumstances, one might well then ask what useful purpose the 23(b) class categories serve, and why litigants are put through the exercise of pleading and supporting certification of a proposed action under the class categories. Ultimately, however, the consequences for class claimants of a 23(b)(1)(A) class action are severe.

Since the amendment of Federal Rule of Civil Procedure 23 in 1966, federal courts generally have not construed Rule 23(b)(1)(A) to permit federal courts to certify damage class actions under the Rule 23(b)(1)(A) provision. The U.S. Supreme Court has acknowledged that Rule 23(b)(1)(A):

\[
\text{takes in cases where the party is obliged by law to treat the members of the class alike (a utility acting toward customers; a government imposing a tax), or where the party}
\]

172 It may well be that Texas is anomalous in permitting certification of 23(b)(1)(A) damage class actions, but Texas is an important jurisdiction regarding the development of state class action jurisprudence. The Texas anomaly, as such, serves as a useful illustration of the problem of class category confusion.

must treat all alike as a matter of practical necessity (a riparian owner using water as against downriver owners). \(^{174}\)

Both the Advisory Committee Note to Rule 23 and numerous federal decisions since 1966 provide examples of situations that the rule drafters contemplated for class certification under Rule 23(b)(1)(A). These authorities indicate that Rule 23(b)(1)(A) was intended to be applied to a very narrow, limited set of circumstances, and not more broadly to any damage classes.

The Advisory Committee Note sets forth six illustrations of when a 23(b)(1)(A) class certification is appropriate. Four of the illustrations involve citizen actions against a municipality. The first concerns an action against a municipality to declare a bond issue invalid. The second deals with an action against a municipality to condition or limit a bond issue. The third concerns an action against a municipality to prevent or limit the municipality in making a particular appropriation. The fourth addresses an action against a municipality to compel or invalidate an assessment. The Advisory Note’s fifth illustration relates to the possibility of “individual litigations of the rights and duties of riparian owners.” The Advisory Committee’s sixth example of suitable certification under 23(b)(1)(A) involves “landowners’ rights and duties respecting a claimed nuisance.” \(^{175}\)

Since 1966, federal class action decisions consistently have applied the Rule 23(b)(1)(A) category only in a narrow set of circumstances contemplated by the rule revisers. More importantly, the federal cases clearly establish the principle that the mere fact that one lawsuit may result in one judgment and another suit may result in a different judgment, is insufficient to sustain class certification under 23(b)(1)(A). \(^{176}\)

Federal courts consistently have held that it is inappropriate to certify damage class actions under the Rule 23(b)(1)(A) provi-

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\(^{175}\) See FRCP 23(b)(1)(A), Advisory Committee Notes, 1966 Amendments, Subdivision (b)(1).

\(^{176}\) See In re Dennis Greenman Securities Litigation, 829 F2d 1539, 1545 (11th Cir 1987); In re Bendectin Products Liability Litigation, 749 F2d 300, 305 (6th Cir 1984); McDonnell-Douglas Corp v US Dist Court for Central District of California, 523 F2d 1083, 1086 (9th Cir 1975); La Mar v H & B Novelty & Loan Co, 489 F2d 461, 466 (9th Cir 1973). See also James Wm. Moore, et al, 5 Moore’s Federal Practice 23.41[2][a] (Matthew Bender 3d ed 2003).
The reason why courts have declined to certify damage class actions under the 23(b)(1)(A) provision is simple: the courts have recognized that the Rule 23(b)(1)(A) class is not intended to encompass situations where a defendant may be found liable to one plaintiff, but not to another. In addition, the fact that separate actions would raise the same questions of law is not sufficient to warrant certification under Rule 23(b)(1)(A).

Currently there is a split among Texas courts as to the proper application of the Rule 42(b)(1)(A) category. Three Texas courts have accepted the federal interpretation of 23(b)(1)(A) classes in analyzing 42(b)(1)(A), and four Texas courts have rejected it. The appellate courts that have correctly construed and applied the Texas Rule 42(b)(1)(A) class category have indicated, noting federal authority, that Federal Rule 23(b)(1)(A)—the federal counterpart to Texas's Rule 42(b)(1)(A)—"will ordinarily be inappropriate in an action for damages." One of the Texas state courts that has correctly construed 42(b)(1)(A) has stated: "When the only risk is that some plaintiffs may win while others may lose on identical facts, the problem of inconsistent or varying adjudications is not raised."

Nonetheless, several Texas appellate courts have rejected the federal jurisprudence regarding (b)(1)(A) class actions, and have permitted (b)(1)(A) damage classes. These jurisdictions believe the Texas approach provides "the better Texas rule" on (b)(1)(A) classes. The Texas Supreme Court has yet to consider the nature,

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177 See Dennis Greenman, 829 F2d at 1545; Bendectin Products, 749 F2d at 305. See also Moore, et al, 5 Moore's Federal Practice §23.41[5][a] (cited in note 176); Wright, Miller, and Kane, 7 Federal Practice and Procedure, §1773 at 427 (cited in note 18).
178 See McDonnell-Douglas Corp, 523 F2d at 1086.
179 Tex R Civ P 42(b)(1)(A).
180 See American National Insurance Co v Cannon, 86 SW3d 801, 810 (Tex App 2002) (certification under Tex R Civ P 42(b)(1)(A) inappropriate where enforcement of agreement depended on varying circumstances and merits of each potential class member's case); Peltier Enterprises Inc v Hilton, 51 SW3d 616, 625 (Tex App 2001) (decertifying inappropriately certified 42(b)(1)(A) class as not meeting the standard for certification); St. Louis Southwestern Railway Co v Voluntary Purchasing Groups, Inc, 929 SW2d 25, 32 (Tex App 1996).
182 Green v Occidental Petroleum Corp, 541 F2d 1335, 1340 (9th Cir 1976).
183 St. Louis Southwestern Railway, 929 SW2d at 32, citing Bendectin Products, 749 F2d at 306.
184 Reserve Life Insurance Co, 917 SW2d at 845.
scope, and extent of the Texas Rule 42(b)(1)(A) class action, or the apparent conflict among the Texas appellate courts concerning the appropriate use of the 42(b)(1)(A) class category.

The Texas state courts that have rejected the federal jurisprudence animating the (b)(1)(A) class category have done so based on one appellate court's misreading of the purpose and intent of the (b)(1)(A) class, and instead grounded approval of a (b)(1)(A) damages class on rationales of judicial efficiency and economy. These appellate decisions directly conflict with federal class action jurisprudence, which does not read the language "inconsistent or varying adjudications" to authorize class certification under 23(b)(1)(A) in any action where individual lawsuits might have different outcomes. Nor does federal class action jurisprudence ground the (b)(1)(A) class category in reasons of judicial efficiency and economy.

In addition, there are serious constitutional constraints that render class certification of damage class actions under 42(b)(1)(A) inappropriate. These include the lack of necessary cohesion among class members, the Shutts problem, res judicata effects, and the inability to solve these problems through use of an opt-out provision.

As indicated above, claims brought under federal and state 23(b)(1) and (b)(2) class categories contemplate that class members' interests are homogeneous; that is, their rights or claims do not involve individual differences. For this reason, the mandatory classes do not provide for an opt-out exit from the class, which is considered to be fair. Precisely because all interests must be shown to be cohesive, there is no need for an opt-out provision. Therefore, many federal courts have held that Rule

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185 See Wagner & Brown, Ltd v Horwood, 53 SW3d 347 (Tex 2001) (denying petition on review from grant of class certification under Tex R Civ 42(b)(1)(A), with dissent by Supreme Court Justices Hecht, Owen and Abbott, who believe that the Texas Supreme Court should grant conflicts review to resolve the split among Texas courts concerning the appropriate application of the (b)(1)(A) class). See Adams, 791 SW2d at 292–93.

186 Moreover, the Adams progeny cases are devoid of any analysis of the nature, scope, and rationale for the (b)(1)(A) class action.

187 See Moore, 5 Moore's Federal Practice, §23.41[2][b] (cited in note 177), which explains that the presence of individual issues would eliminate the possibility that varying adjudications in different lawsuits would subject a defendant to incompatible standards of conduct. This is because if separate lawsuits involve divergent issues, the defendant should be able to satisfy a judgment in one without violating a different judgment in another.
23(b)(1)(A) is suitable only for causes of action where no individual issues exist.\textsuperscript{189}

The concept of homogeneity for the mandatory 23(b)(1) and (b)(2) classes is an important analytical concept with practical implications. Proposed 23(b)(1) and (b)(2) class actions require cohesiveness precisely because these subdivisions do not include the due process protections of notice and the ability to opt out. Therefore, cohesiveness is necessary as a prerequisite to certifying a mandatory class, and justifies the lack of due process protections.

As indicated above, federal and state courts have recognized this important cohesiveness requirement in the medical monitoring context, where plaintiffs have sought certification under the mandatory 23(b)(1) or (b)(2) provisions. In numerous cases, courts have held that the presence of individualized facts and issues among the class members undermines and defeats class certification, because of a lack of cohesion among class members.\textsuperscript{190} Recently, the Fifth Circuit recognized the necessity for homogeneity among class members as a prerequisite for certification of a mandatory class.\textsuperscript{191} The lack of cohesiveness among class members, and the presence of individualized issues, contributed to the reasons why the Fifth Circuit reversed certification of a mandatory class.

The ability to certify mandatory 23(b)(1)(A) damage class actions in states such as Texas also directly implicates a serious \textit{Shutts} problem, where the plaintiff seeks certification of a multi-state action. The Supreme Court's \textit{Shutts} decision and subsequent jurisprudence relating to the \textit{Shutts} problem,\textsuperscript{192} suggest that mandatory damage class actions seeking monetary relief under Rule 23(b)(1) or (b)(2) may run afoul of constitutional due process requirements. Because the Supreme Court has yet to resolve this problem, the viability of certifying damage class actions for monetary relief under the 23(b)(1) or (b)(2) categories is in serious doubt. Any proposed multistate class action that is certified as a mandatory class raises the \textit{Shutts} problem.

\textsuperscript{189} See Doe \textit{v} Guardian Life Insurance Co, 145 FRD 466, 477 (N D Ill 1992); Horowitz \textit{v} Pownall, 105 FRD 615, 618 (D Md 1985); McHan \textit{v} Grandbouche, 99 FRD 260, 266 (D Kan 1983).

\textsuperscript{190} See, for example, Barnes \textit{v} American Tobacco Co, 161 F3d 127, 143, 149 (3d Cir 1998).

\textsuperscript{191} McManus \textit{v} Fleetwood Enterprises, Inc, 320 F3d 545, 553 (5th Cir 2003).

\textsuperscript{192} See Adams \textit{v} Robertson, 520 US 83 (1997); Ticor Title Insurance Co \textit{v} Brown, 511 US 117, 120 (1994); Ticor Title Insurance Co \textit{v} FTC, 998 F2d 1129 (3d Cir 1993).
The *Shutts* problem is further exacerbated in states like Texas, that permit certification of damage actions under the 23(b)(1)(A) provision and thereby directly implicate a *Shutts* problem. Certification of a mandatory Texas multistate class, under the 23(b)(1)(A) provision, would directly implicate both the chief holding in *Shutts* as well as footnote 3, because such a class would be predominantly for damages, without providing for an opt-out right.

The possibility of certifying mandatory damage class actions under the 23(b)(1)(A) provision also implicates serious potential res judicata problems. Under Texas jurisprudence, classes certified under 42(b)(1)(A) bind all members encompassed by the class definition. Absent class members encompassed by the class definition may not opt out of the class. Class members will be bound by the judgment in the 23(b)(1)(A) class. Under res judicata principles, this judgment will bar class members from pursuing all claims that could have, or should have, been raised in the action, including consequential damages.

And, while Texas Rule 42(d) parallels the same Federal Rule 23(d) provision that authorizes the judge to issue various orders relating to the supervision and management of class actions, federal courts have indicated that courts may not solve problems of the mandatory 23(b)(1) and 23(b)(2) classes simply by providing an opt-out provision. To provide an opt-out opportunity for the mandatory classes completely subverts and defeats the concepts underlying the mandatory class categories.

E. Opt-Out Claimants as Hostage Pawns

As these four different illustrations suggest, the practical realities of class action litigation are often far removed from the abstract theories and concepts undergirding a carefully crafted class action rule. In the practical world of class action litigation, attorneys and the courts pay a kind of ritual, winking obeisance to the forms of the class categories, without implementing any meaningful distinctions among them. Pleading the 23(b) class categories, and supporting those categories at certification, is tantamount to a procedural jumping-through-the-hoop trick, with a ringmaster not overly concerned with whether the dog actually makes it through.

Because I believe that the courts have aided and abetted in systematic class category drift (at best), and class category blur-
ring (at worst), I would also suggest that the current state of class action jurisprudence provides few systemic incentives for any actors in the system to care about the opt-out situation. Perhaps even more dire, I would suggest that the system instead has incentives to care about opt-outs in ways that have nothing at all to do with justice and fairness to class claimants.

In this view, the possibility of opt-outs have rendered those opt-outs the pawns—or hostages—of the class action litigation system. Whether a class action will be structured to include an opt-out provision has become a rhetorical negotiating chip among the varying actors’ self-interests. In particular, attorneys care about opt-outs only in instrumental ways, but not in terms of achieving justice, fairness, or due process. Nonetheless, both plaintiffs and class counsel will invoke the rhetoric of justice, fairness, and due process concerning opt-outs, when to do so is congruent with the negotiating posture appropriate at any given moment.


Plaintiffs’ attorneys have ambivalent views about opt-outs, because opt-outs are simultaneously bothersome and utilitarian. Generally, plaintiffs’ attorneys would prefer not to pursue 23(b)(3) opt-out classes because of the difficulties in satisfying the additional predominance and superiority requirements. In the current judicial climate, the requirement that damage classes be pursued as 23(b)(3) actions renders the opt-out class a nuisance. Hence, plaintiffs have been induced to strategically recast complaints under the mandatory 23(b)(1) and 23(b)(2) provisions, which do not require the additional findings of predominance and superiority. For class counsel, life is simpler and easier without the 23(b)(3) requirements and without opt-outs.

Plaintiffs’ attorneys also are not enamored of opt-outs in the litigation context because of the added costs and burdens of notice. And, in both the litigation and settlement contexts, an excess of actual opt-outs may cause a class settlement to collapse (so-called exploding provisions). Exploding agreements are exactly what their labels say: agreements between defense and class counsel that a settlement will “explode”—meaning collapse or be nullified—if x% of class members opt out.

While plaintiffs’ attorneys have compelling strategic reasons for eschewing the 23(b)(3) class category, class counsel nonethe-
less do have a fine appreciation for the utilitarian deployment of the opt-out provision as the all-purpose solver of any and all class problems. Hence, plaintiffs’ attorneys like the theory of opt-outs because it can effectively be used to bail out problematic class certification efforts. Perhaps the most frequently invoked response to judicial queries concerning possible conflicts of interest, res judicata problems, damages calculations and so on, is the plaintiff’s mantra: “Well, your Honor, they can always opt out.”

2. Opt-outs as pawns: the defendants’ perspective.

Defendants are equally ambivalent about opt-outs, and similarly view the possibility of opt-outs as both bothersome or possibly useful, depending on the situation. Thus, defendants will either deploy or barter the opt-out pawn as the litigation strategy develops.

Generally, defendants do not like 23(b)(3) opt-out classes because the certification of a 23(b)(3) class exposes the defendant to potentially unending litigation. As is well known, what defendants seek most from class action litigation is closure, or “global peace.” Rule 23(b)(3) opt-out class actions do not provide global peace and opt-outs are a nuisance.

In addition, notwithstanding well-established precedents mandating that plaintiffs pay the costs for the administration of notice, in a class action universe riddled with exceptions, defendants frequently wind up paying for the not inconsiderable costs of notice. In this scenario, opt-outs therefore are an expensive nuisance. And, precisely parallel to the concerns of plaintiffs, an excess of actual opt-outs may cause a class settlement to collapse.

On the other hand, the 23(b)(3) opt-out class is advantageous to the defense because the plaintiffs carry the burden of satisfying the additional requirements of predominance and superiority. In essence, pleading a 23(b)(3) damage class provides the defense with additional factors for defeating class certification. For the same reasons that defendants may actually find the pleading of a 23(b)(3) opt-out class desirable, plaintiffs prefer the ability to recast the complaint as a mandatory class without additional certification requirements.
3. Opt-outs as pawns: convergence of the plaintiffs' and defense interests.

Whatever high-minded rhetoric plaintiffs' and defense attorneys may attach to the virtues of opt-outs, all such principles will be abandoned when plaintiffs' and defense interests converge on the utility of the mandatory classes. As long as a class action is proceeding towards certification of a litigation class, defendants will steadfastly maintain that damage actions must be certified under the 23(b)(3) opt-out provision and satisfy the predominance and superiority requirements. Under these circumstances—and especially where individualized facts or issues present problems for class certification—plaintiffs will invoke the 23(b)(3) opt-out provision as the band-aid for all individualized differences.

However, at the point when plaintiffs and defendants agree to settle, their interests are likely to converge on settling the dispute by way of a mandatory class with no opt-outs. At this juncture the opt-out pawn, who previously had served useful purposes to each side as long as the proposed class remained in a litigation posture, suddenly will be sacrificed to a different set of interests. The mandatory class ensures global peace for the defendant, and so the defendant will forego the 23(b)(3) class with an opt-out right. The mandatory class eliminates the plaintiffs' burdens of satisfying the additional predominance and superiority requirements, and so the plaintiffs will forego the 23(b)(3) class with an opt-out right. Both plaintiffs and defendants are relieved of the expense and nuisance of notice. And, both plaintiffs and defendants are relieved of the threat of exploding settlements sabotaged by excessive opt-outs.

The mandatory class with no opt-outs is a maximal solution for both class counsel and defendants, whose converging interests will merge to accomplish this result at the time of settlement. If a previously pleaded 23(b)(3) class is converted into a mandatory 23(b)(1) or (b)(2) class for settlement purposes, this decision disfavors segments of the putative class who would have preferred, or perhaps benefited from, the option of an opt-out class. Class members will be subject to all the limitations, restrictions, and perils of the mandatory classes, without recourse, and will have had no say in the strategic decision to reconfigure a 23(b)(3) opt-out class as a mandatory class.
4. **Opt-outs as pawns: the role of the judiciary.**

The judicial system is entrusted with a supervisory role over class actions, and is empowered to serve as an additional guardian for the interests of absent class members. However, the evolution of class action jurisprudence—particularly the blurring of class action categories—has made the judiciary complicit in the “opt-outs as pawns” scenario.

Similar to class counsel and defense attorneys, the judicial system likes opt-outs in theory. The possibility of the opt-out class provides the aura or patina of due process and fairness. The possibility of opt-outs provides the court with a ready-made solution to any or all problems in a proposed 23(b)(3) class that the court is inclined to certify.

The possibility of opting-out provides the judicial system with a cost-free, feel-good solution to permitting class litigation. Courts rarely, if ever, have to actually deal with opt-outs in an administrative capacity. Experience and empirical evidence indicates that few, if any, claimants typically opt out of 23(b)(3) classes, for whatever reasons. Most opt-out claimants do not pursue individual claims; opt-outs simply disappear.

On balance, the judicial system also recognizes the instrumental role that opt-outs play in inducing settlement. Just as the plaintiffs' and defense interests may converge on settlement, so too will the courts' independent interest in resolving cases on its docket converge on a settlement solution. Thus, courts independently recognize that the problems with the 23(b)(3) opt-out class ironically may be conducive to mandatory class settlements.

When the interests of class counsel, defendants, and the judiciary converge on class settlement, courts will accede to proposals for mandatory settlements as a docket-clearing device. Or, courts will permit damage class actions to be certified under the mandatory provisions. Or, courts will invent new “hybrid” forms of class actions to permit the case to be resolved. Whatever previous concerns courts may have had for opt-out claimants, courts will look the other way with regard to the “no-exit” nature of the mandatory class.

*Shutts* problems will be swept under the rug, although the court may invoke some due process rhetoric expressing concern over the implications of the mandatory class. The court may attempt to provide a *Shutts* band-aid, such as ordering notice (but no opt-out) for the mandatory class. In the end, the niceties of
class categories as well as the rationales, purposes, and criteria for class categories, will be rendered meaningless.

CONCLUSION: WHO CARES ABOUT OPT-OUTS?

One wonders whether the Rule 23(b) class categories have continuing meaning, vitality, and jurisprudential coherence, and whether the trend to ignore or blur these categories is a problem worthy of attention. Certification of a proposed class action pursuant to the appropriate class category is singularly important, because the different class categories implicate different due process rights. Class actions are representative actions in which a court has the power to bind absent plaintiffs to a judgment. Hence, the Rule 23(b)(3) damage class action is grounded in important due process protections for absent class members, and affords due process protections through the requirement of notice and the opportunity to exclude oneself from the class.

The Rule 23(b)(1) and (b)(2) classes are known as mandatory classes because a judgment is binding on all class members, no class member may opt out, and notice is not required. The lack of due process protections for 23(b)(1) and 23(b)(2) classes is based on the conceptual foundation that the members have homogeneous, cohesive interests, and are not pursuing individual damage claims. Therefore, class certification under Rule 23(b)(1)(A) or (b)(2) foregoes the due process protections of the 23(b)(3) class.

At least one federal appellate court recently has recognized the nature of these class distinctions and the encroaching problem of category-creep. On February 14, 2003, the United States Court of Appeals for the Fifth Circuit reversed and remanded certification of a 23(b)(2) and (b)(3) hybrid class action, in which the plaintiffs had sought certification under the mandatory Rule 23(b)(2) class category, or alternatively under the Rule 23(b)(3) category. The district court had certified the class under both 23(b)(2) and (b)(3). 197

194 See In re Dennis Greenman Securities Litigation, 829 F2d 1539, 1544 (11th Cir 1987).
195 McManus v Fleetwood Enterprises, Inc, 320 F3d 545 (5th Cir 2003).
196 This class action involved representations that the Fleetwood Company had made concerning the towing capacity of its motor homes. The plaintiffs brought a class action alleging violations of California's Consumers Legal Remedies Act, breach of express war-
The Fifth Circuit reversed the district court’s alternative certification of the class action under the 23(b)(2) and (b)(3) provisions. The Fifth Circuit repudiated the ability of the plaintiffs to seek alternative certification under both the mandatory 23(b)(2) provision and the non-mandatory, opt-out (b)(3) provision.

In criticizing the district court’s decision to certify the class under the mandatory 23(b)(2) provision, the Fifth Circuit indicated:

We emphasize that otherwise inappropriate injunctive relief does not become appropriate for class treatment merely because the more permissive Rule 23(b)(2), as opposed to (b)(3), contemplates injunctive relief. The district court abused its discretion in allowing the Rule 23(b) classifications to inform the appropriate remedy, instead of vice versa.\(^{198}\)

In addition, the Fifth Circuit recognized that the district court’s decision to certify a mandatory 23(b)(2) class where the appropriate remedy was monetary damages, undermined the fundamental scheme of the class action rule:

Moreover, permitting this lawsuit to continue as a Rule 23(b)(2) class would undo the careful interplay between Rules 23(b)(2) and (b)(3). That is, the class members would potentially receive a poor substitute for individualized money damages, without the corresponding notice and opt-out benefits of Rule 23(b)(3); and defendants would potentially be forced to pay what is effectively money damages, without the benefit of requiring plaintiffs to meet the rigorous Rule 23(b)(3) requirements.\(^{199}\)

The Fifth Circuit’s decision is unusual in considering the structure of the pleading of the class claims and relief, and for paying analytical attention to the distinctions among class categories. As I have attempted to demonstrate, most courts do not pay such heed, but rather have embarked on an evolutionary path of eliminating distinctions among class categories.

\(^{198}\) Id.

\(^{199}\) McManus, 320 F3d at 554.
In the end, who needs to worry about opt-outs or opt-ins when the class categories have become hopelessly blurred and have little analytical or conceptual content? The class categories have been rendered virtually meaningless by the courts, and consequently the class action rule is internally incoherent. Against this jurisprudential backdrop, attorneys skillfully exploit the blurring of class category distinctions that courts have engendered and supported. The lack of analytical coherence has, in turn, fostered clever strategic gaming of the system. The Supreme Court has not brought order to this universe, and the Advisory Committee on Civil Rules as well as the Judicial Conference have essentially defaulted on the problem.

Even more troubling, the possibility of opt-outs in the 23(b)(3) class have rendered opt-out claimants as fungible hostages and pawns in the class action game. Notwithstanding all the laudatory due process rhetoric surrounding the desirability of opt-outs, class counsel, defense attorneys, and the courts have proven themselves perfectly willing to abandon opt-outs in the interests of settlement. If mandatory classes with no exit are in tension with the due process rhetoric of the 23(b)(3) class, then mandatory damage class actions are antithetical to notions of collective justice.

The judicial system has been complicit in blithely permitting attorneys to repetitively amend and re-plead class complaints, endorsing changes in the form of the class categories and class-wide relief. Courts have been complicit in permitting attorneys to convert 23(b)(3) actions in (b)(1) or (b)(2) actions, or (b)(2) actions into (b)(1), (b)(2) and (b)(3) hybrid concoctions.

Who wins under this system? Plaintiffs' attorneys win because they settle actions, in many cases accomplish nominal results for the mandatory class, and are awarded fees for their efforts. There is no incentive for plaintiffs to care about opt-outs. Defense attorneys and their clients win: they accomplish global peace without undue added expense and nuisance. There is no incentive for defendants to care about opt-outs. The judicial system wins because the case goes away by agreement of counsel. There is no incentive for the judicial system to care about opt-outs.

Who loses under this system? Class claimants lose because they have no effective voice in the decision to plead or re-plead a class complaint strategically for purposes that may not be in the best interests of the claimants. And, those who still care about
myopic proceduralism, judicial integrity, and principled analysis also lose in the end.