Phillips Petroleum Company v. Shutts, Procedural Due Process, and Absent Class Plaintiffs: Minimum Contacts is Out—Is Individual Notice In?

Introduction

Class actions present tremendous logistical problems for litigants and courts,[1] evoking such fearsome images as Frankenstein monsters[2] and dragons.[3] The most monstrous problem posed by class suits is ensuring that the claims of the absent class members are adjudicated in accordance with the requirements of due process.[4] While some procedural protections are necessary to assure due process, other procedures, most notably individual notice, may be so expensive that they altogether preclude maintenance of the suit and the possiblity of any recovery.[5]

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1. The paradigm of class action rules is the current federal rule, FED. R. CIV. P. 23, which has complex prerequisites to certification, *see generally* 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1759-71 (1977) [hereinafter cited as WRIGHT & MILLER], and distinct subdivisions under which a class suit can be certified. *See infra* note 72. Aside from the initial certification difficulties, one of the most complex logistical problems is providing notice to absent members. *See* Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 299 (1972); *see also* WRIGHT & MILLER, *supra*, at §§ 1785-97.

2. Judge Lumbard characterized one case as a "Frankenstein monster posing as a class action." Eisen v. Carlisle & Jacquelin, 391 F.2d 55, 572 (2d Cir. 1968) (Lumbard, C.J. dissenting). Justice Powell cited the phrase with apparent approval in Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 169 (1974); *see also* Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"*, 92 HARV. L. REV. 664 (1979).

3. Two often-cited commentaries, *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318 (1976), and Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609 (1971), are introduced with a quote by Justice Holmes:

> When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal.

Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) (Address at Boston University School Of Law, Jan. 8, 1897).

4. *See generally* Note, *Jurisdiction and Notice in Class Actions: "Playing Fair" With National Classes*, 132 U. PA. L. REV. 1487 (1984); Comment, *The Importance of Being Adequate: Due Process Requirements in Class Actions Under Rule 23*, 123 U. PA. L. REV. 1217 (1975); McCall, *Due Process and Consumer Protection: Concepts and Realities in Procedure and Substance—Class Action Issues*, 25 HASTINGS L.J. 1351 (1974).

5. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 158 (1974); *see also* Shaman, *Notice Requirements in State Court Class Actions: The Aftermath of Eisen*, 4 CLASS ACTION REP. 195 (1975) ("By placing so heavy a financial burden upon class actions, the [individual notice

Generally, procedural due process is invoked to safeguard the defendant's interests in traditional, nonrepresentative actions.[6] In these cases, due process requires minimum contacts between the defendant and the forum state,[7] and prejudgment notice of the action to the defendant.[8] When the proper procedures are followed, the forum court can exercise jurisdiction over the defendant and proceed to a judgment which has full binding effect in subsequent actions initiated by either the defendant or the plaintiff.[9]

Due process takes on an added dimension in class suits. The nature of the typical class action—a suit against a single defendant by representatives of a large class of plaintiffs—requires that due process protections be provided to the absent class *plaintiffs*,[10] as well as to the defendant. Traditionally, due process has required that class representatives both adequately represent the interests of the class and provide a notice scheme advising the class members of the action.[11] More recently, some courts have also required minimum contacts between nonresident absent class members and the forum state as a prerequisite to entering a judgment binding on the class.[12] These procedural protections—adequate representation, prejudgment notice, and minimum contacts—have generated debate within the legal community[13] and a diversity of court decisions.[14]

Phillips Petroleum Company v. Shutts[15] embodies the United States Supreme Court's most recent pronouncement on the procedural protections available to absent class plaintiffs. In *Shutts* a class action was litigated under the Kansas class action rule.[16] The class representatives provided individual notice to the absent plaintiffs—most of whom were not Kansas residents—and the trial court certified a class consisting of

requirement] enervates the effectiveness of large class actions as a means of redressing legal wrongs that net billions of dollars for the wrongdoers and cause untold damage to innocent individuals as well as to the public interest.").

6. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67 (1972); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

7. *See, e.g.*, World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286 (1980); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

8. *See, e.g.*, Wuchter v. Pizzutti, 276 U.S. 13 (1928); Grannis v. Ordean, 234 U.S. 385 (1914).

9. Pennoyer v. Neff, 95 U.S. 714, 718 (1877). *See generally* 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 4401-78 (1981) [hereinafter cited as WRIGHT, MILLER & COOPER].

10. *See generally* 7A WRIGHT & MILLER, *supra* note 1, at §§ 1785-97.

11. *See infra* notes 53-97 and accompanying text.

12. *See, e.g.*, Feldman v. Bates Mfg. Co., 143 N.J. Super. 84, 362 A.2d 1177 (App. Div. 1976) (applying the minimum contacts doctrine and denying certification of a class action).

13. *See infra* note 85 and accompanying text.

14. *See infra* notes 86-102 and accompanying text.

15. 105 S. Ct. 2965 (1985).

16. KAN. STAT. ANN. § 60-223 (1983).

persons who received notice and did not opt out of the suit.[17] The defendant, Phillips, raised the due process concerns of the absent plaintiffs.[18] Phillips argued that the opt out procedure was insufficient to confer jurisdiction over the absent nonresident plaintiffs, and that the Kansas courts could enter a binding judgment only over the absent plaintiffs who had "minimum contacts"[19] with Kansas, or who affirmatively consented to jurisdiction by opting into the suit.[20] Phillips also raised a conflicts of law argument on which the Supreme Court reversed and remanded the judgment.[21]

In resolving the controversy, the Supreme Court clearly rejected the requirement of minimum contacts between nonresident class plaintiffs and the forum state, holding that a forum court can exercise jurisdiction over a class suit when the absent class plaintiffs are provided with minimal procedural protections of adequate representation, notice, and the opportunity to opt out of the litigation.[22] The Supreme Court upheld the opt out notice scheme authorized by the Kansas rule, specifically rejecting Phillips' argument that due process requires nonresident, absent class plaintiffs to affirmatively opt into the suit before the state court can exercise jurisdiction over them.[23] In dicta, however, the Court implied

17. *See infra* notes 29-30 and accompanying text.

18. An interesting aspect of class suits is the apparent role reversal by the participants. Defendants raise the due process rights of the absent plaintiffs in an effort to prevent certification, while the named plaintiffs mimimize their class' due process concerns in an effort to certify the largest class possible. *See, e.g.*, Phillips Petroleum Co. v. Shutts, 105 S. Ct. 2965 (1985); Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). In addition to generating larger attorney fees and encouraging beneficial settlements, larger plaintiff classes help to bring about the recognized benefits of class suits—judicial economy by consolidating numerous individual actions into one suit, *Shutts*, 105 S. Ct. at 2974, and *effective* access to courts for holders of claims which would be uneconomical to pursue individually. *Id.; see also* McCall, *supra* note 4, at 1355.

19. For a court to assert personal jurisdiction over a defendant, minimum contacts must exist between the forum state and the defendant. International Shoe Co. v. Washington, 326 U.S. 310 (1945); *see also* World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286 (1980).

20. *Shutts*, 105 S. Ct. at 2970. *See infra* notes 33, 109-112 and accompanying text.

21. Phillips' argument centered on the application of Kansas law, particularly its interest rates, to all of the claims of the class members, including the majority (97%) of the members who were residents of states with significantly lower interest rates. In sustaining Phillips' argument, the Court ruled that the Due Process Clause and the Full Faith and Credit Clause place "modest" restrictions on the application of forum law: "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Shutts*, 105 S. Ct. at 2978-79 (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981)). The Court also rejected the contention that maintenance of a class suit afforded Kansas more latitude to apply its law to the entire action. *Id.* at 2980. The Court did not, however, hold that the law of each class member's State must be applied; rather it implied that Kansas would have to augment its justification for its choice of law decision. *Id.* at 2981.

22. *Shutts*, 105 S. Ct. at 2975.

23. *Id.*

that a nonresident class member's failure to respond to the individual notice was tantamount to consent to the court's jurisdiction.[24] Because of this dicta, future class action defendants will likely argue that under *Shutts*, due process requires individual notice to absent class plaintiffs in all common question class actions.[25]

This Comment discusses the extent of notice which is constitutionally required in common question class actions. Part One describes the facts of *Shutts* and the Court's decision. Part Two examines the necessity of providing procedural protections to absent class plaintiffs and reviews the procedural requirements laid down in a trilogy of Supreme Court decisions applicable to class suits. Part Three offers various interpretations of the notice holding in *Shutts*, and Part Four argues that under *Shutts* due process requires a notice scheme in all class suits, but does not require individual notice to every absent class member.

I. *Phillips Petroleum Company v. Shutts*

In *Shutts*, owners of gas leases[26] brought suit against their lessee, Phillips, claiming accrued interest on royalties withheld by Phillips pending administrative approval of an increase in consumer gas prices.[27] Upon certification of a class of approximately 33,000 plaintiffs,[28] the representatives mailed a notice of the action to each class member.[29] The final class consisted of three class representatives and 28,100 absent class members. The court excluded from the final class 3,400 royalty owners who had opted out of the litigation and an additional 1,500 members whose notices could not be delivered.[30] Judgment was entered for the class and affirmed by the Kansas Supreme Court over Phillips' claim that

24. *See infra* notes 41, 109-112 and accompanying text.

25. *See infra* notes 38, 104-105.

26. The named representatives were Irl Shutts, a resident of Kansas, and Robert and Betty Anderson, residents of Oklahoma. *Shutts*, 105 S. Ct. at 2969.

27. Under regulations promulgated by the Federal Power Commission (now the Federal Energy Regulatory Commission), Phillips was required to secure approval for any increases in natural gas prices it charged customers, but was allowed to propose and collect the higher prices subject to final approval by the Commission. Phillips did not, however, remit the increases to its leaseholders until final approval, and the lessors sued in *Shutts* to collect interest on the increased revenues for the period they were withheld. *Id.*

28. Class members resided in all fifty states, the District of Columbia and foreign nations, and the leases were located in eleven states, but principally in Texas. *Id.* at 2968, 2977 n.6.

29. . The Court summarized the notice provided to the absent class members:

> The notice described the action and informed each class member that he could appear in person or by counsel; otherwise each member would be represented by . . . the named plaintiffs. The notices also stated that class members would be included in the class and bound by the judgment unless they "opted out" of the lawsuit by executing and returning a "request for exclusion" that was included with the notice.

Id. at 2969.

30. *Id.*

the due process rights of the absent plaintiffs were violated.[31] Phillips argued that the Kansas courts did not have jurisdiction over the absent class plaintiffs and therefore could not enter a judgment that could bind them.[32] Phillips further contended that unless the absent plaintiffs affirmatively consented to jurisdiction by "opting into" the suit, the court could exercise jurisdiction only over nonresident plaintiffs who had minimum contacts with Kansas under *International Shoe Company v. Washington*[33] and its progeny.

The first issue presented by *Shutts* was whether a defendant could raise the due process concerns of the absent class plaintiffs. The Court held that Phillips had standing to raise these potential claims, because Phillips had a "distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as [Phillips] is bound."[34] The Court reiterated that judicial economy and fairness to the party opposing the class requires an inquiry by the trial court into the binding effect of a class judgment, and allowed Phillips to initiate this inquiry:

> The only way a class action defendant like [Phillips] can assure itself of this binding effect of the judgment is to ascertain that the forum court has jurisdiction over every plaintiff whose claim it seeks to adjudicate, sufficient to support a defense of res judicata in a later suit for damages by class members.[35]

Although the Court allowed Phillips to raise the due process claims of the absent plaintiffs, it rejected Phillips' jurisdictional arguments. In rejecting the minimum contacts argument, the Court acknowledged that due process protections vary depending upon the perceived needs of the parties.[36] While the minimum contacts doctrine was designed to address the concerns of out-of-state defendants, the Court noted that absent class plaintiffs have unique concerns which require unique procedural safeguards.[37] The Court ruled that a state court can bind absent class plaintiffs to a judgment for money damages[38] if it provides the absent parties the minimal procedural protections of adequate representation, notice of the action, and an opportunity to opt out of the litigation.[39]

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31. Shutts v. Phillips Petroleum Co., 235 Kan. 195, 679 P.2d 1159 (1984).

32. *Shutts*, 105 S. Ct. at 2970.

33. 326 U.S. 310 (1945); *see also*, World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286 (1980); Shaffer v. Heitner, 433 U.S. 186 (1977).

34. *Shutts*, 105 S. Ct. at 2972.

35. *Id.*.

36. *Id.* at 2973.

37. *Id.* at 2974 (these safeguards include judicial "inquiry into the common nature of the named plaintiff's and the absent plaintiffs' claims, the adequacy of representation . . . and [restrictions against] dismiss[al] or compromise[ ] without the approval of the court.").

38. The Court stressed that its decision applies only to certain class suits: "Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments." *Id.* at 2975 n.3.

39. *Id.* at 2975.

The Court also rejected Phillips' contention that the absent class plaintiffs must affirmatively consent to jurisdiction by "opting into" the litigation.[40] Although the Court rejected the opt in requirement, it implied that the absent *Shutts* plaintiffs in effect had consented to jurisdiction by failing to opt out of the litigation: "Any plaintiff may consent to jurisdiction. . . . The essential question, then, is how stringent the requirement for a showing of consent will be."[41] In the Court's view, the *Shutts* opt out scheme was not merely *pro forma* because 3,400 lease holders had opted out of the suit.[42] The Court also noted that an "opt in" procedure urged by Phillips as a constitutional safeguard would invalidate the federal class action rule and a score of state rules.[43]

The Court ruled that Kansas' notice procedure "satisfie[d]"[44] due process and held that the Kansas courts properly exercised jurisdiction in *Shutts*.[45] However, the basis of the Court's holding is unclear. The Court may have relied upon one of three theories: the unique procedural safeguards that render traditional due process concepts inapplicable in class suits; the notice actually utililized in the *Shutts* litigation, and the absent class members' ability to opt out of the litigation; or the suggestion that the absent class members may have consented to jurisdiction.

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40. *Id.*

41. *Id.* at 2975-76 (citations omitted).

42. *Id.* at 2976.

43. *Id.* Currently the majority of the state class action rules are modeled after the revised federal rule, FED. R. CIV. P. 23: ALA. R. CIV. P. 23; ARIZ. R. CIV. P. 23; ARK. R. CIV. P. 23-23.2; COLO. R. CIV. P. 23; CONN. PRAC. BOOK § 52 (as amended and renumbered §§ 86-90 (1975)); DEL. CH. CT. R. 23; D.C. SUPER. CT. R. CIV. P. 23; FLA. R. CIV. P. 1.220; HAWAII R. CIV. P. 23; IDAHO R. CIV. P. 23; ILL. R. CIV. P. §§ 57.2-57.7 (1977); IND. R. TRIAL P. 23; KAN. STAT. ANN. § 60-223 (1983); KY. R. CIV. P. 23; ME. R. CIV. P. 23; MICH. GEN. CT. R. 3.501; MINN. R. CIV. P. 23; MO. R. CIV. P. 52.08; MONT. R. CIV. P. 23; NEV. R. CIV. P. 23; N.J. R. CIV. P. 4.32; N.Y. CIV. PRAC. LAW §§ 901-909 (McKinney 1976); OHIO R. CIV. P. 23; 12 OKLA. STAT. tit. 12, §§ 2023-2023.2 (Supp. 1984-85); OR. R. CIV. P. 32; PA. R. CIV. P. 1701-1716; S.D. CODIFIED LAWS ANN. § 15-6-23 (1969); TENN. R. CIV. P. 23; TEX. R. CIV. P. 42; UTAH R. CIV. P. 23; VT. R. CIV. P. 23; WASH. CT. R. 23; WYO. R. CIV. P. 23. All but Arkansas, Connecticut, Hawaii, Illinois, Massachusetts, New York, Texas and Utah have opt out provisions. *See Shutts,* 105 S. Ct. at 2976 n.5. The remainder of the state rules are modeled on the original federal rule or the Field Code version, *see infra* note 82. Original Rule 23 versions are ALASKA R. CIV. P. 23; GA. CODE ANN. § 81-A-123 (Supp. 1967); LA. CODE CIV. PROC. ANN. arts. 591-597 (West 1960); N.M. R. CIV. P. 23; W.VA. R. CIV. P. 23.

The Field Code versions are CAL. CIV. PROC. CODE § 382 (West 1973) (California also has a consumer class action statute, CAL. CIV. CODE § 1781 (West 1983)); NEB. REV. STAT. § 25-319 (1943); N.M. STAT. ANN. § 21.1-1 (1938); N.C. GEN. STAT. § 1A-1, 15-5-50 (Law. Co-op. 1977); WIS. STAT. § 803.08 (1976).

Two states have enacted the Uniform Class Action Rule: IOWA R. CIV. P. 42.1-42-20; N.D. R. CIV. P. 23. Mississippi, New Hampshire and Virginia have no formal class action rules (however Mississippi permits costs and attorney fees in successful class suits. MISS. CODE ANN. § 11-53-37 (1942)).

44. *Shutts,* 105 S. Ct. at 2976.

45. *Id.* at 2977.

II. Due Process and Absent Class Members

The starting point in a discussion of the procedural due process requirements necessary to maintain a class suit is to identify the specific interests being protected. The chose in action of an absent class plaintiff is a property interest[46] which may consist of a claim for declaratory relief[47] or a claim for damages.[48] Damage claims may range from de minimis taxi cab overcharges,[49] to considerable wrongful death claims.[50] In each case, the property interest of the absent class plaintiff is litigated by another plaintiff, and the Constitution requires that the absent plaintiff's claim not be foreclosed without observing due process.[51] If due process is observed, the court may proceed to a judgment which will be binding on the absent class members.[52]

Three Supreme Court decisions detail the procedural protections necessary in class actions. In *Hansberry v. Lee*,[53] the Court upheld the constitutionality of the representative suit and laid down the requirement of adequate representation as a prerequisite to entering a binding class judgment.[54] In *Mullane v. Central Hanover Bank & Trust Company*,[55] the Court determined the necessity and extent of prejudgment notice in representative suits, and in *Eisen v. Carlisle & Jacquelin*,[56] the Court required individual notice in common question class suits maintained pursuant to the federal class action rule.[57]

Hansberry involved the res judicata effect of a judgment in a prior class suit.[58] The defendants disputed the court's power to enter a judg-

46. *Shutts*, 105 S. Ct. at 2973; *see* Note, *Developments in The Law—Class Actions* 89 HARV. L. REV. 1318, 1404 (1976) (discussing whether a particular chose in action is a "property interest" amenable to due process protections).

47. *See, e.g.*, Hansberry v. Lee, 311 U.S. 32 (1940).

48. *See, e.g.*, Miner v. Gillette Co., 87 Ill. 2d 7, 428 N.E.2d 478 (1981), *cert. granted*, 456 U.S. 914, *cert. dismissed*, 459 U.S. 86 (1982).

49. *See, e.g.*, Daar v. Yellow Cab Co. 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).

50. *See, e.g., In re* Federal Skywalk Cases, 680 F.2d 1175 (8th Cir.), *cert. denied sub nom.* Johnson v. Stover, 459 U.S. 988 (1982).

51. U.S. Const. amend. V ("No person shall be . . . deprived of life, liberty, or *property* without due process of law . . . .") (emphasis added); U.S. Const. amend. XIV ("No State shall . . . deprive any person of life, liberty, or *property* without due process of law . . . .") (emphasis added).

52. Hansberry v. Lee, 311 U.S. 32, 41-42 (1940). *See generally* 7A C. WRIGHT, A. MILLER & M. K. KANE, FEDERAL PRACTICE AND PROCEDURE §§ 1786, 1789 (Supp. 1985) [hereinafter cited as WRIGHT, MILLER & KANE]; 3 H. NEWBERG, NEWBERG ON CLASS ACTIONS §§ 16.20-16.24 (2d ed. 1985); 18 WRIGHT, MILLER & COOPER, *supra* note 9, § 4455.

53. 311 U.S. 32 (1940).

54. *Id.* at 42-43.

55. 339 U.S. 306 (1950).

56. 417 U.S. 156 (1974).

57. *Id.* at 176-77.

58. 311 U.S. 32 (1940).

ment binding against them when they were not parties to the prior suit, nor successors in interest or in privity with the parties.[59] The Supreme Court rejected this broad attack on the class action device, recognizing the need for a class or representative suit when the number of interested parties is too great to allow for joinder.[60] The Court set out the principles for rendering a binding class judgment:

> In such cases where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree. . . .
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> [T]here has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it. . . .
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> [M]embers of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present.[61]

Because it was evident that the named plaintiffs in the prior class suit did not represent the interests of the defendants in *Hansberry*,[62] the Court held that the previous judgment was not binding upon them.[63] Finding the representation clearly inadequate, the Court failed to specify the elements of adequate representation; nor did the Court determine whether additional safeguards were necessary.[64]

Subsequent decisions elaborating the concept of adequate representation have required certifying courts to examine the motivations of the class representatives, their financial ability to fully litigate the claims, and the competency of their counsel.[65] Additionally, the adequacy of the class representation is subject to ongoing review throughout the litiga-

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59. *Id.* at 38.

60. *Id.* at 41.

61. *Id.* at 41-43 (citations omitted).

62. The original class suit was instituted to declare the validity of a racially restrictive covenant, whereas the defendants in *Hansberry*, who were nominal members of the plaintiff class, disputed the covenant's validity and arranged for the sale of a home in violation of the covenant. *Id.* at 37-39.

63. *Id.* at 44.

64. *Id.* at 43-44.

65. The existence of strike suits caused a great deal of concern with early class actions. *See* Miller, *Of Frankenstein Monsters*, *supra* note 2. Critics claimed that without adequate supervision, plaintiff's counsel tended to settle the claims for large fees, but without adequate compensation to the absent plaintiff class. Court review of attorney fees and settlement agreements were designed to meet these problems. *See generally* 7A WRIGHT, MILLER & KANE, *supra* note 52, at §§ 1761, 1764-70; 1 NEWBERG, *supra* note 52, at §§ 5.01-5.15. The current rules have incorporated protections against strike suits by codifying these protections. *See, e.g.*, FED. R. CIV. P. 23; *see also* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356 (1967).

tion.[66] Adequate representation is a prerequisite to certification in virtually all of the class action rules currently in force[67] and is the paramount procedural due process safeguard available to absent class plaintiffs.[68] Adequate representation effectively protects absent class members' interests by giving the courts a focal point for their certification determinations, and affording the absent parties a means for attacking the judgment if it is adverse to their interests.[69] Adequate representation, coupled with the common safeguards of court review of settlement agreements[70] and attorney fees,[71] assure that the absent plaintiffs' interests are fully litigated. Indeed, these are the only protections expressly provided to absent plaintiffs in class suits where notice is discretionary.[72]

However, most class action rules in force also expressly require prejudgment notice in common question class suits.[73] The notice requirement arises principally from the case of *Mullane v. Central Hanover*

66. *See, e.g.,* Gonzales v. Cassidy, 474 F.2d 67, 72 (5th Cir. 1973) (Plaintiff successfully collaterally attacked a class judgment by arguing that the representative failed to *continue* to adequately represent his interests by not appealing the nonretroactivity of a favorable judgment. The Fifth Circuit outlined a two-part test for reviewing the adequacy of representation: "(1) Did the trial court in the first suit correctly determine, initially, that the representative would adequately represent the class? and (2) Does it appear, after the termination of the suit, that the class representative adequately protected the interest of the class?").

67. *See supra* note 43 and accompanying text.

68. *See, e.g., Shutts,* 105 S. Ct. at 2975; Paulino v. Hardister, 306 So. 2d 125, 128 (Fla. Dist. Ct. App. 1974); *see generally* 1 NEWBERG, *supra* note 52, at § 1.06; 7 WRIGHT & MILLER, *supra* note 1, at § 1765; 3B J. MOORE & J. KENNEDY, MOORE'S FEDERAL PRACTICE ¶ 23.07 (1985). *But see In re* Four Seasons Securities Laws Litigation, 59 F.R.D. 657 (W.D. Okla. 1973) (Court refused to consider the adequacy of the representation where the absent class member received opt out notice and failed to respond). *See generally* Note, *Collateral Attack on the Binding Effect of Class Action Judgments,* 87 HARV. L. REV. 589 (1974).

69. *See supra* note 66 and accompanying text.

70. *E.g.,* FED. R. CIV. P. 23(e) ("A class action shall not be dismissed or compromised without the approval of the court."); *see also supra* note 65.

71. *See* 3 NEWBERG, *supra* note 52, at § 16.13; Homburger, *State Class Actions and the Federal Rule,* 71 COLUM. L. REV. 609, 647-51 (1971); *see also supra* note 65.

72. *See, e.g.,* FED. R. CIV. P. 23 (b). The federal rule has three subdivisions under which class suits may be maintained: (1) the "anti-prejudice" classes, in which individual suits would create the risk that the party opposing the class would be faced with inconsistent judgments, or where individual suits would be dispositive of absent persons' interests, FED. R. CIV. P. 23(b)(1) (*see generally* 7A WRIGHT & MILLER, *supra* note 1, at §§ 1772-74); (2) the "injunction" classes, in which the class is seeking injunctive or declaratory relief or the plaintiff is attempting to enjoin conduct by a defendant class, FED. R. CIV. P. 23(b)(2) (*see generally* 7A WRIGHT & MILLER, *supra* note 1, at §§ 1775-76); and (3) the "common question" classes, in which common questions of law or fact predominate over questions concerning the individual class members, FED. R. CIV. P. 23(b)(3) (*see generally* 7A WRIGHT & MILLER, *supra* note 1, at §§ 1777-84). Notice in (b)(1) and (b)(2) suits is discretionary, while notice in (b)(3) suits is mandatory. FED. R. CIV. P. 23(c)(2).

73. *E.g,* FED. R. CIV. P. 23(c)(2) ("In any class action maintained under subdivision (b)(3) [the "common questions" or damages subdivision] the court *shall* direct to the members of the class the best notice practicable under the circumstances.") (emphasis added).

Bank & Trust Company,[74] decided a decade after *Hansberry*. *Mullane* was not a class action; instead it involved an application for an accounting by the trustee of a common trust fund. The interests of the trust beneficiaries were represented by a guardian *ad litem*, and the only notice provided to the beneficiaries was publication in local newspapers.[75] The representative argued that this notice violated the beneficiaries' due process rights, and the Supreme Court agreed:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. . . .
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> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance.[76]

The Court found that the constructive notice utilized in *Mullane* was insufficient not because it failed to reach every beneficiary, but because, under the circumstances, individual notice was a reasonably available alternative.[77] However, the Court also indicated that under certain circumstances, less than individual notice would satisfy due process:

> This type of trust presupposes a large number of small interests. The individual interest does not stand alone but is identical with that of a class. The rights of each in the integrity of the fund and the fidelity of the trustee are shared by many other beneficiaries. *Therefore notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objection sustained would inure to the benefit of all.*[78]

Although *Mullane* was not a class action, it was a form of representative suit and its holding applies to modern class actions. Prejudgment notice safeguards the absent parties' interests by allowing them a timely means of objecting to litigation ostensibly filed on their behalf. These objections allow the court to determine whether the representatives are

74. 339 U.S. 306 (1950).

75. *Id.* at 309-10.

76. *Id.* at 313-14 (citations omitted).

77. *Id.* at 319. The Court pointed out that the trustee individually communicated with the beneficiaries upon establishing the common trust fund and when remitting their income, and that individual notice would not unduly interfere with the maintenance of the suit or frustrate the legitimate state interest in rendering a final accounting of the fund.

78. *Id.* (emphasis added).

indeed acting on behalf of the purported class. Thus, *Mullane* essentially assigns notice a role of supplementing and ensuring the adequacy of the representation.

Although prejudgment notice is a requirement in the majority of class action rules, the extent of notice required is not uniform.[79] Most class action rules distinguish between the various types of class suits. Suits claiming injunctive relief and suits against a limited fund typically have discretionary notice provisions, while suits principally for damages and based only on common questions of law or fact typically have mandatory notice provisions.[80] The extent of notice constitutionally *required* in common question class suits remains unanswered.

The Supreme Court discussed this issue in *Eisen v. Carlisle & Jacquelin*,[81] which involved the certification of a common question class action under the current federal class action rule.[82] By literally applying

79. *See supra* notes 43, 51-52 and accompanying text.

80. *See supra* notes 51-52. The federal rule allows for discretionary notice in nondamage class actions. FED. R. CIV. P. 23(d).

81. 417 U.S. 156 (1974).

82. FED. R. CIV. P. 23. The current rule is the culmination of various attempts to codify the class action device. Indeed, the history of the federal codification reveals the problems generated by a device which endeavors to bind parties not before the court. Codification began in 1842 with Federal Equity Rule 48:

> Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. *But, in such cases, the decree shall be without prejudice to the rights and claims of the absent parties.*

(quoted in 7 WRIGHT & MILLER, *supra* note 1, at § 1751) (emphasis added). Despite the last sentence, the Supreme Court found the judgment binding on absent parties in Smith v. Swormstedt, 57 U.S. (16 How.) 288, 303 (1853).

Equity Rule 48 was replaced with a more concise rule, Federal Equity Rule 38, in 1912: "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole." The new rule omitted the reference to the binding effects of a class judgment, and as a result, there was uncertainty about the binding effect of a class judgment. 7 WRIGHT & MILLER, *supra* note 1, at § 1751. However, in Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921), the Supreme Court "left little doubt as to its belief in the desirability of binding unnamed members of a class." 7 WRIGHT & MILLER, *supra* note 1, at § 1751, p. 509.

Class actions affording legal relief were authorized in 1938 with the promulgation of Original Rule 23, FED. R. CIV. P. 23 (1938) (amended 1966). The rule divided class actions into categories which came to be known as "true", "hybrid" and "spurious". *See generally* 7 WRIGHT & MILLER, *supra* note 1, at § 1752. The spurious category concerned actions involving "a common question of law or fact affecting the several rights and a common relief is sought." FED. R. CIV. P. 23 (1938) (amended 1966). Spurious actions were not binding upon absent parties, and this led to the practice of one-way intervention. The absent party could take advantage of a favorable judgment but was not bound by an adverse judgment.

The most recent effort at federal codification is the Revised Rule 23, FED. R. CIV. P. 23, which has categories roughly analogous to those in the original rule but which are based on the

Mullane and strictly interpreting the federal rule, the *Eisen* Court held that individual notice must be sent to "all members who can be identified through reasonable effort."[83] Although the Court acknowledged that the costs of such a requirement would have the effect of terminating the action and precluding many similar actions,[84] the Court insisted that such individual notice be provided.

The *Eisen* decision generated considerable debate as to whether the decision was based on an interpretation of Rule 23 or on the Due Process Clause.[85] If *Eisen* were a due process decision, its notice holding would have been applicable to state actions. If *Eisen* were a rule decision, state courts would have been free to develop their own interpretations as to the applicability of *Mullane* to common question class suits. A number of states concluded that *Eisen* was a rule decision and rejected an inflexible requirement of individual notice in all common question class actions.[86] While accepting the principle that notice is a necessary element of due process which is required in class actions, these courts retained discretion as to the type of notice required in a given case.[87] Circumstances consid-

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subject matter of the claims and relief sought, rather than the jural relationships between the class members. A principal aim of the drafters of the Revised Rule was to ensure that class judgments were binding on all class members. *Advisory Committee Notes*, 39 F.R.D. 69, 99 (1966); *see also* Kaplan, *supra* note 65.

Currently, the Revised Rule is the model for the majority of the state class action statutes and the Uniform Class Action Rule, UNIF. CLASS ACTION [ACT][RULE], 12 U.L.A. 26 (Supp. 1985).

State codification of class actions originally began in the mid 1800's, commencing in 1849 with an amendment to the Field code of New York. The Field Code version was the predecessor to Federal Equity Rule 38, and stated: "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole." 1849 N.Y. LAWS ch. 438 § 119. For a complete list of the state rules currently in force, see *supra* note 43.

83. Eisen v. Carlisle & Jacquelin, 417 U.S. at 177.

84. *Id.* at 176.

85. *See generally* 7A WRIGHT, MILLER & KANE, *supra* note 52, at § 1786; 3 NEWBERG, *supra* note 52, at § 13.20; Shaman, *Notice Requirments in State Court Class Actions: The Aftermath of Eisen*, 4 CLASS ACTION REP. 195 (1975) (advocating interpreting *Eisen* as a rule decision, but arguing that neither the rule nor due process requires individual notice).

86. *See, e.g.*, Ray v. Midland Grace Trust Co. 35 N.Y.2d 147, 316 N.E.2d 320, 359 N.Y.D.2d 28 (1974); Cartt v. Superior Court, 50 Cal. App. 3d 960, 124 Cal. Rptr. 376 (1975); *see also* 3 NEWBERG, *supra* note 52, at § 13.20.

87. *See, e.g.*, Frank v. Teachers Ins. & Annuity Ass'n, 71 Ill. 2d 83, 592-93, 376 N.E.2d 1377, 1381-82 (1978):

> While the courts . . . differ as to whether the result in Eisen was predicated upon Federal Rule 23(c)(2) . . . or based upon due process considerations, this court has recognized that although "notice to absent class members as it relates to due process was discussed in Eisen, that constitutional requirement was not the basis of the Eisen decision." (citations omitted) . . . We [have] also noted . . . that due process does not require individual notice to every member of the class in all circumstances. . . . Due process considerations come into play, of course, because in class action litigation all members of the class are bound by the result. Where it is apparent that there may be

ered by courts in determining the type of notice required in a given case include the cohesiveness of the class, the size of the claims, the likelihood of relitigation, the expected cost of individual notice and the desirability of maintaining the action.[88]

In *Cartt v. Superior Court*,[89] a California court of appeals took a unique approach to notice requirements by adopting two distinct notice standards. The first was the extent of notice required to maintain the action initially, and the second, possibly more rigorous standard, was the extent of notice required to preclude relitigation of the issues by absent class members.[90] Although the court's approach was reasonable in that it accounts for the plaintiff's administrative problems in providing pre-judgment notice,[91] it fails to consider the interests of the party opposing the class. Because the *Shutts* decision reiterates the necessity of assuring that a class judgment is binding on all class members prior to certification of the suit,[92] it is doubtful that the *Cartt* approach would be sustained after *Shutts*.

State courts were not alone in rejecting *Eisen* as a due process decision. The Commissioners on Uniform State Laws rejected its holding in their draft of the Uniform Class Action Rule.[93] The Uniform Rule takes a flexible approach to notice and requires individual notice to absent plaintiffs with claims of $100 or more.[94] To date, the Uniform Rule has been enacted by Iowa and North Dakota.[95] The American Law Institute also rejected a requirement of individual notice in representative suits: "A person represented by a party to an action is bound by the judgment even though the person himself does not have notice of the action, is not served with process, or is not subject to service of process."[96] In addition, the legislatures of California and New York rejected mandatory individ-

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differing interests among class members or differing opinions as to the desirability of the relief requested in the complaint, those persons who may object have a right to be notified of its pendency so that they may take such actions as they deem appropriate to the protection of their interests.

88. *See, e.g., Frank*, 71 Ill. 2d at 593, 376 N.E.2d at 1381 (allowing less than individual notice stating, "[t]o the degree there is cohesiveness within the class, the need for notice to absent members will, of course, tend toward a minimum . . . ."); Cartt v. Superior Court, 50 Cal. App. 3d 960, 973, 124 Cal. Rptr. 376, 385 (1975) (finding individual notice unnecessary where "[t]he class is huge, the damages per member trifling and the financial burden of the notice ordered by the . . . court entirely out of proportion to its beneficial results.").

89. 50 Cal. App. 3d 960, 124 Cal. Rptr. 376 (1975).

90. *Id.* at 965, 124 Cal. Rptr. at 383.

91. *Id.* at 973, 124 Cal. Rptr. at 385.

92. *Shutts*, 105 S. Ct. at 2972.

93. UNIF. CLASS ACTION [ACT][RULE], 12 U.L.A. 24 (Supp. 1985).

94. *Id.* at § 7.

95. IOWA R. CIV. P. 42.1-42.20 (adopted 1980); N.D. R. CIV. P. 23 (adopted 1976).

96. RESTATEMENT (SECOND) OF JUDGMENTS § 41(2) (1980). Section 41 is qualified by the following:

(1) A person is not bound by a judgment for or against a party who purports to represent him if: (a) Notice concerning the representation was required to be given

ual notice in their class action statutes.[97]

Class action defendants' attempts to apply the minimum contacts doctrine to nonresident class plaintiffs is of more recent vintage. The argument arises from the Supreme Court's decision in *World-Wide Volkswagon Corporation v. Woodson*,[98] which indicated that the minimum contacts doctrine had federalism underpinnings as well as providing due process protections to out of state defendants.[99] Class action defendants have argued that trial courts cannot reach beyond their borders and bind class plaintiffs without exceeding the scope of their own state's sovereignty.[100] Generally, state courts have rejected this argument.[101] *Shutts* is the first Supreme Court decision squarely dealing with the argument, and it too rejects the applicability of the minimum contacts doctrine to absent class plaintiffs.[102]

III. Interpretations of *Shutts*

In one respect, *Shutts* encourages the maintenance of multistate class actions by clearly declaring the minimum contacts standard inapplicable to absent class plaintiffs and by approving the opt out procedures authorized by most of the current rules. But the Court's language gives rise to interpretations which actually may limit the effective use of class actions, particularly multistate class suits.

> to the represented person, or others who might act to protect his interest, and there was no substantial compliance with the requirement . . . .

Id., at § 42. However, the commentators reject the proposition that individual notice is a *prerequisite* to binding absent parties to a judgment in a representative suit:

> With respect to Federal Rule 23 and similar rules governing class suits, the queston of what, under the circumstances of the case, constitutes adequate notice to the represented class is itself a matter of some uncertainty. . . . That question is beyond the scope of this Restatement. The rule of paragraph (1)(a) deals with the situation that arises when the required notice, whatever it might be, was not given.

Id., at § 42 comment b (citations omitted).

97. Consumers Legal Remedies Act, CAL. CIV. CODE §§ 1750-1784 (West 1985) (allowing notice by publication "if personal notification is unreasonably expensive . . . ." *Id.*, at § 1781(d)); N.Y. CIV. PRAC. LAW §§ 901-909 (McKinney 1976) (allowing judicial discretion to "send[ ] notice to a random sample of the class." *Id.*, at § 904c(III)).

98. 444 U.S. 286 (1980).

99. *Id.* at 291-94.

100. *See, e.g.*, Shutts v. Phillips Petroleum Co., 222 Kan. 527, 567 P.2d 1292 (1977), *cert. denied*, 434 U.S. 1068 (1978) (a successful prior class action commenced by Mr. Shutts for interest on suspended royalties from leaseholds located in Kansas, Texas and Oklahoma during the years 1961-70; referred to as *"Shutts I"*); *see also*, Note, *Civil Procedure—Class Action Jurisdiction Over Nonresident Plaintiffs—Shutts v. Phillips Petroleum Company ("Shutts II")*, 33 U. KAN. L. REV. 525 (1985).

101. *See, e.g., Shutts I*, 222 Kan. 527, 567 P.2d 1292 (1977); Horst v. Guy, 211 N.W.2d 723 (N.D. 1973).

102. *Shutts*, 105 S. Ct. at 2973.

A. Individual Notice

The first ambiguity in *Shutts* arises from the fact that the class representatives provided individual notice to each member of the certified class. This fact could be read as integral to the Court's decision or as merely an incidental fact. The Court stated:

> The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane . . . ; *c.f.* Eisen v. Carlisle & Jacqueline . . . . The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court.[103]

The most expansive reading of this holding is that individual notice must be given to all absent plaintiffs in all common question class suits. Another plausible interpretation is that *Shutts* requires individual notice to nonresident class plaintiffs but not to class plaintiffs residing in the forum state. It is likely that defendants in class suits will press one of these interpretations to prevent the certification of large classes of plaintiffs because of the expense of individual notice. If, however, *Shutts* is read as a whole and in context with prior Supreme Court decisions on class actions, the legitimate interpretation of *Shutts* is more limited: the decision merely rejects the applicability of the minimum contacts doctrine, requires the ability to opt out of common question class actions, and requires a notice scheme—but not necessarily individual notice.

The notice holding may be interpreted as requiring individual notice to *all* absent plaintiffs in *all* common question class actions. The opinion states that absent plaintiffs must have the opportunity to opt out of the suit by returning an opt out or request for exclusion "form" to the court.[104] In support of its notice holding, the Court cites *Eisen*—where individual notice was mandated—as analogous;[105] in addition, the Court stated that absent class plaintiffs must "receive" notice.[106]

Although *Shutts* promotes the ability to opt out to constitutional dimensions, it does not necessarily follow that individual notice is required. The issue in *Shutts* was whether the opt out procedure authorized by the Kansas class action rule violated the due process rights of the absent class plaintiffs, and the Court held only that, at a minimum, due

103. *Id.* at 2975.
104. *Id.*
105. *Id.*
106. *Id.*

process requires adequate representation and the ability to opt out of the litigation. The *required method* for providing adequate notice and the opportunity to opt out was not at issue, nor definitively ruled upon by the Court. Further, the Court quoted *Mullane*, and stated that absent class plaintiffs must receive the best notice practicable under the circumstances.[107] Other courts relying on the same language in *Mullane* have rejected an individual notice requirement.[108]

Although the Court stated that absent plaintiffs must be able to return a "form" to the certifying court, *Shutts* does not require that the form be supplied by individual notice. Such a form could easily be made available through publication in newspapers and magazines. The pertinent aspect of the opt out holding is the *ability* to opt out of the litigation, not a required method for doing so.

Undoubtedly the *Shutts* Court was aware of the debate generated by *Eisen*, and thus its failure to categorically state that individual notice is a due process requirement is significant. The absence of a clear statement requiring individual notice should be interpreted as an intentional omission: the Court did not make such a statement because due process does not require individual notice in all circumstances.

B. Notice As Consent

More significant, perhaps, is the implication in *Shutts* that the opt out notice scheme established that each nonresident class member in effect consented to jurisdiction. If *Shutts* requires consent by each nonresident class member, and if *receipt* of notice establishes consent, then arguably *Shutts* requires, at a minimum, individual notice to nonresident class members. On this interpretation, the failure to opt out after receipt of individual notice would be the specific act by which consent could be determined.[109] If notice is elevated to the role of establishing consent to jurisdiction, then non-receipt of notice would be tantamount to a lack of jurisdiction.

However, this elevated role of notice is not mandated by the specific language or the basic rationale of the Court's decision. The consent discussion can be read as responding to Phillips' contention that opt out procedures are insufficient to establish consent. The Court did not hold that the absent class plaintiffs must consent to jurisdiction as a prerequisite to maintaining a common question class action; rather, in dicta, the Court showed that such a procedure, under certain circumstances, can establish consent. The important point is that the Court upheld the individual opt out procedure utilized in the case by twice stating that such a

107. *Id.*

108. *See supra* notes 86-92 and accompanying text.

109. The *Shutts* Court emphasized that only those persons whose notices were actually delivered were included in the class. *Shutts*, 105 S. Ct. at 2969, 2976.

procedure "satisifies" due process;[110] it did not state that due process requires such a procedure.

The notice-as-consent interpretation is inconsistent with the tenor of *Shutts*, and, if accepted, would raise difficult and novel issues for the courts. If the role of notice is to establish consent to jurisdiction by nonresident class plaintiffs, it apparently would be unnecessary to provide notice to resident plaintiffs, where traditional notions of territorial jurisdiction exist.[111] However, the *Shutts* Court clearly held that some type of notice to class members—the best practicable under the circumstances—is required.[112]

An individual notice interpretation of *Shutts* would not facially invalidate the majority of class action rules which contain discretionary notice provisions, but it would, however, overturn a decade of thoughtful decisions by various state courts[113] and invalidate the consumer class action statutes of California and New York.[114] It would also invalidate the Uniform Class Action Rule as enacted by Iowa and North Dakota.[115] Indeed, an individual notice requirement could be the death knell for many consumer class actions because of its prohibitive costs.[116]

IV. The Better Interpretation

Read in context, *Shutts* should be interpreted as holding that due process requires a notice scheme in all class action suits, but that the scheme need not rely on individual notice. This interpretation enables class actions to provide the benefits for which they were developed, while simultaneously securing ample protection for the rights of absent class plaintiffs.

The thrust of *Shutts* supports a flexible notice requirement. The underlying rationale for the Court's rejection of the minimum contacts doctrine in class suits is that due process is a flexible concept. The Court illustrated this by contrasting the concerns of out-of-state defendants with those of absent class plaintiffs. The Court mentioned that absent class plaintiffs have protections unique to class suits.[117] Significant among these protections is one created by *Shutts* itself: the defendant can raise the due process concerns of the absent plaintiffs. By emphasizing that it is in the defendant's interest to assure a binding class judgment, and giving the defendant standing to raise potential claims of the

110. *Id.* at 2976.
111. *See generally* 18 WRIGHT, MILLER & COOPER, *supra* note 32, at § 1064.
112. *Shutts*, 105 S. Ct. at 2975.
113. *See supra* notes 86-92 and accompanying text.
114. *See supra* note 97.
115. *See supra* notes 93, 95 and accompanying text.
116. *See* Shaman, *supra* note 5.
117. *See supra* note 37.

absent plaintiffs, *Shutts* in effect provides the absent plaintiffs with an additional "representative"—the defendant.

Acknowledging that the concerns of out-of-state defendants are different from those of absent class plaintiffs, the Court held that due process affords the former more protection than it does the latter.[118] The next logical step is to apply this approach within the framework of common question class actions. The concerns of absent class plaintiffs vary with the nature of the case, and the due process protections required in a given case should be designed to respond to those varying concerns. A mandatory individual notice requirement does not respond to these differing needs.

An example using the federal rule illustrates the inappropriateness of a uniform notice standard for all common question class actions. Under the federal rule, and the majority of the state rules, a mass tort class action and a consumer class action could be certified under the same subdivision.[119] It is apparent that the interests of the class members in these two cases will be substantially different. The plaintiff in the tort action generally is aware of her claim. The potential of a substantial judgment and the practice of contingency fees provides such a plaintiff access to counsel, and she has a potentially greater loss if her claim is foreclosed by an adverse class judgment. On the other hand, the consumer victim may well be unaware that she has a cause of action. Financial barriers may effectively preclude her from litigating a claim of which she is aware, and she usually has a smaller potential for loss if her claim is foreclosed by res judicata.

Individual notice in the tort action may be practicable, and considering the enhanced interests of the class members, desirable. Individual notice in the consumer action may be both impracticable and unnecessary because selective notice will likely produce any legitimate objections which would be raised. To contend that due process requires the same level of notice in both situations contradicts the concept that due process molds to the perceived needs of the parties in a given situation.

Moreover, the individual notice requirement, as it exists in the federal courts, is more untenable because class representatives merely strive to certify their suits pursuant to categories in which notice is discretionary.[120] Artful pleading enables the tort action to fall within a limited

118. *Shutts*, 105 S. Ct. at 2975.

119. FED. R. CIV. P. 23(b)(3) (common question subdivision). For a discussion of mass tort claims filed pursuant to the (b)(3) classification, *see* 7A WRIGHT, MILLER & KANE, *supra* note 52, at § 1783 n.9; *see also* Note, *Jurisdiction and Notice in Class Actions: "Playing Fair" With National Classes*, 132 U. PA. L. REV. 1487, 1503 n.80 (1984).

120. *E.g.*, Abed v. A.H. Robbins Co., 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983) (Defendant A.H. Robbins Co. attempted to certify a class pursuant to the (b)(1)(B) limited fund subdivision for the outstanding claims arising from the use of its Dalkon Shield IUD. The Ninth Circuit refused to certify the class, finding that Robbins failed to

fund classification—where notice is discretionary—but there are no legitimate arguments which enable a consumer action to avoid the common question classification. Thus, under the rules as they presently exist, the consumer action is in effect barred from the federal courts; yet the mass tort action may proceed, possibly with no notice whatsoever. An individual notice requirement in common question class actions, while purportedly protecting the interests of the absent class plaintiffs, effectively discriminates against many meritorious actions by foreclosing them from the federal courts.[121]

The argument for a flexible notice requirement does not advocate dispensing with individual notice where it is practicable and desirable.[122] However, a mandatory individual notice requirement does not always protect the interests of the absent class plaintiffs. Their interests are best protected by focusing on the adequacy of representation. This focus ensures that their interests are not foreclosed without due process because an absent member can attack the judgment if she can establish that the representatives failed to protect her interests.[123] By contrast, receipt of notice and failure to opt out can have the effect of foreclosing an absent party's claim regardless of the adequacy of the representation.[124]

Undoubtedly individual notice informs many absent class plaintiffs of their rights, but reliance on such notice as a principal due process safeguard is misplaced. Legal notices are generally mysterious—if not incomprehensible—to the average citizen,[125] and contending that mere receipt of notice protects a potential litigant's interests defies common experience. Indeed, there are cases in which receipt of notice clearly failed to inform the parties of the pendency of the action or of their

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prove the existence of a limited fund); *see also* 7A WRIGHT, MILLER & KANE, *supra* note 52, at § 1779.

121. Maintenance of consumer class actions in the federal courts was effectively curtailed by the decision of Zahn v. International Paper Co., 414 U.S. 291 (1973), where the Court held that *each* class plaintiff's claim must meet the $10,000 jurisdictional amount to satisfy diversity jurisdiction, 28 U.S.C. § 1332. Although *Zahn* limited the use of the federal courts in diversity cases, classes maintained under federal question jurisdiction are allowed and some consumer class actions qualify. *See, e.g.,* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (claims arising from violations of the federal security laws). The *Eisen* individual notice requirement effectively precludes many of those suits, which shifted many multistate class actions to the state courts. *See* Dam, *Class Action Notice: Who Needs It?,* 1974 SUP. CT. REV. 97, 99 (suggesting that the true reason for the *Eisen* decision was to ease the caseload of the federal courts by forcing class suits into the state courts).

122. *See, e.g.,* McCall, *supra* note 4 (advocating a balancing approach between the state's interest in redressing consumer grievances and the obstacles of individual notice).

123. *See supra* note 66 and accompanying text.

124. *See supra* note 68.

125. *See generally* T. BARTSH, F. BODDY, B. KING & P. THOMPSON, A CLASS-ACTION SUIT THAT WORKED 101-118 (1978), for a discussion of various types of notice, including comparisons on the relative effectiveness of individual notice and media notice.

rights.[126]

Conclusion

Prejudgment notice in class actions can be an integral aspect of the protections afforded absent class plaintiffs. To serve its purposes, however, the notice should be designed to protect the interests of the absent class members by giving them the opportunity to assist the court in determining whether the class representatives will adequately represent their interests. The interests of class plaintiffs are not protected when redress of their claims is precluded altogether because a prejudgment notice requirement is prohibitively expensive. The better approach is for the court to design a notice scheme tailored to the facts of each case. *Shutts* furthered this approach by refusing to apply a clearly inappropriate safeguard—minimum contacts. It is for the state courts to continue this approach.

The forum court should first determine the likelihood of relitigation by absent class plaintiffs, and then formulate a notice scheme which is likely to inform as many of the absent parties as possible. The interests of the absent parties will be protected, the defendant will be assured of a binding judgment, and the class action device will continue to function as a viable means for redressing multiparty complaints. With this approach, the courts will have effectively tamed a beneficial beast and laid Justice Holmes' fears to rest.

*By Bob Wenbourne**

126. *See* Miller, *Problems of Giving Notice in Class Actions,* 58 F.R.D. 299, 321-22 (1973):

> The sad truth is that notices issued by courts or attorneys are much too larded with legal jargon to be understood by the average citizen.
>
> A good illustration of this also is offered by the tetracycline cases. The Attorney General of North Carolina sent notice of the action to citizens . . . . Some of the responses are worth reading . . . .
>
> Dear Mr. Clerk: I have your notice that I owe you $300 for selling drugs. I have never sold any drugs, especially those you have listed; but I have sold a little whiskey once in a while.
>
> . . . .
>
> Dear Sir: I received your pamphlet on drugs, which I think will be of great value to me in the future. I am unable to attend your class, however.

Id. at 322.

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