

Commentary***The Constitutional Limitations On Class Actions***

By
Evan M. Tager

[Editor's Note: Evan M. Tager is a partner in the Washington, D.C. office of Mayer, Brown & Platt. Mr. Tager regularly represents defendants in opposing class certification and has filed amicus briefs in the U.S. Supreme Court, state supreme courts, and federal appellate courts on various class certification issues. Copyright by the author 2001. Replies to this commentary are welcome.]

Now that the Supreme Court has issued a blockbuster ruling on the constitutional limitations on state election law,¹ it seems like an appropriate time to consider the far more common question of the extent to which the Constitution limits use and management of the class action device. The issue is important because, as in the case of state election law, the only way to obtain Supreme Court review of a state court ruling is by raising an issue of federal law; in the case of state-court class actions alleging state-law claims, the only source of federal law is the Constitution. Indeed, even in cases arising in federal court, the existence of a constitutional overlay is significant because it will likely prompt an appellate court to give closer scrutiny to the lower court's resolution of the issue than would be the case if the issue were raised solely under Rule 23: it is frequently said that district courts' applications of Rule 23 are reviewed for an abuse of discretion,² but a review of the case law should persuade the reader that the federal appellate courts afford little deference when constitutional claims are raised.³

Although my list does not purport to be exclusive, this article will address four areas in which the Constitution plays a significant role in constraining the use and management of the class action device. Specifically, Section A discusses the due process and Seventh Amendment limitations on the manageability of class actions; Section B discusses the constitutional limitations on choice of law in multistate class actions; Section C discusses the due process limitations on the use of non-opt-out class actions; and Section D discusses the due process requirements for the notice that must be given to absent class members.

A. *The Due Process Limitations On The Management Of Class Actions*

For a class to be certified under Federal Rule of Civil Procedure 23(b)(3) and its state-law counterparts, the trial court must find that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy," and, in making this determination, the court must consider, among other things, "the difficulties likely to be encountered in the management of a class action."⁴ Indeed, one court recently held — quite logically in my view — that a showing of manageability is a requirement even for cases seeking certification under Rules 23(b)(1) and (b)(2).⁵

The courts have made clear that the burden is on the plaintiff to demonstrate that the case can be manageably tried as a class action and that the failure to meet that burden precludes certification of a class.⁶ Concomitantly, a trial court's failure to explain how it intends to manage a case as a class action necessitates reversal of its class certification order.⁷

In an effort to satisfy the manageability requirement, plaintiffs' counsel generally assert that their claims can be established through "common proof," such as company documents and expert testimony. This is where the Constitution — and, when the case is in federal court, the Rules Enabling Act — come into play. The Supreme Court has made clear that Rule 23(b)(3)'s manageability test is satisfied only if trial of the case as a class action can be accomplished "without sacrificing procedural fairness" and without "abridg[ing], enlarg[ing] or modify[ing] any substantive right."⁸ What this means, as a practical matter, is that, in an effort to achieve manageability, courts may not relieve plaintiffs of the burden of proving the individualized elements of their claims (which is what happens when they are allowed to go forward solely on the basis of "common proof") and may not deprive defendants of the right to put on individualized evidence, to raise individualized defenses, and to receive a verdict on the individualized facts of each class member's claims. Several cases have recognized this critical point.

One of the earliest was *Western Elec. Co. v. Stern*,⁹ a gender discrimination class action under Title VII of the Civil Rights Act. The district court had refused to allow the defendant any discovery relating to the claims of individual class members. The plaintiffs defended this ruling on the ground that the defendant would be entitled to such discovery in the second phase of the case, after class-wide liability had been resolved, and argued that "to bring up individual cases during the class stage of the trial would introduce needless complications."¹⁰ The Third Circuit rejected that contention and reversed the district court, explaining:

[T]o deny Western the right to present a full defense on the issues would violate due process. Thus, while plaintiffs may make out a prima facie case under Title VII without introducing evidence on individual cases, at least under some circumstances, *defendants must be allowed to present any relevant rebuttal evidence they choose*, including evidence that there was no discrimination against one or more members of the class.¹¹

Although *Stern* did not involve a choice between allowing the defendant to present individualized evidence and maintaining a manageable class action, more recent cases have. For example, in one of the more comprehensive treatments of the issue, the Texas Supreme Court recently decertified a personal injury class action arising out of a refinery tank fire, explaining:

The class action is a procedural device intended to advance judicial economy by trying claims together that lend themselves to collective treatment. It is not meant to alter the parties' burdens of proof, right to a jury trial, or the substantive prerequisites to recovery under a given tort. * * * Although a goal of our system is to resolve lawsuits with

great expedition and dispatch and at the least expense, the supreme objective of the courts is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. This means that convenience and economy must yield to a paramount concern for a fair and impartial trial. And basic to the right to a fair trial — indeed, basic to the very essence of the adversarial process — is that each party have the opportunity to adequately and vigorously present any material claims and defenses.¹²

The court reasoned that the defendant was “entitled to a fair opportunity to individual determinations of causation and damages for each of the 904 plaintiffs” and that this encompassed a right “to challenge the credibility of and its responsibility for each personal injury claim individually.”¹³ Because trying the case this way would result in it “degenerat[ing] into multiple lawsuits separately tried,” the court concluded that the case could not satisfy the superiority requirement.¹⁴

The Fourth Circuit applied a similar analysis in *Broussard v. Meineke Discount Muffler Shops, Inc.*¹⁵ In that case, the plaintiffs, who were owners of Meineke Discount Muffler franchises, brought suit against Meineke — purportedly on behalf of a nationwide class of former and current Meineke franchisees — alleging a variety of tort, contract, and statutory unfair trade practices/consumer fraud claims, all stemming from Meineke’s alleged violation of its franchise agreements with the plaintiffs. The Fourth Circuit reversed a massive judgment and ordered decertification of the class, explaining:

[P]laintiffs portrayed the class at trial as a large, unified group that suffered a uniform, collective injury. And Meineke was often forced to defend against a fictional composite without the benefit of deposing or cross-examining the disparate individuals behind the composite creation. Fundamentally, the district court lost sight of the fact that a class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. It is axiomatic that the procedural device of Rule 23 cannot be allowed to expand the substance of the claims of class members. Thus courts considering class certification must rigorously apply the requirements of Rule 23 to avoid the real risk, realized here, of a composite case being much stronger than any plaintiff’s individual action would be. Because the class action device permitted plaintiffs to strike Meineke with selective allegations, which may or may not have been available to individual named plaintiffs or franchisees, the judgment below cannot stand.¹⁶

Several other courts have made similar points.¹⁷

In short, it is simply wrong to think that the mere fact that putative class counsel believe that they can prove *their* case using common proof is sufficient to make the case manageable as a class action. The Constitution and, in cases in federal court, the Rules

Enabling Act require that the defendant be afforded the opportunity to contest liability using individualized evidence. The upshot is that *only* those cases in which there truly is no relevant individualized evidence (or in which such evidence plays a legitimately subsidiary role) can meet the manageability standard.

This is not to say, of course, that the adoption of Rule 23 was a futile gesture. There will be cases when there is no relevant individualized evidence. For example, if an opera company were to cancel a show and refuse to make refunds, the ticketholders would all have identical breach of contract claims and no individual proof would be needed. Similarly, there may be many instances in which there are no individual issues relating to liability, and the only individualized issues relate to damages. In those instances, it is conceivable that the case could be manageably tried through common proof relating to liability and a damages mechanism that allows for individualized proof. An example would be the sale of adulterated orange juice. Every purchaser would have an identical breach of contract action, having paid for something — pure orange juice — that was not received. But the damages would be different, because different purchasers may have paid different prices and bought different quantities of juice. In that situation, liability could be manageably tried on a class wide basis, and, if liability were found, a relatively streamlined claims procedure could be designed to ensure that the injured receive compensation.

B. The Constitutional Limitations On Choice-Of-Law In Multi-State Class Actions

It has become increasingly common for putative class counsel to request certification of nationwide classes. Dozens of courts have held that the need to instruct the jury on the laws of multiple states makes the case unmanageable and necessitates denial of class certification.¹⁸

Plaintiffs' counsel often seek to circumvent this problem by contending that the court can simply apply the law of the defendant's domicile on the ground that that state has a dominant interest in ensuring that its domestic companies abide by the law. Such a gambit raises serious constitutional issues. The United States Supreme Court, in a wide range of contexts and under various constitutional provisions (including the Due Process, Full Faith and Credit, and Commerce Clauses), has consistently rejected state efforts to apply local law to transactions that occurred entirely in other states.¹⁹

Two of these cases — *Phillips Petroleum Co. v. Shutts* and *BMW of North America, Inc. v. Gore* — are especially pertinent to the subject of choice of law in multistate class actions. *Shutts* was a class action filed in Kansas on behalf of residents of all 50 states against a lessee of oil and gas properties located in 11 states. In an effort to facilitate adjudication of the case as a nationwide class action, the trial court applied Kansas law to every plaintiff's claim without regard to that plaintiff's state of residence or the location of the property that was the subject of the claim. Noting that "[t]here is no indication that when the leases involving land and royalty owners outside of Kansas were executed, the parties had any idea that Kansas law would control," the Supreme Court held that the application of Kansas law to claims that had nothing to do with Kansas was "sufficiently arbitrary and unfair as to exceed constitutional limits" imposed by the Due Process and Full Faith and Credit Clauses. 472 U.S. at 822. The Court emphasized that "Kansas 'may not abrogate the rights of parties beyond its borders having no relation to

anything done or to be done within them.” *Ibid.* (quoting *Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930)). It concluded that these “constitutional limitations * * * must be respected even in a nationwide class action.” *Id.* at 823.

In *BMW*, the Supreme Court held that an Alabama jury could not punish the defendant under that state’s general fraud law for vehicle transactions that had no connection to Alabama. The Court found Alabama’s effort to dictate standards of conduct in other states irreconcilable with principles of federalism, explaining: “[A] State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors’ lawful conduct in other States. * * * [B]y attempting to alter BMW’s nationwide policy, Alabama would be infringing on the policy choices of other States.”²⁰

Under these precedents, a trial court simply may not attempt to make a nationwide class action manageable by applying the law of the defendant’s domicile. Under the Due Process and Full Faith and Credit Clauses, one state’s laws cannot constitutionally be applied to the claims of persons in other states without “a significant contact or significant aggregation of contacts to the claims asserted by each member of the plaintiff class.”²¹ Likewise, the Commerce Clause prohibits a “single state [from] impos[ing] its own policy choice on neighboring States”²² and instead preserves the sovereign authority of each state to regulate conduct occurring within its own borders.²³

Consider, for example, the increasingly common contention that the forum state may uniformly apply the law of the insurer’s home state to govern the sale of insurance throughout the country. Just as Kansas had no stake in whether the defendant should pay interest on delayed royalty payments to non-Kansans whose property was located outside of Kansas and Alabama had no legitimate interest in whether and when BMW was required to disclose pre-sale repairs when selling vehicles in other states, the insurer’s home state has no stake in how the insurer markets insurance policies through out-of-state insurance agents to out-of-state policyholders. The application of the law of the insurer’s domicile to the claims of absent class members nationwide would unconstitutionally override the authority of the 49 other states (and the District of Columbia) to regulate insurance transactions within their borders, and would effectively permit the insurer’s home state to arrogate to itself the power to effectuate a nationwide policy governing the sale of insurance. In my view that violates the sovereignty of the other states in conflict with *BMW*. Moreover, nationwide application of the law of the defendant’s home state generally cannot be said to be within “the expectation of the parties,” which the Supreme Court has indicated is “an important element” of the due process analysis.²⁴

Indeed, as far as my research has disclosed, the overwhelming majority of courts to consider the question have held that it is impermissible to apply a single state’s law in a nationwide class action simply because the defendant is headquartered in that state.²⁵

It is equally clear that courts confronted with multistate class actions may not attempt to solve the manageability problems resulting from the inability to apply a single state’s laws by using “a kind of Esperanto instruction” that is “an amalgam” of the “unidentical” legal standards of the various states.²⁶ As Judge Posner has explained, “[t]he voices of the quasi-sovereigns that are the states of the United States sing * * * with a different pitch,” and even differences in nuance have substantial legal effect on the rights and responsibilities of the parties.²⁷ That different states choose as a matter of public policy

to define nominally similar causes of action differently is entirely proper and, in accordance with the Full Faith and Credit Clause, ought to be respected. "If not, one begins to wonder why this country bothers with different state legal systems."²⁸

C. The Due Process Limitations On Non-Opt-Out Class Actions

Rule 23(b)(1)(A) provides for certification of cases when there is a risk that allowing individual actions will result in the imposition of "incompatible standards of conduct for the party opposing the class." The prototypical example is when multiple citizens sue to declare a bond issue invalid. If one citizen prevails and another loses, the municipality will be confronted with irreconcilable obligations.²⁹ Rule 23(b)(1)(B) provides for certification when adjudication of the claims of some members of the class would, as a practical matter, substantially impede the ability of other class members to vindicate their rights — for example, when there is a limited fund from which to satisfy claims.³⁰ And Rule 23(b)(2) provides for certification when the defendant has acted or refused to act on grounds generally applicable to the class, such as when a general practice of the defendant is alleged to be discriminatory.³¹

The objective of each of these provisions would be utterly frustrated if members of the class were allowed to opt out and pursue their own law suits. The clearest illustration of this is Rule 23(b)(1)(A), the purpose of which is to preclude the imposition of incompatible standards of conduct. Needless to say, it is a logical impossibility to grant class certification on the ground that there is a need to avoid the judicial imposition of incompatible standards of conduct, but then turn around and allow any member of the class to opt out and pursue his or her own case against the defendant. Similarly, if there is a limited fund, the goal is to put everyone with a claim to that fund together in the same forum so that the fund can be equitably distributed among them (assuming, of course, that liability is found). It makes no sense to certify a class on the ground that there is a limited fund, but then allow class members to opt out and engage in a race to judgment in other forums. Finally, if the defendant's practice is truly applicable to a coherent, definable class, and if only injunctive or declaratory relief is sought, there is no sound reason for allowing individual class members to go their own way: the members of the class, the defendant, and the judiciary all have an interest in seeing the issue resolved once and for all in a single action. It is for these reasons that part and parcel of certification under Fed. R. Civ. P. 23(b)(1) or (2) is forced participation in the lawsuit: there is no right to opt out as there is in cases certified under Fed. R. Civ. P. 23(b)(3).³²

Frequently, putative class counsel seek to circumvent the "predominance" and "manageability" requirements for certification under Fed. R. Civ. P. 23(b)(3), by claiming that the case can be certified under Rules 23(b)(1)(A) or (b)(2).³³ And sometimes defendants, seeking to buy peace, either affirmatively seek or at least acquiesce in certification under Rule 23(b)(1)(B).³⁴ When it is clear that the class is seeking compensation, not simply a declaration or injunction, the issue arises as to whether the Due Process Clause requires that class members be given notice of the class action and an opportunity to opt out.

The Supreme Court has squarely held that, "[i]f the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law," due process requires that the plaintiff receive notice and an opportunity to opt out.³⁵ It made clear, however, that this holding was "limited to those class actions which seek to bind known plaintiffs concerning claims *wholly or predominately for money judgments*" and

that it was leaving open the question whether an opt out right must be provided in "other types of class actions, such as those seeking equitable relief."³⁶

Since that time, the Supreme Court has granted certiorari on three occasions in the expectation of resolving whether and when the right to opt out can be denied in cases certified under Rule 23(b)(1) or (2). Each time it failed to reach the issue.³⁷ The third time, however, a seven-Justice majority did strongly hint as to the result the Court would reach. In the course of reversing the certification of an asbestos class action under Rule 23(b)(1)(B), the Court explained:

[M]andatory class actions aggregating damages claims implicate the due process principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process, it being our deep-rooted historic tradition that everyone should have his own day in court. * * *

The inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damages gathered in a mandatory class. Unlike Rule 23(b)(3) class members, objectors to the collectivism of a mandatory subdivision (b)(1)(B) action have no inherent right to abstain. The legal rights of absent class members * * * are resolved regardless either of their consent, or, in a class with objectors, their express wish to the contrary.³⁸

Applying the principle that statutes and rules should be construed to avoid "serious constitutional concerns,"³⁹ the Court held that Rule 23(b)(1)(B) could not be invoked under the circumstances of that case, leaving the constitutional issue for another day.

Nevertheless, given its statements in *Shutts* and *Ortiz*, the odds seem good that, when it does reach the issue (most likely in a case arising out of state court in which the Court has to accept the state supreme court's interpretations of its own class action rules), the Court will hold that Rules 23(b)(1)(A) and (b)(2) may not be utilized to aggregate claims for money damages even when there is a risk of incompatible standards of conduct or when the defendant has acted or failed to act on grounds generally applicable to the class, making *injunctive or declaratory* relief appropriate.⁴⁰ Counsel for defendants therefore should make certain to preserve a due process challenge whenever plaintiff' counsel seek to circumvent the requirements of Rule 23(b)(3) by requesting certification under Rules 23(b)(1)(A) or (b)(2).

D. Due Process Constraints On Notice

In a wide range of contexts, including class actions seeking monetary relief, the Supreme Court has "adhered unwaveringly" to the principle that, when the names and addresses of interested parties are readily identifiable, publication notice is a constitutionally inadequate means of informing them of the existence of a proceeding that will affect their rights: the Due Process Clause requires that such parties be afforded actual notice by means of either personal service or mailed notice.⁴¹

In *Eisen v. Carlisle & Jacquelin*, for example, the Court considered the notice requirement in the context of a federal class action, holding that “[i]ndividual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort.”⁴² Although this conclusion was based on the language of Fed. R. Civ. P. 23(c)(2), which requires that class members be provided “the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort,” the Court emphasized that that provision was “designed to fulfill the requirements of due process to which the class action procedure is of course subject.”⁴³ In requiring individual notice, the Advisory Committee was guided by the Supreme Court’s holding in *Mullane v. Central Hanover Bank & Trust Co.* that “publication notice could not satisfy due process where the names and addresses of the [affected individuals] were known.”⁴⁴ Endorsing that view, the *Eisen* Court stated: “In such cases, ‘the reasons disappear for resort to means less likely than the mails to apprise them of an action’s pendency.’”⁴⁵ As further support, the *Eisen* Court invoked *Schroeder v. City of New York* — another due process case — which, it noted, “explained that *Mullane* required rejection of notice by publication where the name and address of the affected person were available.”⁴⁶

By relying on *Mullane*, *Schroeder*, and the Advisory Committee Note, *Eisen* makes clear that individual notice is a requirement of due process, not just Rule 23. Any doubt on that score was removed in *Shutts*, which was a state-court class action. The defendant there argued that the state court could not exercise personal jurisdiction over class members who had not affirmatively indicated an intention to be bound by the judgment by “opting in” to the class. The Supreme Court disagreed, holding that, so long as class members received notice and an opportunity to “opt out,” it was permissible for the forum to exercise jurisdiction over the absent class members. Citing *Mullane* and *Eisen*, the Court stated that “[t]he 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.”⁴⁷ Turning to the facts of the case, the Court found due process satisfied by “the procedure followed by Kansas, where a fully descriptive notice is sent first-class mail to each class member, with an explanation of the right to ‘opt out.’”⁴⁸ In short, after *Shutts* it is (or at least should be) clear that the minimum acceptable notice requirements are one and the same in state and federal court.

It is a matter of common sense that both the pressure on the defendant to settle and the value of the ultimate settlement are proportional to the size of the class and hence inversely proportional to the number of opt outs. Accordingly, plaintiff-side class action lawyers routinely seek to minimize the number of opt outs by attempting to persuade the trial court to relieve them of their obligation to provide actual notice. Instead, they argue, given the mobility of people in this country, publication notice (including now postings on class action websites) is a better means of reaching more people. In my view, this self-serving argument is in the teeth of the Supreme Court’s repeated statement — which is even truer in today’s era of reduced newspaper subscribership — that publication notice is “a poor substitute for actual notice.”⁴⁹

Nor, in my view, is it valid to refuse to require actual notice on the ground that the defendant cannot supply the addresses for all members of the class. While it may be necessary to utilize publication notice in order to reach class members whose addresses are unavailable, that does not excuse failure to provide actual notice to those class members whose addresses are available. Thus, in *Eisen* the Supreme Court required that

individual notice be mailed to the 2.25 million class members who were “easily ascertainable” even though another 3.75 million class members could not be identified and even though it was virtually certain that the addresses for some significant number of the 2.25 million class members would not be current.⁵⁰

Although much attention has been given to the procedural aspect of the notice requirement — *i.e.*, actual versus publication notice — defense counsel and courts often overlook the substantive component. Actual notice is close to worthless if the content of that notice does not tell the absent class member what he or she needs to know in order to make an intelligent decision about whether to stay in the class or opt out. For example, in order to persuade a court that a case is manageable as a class action and that common issues predominate over individualized ones, class counsel often either exclude from their complaint (or amend their complaint to withdraw) claims for punitive and non-economic damages. If the class is large enough, class counsel still stand to obtain a substantial settlement and with it a significant common-fund fee award, but the recovery for any particular class member in these circumstances is likely to be small. Needless to say, this is information that an absent class member needs in order to make an informed decision about whether to remain in the class. Yet it is the rare class notice that discloses this kind of information. Indeed, I have never seen one that has made such a disclosure.

Class notices also rarely (if ever) apprise class members of the burdens they might have to bear in the event the case is not immediately settled. For example, in cases that are certified despite the existence of individualized issues, due process requires that the defendant be afforded the opportunity to depose class members and demand their attendance at trial.⁵¹ If, as is generally the case, the class members cannot expect more than modest recoveries, the burden associated with remaining in the case may well exceed the benefit. For them to make an informed decision, they need to be given information about the maximum expected recovery as well as the burdens that they may have to bear to obtain that recovery. The failure to do so, in my view, renders the notice insufficient to satisfy due process requirements.

In my view, this is an area to which defense counsel should give increased attention. Because inadequacy of notice can support a collateral attack on either a litigated judgment or a settlement, defendants have standing to raise these kinds of arguments.⁵² Moreover, they are a good means of crystallizing the unseemly conflict of interest between class counsel and the class members that is present in almost every case. How, for example, can class counsel legitimately oppose telling class members what claims have been jettisoned and what burdens class members who remain in the case can be forced to bear? Indeed, if they do oppose the provision of this kind of notice, that would surely reflect adversely on their adequacy as class counsel, one of the factors that courts must consider in deciding whether to certify (or decertify) a class.

Conclusion

In the late 1980s and early 1990s, this country witnessed an explosion of punitive damages litigation. Eventually the Supreme Court felt obliged to step in and articulate the due process limitations on punitive damages.⁵³ In the last decade, we have seen a similar explosion in state-court class action litigation. A few courts in particular have gained a reputation for being havens for such cases regardless of compliance with the govern-

ing rules.⁵⁴ But the state rules of civil procedure are not the only applicable limits on class action practice. The federal Constitution, and the Due Process Clause in particular, provide their own limits on class actions. As in the punitive damages area, defense counsel should be careful to preserve such constitutional challenges, because it is predictable that the Supreme Court will eventually grant review to resolve once and for all the constitutional limitations on state-court class actions.

ENDNOTES

1. See *Bush v. Gore*, 121 S. Ct. 525 (2000).
2. See, e.g., *Spence v. Glock, Ges.m.b.H.*, 227 F.3d 308, 310-311 (5th Cir. 2000); *In re School Asbestos Litig.*, 789 F.2d 996, 1009 (3d Cir. 1986).
3. See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995).
4. Fed. R. Civ. P. 23(b)(3)(D).
5. *Zapka v. Coca-Cola Co.*, No. 99-CV-8238, 2000 WL 1644539, at *4 (N.D. Ill. Oct. 27, 2000).
6. See, e.g., *Carpenter v. BMW of N. Am., Inc.*, No. 99-CV-214, 1999 WL 415390, at *5 & n.9 (E.D. Pa. June 21, 1999) (denying class certification sought by plaintiff who submitted only a "sketchy proposal for managing the plethora of manageability problems" presented by the case); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 459 (D.N.J. 1998) (refusing to certify class "on the basis of mere promises that a manageable litigation plan can be designed in this case for five causes of action under the law of 52 jurisdictions as the litigation progresses" and observing that "[p]laintiffs, not the Court, have the burden of designing a workable plan for trial embracing all claims and defenses prior to class certification"); *Southwestern Refg. Co. v. Bernal*, 22 S.W.3d 425, 435, 436 (Tex. 2000) ("it is improper to certify a class without knowing how the claims can and will likely be tried," so, "[i]f it is not determinable from the outset that the individual issues can be considered in a manageable, time-efficient, yet fair manner, then certification is not appropriate").
7. *Castano v. American Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996) (failure of district court's predominance analysis to "include consideration of how a trial on the merits would be conducted * * * mandates reversal").
8. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613, 615 (1997) (quoting the Rules Enabling Act, 28 U.S.C. § 2072(b)).
9. 544 F.2d 1196 (1976).
10. *Id.* at 1199.
11. *Id.* (emphasis added).
12. *Bernal*, 22 S.W.3d at 437 (internal quotation marks and citations omitted).

13. *Id.*
14. *Id.*
15. 155 F.3d 331 (1998).
16. *Id.* at 345 (internal quotation marks and citations omitted).
17. *See, e.g., Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 312 (5th Cir. 1998) ("Rule 23(b)(3) * * * does not alter the required elements which must be found to impose liability and fix damages (or the burden of proof thereon) or the identity of the substantive law * * * which determines such elements"); *In re Fibreboard Corp.*, 893 F.2d 706, 711-712 (5th Cir. 1990) (rejecting plan to try 3,000 asbestos claims "as a group" on the ground that such a procedure "cannot focus upon such issues as individual causation" and "[c]ommonality among class members on issues of causation and damages can be achieved only by lifting the description of the claims to a level of generality that tears them away from their substantively required moorings to actual causation and discrete injury"); *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 221 (E.D. La. 1998) (finding fraudulent nondisclosure case unmanageable as a class action because the only way to address individualized issues of causation was by means of a "one-sided procedure [that] would amount to an end-run around defendant's right to cross-examine individual plaintiffs"); *Arch v. American Tobacco Co.*, 175 F.R.D. 469, 487-489 & n.21 (E.D. Pa. 1997) (denying class certification in tobacco addiction case because issues of causation and injury were inherently individualized and rejecting plaintiffs' proposal to establish causation and injury via questionnaires because doing so without allowing defendants to cross-examine each class member and to present rebuttal evidence would violate due process); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 425 (E.D. La. 1997) (refusing to certify nationwide class of consumers claiming to have received defective siding products because, among other things, "it is apparent that [defendant] cannot receive a fair trial without a process which permits a thorough and discrete presentation of [its individualized] defenses"); *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 370 (D.N.J. 1987) (decertifying age discrimination class action and noting that "[t]o proceed without permitting Xerox to raise at the liability stage of trial each and every defense available to it where each potential class member is readily identifiable and must step forward in order to assert and prove an individual claim for liability or at least be the subject of a defense particular to each such plaintiff would deprive defendant of the Fifth Amendment right to due process."), *mandamus granted on other issues*, 855 F.2d 1062 (3d Cir. 1988); *Mentis v. Delaware Am. Life Ins. Co.*, No. CA 98C-12-0232WTQ, 2000 WL 973299, at *8 (Del. Super. May 30, 2000) ("[S]ince a large percentage of common law class actions will sound in tort there will be a tendency to look for shortcuts in the matter of proof of damages, along the lines of regulatory agencies. This tendency is * * * foreign to traditional standards for damages at common law. When standards of proof lessen to serve some mass interest, the Court runs the risk of blurring its role as a neutral adjudicator on an evidentiary record and developing an interest in enforcing the 'policy' involved in the litigation."). *See generally Lindsey v. Normet*, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense.") (quoting *American Sur. Co. v. Baldwin*, 287 U.S. 156, 168 (1932)); *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971) (a defendant's "right to litigate the issues raised" is "a right guaranteed to him by the Due Process Clause").
18. *See, e.g., Castano*, 84 F.3d at 749-750; *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1085-1086 (6th Cir. 1996); *Rhone-Poulenc*, 51 F.3d at 1299-1303; *Kirkpatrick v. J.C. Bradford Co.*, 827 F.2d 718, 725 (11th Cir. 1987); *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 679-680 (S.D. Cal. 1999); *In re Jackson Nat'l Life Ins. Co. Premium Litig.*, 183 F.R.D. 217, 225 (W.D. Mich. 1998); *Chin*, 182 F.R.D. at 460-461; *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. at 224; *Marascalco v. International Computerized Orthokeratology Soc'y Inc.*, 181 F.R.D. 331, 340 (N.D. Miss. 1998);

- Poe v. Sears Roebuck & Co.*, No. 96-CV-358-ALV, 1998 WL 113561, at *4 (N.D. Ga. Feb. 13, 1998); *Dubose v. First Sec. Sav. Bank*, 183 F.R.D. 583, 588 (M.D. Ala. 1997); *Mack*, 169 F.R.D. at 676; *Wall v. Merrill Lynch, Pierce, Fenner & Smith*, No. 92-C-1642, 1992 WL 245540, at *4 (N.D. Ill. Sept. 21, 1992); *Coe v. National Safety Assocs., Inc.*, 137 F.R.D. 252, 254 (N.D. Ill. 1991); *Majeski v. Balcov Entertainment Co.*, 134 F.R.D. 240, 249 (E.D. Wis. 1991); *Brooks v. Southern Bell Tel. & Tel. Co.*, 133 F.R.D. 54, 57 (S.D. Fla. 1990); *Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 264-265 (S.D. Cal. 1988); *Raye v. Medtronic Corp.*, 696 F. Supp. 1273, 1275 (D. Minn. 1988); *Blake v. Chemlawn Servs. Corp.*, No. 86-3413, 1988 WL 6151, at *4 (E.D. Pa. Jan. 26, 1988); *In re Storage Tech. Corp. Sec. Litig.*, 630 F. Supp. 1072, 1080-1081 (D. Colo. 1986); *Zandman v. Joseph*, 102 F.R.D. 924, 929 (N.D. Ind. 1984); *Brummett v. Skyline Corp.*, No. C-81-0103-L(B), 1984 WL 262315, at *4 (W.D. Ky. Apr. 11, 1984); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 605-606 (S.D.N.Y. 1982); *Coca-Cola Bottling Co. of Elizabethtown, Inc. v. Coca-Cola Co.*, 95 F.R.D. 168, 178 (D. Del. 1982); *Elster v. Alexander*, 76 F.R.D. 440, 442 (N.D. Ga. 1977); *Graybeal v. American Sav. & Loan Ass'n*, 59 F.R.D. 7, 15-16 (D.D.C. 1973); *Ex parte Exxon Corp.*, 725 So. 2d at 934; *Ex parte Green Tree Fin. Corp.*, 723 So. 2d 6, 11 (Ala. 1998); *Rose v. Medtronics, Inc.*, 166 Cal. Rptr. 16, 20 (Ct. App. 1980); *Oliveira v. Amoco Oil Co.*, 726 N.E.2d 51, 62 (Ill. App. Ct.), *review granted*, 189 Ill.2d 690 (2000).
19. *See, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568-573 (1996) (Alabama jury could not apply Alabama law to punish defendant for transactions taking place in other states); *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders"); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 582-583 (1986) (rejecting New York's attempt to "project its legislation" into other states); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-823 (1985) (Kansas court could not apply forum law to claims of class members that had no connection with Kansas); *Edgar v. MITE Corp.*, 457 U.S. 624, 641-643 (1982) (plurality op.) (Illinois anti-takeover statute impermissibly regulated transactions occurring entirely outside of Illinois); *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975) ("[a] State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State"); *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) ("[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State * * * without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends."); *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881) ("[n]o State can legislate except with reference to its own jurisdiction").
20. 517 U.S. at 572 (footnotes omitted).
21. *Shutts*, 472 U.S. at 821 (internal quotation marks omitted).
22. *BMW*, 517 U.S. at 571.
23. *See also Brown-Forman Distillers*, 476 U.S. at 582-583 (holding that, while a state may regulate transactions within its borders, "it may not project its legislation into [other states]").
24. *See Shutts*, 472 U.S. at 822.
25. *See Poe v. Sears, Roebuck & Co.*, 1998 WL 113561, at *4 (N.D. Ga. Feb. 13, 1998) (under *Shutts*, applying the law of the state in which the defendant is headquartered "would not pass constitutional muster"); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 348 (D.N.J. 1997) (as a matter of both choice-of-law principles and due process, the fact that the defendant is headquartered in Michigan does not justify applying only Michigan law in 50-state class action); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 371 (E.D. La. 1997) (under *Shutts*, Michigan law may not be applied in nationwide class action

even though the defendant is headquartered in Michigan); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 423 (E.D. La. 1997) (under applicable choice-of-law principles, the fact that defendant's primary place of business is in Illinois does not justify applying Illinois law to the claims of all members of a 50-state class); *Endo v. Albertine*, 1995 WL 170030, at *5 (N.D. Ill. Apr. 7, 1995) (fact that Illinois is defendant's primary place of business is not adequate under *Shutts* to justify applying Illinois law to claims of out-of-state class members); *Oliveira v. Amoco Oil Co.*, 726 N.E.2d 51, 61-62 (Ill. App. Ct.) (Illinois law could not constitutionally be applied to transactions of Illinois-domiciled company with consumers in other states), *review granted*, 189 Ill.2d 690 (2000); *Duvall v. TRW, Inc.*, 578 N.E.2d 556, 559 (Ohio App. 1991) ("the fact that TRW is incorporated and headquartered in Ohio" is "an insufficient basis for applying Ohio law to these potential out-of-state class members"). *But see Clothesrigger, Inc. v. GTE Corp.*, 191 Cal. App. 3d 605, 613, 236 Cal. Rptr. 605, 608 (Cal. Ct. App. 1987) (holding that fact that one defendant's principal offices were in California and that the advertising and promotional literature of another defendant were prepared by employees located in California "would appear to constitute a sufficient aggregation of contacts under *Phillips* to permit applying California law to the claims of nonresident plaintiffs").

26. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300, 1302 (7th Cir. 1995) (issuing writ of mandamus directing decertification of class where trial judge intended to give single instruction merging all fifty states' negligence laws).
27. *Id.* at 1301-1303.
28. *Id.* at 1301.
29. See Advisory Committee Notes to Fed. R. Civ. P. 23.
30. *Id.*
31. *Id.*
32. See Fed. R. Civ. P. 23(c)(2); *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994) (contrasting "Rule 23(b)(3), which permits opt-out" with "Rules 23(b)(1) and (b)(2), which do not").
33. It is my view that the due process underpinnings of the manageability requirement necessitate consideration of that requirement even when class certification is being pursued under Rules 23(b)(1) or (b)(2): if a case can't be managed as a class action without lightening the plaintiffs' burden of proof or depriving the defendant of the right to put on individualized evidence and raise individualized defenses, it shouldn't matter what subsection of the Rule is the basis for certification. Due process forbids litigating the case as a class action. See generally *Zapka v. Coca-Cola Co.*, No. 99-CV-8238, 2000 WL 1644539, at *4 (N.D. Ill. Oct. 27, 2000). Notably, this should never be a problem in a case that truly does fit the model of a Rule 23(b)(1) or (b)(2) class. It is only when class counsel seek to bring a damages action in through the backdoor of a (b)(1) or (b)(2) claim that this issue arises.
34. See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).
35. *Shutts*, 472 U.S. at 811-812.
36. *Id.* at 811 n.3 (emphasis added).
37. See *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994) (cert. dismissed as improvidently granted); *Adams v. Robertson*, 520 U.S. 83 (1997) (same); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (issue raised, but not squarely resolved).

38. *Ortiz*, 527 U.S. at 846-847 (internal quotation marks and citations omitted).
39. *Id.* at 845.
40. It is less clear to me how the Court would rule in a true limited fund case. The unique equities of that circumstance and the relatively long pedigree of that rationale for group litigation might override the individual class members' right to pursue their claims independently.
41. *Menonite Bd. of Missions v. Adams*, 462 U.S. 791, 795-797 (1983). *Accord Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-175 (1974); *Schroeder v. City of New York*, 371 U.S. 208, 211-213 (1962); *Walker v. City of Hutchinson*, 352 U.S. 112, 115-116 (1956); *City of New York v. New York, N. H. & H. R. Co.*, 344 U.S. 293, 296 (1953); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *cf. Shutts*, 472 U.S. at 811-814 (due process does not require opt-in procedure when class members have received *actual notice* of the class action and the opportunity to opt out).
42. 417 U.S. at 173.
43. 417 U.S. at 173 (quoting Advisory Committee Note).
44. *Id.* at 173-174.
45. *Id.* at 174-175 (quoting *Mullane*, 339 U.S. at 318) (alterations deleted).
46. *Id.* at 175.
47. 472 U.S. at 812 (internal quotation marks omitted).
48. *Id.*
49. *Eisen*, 417 U.S. at 175; *see also Walker*, 352 U.S. at 116 ("It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property."); *New York, N. H. & H. R. Co.*, 344 U.S. at 296 ("Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice."); *Mullane*, 339 U.S. at 315 ("It would be idle to pretend that publication alone * * * is a reliable means of acquainting interested parties of the fact that their rights are before the courts."); *id.* at 318 ("Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.").
50. 417 U.S. at 166, 175.
51. *See* Section A, *supra*.
52. *See Shutts*, 472 U.S. at 805 ("Whether it wins or loses on the merits, [defendant] has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as [defendant] is bound. The only way a class-action defendant * * * 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.").
53. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).
54. *See* Richard Schmitt, *Justice RFD: Big Suits Land in Rural Courts*, Wall St. J., Oct. 10, 1996, at B1; Stateside Associates, *Class Action Lawsuits in State Courts: A Case Study in Alabama* (1998)

(attached to Statement of Dr. John B. Hendricks before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary (Mar. 5, 1998), available at 1998 WL 122544); Hearings on Mass Torts and Class Actions Before the Courts and Intellectual Property Subcomm. of the House Judiciary Comm., 105th Cong. (Mar. 5, 1998), 1998 WL 122553 (statement of John W. Martin, Jr.); Max Boot, *Rule of Law: A Texas-Sized Class Action Fraud*, WALL ST. J., May 22, 1996, at A23; *Auto Insurance: Class-Action Settlement Was a Travesty*, DALLAS MORNING NEWS, Dec. 26, 1996, at 28A; *Review & Outlook: Taken for a Ride*, WALL ST. J., Oct. 23, 1996, at A22. ■