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NOTES

INFORMATION FAMINE, DUE PROCESS, AND THE REVISED CLASS ACTION RULE: WHEN SHOULD COURTS PROVIDE A SECOND OPPORTUNITY TO OPT OUT?

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INTRODUCTION

Imagine your friend Alice, a young mother, comes to you for advice. Her baby has severe birth defects, which likely resulted from the morning sickness drug Alice took when she was pregnant. Alice has incurred tremendous hospital bills for her child and is afraid she will not have enough money to pay for the additional surgeries her child will need in the future. After looking over the documents she recently received, you tell her she has a fast-approaching deadline to decide whether to commit herself to accepting a settlement from the company that manufactured the morning sickness drug. Understandably, Alice wants to know how much she would receive under the settlement and is frustrated because the documents she received do not give her this information. To her great astonishment, you explain that the settlement does not yet exist and there is no way to predict how much the settlement might ultimately provide her. Anticipating her next question, you then tell her that she will not be able to learn the settlement's terms before the deadline for accepting or rejecting them. In fact, you know the attorney who represents her has barely begun negotiations with the pharmaceutical company.

What you are explaining to Alice is that her claim against the pharmaceutical company has become part of a traditional class action under Federal Rule of Civil Procedure 23(b)(3). The class action al-

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lows a court to deal with the large number of similar claims against the pharmaceutical company in a single lawsuit that will more than likely result in a court-approved settlement. If Alice stays in the class action, her claim will be conclusively decided by the class action and she will—hopefully—receive a check from the pharmaceutical company. Alice also has the option to exclude herself from the class, or "opt out," if she thinks she can obtain a more favorable settlement or judgment by bringing an individual lawsuit. The catch is that Alice must decide, right now, whether to bind herself to accept the settlement that the class action will ultimately yield or to opt out and go it alone.[1] If she stays in the class action, settlement negotiations will be entirely out of her hands. She will have no authority to reject proposed settlements and will simply receive whatever remedy the class settlement provides. If she feels the settlement is unfair, her recourse will be to become an objector and attempt to persuade the court to withhold its approval of the settlement. Alternatively, she may entreat class counsel to renegotiate with the defendant. Neither avenue of protest is likely to be successful.[2] So, Alice must choose today whether she will opt out of the settlement or accept whatever amount the class action ultimately provides.

With a lawyer's help, Alice can roughly estimate how much she could recover in an individual lawsuit, but this information is not sufficient to make an informed opt-out decision because she cannot know the value of the class settlement. The class action might be a better option or it might be much worse. Either way, Alice is stuck. Her choice is a painful real life parallel to the dilemma often posed to game show contestants: whether to accept a prize they have seen or reject it in favor of the unknown prize behind door number two. For Alice, the choice is not simply a gamble for the greater of two windfalls. Rather, her gamble is to pick the avenue that will come closest to covering her debt to the hospital and her child's future surgeries.

1 Because Rule 23(b)(3) requires that class members receive notice and an opportunity for exclusion "[a]s soon as practicable after the commencement of an action brought as a class action," opt-out deadlines often expire before claimholders possess enough information about the value of their claims to make an informed decision about whether to opt out. FED. R. CIV. P. 23(c)(1); *see* Report of the Judicial Conference Committee on Rules of Practice and Procedure, 215 F.R.D. 158, 189 (2003) [hereinafter 2003 Report of Rules Committee].

2 As at least one court has acknowledged, the ability to appear to contest a settlement often is insufficient to protect a person's property interest in her cause of action. *See* Colt Indus. S'holder Litig. v. Colt Indus. Inc., 566 N.E.2d 1160, 1167 (N.Y. 1991) ("Despite the fact that Merritt had notice of the action and could have chosen to appear to contest the settlement, we do not believe that this was sufficient to protect Merritt's property interest in its cause of action.").

If she does not opt out of the class action, she commits herself to accepting whatever money the class settlement provides and forgoes her opportunity to pursue an individual lawsuit.

This Note contends that, in appropriate circumstances, judges overseeing class litigation should exercise their discretion to provide class members like Alice a *second* chance to opt out at the time when settlement terms are known. Such an opportunity comports with the plaintiff's traditional due process right to exert control over her claim and simultaneously recognizes the need to efficiently resolve large numbers of similar claims. Judges should provide a second opt-out opportunity when two factors are present: (1) when class members did not have sufficient information to make an informed choice by the opt-out deadline and (2) when a significant number of the claims would be economically viable in individual litigation. When both of these factors are present, a class member's interest in controlling her claim will normally outweigh the efficiency gains that might be achieved by denying class members a second opportunity to opt out.

I. THE 2003 REVISION TO RULE 23

In December 2003, Congress approved several revisions to the federal class action rule. Among these revisions was a new provision that gave courts discretionary authority to direct a second opt-out opportunity when the parties reach settlement terms.[3] The added text provides: "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."[4]

As the Federal Rules Advisory Committee explains, at a "basic level, the second opt-out opportunity gives class members the same opportunity to accept or reject a proposed settlement as persons enjoy in individual lawsuits."[5] It also "introduces a measure of class-member self-determination and control that best harmonizes the class action with traditional litigation."[6] The Committee further explains:

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3 FED. R. CIV. P. 23(e)(3). Prior to the revision, several judges had already approved settlements requiring a second opt-out opportunity. *See, e.g., In re* Silicone Breast Implant Prods. Liab. Litig., No. CV 92-P-10000-S, 1994 U.S. Dist. LEXIS 12521, at *17 (N.D. Ala. Sept. 1, 1994).

4 FED. R. CIV. P. 23(e)(3).

5 2003 Report of Rules Committee, *supra* note 1, at 189–90.

6 *Id.* at 190.

> The presumption of consent that follows a failure to affirmatively opt out at the time of certification may lose its footing when circumstances have changed materially from the time when the class action is finally settled. In these cases, a second opt-out opportunity could relieve individuals from the unforeseen consequences of inaction or decisions made at the time of certification, when limited meaningful information was available.[7]

Though the revision to Rule 23 makes clear that judges may direct a second opt-out opportunity, it provides very little guidance as to what factors judges should consider to decide whether to do so. The Committee's comments simply state that "[t]here is no presumption that a second opt-out opportunity should be afforded" and the "question is left entirely to the court's discretion."[8] Perhaps the most significant guidance for courts is that the Committee considered but declined to adopt a revision that would have automatically provided a second opt-out opportunity.[9]

As of September 2004, only two reported opinions have grappled with the question of when courts should provide a second opt-out opportunity pursuant to Rule 23's new opt-out provision.[10] Both declined to provide the second opt-out opportunity.[11] In one of those cases, the judge acknowledged that Rule 23 now allows courts to direct a second opt-out opportunity, but concluded that "[b]ecause I have approved these [s]ettlements as fair . . . due process does not afford [c]lass members a second opportunity to opt out."[12] The judge's deci-

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7 *Id.*

8 *Id.* at 190.

9 The Committee considered a revision that would have "direct[ed] that notice of the proposed settlement afford a new opportunity to elect exclusion unless the court finds good cause to deny the opportunity." *Id.* at 243. The Committee chose the discretionary version over the mandatory version amidst concern from members of the bar that an automatic second opt-out opportunity would impede settlement. *See id.* at 244 ("The common observation that the proposal may make it more difficult to reach a settlement agreement was divided between the view that the result will be better terms for class members and the view that good settlements may be defeated by a settlement opt-out opportunity.").

10 *In re* Auto. Refinishing Paint Antitrust, MDL No. 1426, 2004 WL 1068807, at *3 (E.D. Pa. May 11, 2004); *In re* Visa Check/Mastermoney Antitrust Litig., 297 F. Supp. 2d 503 (E.D.N.Y. 2003). Another court noted, without comment, that the class had enjoyed a second opportunity to opt out after the settlement terms were reached pursuant to the revised rule. *In re* AMF Bowling, No. 99 Civ. 3023(PKC), 2004 WL 2049277, at *2 (S.D.N.Y. Sept. 13, 2004).

11 *In re Auto. Refinishing Paint Antitrust*, 2004 WL 1068807 at *3; *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d at 518 n.18.

12 *See In re Visa Check/Mastermoney Antitrust Litig*, 297 F. Supp. 2d at 518 n.18 (internal citations omitted).

sion may have been influenced by the Federal Rules Advisory Committee's suggestion that a second opt out can "provide[ ] an opportunity to gain information that the court can use in evaluating the proposed settlement."[13] By focusing on this language, the judge could have concluded that informed opt out is necessary only when the court reviewing the class settlement suspects that the settlement is unfair.

This Note, by contrast, contends that the purpose and need for informed opt out is much greater than simply to give judges information about whether a proposed settlement is fair. If judges provide a second opt-out opportunity only when settlements are unfair, the revision adds nothing to the rule. Rule 23 already required judges to withhold their approval of unfair settlements. Informed opt out should be viewed not simply as a tool for courts to gather information about the fairness of a settlement, but as an important procedural safeguard that protects the right of claimholders to exert control over their claims.

II. SUMMARY

The first part of this Note argues that the traditional conception of a plaintiff's right to exert control over her claim, the history of Rule 23, and the emerging concern about "information famine" in the context of class action settlements make an informed opt-out opportunity appropriate for most class actions involving damages claims. Though the current majority view is that due process does not require a second opportunity to opt out, there is strong evidence that the drafters of Rule 23 believed that the purpose of the right to opt out was to enable potential class members to intelligently decide whether to stay in the class action. Furthermore, recent class action settlement cases from the Supreme Court and the courts of appeals evidence a growing concern that the inability of class members to intelligently exercise their right to opt out violates due process. Much like "future claimant" class members who cannot evaluate the adequacy of a proposed settlement because they have not yet suffered injury, class members who must decide whether to opt out before settlement terms are known cannot evaluate whether their interests would be better served by opting out or remaining in the class.

The second part of this Note proposes a two-factored test courts should employ to decide whether to exercise their discretionary authority to provide an opportunity for class members to opt out after settlement terms are known. A court should first consider whether

13 2003 Report of Rules Committee, *supra* note 1, at 243.

the class members had insufficient information at the initial opt-out deadline to decide whether to stay in the class. In some situations, the settlement terms may have been known or readily estimable and thus the class members actually had sufficient information to make an informed decision. Second, the court should consider whether the class action contains claims large enough to be economically viable in individual litigation. The presence of such claims strongly argues for an opportunity for class members to make an informed opt-out decision. If both of these factors are present, the court should provide an informed opt-out opportunity. The Note concludes by arguing that informed opt out will not undermine the efficiency of (b)(3) class actions.

III. STRIKING A BALANCE: THE FEDERAL CLASS ACTION RULE

The federal class action rule attempts to strike an acceptable balance between the rights of individual plaintiffs to exert control over the fate of their claims and the benefits of simultaneously resolving similar claims as a group. The current compromise between efficiency and individual rights has yielded a system that guarantees class members different due process rights depending on the character of their claims. The rule designates three general types of class actions, each providing their members different levels of procedural protection. Class members like Alice, with individual damages claims, are entitled (1) to be adequately represented by a party with the same interests,[14] (2) to receive notice that their claims will be conclusively determined by the class judgment or settlement,[15] and (3) to have an opportunity to opt out of the class action to bring an individual claim.[16] These class actions fall under Federal Rule of Civil Procedure 23(b)(3) and are commonly called "(b)(3) class actions." They are also known as "opt-out" class actions because the other two types of class actions—certified under Rule 23(b)(1) and Rule 23(b)(2)—do not provide class members the right to opt out.[17] This is because the (b)(1) and (b)(2) provisions address special situations where there is an overwhelming need to resolve all the class members' claims in one lawsuit because a multiplicity of lawsuits would be harmful to the class.[18] Class actions brought under Rule 23(b)(1) often involve situa-

14 FED. R. CIV. P. 23(a).

15 FED. R. CIV. P. 23(c)(2).

16 *Id.*

17 *See* Fed. R. Civ. P. 23.

18 In (b)(1) and (b)(2) class actions, the benefits of simultaneous resolution of the entire class's claims outweigh the costs of limiting the rights of the individual class

tions in which a court must resolve all potential claims in one suit because there are insufficient funds to cover the claims. Class actions brought under Rule 23(b)(2) often involve injunctive relief where multiple suits would inflict inconsistent obligations on the defendant. This Note focuses on (b)(3) class actions. In (b)(3) class actions, Rule 23 guarantees class members an opportunity to opt out, but does not require that the opt-out opportunity occur at a time when class members have knowledge of the settlement terms. Generally, the opt-out deadline occurs shortly after class certification and before settlement terms are known.[19]

Since the creation of the (b)(3) class action, both practitioners and academics have vigorously debated the proper place of opt-out rights in class actions and whether class members should be able to opt out at all. The debate reflects a lack of consensus about how to balance each class member's interest in controlling her claim with the benefits of simultaneously resolving similar claims as a group. The long-standing ideals of the American adversarial system suggest that each class member with a traditional claim for money damages should possess the same unilateral authority to control her claim as is possessed by individual plaintiffs. As Professor Roger Trangsrud notes, it seems unfair to provide a plaintiff injured by a morning sickness drug

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members. No opt-out rights are provided in class actions that involve limited fund situations, covered by Rule 23(b)(1), because "the only question is how to divide up the pie." *In re* Telectronics Pacing Sys., Inc., 221 F.3d 870, 881 (6th Cir. 2000). All persons who have a right to a piece of the limited fund must be present in order to determine each claimholder's respective share. Opt-out rights are similarly denied in (b)(2) class actions because it is simply impracticable for some members of the plaintiff group to exempt themselves from the effect of the judgment. The (b)(2) class action is used for fashioning broad equitable remedies for a defendant's wrongdoing—such as maintaining unconstitutional prison conditions or segregated schools—that affect a large class of people. For this type of class action, there is a strong need "to avoid the possibility of conflicting judgments . . . which would subject the defendants to varying and possibly inconsistent obligations." Colt Indus. S'holder Litig. v. Colt Indus. Inc., 566 N.E.2d 1160, 1167 (N.Y. 1991). Accordingly, class members are not given the option to opt out and pursue their claims individually because the "interest in promoting individual control of litigation is outweighed by the importance of obtaining a single, binding determination." *Id.*

19 *See* DEBORAH R. HENSLER ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 75 (2000) ("Such early notice means that at the time they learn of the case, potential class members cannot know how it will be resolved and whether, or how much, they might be recompensed for the alleged harms."); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.311 (2004) ("Ordinarily, notice to class members should be given promptly after the certification order is issued.").

fewer procedural rights than a plaintiff injured in a car accident.[20] From the plaintiff's point of view, her injuries and need for compensation are the same whether she was the only person harmed by the defendant's negligence or one among thousands.

On the other side of the issue, the benefits of efficiently resolving large numbers of similar claims have led some commentators, such as Professor David Rosenberg, to recommend that the law should never let so-called "mass tort" victims exert independent control over their claims.[21] Rosenberg proposes that Congress should transform (b)(3) class actions into a vehicle for collective insurance whereby mass tort victims receive damages according to the relative severity of their injuries rather than the relative strength of their claims.[22] Accordingly, Rosenberg argues that the law should not permit any one class member to derail the efficiency of group settlement by opting out of the class.[23] He recommends not only that courts should deny class members a second opportunity to opt out but also that Congress should amend Rule 23 to eliminate the initial opt-out opportunity guaranteed to (b)(3) class members.[24]

Rosenberg's proposal, while certainly efficient from a macro-level financial perspective, would abrogate the traditional right of a plain-

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20 *See* Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, U. ILL. L. REV. 69, 87 (1989).

> Our civil justice system owes a twelve-year-old girl born with foreshortened limbs after her mother took a prescribed morning sickness drug the same due process it owes a thirty-two-year-old man paralyzed when the brakes on his Chevrolet fail and his automobile slams into a tree.

Id.

21 *See* David Rosenberg, *Adding a Second Opt-Out to Rule 23(b)(3) Class Actions: Cost Without Benefit*, 2003 U. CHI. LEGAL F. 19 [hereinafter Rosenberg, *Adding a Second Opt-Out*]; David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561 (1987); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851 (1984); David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases*, 71 N.Y.U. L. REV. 210 (1996); David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831 (2002) [hereinafter Rosenberg, *Mandatory-Litigation*]; David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393 (2000); David Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 B.U. L. REV. 695 (1989); David Rosenberg, *The Regulatory Advantage of Class Action*, *in* REGULATION THROUGH LITIGATION 244 (W. Kip Viscusi ed., 2002); Michael A. Perino, *Class Action Chaos? The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions*, 46 EMORY L.J. 85 (1997).

22 Rosenberg, *Mandatory-Litigation*, *supra* note 21, at 834.

23 *Id.* at 862.

24 Rosenberg, *Adding a Second Opt-Out*, *supra* note 21, at 23.

tiff to exert control over her claim. It would effectively transfer that control, by governmental fiat, to class attorneys and defense counsel. The appropriate measure for whether particular compromises between efficiency and individual rights are acceptable is rooted not merely in concern for efficiency, but also in concern for the individual procedural rights guaranteed by the Constitution.[25]

A. Opt Out and Due Process

The Due Process Clause applies whenever the government threatens a person with deprivation of their life, liberty, or property.[26] Class actions invoke the Due Process Clause because an individual's cause of action is itself a "protected property interest in its own right."[27] The Supreme Court has frequently acknowledged that a cause of action is property, separate and apart from the property that makes up the subject of the litigation.[28] Furthermore, the order of a court—including an order approving a class settlement—is a government act that extinguishes a claimholder's property right in her cause of action. In the class action context, the termination of claims through settlement is not merely a contractual exchange between the parties to the litigation but a governmentally-created procedure that extinguishes the claims of persons who—for most purposes—are not parties to the litigation.

The fact that a class judgment or settlement can extinguish class members' claims is a departure from the general rule that no one is bound by a judgment to which he was not a party or a party's successor in interest.[29] In class actions, the actual plaintiff parties to the case—the class representatives—litigate the case and decide whether

25 *See* Fuentes v. Shevin, 407 U.S. 67, 90 n.22 (1972) ("[O]ne might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency.") (quoting Stanley v. Illinois, 405 U.S. 645, 656 (1972)); *cf.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 628–29 (1997) ("The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution.").

26 U.S. CONST. amend. V.

27 Richards v. Jefferson County, 517 U.S. 793, 804 (1996).

28 *See id.*; Phillips Petroleum v. Shutts, 472 U.S. 797, 807 (1985) (noting that each class member possesses a constitutionally protected property interest in his or her claim); *see also* Colt Indus. S'holder Litig. v. Colt Indus. Inc., 566 N.E.2d 1160, 1167–68 (N.Y. 1991) (holding that a class member's damage claim was a constitutionally protected right and that certain procedural requirements had to be met before the class member could be bound by a class settlement).

29 *Richards*, 517 U.S. at 798 (citing Hansberry v. Lee, 311 U.S. 32, 40 (1940)).

to accept or reject settlements. In reality, the class attorney often wields considerable power to make ultimate decisions and the class representatives only nominally participate.[30] The vast majority of class members, who are not class representatives, have no authority to accept or reject settlements or to otherwise direct the actions of the class attorney.[31]

The vulnerable position of (b)(3) class members underlies Rule 23's three protections for class members: adequate representation, notice, and the right to opt out.[32] The first two protections antedate the modern Rule 23, which was adopted in 1966. In 1940, the Supreme Court held that persons who are not parties to a lawsuit cannot be bound by an order resolving it unless one of the parties adequately represented them.[33] Thus, in the class action context, class representatives' interests must align with the interests of absent class members. In 1950, the Court held that due process also requires that persons who are not parties but whose rights will be conclusively determined by the group litigation receive notice.[34] The Court explained that notice is "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality."[35]

At the time Rule 23 was enacted, the Supreme Court had not addressed opt-out rights. In fact, the creation of opt-out rights in 1966 represented a constriction of the procedural protections provided to class members. Prior to 1966, members of the type of class actions that roughly correspond to today's (b)(3) actions were not bound by a class judgment or settlement unless they affirmatively *opted into* the class.[36] The class action did not bind anyone who did not choose to enter into the class action and be bound by the judgment. Though the Committee that drafted Rule 23 settled on an "opt out" rather than an "opt in" rule,[37] the Committee stressed that class members must receive notice of their right to opt out "to fulfill requirements of

30 HENSLER ET AL., *supra* note 19, at 118.

31 *Id.*

32 *See* Fed. R. Civ. P. 23(a)(4).

33 Hansberry v. Lee, 311 U.S. 32, 40 (1940).

34 Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

35 *Id.*

36 *See, e.g.*, John E. Kennedy, *Class Actions: The Right to Opt Out*, 25 ARIZ. L. REV. 3, 14–15 (1984).

37 The Rules Advisory Committee felt a departure from the "opt-in" rule was necessary because of their concern for promoting the mutuality of claim preclusion. The mutuality rule, important in 1966, has since been discarded. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979).

due process to which the class action procedure is of course subject."[38] There was "a strong feeling that the person who wants to go it alone, and to bring his individual action with his own lawyer, should be permitted to do so."[39] The Committee's notes emphasized that courts must ensure that (b)(3) class members have an opportunity to opt out and cannot waive this right under any circumstances.[40]

Though the drafters of Rule 23 assumed that due process required an opportunity to opt out, the Supreme Court did not consider the due process underpinnings for opt-out rights until *Phillips Petroleum v. Shutts*,[41] nearly twenty years after the enactment of the modern Rule 23. In *Shutts*, the Court's precise holding was not that due process requires an opportunity to opt out for all (b)(3) class members, but that due process mandates an opt-out opportunity for out-of-state (b)(3) class members.[42] In *Shutts*, almost all of the plaintiff class members lacked minimum contacts with Kansas, the forum state.[43] Applying the jurisdictional principles of *International Shoe Co. v. Washington*[44] that courts normally apply to defendants, the Court reasoned that plaintiff class members lacking minimum contacts with the state could be bound only if they had consented to the court's jurisdiction.[45] The Court concluded that an out-of-state class member who had no opportunity to exclude himself from the class could not be said to have "consented" to the court's authority.[46] Accordingly, the Court held that, in addition to notice and adequate representation, "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."[47]

Despite *Shutts*'s narrow holding, many courts have cited *Shutts* for the proposition that due process requires an opportunity to opt out for (b)(3) class actions, regardless of whether the class members have

38 Notes of Rules Advisory Committee to 1966 Amendments to Rule 23, 39 F.R.D. 69, 107 (1966) [hereinafter 1966 Rules Advisory Notes].

39 Charles A. Wright, *Proposed Changes in Federal Civil, Criminal and Appellate Procedure*, 35 F.R.D. 317, 338 (1964).

40 1966 Rules Advisory Notes, *supra* note 38, at 106–07.

41 472 U.S. 797 (1985).

42 *Id.* at 812.

43 *Id.* at 811.

44 326 U.S. 310 (1945).

45 *Shutts*, 472 U.S. at 807–13.

46 *Id.* at 812–13.

47 *Id.* at 812.

minimum contacts to the forum.[48] The Supreme Court bolstered this practice when it rearticulated *Shutts*'s holding in *Ortiz v. Fibreboard Corp.*,[49] in language that focused more clearly on class members' property rights in the context of class action settlements.[50] The Court stated that "before an absent class member's right of action [is] extinguishable due process require[s] 'at a minimum . . . an absent plaintiff . . . be provided with an opportunity to remove himself from the class.'"[51] Though the Court included a footnote explaining that *Shutts* only examined the procedural protections attendant on binding out-of-state class members,[52] many commentators have concluded that due process provides all (b)(3) class members the right to opt out of a class action.[53]

B. Informed Opt Out and Due Process

While the majority view is that due process mandates an opt-out opportunity for (b)(3) class members, the current consensus among the courts is that "due process does not afford class members a second opportunity to opt out."[54] Most courts read *Shutts* to suggest that

48 *See, e.g.*, *In re* Telectronics Pacing Sys., Inc., 221 F.3d 870, 881 (6th Cir. 2000) ("[D]ue process requires that class members bringing particularized tort claims for money damages be provided an opportunity to opt-out of the class."); Feuerman v. Sears, Roebuck & Co., No. 96 Civ. 0120, 1996 WL 648966, at *5 (S.D.N.Y. Nov. 6, 1996) ("[M]inimum due process requirements are: adequate notice, an opportunity to appear, an opportunity to opt out, and adequate representation."); Williams v. Lane, 129 F.R.D. 636, 641 (N.D. Ill. 1990) ("Phillips Petroleum Co. v. Shutts explicitly held that due process required both notice and an opportunity to opt out before judgment may bind a known but absent member of a damage-seeking class."); *see also* Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045, 1087 (1995) (noting that "[i]n *Phillips Petroleum Co. v. Shutts*, the Supreme Court held that in class actions brought for money damages . . . due process requires that absent class members receive notice and the opportunity to opt out").

49 527 U.S. 815 (1999).

50 *Id.* at 848–49 (1999) (citing *Shutts*, 472 U.S. at 812).

51 *Id.*

52 *Id.* at 848 n.24.

53 *See, e.g.*, Koniak, *supra* note 48, at 1087–88 (noting that "[i]n *Phillips Petroleum Co. v. Shutts*, the Supreme Court held that in class actions brought for money damages . . . due process requires that absent class members receive notice and the opportunity to opt out").

54 *In re* Visa Check/Mastermoney Antitrust Litig., 297 F. Supp. 2d 503, 518 n.18 (E.D.N.Y. 2003); *see* Officers for Justice v. Civil Serv. Comm'n, 688 F.2d 615, 635 (9th Cir. 1982) ("[W]e have found no authority of any kind suggesting that due process requires that members of a Rule 23(b)(3) class be given a second chance to opt out. We think it does not."); *In re* Lloyd's Am. Trust Fund Litig., No. 96 Civ. 1262, 2002 WL 31663577, at *12 (S.D.N.Y. Nov. 26, 2002) ("If the proposed settlement is fair, ade-

once an individual fails to opt out, she has "consented" to the court's jurisdiction and thus has forgone her single opportunity to escape the binding judgment (or settlement) entered by the court. The *Shutts* idea that failure to opt out equals consent is, of course, fictional. Class members often do not have enough information by the opt-out deadline to "consent" to the class action. Even if sufficient information exists, some class members will not understand, read, or perhaps even receive the notice informing them of the class action and their right to opt out.[55] Even so, the *Shutts* holding requires only one chance to opt out; it does not require an opportunity to make an informed choice about whether to stay in the class.

Notwithstanding the absence of case law directly supporting a second opportunity to opt out, Rule 23's history demonstrates that the drafters designed the opt-out provision not simply to satisfy the requirements of personal jurisdiction but to foster class members' abilities to decide whether to remain in the class action or pursue individual litigation.[56] Paul Carrington and Derek Apanovitch assert that "it was clearly understood in 1966 that no class member could possibly be bound to a judgment who was not given actual notice of the proceeding and in a position to *exercise intelligently* the choice to opt out."[57]

Furthermore, the Supreme Court has indicated that due process procedures must be implemented in a manner calculated to accomplish their purpose. For example, in *Mullane v. Central Hanover Bank & Trust Co.*,[58] the Court held that "when notice is a person's due, process which is a mere gesture is not due process" and that the "con-

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quate and reasonable, due process does not afford Class Members a second opportunity to opt out.").

55 *See* 2003 Report of Rules Committee, *supra* note 1, at 190.

> The presumption of consent that follows a failure to affirmatively opt out at the time of certification may lose its footing when circumstances have changed materially from the time when the class action is finally settled. In these cases, a second opt-out opportunity could relieve individuals from the unforeseen consequences of inaction or decisions made at the time of certification, when limited meaningful information was available.

Id.

56 *See supra* notes 38–40 and accompanying text.

57 Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Invalidity of Proposed Rule 23(b)(4)*, 39 ARIZ. L. REV. 461, 489 (1997) (emphasis added) (citing John P. Frank, *Response to 1996 Circulation of Proposed Rule 23 on Class Actions*, *in* 2 ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, at 264, 269 (1997)).

58 339 U.S. 306 (1950).

stitutional validity" of a particular manner of notifying claim holders should be judged by whether it was "reasonably certain to inform those affected."[59] Thus, the measure of whether notice complies with due process is whether the manner in which the notice requirement is carried out comports with the purpose of the notice requirement. Similarly, in the context of the right to a hearing in individual litigation, the Court has held that due process requires not only the opportunity to be heard, but an "opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[60] The Court has acknowledged that a hearing which takes place at an inappropriate time may be "an exercise in futility" that violates due process.[61]

The prevailing practice under Rule 23—which provides a single opportunity to opt out at a time when class members cannot intelligently decide whether to do so—is analogous to a notice procedure that does not actually attempt to inform the persons affected and to a hearing set too early or too late to preserve a person's rights. The due process rights to potentially effective notice and hearings suggest that opt-out opportunities should be structured in a way that gives claimholders the ability to meaningfully exercise their right to opt out.

Further support for an informed opt-out rule can be found in recent opinions involving the subset of class actions in which attorneys reach a settlement prior to filing the lawsuit. Several courts have held that due process requires that class notices in settlement-only class actions not only inform class members of their right to opt out, but also describe the settlement terms so class members can make informed decisions.[62] The Fifth Circuit held that a settlement-only class action

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59 *Id.* at 315. The Court held that notice by publication did not satisfy due process when the names and addresses of the interested persons were known. *Id.* at 318–20.

60 City of Los Angeles v. David, 538 U.S. 715, 717 (2003); *see* Richards v. Jefferson County, 517 U.S. 793, 804 (1996) ("[The state] may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.") (citation omitted); Barry v. Barchi, 443 U.S. 55, 72 (1979) ("The Fourteenth Amendment requires 'an opportunity . . . granted at a meaningful time and in a meaningful manner.'") (citations omitted).

61 *Barry*, 443 U.S. at 74 (quoting Barchi v. Sarafan, 436 F. Supp. 775, 782 (S.D.N.Y. 1977); *see* Irene Sharf & Christine Hess, Comment, *What Process Is Due? Unaccompanied Minors' Rights to Deportation Hearings*, 1988 DUKE L.J. 114, 116 ("[T]he exercise of a right that was created to protect constitutional entitlements . . . must be feasible.") (citing Haitian Refugee Ctr. v. Smith, 676 F.2d 1023, 1039 (5th Cir. 1982)).

62 *See, e.g.*, Maywalt v. Parker & Parsley Petroleum Co., 67 F.3d 1072, 1079 (2d Cir. 1995); *In re* Nissan Motor Corp. Antitrust Litig., 552 F.2d 1088, 1103–05 (5th Cir.

notice must not only meet Rule 23's formal requirement that the notice take the best form "practicable under the circumstances,"[63] but "must also contain information reasonably necessary to make a decision to remain a class member and be bound by the final judgment or opt out of the action."[64] The court went on to specify that the notice "must contain information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the class and be bound by the final judgment."[65] The court reasoned that "[i]f the initial class notice does not include information of the proposed settlement . . . an absentee class member lacks an essential factor in the decisionmaking equation."[66] The Second Circuit has more explicitly stated that "[d]ue process requires that the notice to class members fairly apprise the . . . members of the class of the terms of the proposed settlement and of the options that are open to them."[67]

The Fifth and Second Circuits' concern for the ability of class members to know the settlement's terms echoes *Mullane v. Central Hanover Bank & Trust Co.*, in which the Supreme Court held that due process requires that a claimholder receive notice of a pending action in which her rights will be conclusively determined.[68] In *Mullane*, the Court noted that the right to be heard—"[t]he fundamental requisite of due process"—"has little reality or worth unless one is informed

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1977); Grunin v. Int'l House of Pancakes, 513 F.2d 114, 122 (8th Cir. 1975); *see also* 32B AM. JUR. 2d *Federal Courts* § 2073 (1996).

> The . . . requirement that absentee class members be given the best notice practicable under the circumstances demands that the class members receive notice of a proposed settlement, since the members' rights are clearly affected by the settlement, and without notice of it, the absentee class member lacks an essential factor affecting the decision whether to remain a member of the class.

Id.

63 FED. R. CIV. P. 23(c)(2) (amended 2003). The current rule, changed by the 2003 revisions, provides more detailed requirements for the class notice. FED. R. CIV. P. 23(c)(2).

64 *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d at 1105 (citations omitted).

65 *Id.*

66 *Id.*

67 *Maywalt*, 67 F.3d at 1079. On this principle, some courts have required parties to delay notifying the class until the settlement is sufficiently well-defined to allow class members to make an informed choice about whether to opt out. For example, one court concluded that "[a] full description of [the settlement terms] will need to be determined . . . prior to any opt-out notices being sent to class members [because] in the absence of such information, no informed opt-out decision could be made." *In re* Inter-Op Hip Prosthesis Liab. Litig., 204 F.R.D. 330, 356 (N.D. Ohio 2001).

68 339 U.S. 306, 314 (1950).

that the matter is pending *and can choose for himself* whether to appear or default, acquiesce or contest."[69]

The Fifth and Second Circuits' insistence that settlement-only class members know the settlement's terms suggests there is a due process problem *whenever* class members do not know the terms of the class settlement before the opt-out period expires.[70] If it is a due process violation for settlement-only class members to have to decide whether to opt out without knowing the terms of the settlement, it is also a due process violation to put traditional class action members in the same position. There is no principled reason to deny traditional class action members the right to informed choice that is guaranteed to their counterparts in settlement-only class actions.

Courts have also noted that information famine violates due process in the context of settlements that purport to bind future claimants, such as persons who have been exposed to a cancer-causing substance and have an indeterminate risk of future injury. In *Amchem Products, Inc. v. Windsor*,[71] the Supreme Court suggested that the inability of future claimants to predict the value of their potential future claims in comparison with the terms of a known settlement might violate due process.[72] The *Amchem* class action—which involved asbestos—had been certified for settlement only, so class members knew the terms of the settlement before the opt-out deadline.[73] However, the class members who had not yet developed injuries as a result of their exposure to asbestos could not predict the value of their claims. The effects of asbestos can be latent for more than forty years and while some exposed persons will develop serious diseases, some will not.[74] The Court agreed with the Third Circuit's conclusion that the class members with future claims "lack[ed] adequate information to properly evaluate whether to opt out of the settlement."[75]

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69 *Id.* (emphasis added).

70 Informed opt out would "provide the same ability to opt out with knowledge of the settlement terms that is enjoyed by members of the many (b)(3) classes that are considered for certification—and thus afford a right to request exclusion—after a settlement has been reached." 2003 Report of Rules Committee, *supra* note 1, at 189.

71 521 U.S. 591 (1997).

72 *Id.* at 628.

73 *Id.* at 597.

74 *Id.* at 598.

75 Georgine v. Amchem Prods., Inc., 83 F.3d 610, 633 (3d Cir. 1996); *see Amchem*, 521 U.S. at 611 (recognizing "the unfairness of binding exposure-only plaintiffs who might . . . lack sufficient information about their exposure to make a reasoned decision whether to stay in or opt out" and criticizing the settlement for providing only very limited opportunities for future claimants to exit the class when they developed injuries).

The Court explained that the "serious fairness concerns"[76] identified by the Third Circuit were typified by class member Margaret Balonis, the widow of a man who was symptom-free at the time the opt-out period expired but developed a fatal asbestos-related disease a few months thereafter.[77] The Court noted that future claimants like Mrs. Balonis "may not have the information or foresight needed to decide, intelligently" whether to opt out of the class settlement.[78] The Third Circuit had acknowledged that the "powerful" due process arguments[79] presented in *Amchem* suggest that Congress should amend Rule 23 to provide additional opt-out rights for future claimants.[80]

The information famine that confronts class members in a traditional class action is analogous to the predicament of future claimants. Both future claimants and members of traditional class actions must choose between accepting a settlement and preserving their individual claim without knowing the value of one of the choices. At the time the *Amchem* future claimants had to decide whether to opt out, they knew the value of the settlement but did not know the value of their claims. Traditional class members, at the time they must decide whether to opt out, probably have some idea of the value of their claims, but they do not know the value of the settlement. It is telling that the settling parties in *Amchem* defended the unfair effects of their settlement on future claimants by arguing that "the class members [with future claims], having the terms of the settlement before them, were in a better position to exercise a choice than the usual notice recipient who has no idea how the case will come out."[81]

The emerging concern about information famine in *Amchem* and the Fifth and Second Circuits' notice cases suggests that no (b)(3) class member should have to decide whether to accept a settlement

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76 *Georgine*, 83 F.3d at 634.

77 *Amchem*, 521 U.S. at 605 n.7.

78 *Id.* at 628; *see also* Yandle v. PPG Indus., Inc., 65 F.R.D. 566, 572 (E.D. Tex. 1974) (noting that persons "might neglect to 'opt-out' of the class, and then discover some years in the future that they have contracted asbestosis, lung cancer or other pulmonary disease").

79 *Georgine*, 83 F.3d at 622.

80 *See id.* at 634–35 (suggesting that the Rules Committee or Congress could address due process problems implicated by future claims by providing for "opt-in classes" or "classes with greater opt-out rights"). Ultimately, however, the Third Circuit and the Supreme Court couched their disapproval of the *Amchem* settlement not in terms of opt-out rights, but in terms of improper class certification—the class did not meet Rule 23's requirements that absent class members be adequately represented by class representatives and that common issues predominate over any questions affecting only individual members. *Amchem*, 521 U.S. at 625; *Georgine*, 83 F.3d at 617.

81 *Amchem*, 521 U.S. at 629.

agreement at a time when she has no idea what the terms of that settlement will be. Class members should have the ability to meaningfully exercise their right to opt out. Plaintiffs in one-on-one litigation have an absolute right to evaluate and reject settlement terms.[82] According to the Second and Fifth Circuits, plaintiffs in settlement-only class actions also have the right to know settlement terms before deciding whether to opt out of a class action. Class members in traditional (b)(3) class actions, who often have claims identical to plaintiffs in settlement-only class actions and one-on-one litigation, should also have the ability to make an informed choice.

C. When Should Courts Provide a Second Opportunity to Opt Out?

The argument for informed opt out, outlined above, emphasizes the need for class members to intelligently exercise their right to decide whether to remain in the class. Informed opt out is necessary to achieve the purpose of opt-out rights and to harmonize the rights provided to class action members with the rights provided to plaintiffs in

82 In fact, the public policy favoring an individual plaintiff's right to evaluate and reject settlement terms is so strong that courts in most states will invalidate a client's attempt to give up this right. *See* Ariz. Ethics Op. 94–03 (1994) (holding that a retainer agreement violated the professional rules of conduct when it gave the lawyer broad power to abandon the client's case or settle it without the client's consent); *In re* Grievance Proceeding, 171 F. Supp. 2d 81 (D. Conn. 2001) (holding that a written fee agreement delegating all settlement authority to a lawyer violated Rule of Professional Conduct 1.2(a)); *In re* Lansky, 678 N.E.2d 1114 (Ind. 1997) (holding that a fee agreement in which a client gave up her right to determine whether to accept a settlement offer violated Rule of Professional Conduct 1.2(a)). Even agreements that merely place economic pressure on the client to accept the attorney-approved settlement terms, rather than completely eliminate her choice, are invalid. *See* Conn. Informal Ethics Op. 99–18 (1999) (holding that a contingent-fee agreement may not include a clause requiring the client to pay the lawyer at an hourly rate if the client rejects a settlement offer recommended by the lawyer and the defendant prevails, and further noting that the client has the right to decide whether to accept a settlement and that economic pressure limiting that right violates Rule of Professional Conduct 1.2(a)).

If the public policy favoring a client's right to evaluate settlement terms is so strong that the courts will invalidate a client's attempt to contract around it, it seems irrational to compel class action litigants to abdicate their authority to make settlement decisions. If an individual claimholder cannot contract to allow her trusted individual attorney to make settlement decisions for her, a claimholder swept into class action litigation should not be forced to surrender her decision-making authority to an attorney whom she most likely has never met. The class action claimholder, even more than the individual claimholder, cannot predict, months or years before settlement is reached, whether the attorney who represents her will deliver acceptable settlement terms. She should not be forced to choose whether to accept a settlement payout before knowing what the contours of that settlement will be.

individual litigation. As the above argument acknowledges, however, determining the specific requirements of due process in particular situations involves balancing individual rights with the judicial system's competing interest in efficiently resolving large numbers of similar claims.[83] In most situations, the class members' rights to control their claims will outweigh the costs of a second opt-out opportunity. However, there may be situations in which the class members' interests in controlling their claims are so small that the costs of a second opportunity to opt out will outweigh its benefits. The next two sections outline two factors courts should consider to determine, on a case by case basis, whether to provide a second opt-out opportunity.

1. The Inadequacy of Information at the Initial Opt-Out Deadline Should Weigh in Favor of Providing a Second Opportunity to Opt Out

The first factor a court should consider is whether the class members had insufficient information at the initial opt-out deadline to decide whether to stay in the class. In some situations, the class members may know the settlement terms prior to the opt-out deadline and thus not need a second chance to make an informed decision.

Accordingly, a second opt-out opportunity is unnecessary in settlement-only class actions in which plaintiff and defense counsel have arrived at settlement terms before going to court.[84] In these situations, one opt-out opportunity is sufficient because the initial notice sent to class members will contain the terms of the settlement. At the time of the opt-out deadline, a class member can simply estimate how much he or she would recover in an individual lawsuit and compare that amount with the amount he or she would receive under the settlement.

Even though settlement-only class action notices often do not specify the precise amount each class member will receive but instead provide an estimate of settlement terms, the information contained within the estimate will usually be sufficient to enable the class members to make a reasonably informed decision. Though it would be

83 *See* Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (explaining that "due process is flexible" and that the procedural protections mandated by due process vary depending on the nature of the governmental and private interests involved).

84 *See* 2003 Report of Rules Committee, *supra* note 1, at 190.

> The proposal will only make a difference in cases in which the class is certified and the initial opt-out period expires before a settlement agreement is reached. It is irrelevant in those cases in which a settlement agreement is submitted to the court simultaneously with a request that a class be certified.

Id.

hard to imagine a plaintiff in individual litigation binding herself to a settlement when she knows only a rough approximation of the settlement's value, the benefits of efficient group settlement probably outweigh this relatively small detriment to individual class members. A court should provide a second opportunity to opt out, however, if the court ultimately finds a significant disparity between the estimated and final settlement terms.

2. The Presence of Claims that Would Be Viable in Individual Litigation Should Weigh in Favor of Providing a Second Opportunity to Opt Out

The second factor a court should consider when deciding whether to provide a second opportunity to opt out is the size of the individual class members' claims. If no class members could feasibly bring their claims in individual litigation, it may be reasonable for a court to deny a second opt-out opportunity.[85] If, however, a significant number of the class members' claims would be economically viable in individual litigation, the class members should have the opportunity to make an informed decision about whether to stay in the class or litigate their claims individually.

A court should provide an informed opt-out opportunity in class actions with high-value claims not only because persons with high-value claims have more to lose but also because they are more likely to be harmed by the class action mechanism.[86] This is because plaintiff class counsel has an incentive to undercut the interests of class members who hold high value claims. If class counsel acts in his rational self-interest, he will seek to settle the class action to achieve the greatest possible personal profit in the shortest amount of time.[87] Though settlements involving outright collusion between class counsel and the

85 Courts widely acknowledge that the rationale for the class action procedure is most compelling when the cost for each claimholder to bring an individual lawsuit would exceed her potential recovery. In fact, several courts have hinted that the superiority requirement for class certification may require the presence of negative-value claims. *See* Rutstein v. Avis Rent-A-Car Sys., 211 F.3d 1228, 1241 n.21 (11th Cir. 2000); Allison v. Citgo Petroleum Corp., 151 F.3d 402, 420 (5th Cir. 1998); *see also* Castano v. Am. Tobacco Co., 84 F.3d 734, 748 (5th Cir. 1996); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299 (7th Cir. 1995).

86 *See* Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 162 (2003) (noting that persons with strong claims are most at risk from the monopoly power wielded by class counsel).

87 *See* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 685 (1986).

defendant may be rare,[88] even the most well-intentioned class attorney can easily bow to defendant pressure to push the recovery of high-value claimants toward the average.[89] Furthermore, the courts—which must approve class settlements as fair—often lack adequate information to probe settlement agreements for potential fairness concerns not brought to their attention by class counsel.[90] Even if the court has adequate information, there will often be a sizable gap between the settlement a court will approve and the settlement an individual claimholder would voluntarily accept.

As Richard Nagareda has suggested, informed opt out would be an effective check on the tendency of class counsel to accept settlement terms unfavorable to high value claimholders. Nagareda explains that, from the perspective of class counsel, the exit of a class member corresponds to the entry of a competing attorney who will take a piece of the pie formerly held intact by class counsel's representation of all the claimants in the class.[91] Opt out—or merely the threat of opt out—serves to discipline class counsel to work harder to negotiate a settlement acceptable to the members of the class who have the most to lose. The same threat motivates defendants to compromise so they can achieve global peace. Accordingly, when a class contains members who could litigate their claims on their own, the court should provide class members the opportunity to intelligently decide whether to remain in the class.

By contrast, a judge could reasonably deny a second opt-out opportunity to a class in which none of the members could feasibly bring their claims in individual litigation. Though a holder of a nominal claim possesses a property interest just like the holder of a high-value claim, there is a reasonable argument that the efficiency of resolving a large number of claims at once outweighs the low-value claimholder's interest in intelligently exerting control over her claim. The information famine created by a single opt-out procedure has far less adverse impact on persons holding claims they would never bring in individ-

88 *See* HENSLER ET AL., *supra* note 19, at 93–99 (explaining that while conventional wisdom is that collusion between class attorneys and defendants is a serious problem, there has been very little research attempting to quantify the problem).

89 *See* Nagareda, *supra* note 86, at 167 (noting that high value claimholders are most at risk because "[t]he greater the variance in claim value, the more fervent the effort at variance reduction through the embrace of a class settlement that dampens the prospect for variance at the high end of the damage scale and pushes payouts toward the average").

90 *See id.* at 169 (noting that "courts, at best, are awkwardly suited for this role, for it requires them to act contrary to their self-interest in docket clearance").

91 *See id.* at 170.

ual litigation. Arguably, these claimholders do not need to know the terms of the settlement in order to decide intelligently whether to stay in the class or opt out. They know that they would not bring their claims in individual litigation and accordingly can easily realize that any amount of recovery the class action provides would be larger than nothing, the amount they would otherwise receive. Furthermore, the low-value claimholder who wishes to litigate her claim in an individual lawsuit for non-economic reasons[92] will have all the information she needs to decide whether to do so by the normal opt-out deadline.

Drawing on general legal billing practices, a court should be able to distinguish between claims that feasibly could be brought in individual litigation and those that could not. Prevailing norms should indicate which claims are economically viable. If the claimholder could not retain an attorney on a contingent-fee basis and the lodestar fees that would be necessary to litigate the claim would exceed the likely recovery, the claim is not economically viable.

D. Informed Opt Out Will Not Significantly Affect the Efficiency of Class Settlement

The primary fear associated with providing class members a second opportunity to opt out is that the availability of such an opportunity would impede settlement. In the context of explaining the 2003 revisions to Rule 23, the Rules Advisory Committee indicated that it chose to recommend a discretionary rather than automatic second opt-out opportunity because of the large number of comments it received reflecting the widely-held assumption that an informed opt-out rule would impede settlement. The Committee reported that many commentators shared "the view that good settlements may be defeated by a settlement opt-out opportunity."[93]

The widespread concern about the defeat of "good settlements" embodies a general feeling that a few members of a class should not be permitted to "spoil" the settlement by exiting the class after settlement terms are reached.[94] It is not at all clear, however, that in-

92 Non-economic reasons that might motivate a claimholder to litigate a non-economically viable claim include the desire to litigate "for the principle of the thing" and to raise public awareness of the defendant's wrongdoing.

93 2003 Report of Rules Committee, *supra* note 1, at 244.

94 *See, e.g.*, Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 639 (N.D. Cal. 1978) (stating that a few class members with high claims "should not . . . be allowed to play the role of spoilers" for the rest of the class); David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 954–55 (1998) (suggesting that the interests of the class as a whole would "be severely undermined and potentially destroyed if individual members could opt out at will"); Patrick Woolley, *Rethinking the*

formed opt out would actually pose a danger to "good settlements." In individual litigation, a "good settlement" would be one to which all the persons involved *voluntarily* give their consent after considering the value of the settlement terms vis-à-vis the strength of their claims. To the extent that class members would not choose to consent to the terms of a class settlement, it is difficult to claim that the settlement is a "good" one. The primary groups that express concern about the defeat of "good settlements" are defendants, defense attorneys, and class attorneys—the persons who stand to gain from settlements that provide class members less than they would achieve in individual litigation.[95]

Furthermore, providing class members the ability to make informed choices about whether to exit the class would not work an injustice on the class members who choose to stay. Admittedly, the exit of some class members (most likely those with stronger claims) might reduce the compensation other class members would receive in the settlement if the defendant was willing to pay a premium for the ability to settle with all the claimholders at once.[96] Though the loss of premium payment when some claimholders opt out is unfortunate from the perspective of class members who choose to stay in the class (most likely those with weaker claims), it is not unfair. The substantive law dictates that many injured persons will not receive compensation through the legal system (because, for example, they have causation or statute of limitations problems) while others may recover in excess of their actual loss.

As Richard Nagareda has noted, while the combination of strong and weak claims in a class action may work to increase the amount the defendant pays to holders of weak claims, weak claim holders have no "right" to the additional amount that they could not achieve on their own.[97] This additional amount largely results from the cost savings associated with settling large numbers of claims at once and the assur-

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Adequacy of Adequate Representation, 75 TEX. L. REV. 571, 612 (1997) ("Because defendants may refuse to settle unless they obtain a global settlement, the refusal of some class members to settle may in fact deny other class members the ability to settle their claims, requiring them instead to assume the risk of trial."). Some commentators have gone so far as to suggest that as a precondition to opt out, there should be a good cause hearing at which the court would balance the interest of the litigant in seeking to exit the class against those of the class members who would thereby be injured. *See, e.g.*, American Bar Ass'n Section of Litig., *Report and Recommendations of the Special Committee on Class Action Improvements*, 110 F.R.D. 195, 202 (1986).

95 HENSLER ET AL., *supra* note 19, at 93–99.

96 In fact, defendants will likely protect themselves by conditioning settlement agreements on a maximum number of opt outs.

97 Nagareda, *supra* note 86, at 217.

ance—if "global peace" is achieved—that the defendant will not have to defend against any more claims of the same type.[98] If the potential cost-savings evaporate because persons with high-value claims opt out of the class, low-value claimholders have not lost anything to which they were previously entitled.[99] In our current legal system, it would be unjust to short-circuit substantive tort law by forcing all class members to remain in a class action. In the absence of a true limited-fund scenario, claimholders should not be forced to accept lower recoveries than they could recover in one-on-one litigation simply because many other people suffered a similar injury.[100]

Furthermore, it is not inevitable that informed opt out would be less efficient than the current single opt-out procedure. Though many courts and commentators have assumed that informed opt out would result in a higher total number of persons exiting the class, they have developed this view by considering the issue at the time settlement terms are reached. They have not considered the possibility that the information famine inherent in the current single opt-out procedure may lead some class members to opt out of the class who would have chosen to stay in the class if they had the ability to know the settlement terms at the time of their decision. A risk-averse game show contestant may choose to settle for the prize he has seen rather than gamble on a concealed—potentially larger or smaller—prize.[101] It is even more likely that an injured person with real financial need—like your friend Alice, discussed *supra*[102]—will opt for the individual recovery she can estimate and, to some extent, control, rather than bind herself to accept an unknown class action settlement. The Fifth Circuit acknowledged this possibility in the context of a settlement-only class action.[103] It concluded that providing less than complete information about the settlement terms was inconsistent with the goal of having the class settlement dispose of as many claims as possible, noting that "[t]he binding scope of the present action would be directly diminished by that number of class members who decided to opt out of the action but who otherwise would have utilized the class action device if information of the proposed settlement had appeared

98 *Id.*

99 *Id.*

100 Trangsrud, *supra* note 20, at 87.

101 *See* WILLIAM SHAKESPEARE, HAMLET act 3, sc. 1 (noting the human tendency to prefer to "bear those ills we have / Than fly to others that we know not of"); *see also* the traditional Latin proverb "a bird in the hand is worth two in the bush."

102 *See supra* pp. 377–79.

103 *See In re* Nissan Motor Corp. Antitrust Litig., 552 F.2d 1088, 1105–06 (5th Cir. 1977).

[in the notice]."[104] Thus, it is possible that informed opt out may in fact *increase* the number of claims settled because it will keep claimants in the class for a longer period of time. Instead of hastily opting out at the commencement of the action, claimholders could wait to make an informed decision.

CONCLUSION

The 2003 revisions to the federal class action rule empower courts to cure the problem of information famine often faced by the members of (b)(3) class actions. The revisions, however, make exercise of this power purely discretionary. This Note has argued that courts should liberally use their authority to provide class members the ability to make informed opt-out decisions. Courts should provide class members a second opportunity to opt out when two factors are present: when (1) the class members had inadequate information at the initial opt-out deadline and (2) it would be economically feasible for class members to pursue their claims in individual litigation.

Though the current majority view is that due process does not require a second opportunity to opt out, recent cases evidence a growing concern that the information famine suffered by class members when they blindly exercise their single right to opt out violates due process. Much like class members who cannot evaluate the adequacy of a proposed settlement because they have not yet suffered injury, class members who must decide whether to opt out before the settlement terms are known cannot evaluate whether their interests would be better served by opting out or remaining in the class.

Even if due process does not require informed opt out, basic fairness suggests that (b)(3) class members with economically viable claims should have the ability—guaranteed to plaintiffs in individual litigation and to many class members in settlement-only class actions—to make an informed decision about whether to accept a settlement. Contrary to widely-held assumptions, informed opt out will not necessarily impede the efficiency of good class settlements. It will instead ensure that class members are not forced to swallow settlement terms they would have never accepted voluntarily. Liberal use of Rule 23's new informed opt-out provision will not only alleviate the predicament faced by members of (b)(3) class actions, but will also give new life and legitimacy to Rule 23(b)(3).

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104 *Id.* at 1106.