CHAPTER 30

OTHER DUE PROCESS CHALLENGES TO THE CLASS DEVICE

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I. Introduction

By their very nature, group litigation and the class action procedure implicate the protections afforded by the due process clauses of the 5th and 14th Amendments to the U.S. Constitution. From the earliest days of the class device, courts have struggled with the inherent tension between the basic right of any litigant to due process of law and the efficiencies of adjudicating the rights of unnamed parties through a class action. Every class action involves the balancing of these competing interests. The keystone for this analysis is safeguarding the rights of absent class members while protecting the rights of defendants facing potentially annihilating liability.

While other chapters discuss these issues, this chapter will focus on the due process concerns that permeate any class action, as well as due process objections that defendants may raise in opposing class certification and class judgments. Many of the requirements the drafters of Rule 23 incorporated into the Rule are both based in and required by constitutional due process and therefore arise every time a court is faced with the question whether to certify a class under Rule 23. Courts typically focus on due process issues in certain contexts where the risks of abuse by class representatives and class counsel are particularly acute, such as in putative nationwide class actions, hybrid Rule 23(b)(2)/(b)(3) actions, defendant classes, and class settlements. In addition, some types of claims and remedies raise unique and complex due process problems when a plaintiff seeks to certify them

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as a class. For example, plaintiffs may not constitutionally subject a defendant to a nationwide class that involves claims from multiple jurisdictions with conflicting laws or that otherwise applies the law of a given state in an arbitrary or fundamentally unfair manner. And due process concerns arise in putative classes that seek to adjudicate claims and remedies in such a way that constricts the defenses a defendant is permitted to raise or otherwise alters the substantive law that would govern in an individual action. With respect to each of these issues, courts are guided by concerns with unduly binding absent class members to judgments in which they were not represented effectively, and with ensuring that defendants are able to defend themselves as fully as they could in individual actions.

II. Due Process and Rule 23

The familiar elements of Rule 23 of the Federal Rules of Civil Procedure—that a plaintiff must satisfy the preliminary requirements of Rule 23(a) (numerosity, commonality, typicality, and adequacy) and then one or more of the requirements of Rule 23(b)—have an essential due process component. Each requirement serves to ensure that classes are only certified when they involve homogenous and cohesive claims such that the class representative, in litigating his or her action, effectively litigates the claims of each absent class member as well, therefore making it appropriate to bind the absent class members based on the class representative's case. The requirements that the class representative be adequate, present common issues typical of the claims of the absent class members, and, in claims involving monetary damages, that common issues *predominate* over any individualized issues attempt to ensure the cohesiveness necessary to constitutionally bind the absent class members.

The historical development of Rule 23 reflects the symbiotic relationship between class actions and due process. As originally designed, Rule 23 suffered from potentially fatal ambiguities. The Rule allowed certification of classes under different categories, defined by the rights involved in the action, but it did not detail the requirements that plaintiffs seeking certification needed to satisfy and it afforded courts no mechanisms to ensure that the rights of absent class members were protected.[2] For example, the Advisory Committee determined that its original rule did not adequately confront "the measures that might be taken during the course of the action to assure procedural fairness, particularly giving notice to

2. *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 380–94 (1967) (detailing the problems with original Rule 23 and providing an account of the Advisory Committee's development of the new rule); FED. R. CIV. P. 23 advisory committee note (1966) (explaining the deficiencies of the original rule).

members of the class, which may in turn be related in some instances to the extension of the judgment to the class."[3]

Accordingly, in 1966, the Advisory Committee amended Rule 23 and produced the modern procedural vehicle for class action litigation. The most revolutionary change to Rule 23 was the Committee's proposed solution to the constitutional defects in the original rule—the requirements of notice and the right to opt out of a class action that seeks money as the predominant form of relief.[4] Several other amendments to Rule 23 had their roots in due process as well, and are set forth below.[5]

A. DUE PROCESS UNDERPINNINGS OF THE RULE 23(A) REQUIREMENTS

The Rule 23(a) requirements of adequate representation, commonality, and typicality[6] also are rooted in due process concerns.[7] Because class actions can bind class members to judgments in actions in which they did not participate, and about which they may not even have been aware, due process mandates that courts carefully scrutinize proposed class counsel and class representatives seeking to act on

3. Fed. R. Civ. P. 23 advisory committee note (1966). *See also Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 568 (2d Cir. 1968) ("The Advisory Committee in its note has suggested that the mandatory notice pursuant to 23(c)(2) and the discretionary notice under 23(d)(2) were intended to fulfill the requirements of due process.").

Some courts have even held that class action defendants have a due process right to secure a determination of the issues related to certification prior to the determination of the merits of the case, *Rose v. City of Hayward*, 126 Cal. App. 3d 926, 937 (1981), and to have the case result in a final binding resolution of the dispute, *State ex rel. Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729, 740 (Mo. 2004). Rule 23 prohibits "one-way intervention," whereby putative class members could sit on the sidelines, watch how the case unfolded, and then decide whether to exercise their opt-out rights, Fed. R. Civ. P. 23(c)(2), and some courts have held that due process prohibits this gamesmanship, because it places all of the risk of a class action on the defendant, without any offsetting benefit of a final judgment that binds the class. *See, e.g.*, *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547–49 (1974); *Home Sav. & Loan Ass'n v. Superior Court*, 42 Cal. App. 3d 1006, 1010–11 (1974).

4. Fed. R. Civ. P. 23 advisory committee note (1966); *see also* Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. Pa. L. Rev. 1439, 1488 (2008) ("The Advisory Committee settled on notice and opt-out rights to meet the expressed concern that (b)(3) classes might be used by class counsel, in league with the defendants, to force those with substantial individual claims into group litigation inimical to their interests.").

5. There have been other amendments to Rule 23 since 1966, and some of these were substantial. For example, in 1998 the Advisory Committee added subdivision (f), which provides for interlocutory review of a district court's certification decision, and in 2003 the Committee amended subdivision (c)(1)(C) to preclude "conditional certification," and mandated that "[a] court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met." Fed. R. Civ. P. 23 advisory committee note (2003). But these amendments did not effect the same revolutionary change on the due process rights of plaintiffs and defendants as the 1966 amendments.

6. *See* Chapter 3.B, "Numerosity, Commonality, and Typicality," and 3.C, "Adequacy Requirements."

7. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 182 n.27 (3d Cir. 2001) (explaining that these Rule 23(a) requirements "constitute a multipart attempt to safeguard the due process rights of absentees").

behalf of the absent class members.[8] Class representatives have a strict fiduciary duty to represent and protect the interests of absent class members.[9]

The Supreme Court established this rule in the landmark case of *Hansberry v. Lee*.[10] In that case, the defendant appealed a state court's decision rejecting a class certification order in a dispute over a racially restrictive land use covenant. The state court had held that the plaintiffs were members of a prior class and that the claim challenging the covenant was therefore barred by res judicata. The Supreme Court reversed and held that the appointment of class representatives implicates the due process rights of absent class members. The Court explained that "a selection of representatives . . . whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires."[11] The Advisory Committee cited *Hansberry* and recognized this due process limitation in its 1966 amendments to Rule 23(a).[12]

In determining whether a proposed class representative adequately represents the interests of absent class members and comports with due process, courts consider several factors, including (1) the gravity, quantity, and degree of conflicts between proposed class counsel and/or class representatives on the one hand and absent class members on the other; (2) the viability of alternatives to the class device; (3) the feasibly available procedures to limit the effect of conflicts (e.g., supervision by the court, the creation of subclasses, or the court's discretionary authority under Rule 23(d) and (e)); (4) whether there are other proposed representatives; and (5) any other facts bearing on the procedural fairness.[13] Further, a class representative also must convince the court that he or she will "vigorously prosecute the interests of the class through qualified counsel."[14] In assessing these

8. *See, e.g.*, *Hansberry v. Lee*, 311 U.S. 32, 43 (1940); *Kincade v. Gen. Tire & Rubber Co.*, 635 F.2d 501, 506–08 (5th Cir. 1981); *Susman v. Lincoln Am. Corp.*, 561 F.2d 86, 90 (7th Cir. 1977); *Dosier v. Miami Valley Broad. Corp.*, 656 F.2d 1295, 1299 (9th Cir. 1981); *see also Daly v. Harris*, 209 F.R.D. 180, 189 (D. Haw. 2002) (explaining that Rule 23(a)(4)'s adequacy requirement is of paramount importance in all class actions because it "serves to protect the due process rights of absent class members who will be bound by the judgment").

9. *Hansberry*, 311 U.S. at 35.

10. *Id.* at 43.

11. *Id.* at 45.

12. Fed. R. Civ. P. 23 advisory committee note (1966).

13. *Blackie v. Barrack*, 524 F.2d 891, 910 (9th Cir. 1975); *see also* Fed. R. Civ. P. 23(g) ("[I]n appointing class counsel, the court . . . may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class.").

14. *Piazza v. Ebsco Indus., Inc.*, 273 F.3d 1341, 1346 (11th Cir. 2001).

factors, courts often are skeptical of class counsel's motivations.[15] The court's obligation to assess these concerns continues throughout the litigation.[16]

Separately, the due process clause adds an additional layer of protection on the Rule 23(a) requirements.[17] Absent class members are not bound by a judgment where their claims were not "typical" or "common" to those of the class representative. These requirements serve a function similar to that of adequacy, in that they require a court to ensure that the claims prosecuted by the named plaintiff do not differ from the claims of the absent class members.[18] As the Third Circuit explained, "a court cannot infer that the rights of the *entire* class were vindicated without having assured that commonality and typicality were satisfied."[19]

B. DUE PROCESS ISSUES IN 23(B)(3) CLASSES

In addition to establishing the factors required by Rule 23(a), a class action plaintiff must satisfy the requirements of one or more of the subparagraphs of Rule 23(b).

1. Class Notice and the Right to Opt Out

If the plaintiff seeks certification of a class action under Rule 23(b)(3), that plaintiff must establish "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[20] Rule 23(b)(3) requires that putative class members receive notice[21] and a right to opt out of the class.[22] The Advisory Committee included these requirements to address its concerns about fairness and due

15. *See, e.g.*, *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991) (expressing "fear that class actions will prove less beneficial to class members than to their attorneys[, which] has been often voiced by concerned courts and periodically bolstered by empirical studies" (internal citations omitted)).

16. *McNeil v. Guthrie*, 945 F.2d 1163, 1167 (10th Cir. 1991) ("[T]he district court must constantly scrutinize class counsel to determine if counsel is adequately protecting the interests of the class."); *Kemp v. Birmingham News Co.*, 608 F.2d 1049, 1054 (5th Cir. 1979); *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 248 (3d Cir. 1975); *Gonzales v. Cassidy*, 474 F.2d 67, 73 n.11 (5th Cir. 1973).

17. *See, e.g.*, *Hansberry*, 311 U.S. at 44–45; *Newton*, 259 F.3d at 182; *Turner v. A.B. Carter, Inc.*, 85 F.R.D. 360, 369 (E.D. Va. 1980); *McKernan v. United Techs. Corp.*, 120 F.R.D. 452, 455 (D. Conn. 1988).

18. *In re Gen. Motors Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 796 (3d Cir. 1995).

19. *Id.* (emphasis in original).

20. Fed. R. Civ. P. 23(b)(3).

21. Fed. R. Civ. P. 23(c)(2)(B).

22. Fed. R. Civ. P. 23(c)(2)(B)(v). For a more detailed discussion of the notice and opt-out requirements of Rule 23(c), *see* Chapter 3.E, "Predominance and Superiority," and Chapter 20, "Special Issues Relating to Class Notice."

process,[23] and several courts have held that due process requires these rights when money damages are involved.[24]

In mandatory and hybrid classes where plaintiffs do not seek predominantly monetary damages, the due process requirements are less clear.[25] The Supreme Court stated in *Phillips Petroleum Co. v. Shutts* that the due process right to notice and the opportunity to opt out were "limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments,"[26] and the lower courts have therefore not extended notice and opt-out rights to mandatory classes.[27] In hybrid classes involving both monetary and equi-

23. *See* FED. R. CIV. P. 23 advisory committee note (1966) ("[M]andatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which the class action procedure is of course subject.").

24. The Supreme Court hinted at this requirement in *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950), and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985), and a subsequent per curiam decision raised the issue as well, *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994), but it has never squarely held that due process requires that plaintiffs receive notice and be able to opt out of a class. Many lower courts have held that opt-out rights are required by due process. *Lindsay v. Gov't Employees Ins. Co.*, 448 F.3d 416, 420 (D.C. Cir. 2006) ("Because members of a class seeking substantial monetary damages may have divergent interests, due process requires that putative class members receive notice and an opportunity to opt out."); *In re Telectronics Pacing Sys., Inc.*, 221 F.3d 870, 881 (6th Cir. 2000) ("[C]onstitutional considerations of due process and the right to a jury trial all lead to the conclusion that in an action for money damages class members are entitled to personal notice and an opportunity to opt out."); *In re Prudential Ins. Co.*, 148 F.3d 283, 306 (3d Cir. 1998) ("The combination of reasonable notice, the opportunity to be heard and the opportunity to withdraw from the class satisfy the due process requirements of the Fifth Amendment.").

25. For a more detailed discussion of mandatory and hybrid classes, *see* Chapter 3.D, "Nonmonetary Relief," and Chapter 14, "The Special Role of 23(b)(2) Classes."

26. 472 U.S. at 811–12 n.3. *See also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848 n.24 (1999) (noting that "an important caveat" to the notice and right to opt-out protections enunciated in *Shutts* is the limitation of these protections to "out-of-state class members whose claims were 'wholly or predominately for money judgments'"); *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 395 (1996) (Ginsburg, J., concurring and dissenting in part) ("In [*Shutts*], this Court listed minimal procedural due process requirements a class action money judgment must meet if it is to bind absentees; those requirements include notice, a right to opt out, and adequate representation.").

27. *See, e.g.*, *In re Veneman*, 309 F.3d 789, 792 (D.C. Cir. 2002) ("Because members of a class seeking substantial monetary damages may have divergent interests, due process requires that putative class members receive notice and an opportunity to opt out. By contrast, Rule 23(b)(2) imposes no similar requirements." (citations omitted)); *Molski v. Gleich*, 318 F.3d 937, 948 (9th Cir. 2003); *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 645 (6th Cir. 2006) ("Rule 23(b)(1) and Rule 23(b)(2) authorize 'mandatory' class actions under which potential class members do not have an automatic right to notice or a right to opt out of the class."); *McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545, 553 (5th Cir. 2003) ("Unlike Rule 23(b)(3), class members are not permitted to opt-out of a Rule 23(b)(2) class to pursue their claims individually."); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 165 (2d Cir. 2001) ("Where class-wide injunctive or declaratory relief is sought in a (b)(2) class action for an alleged group harm, there is a presumption of cohesion and unity between absent class members and the class representatives such that adequate representation will generally safeguard absent class members' interests and thereby satisfy the strictures of due process."); *Lemon v. Int'l Union of Operating Eng'rs*, 216 F.3d 577, 580 (7th Cir. 2000).

table relief, courts differ on whether absent class members must also be able to opt out.[28] Several courts have held that due process requires opt-out rights in hybrid classes.[29]

The due process clause not only governs whether notice is required, but it also imposes several requirements on the form and content of the notice. The touchstone of the due process analysis is the Supreme Court's instruction in *Shutts* that the "best notice practicable under the circumstances be given."[30] At a minimum, the notice must provide putative class members with enough details about the case to allow them to evaluate whether to participate or opt out.[31] But in practice, this broad standard varies depending on the individual circumstances of each case. In some cases, this requires individual notice via first-class mail to those class members who can be identified through reasonable effort,[32] while other courts require further publication in newspapers, periodicals, or television commercials.[33] Courts

28. *See, e.g.*, *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 667–68 (Tex. 2004) ("[T]rial courts considering certification under (b)(2) must consider, and due process may require, individual notice and opt-out rights to class members who seek monetary damages under any theory."); *see generally* Robert L. Serenka, Jr., Annotation, *Propriety of Allowing Class Member to Opt Out in Class Action Certified Under Subsections (b)(1) or (b)(2) of Rule 23 of Federal Rules of Civil Procedure*, 146 A.L.R. FED. 563 (2009).

29. *See, e.g.*, *Ayers v. Thompson*, 358 F.3d 356, 375–76 (5th Cir. 2004) (a hybrid class action "begins to resemble a 23(b)(3) action, and there has been more concern with protecting the due process rights of the individual class members to ensure they are aware of the opportunity to receive the monetary relief to which they are entitled" (quoting *Penson v. Terminal Transp. Co.*, 634 F.2d 989, 994 (5th Cir. 1981))); *Johnson v. Gen. Motors Corp.*, 598 F.2d 432, 438 (5th Cir. 1979) ("Where, however, individual monetary claims are at stake, the balance swings in favor of the provision of some form of notice. It will not always be necessary for the notice in such cases to be equivalent to that required in (b)(3) actions."); *Williams v. Burlington N., Inc.*, 832 F.2d 100, 104 (7th Cir. 1987); *see also Ortiz*, 527 U.S. at 845–48; *Ticor*, 511 U.S. at 121–22 (raising, but not deciding, this issue).

Many courts that have granted opt-out rights in Rule 23(b)(2) classes have relied on the discretionary authority granted them under Rule 23(d)(2). *See, e.g.*, *Penson*, 634 F.2d at 994; *Johnson*, 598 F.2d at 437; *Molski*, 318 F.3d at 947 (noting that "a district court may require notice and the right to opt-out under its discretionary authority provided in Rule 23(d)(2)"). But there is some disagreement on whether the use of 23(d)(2) to create a right to opt out is appropriate. *See generally* Serenka, *supra* note 28 (examining the different approaches that courts have taken with respect to opt-outs in (b)(1) and (b)(2) actions).

30. 472 U.S. at 812.

31. *Kyriazi v. W. Elec. Co.*, 647 F.2d 388, 395 (3d Cir. 1981).

32. *See, e.g.*, *Shutts*, 427 U.S. at 811–12; *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 832 (3d Cir. 1973); *Mountain States Tel. & Tel. Co. v. Dist. Court*, 778 P.2d 667, 672–73 (Colo. 1989); *Nat'l Lake Devs., Inc. v. Lake Tippecanoe Owners Ass'n, Inc.*, 417 So. 2d 655, 657 (Fla. 1982); *Client Follow-Up Co. v. Hynes*, 434 N.E.2d 485, 490 (1982).

33. *See, e.g.*, *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 246 F.3d 315, 318, 327 n.11 (3d Cir. 2001); *In re Diet Drugs Prods. Liab. Litig.*, Nos. 1203, 99-20593, 2000 WL 1222042, at *34–35 (E.D. Pa. Aug. 28, 2000); *see also* Chapter 20.A, "Quantifying Notice Results in Consumer, Mass Tort, and Product Liability Class Actions—the *Daubert/Kuhmo Tire* Mandate."

also differ on the degree of detail that the notice must contain.[34] The trial courts enjoy considerable discretion to formulate a notice plan.[35]

Courts continue to struggle with applying these requirements in the electronic age, as new and less expensive means of service become available and as privacy concerns present new challenges on the use of these methods.[36] For example, there is a split of authority on whether due process allows notice via e-mail. Some jurisdictions approve of e-mail notice, particularly where the class members' contact with the defendant is through an Internet website.[37] But even those courts that are willing to accept e-mail notice often require that the parties also provide notice by U.S. mail for class members whose e-mail addresses are unavailable and/or inactive.[38] Other courts have disapproved altogether of e-mail as a form of service.[39]

2. Manageability

Rule 23(b)(3) also requires that a class be "manageable" and that courts weigh this factor in determining whether a proposed class satisfies the superiority requirement.[40] Some courts have held that this factor has a constitutional component,

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34. *Compare Gottlieb v. Wiles*, 11 F.3d 1004, 1013 (10th Cir. 1993) (no due process violation where formula for calculating potential damages awards for individual class members not included) *with Penn. Ass'n for Retarded Children v. Penn.*, 343 F. Supp. 279, 304 (E.D. Pa. 1972) ("The notice shall describe the proposed action in detail, including specification of the statute or regulation under which such action is proposed and a clear and full statement of the reasons therefor, including specification of any tests or reports upon which such action is proposed."); *see also*, *e.g.*, *Ford Motor Co. v. Sheldon*, 22 S.W.3d 444, 453 (Tex. 2000); *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326, 1337–38 (2d Cir. 1992); *Noble Park, L.L.C. of Vancouver v. Shell Oil Co.*, 95 P.3d 1265, 1270 (Wash. 2004).

35. *Kyriazi*, 647 F.2d at 395; *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 168 (2d Cir. 1987) ("Rule 23, of course, accords considerable discretion to a district court in fashioning [settlement] notice to a class."); *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 121 (8th Cir. 1975) ("[T]he mechanics of the notice process are left to the discretion of the court subject only to the broad 'reasonableness' standards imposed by due process."); *Crow v. Citicorp Acceptance Co.*, 354 S.E.2d 459, 466 (N.C. 1987).

36. *See* Chapter 20.C, "Reality Check: The State of New Media Options for Class Notice."

37. *See, e.g.*, *Browning v. Yahoo! Inc.*, No. C04-01463 HRL, 2007 U.S. Dist. LEXIS 86266, at *13 (N.D. Cal. Nov. 16, 2007); *Lundell v. Dell, Inc.*, No. C05-3970 JW/RS, 2006 U.S. Dist. LEXIS 90990, at *2–3 (N.D. Cal. Dec. 5, 2006); *Larson v. Sprint Nextel Corp.*, No. 07-5325 (JLL), 2009 U.S. Dist. LEXIS 39298, at *7–8 (D.N.J. Apr. 30, 2009).

38. *See, e.g.*, *Browning*, 2007 U.S. Dist. LEXIS 86266, at *13; *Lundell*, 2006 U.S. Dist. LEXIS 90990, at *2–3.

39. *See, e.g.*, *Karvaly v. eBay, Inc.*, 245 F.R.D. 71, 93 (E.D.N.Y. 2007) (explaining that notice via e-mail "does not produce the same degree of reassurance that every member of the proposed class will receive individual notice of the settlement that a plan of notification by first class mail would"); *Reab v. Elec. Arts, Inc.*, 214 F.R.D. 623, 630 (D. Colo. 2002) (rejecting e-mail notice because e-mail could, among other things, "be copied and forwarded to other people via the internet with commentary that could distort the notice approved by the Court").

40. FED. R. CIV. P. 23(b)(3)(D). For a more detailed discussion of the manageability and superiority requirements in Rule 23(b)(3), *see* Chapter 3.E, "Predominance and Superiority" and Chapter 17, "Manageability and Predominance Concerns in Particular Class Actions."

in that an unmanageable class also violates due process.[41] In determining whether a class is manageable, courts must weigh "the whole range of practical problems that may render the class action format inappropriate for a particular suit."[42] Courts generally do not deny certification of a class solely based on manageability problems,[43] although concerns over manageability often also raise questions regarding whether common issues predominate over individual issues[44] and the sheer number of issues presented.[45]

III. Due Process Issues in Defendant Classes

Defendant classes raise unique and important due process concerns, and courts have exercised special cautions to ensure fairness and protect defendants' due process rights.[46] For example, the Tenth Circuit has cautioned that "defendant class actions create a special need to be attentive to the due process rights of absent parties."[47] Although the articulated adequacy standard for defendant classes is the same as the standard for plaintiff classes, courts are particularly cautious about the selection of class representatives in a defendant class, because of the risk that plaintiffs, for strategic reasons, may select weaker adversaries to represent the class.[48]

41. *See, e.g.*, *Murry v. Griffin Wheel Co.*, 172 F.R.D. 459, 462 (N.D. Ala. 1997) ("'[D]ue process' . . . requires manageability as well as fairness.").

42. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 164 (1974).

43. *In re Visa Check/Mastermoney Antritrust Litig.*, 280 F.3d 124, 140 (2d Cir. 2001). *But see Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1023 (11th Cir. 1996) ("[I]f the court finds 'that there are serious problems *now appearing*, it should not certify the class merely on the assurance . . . that some solution will be found.'" (citation omitted) (emphasis in original)).

44. *Klay v. Humana, Inc.*, 382 F.3d 1241, 1273 (11th Cir. 2004).

45. *Robinson v. Tex. Auto Dealers Ass'n*, 387 F.3d 416, 426 (5th Cir. 2004) ("[P]arties have an interest in ensuring that the jurors will have a reasonable chance of remembering which party presented which evidence. The sheer number of individual defendants and the incentive to offer individual defenses create the possibility of jurors' having to base their determinations on evidence offered throughout a long proceeding.").

46. *Marchwinski v. Oliver Tyrone Corp.*, 81 F.R.D. 487, 489 (W.D. Pa. 1979).

47. *In re Integra Realty Res., Inc.*, 262 F.3d 1089, 1105 (10th Cir. 2001).

48. *Ameritech Benefit Plan Comm. v. Commc'n Workers of Am.*, 220 F.3d 814, 820 (7th Cir. 2000) ("Defendant classes, initiated by those opposed to the interests of the class, are more likely than plaintiff classes to include members whose interests diverge from those of the named representatives, which means they are more in need of the due process protections afforded by (b)(3)'s safeguards."); *The Flying Tiger Line, Inc. v. Cent. States, Sw. & Se. Areas Pension Fund*, No. 86-304 CMW, 1986 WL 13366, at *4 (D. Del. Nov. 20, 1986) ("Defendant class actions, while appropriate, require special care before certification."); *Thillens, Inc. v. Cmty. Currency Exch. Ass'n of Ill., Inc.*, 97 F.R.D. 668, 674 (N.D. Ill. 1983) ("The crux of the distinction is: the unnamed plaintiff stands to gain while the unnamed defendant stands to lose.").

IV. Class Settlements

In evaluating class settlements, courts often view themselves as the guardians of the absent class members' due process rights against the risk of collusion between the named parties.[49] In particular, courts are suspicious of settlements that compensate the class representatives and their counsel and grant the defendant a broad release of all class claims, while providing very little meaningful relief for the class.[50]

Many proposed settlements that present indicia of potential collusion also feature other criteria that trouble courts, such as the lack of any proposed notice to class members or a right to opt out, large attorney fees awards that appear disproportionate to the amount of work expended on the action and/or the relief obtained for the class, an early settlement and compromise of damages claims before class counsel has had an opportunity to conduct an investigation and evaluate the merits of the claims, or other factors suggesting potential collusion.[51] Some courts therefore require a stricter review of class settlements reached *before* certification.[52]

As with certification of classes for litigation, courts require that the notice sent to putative class members be "reasonable,"[53] and the best practicable under the cir-

49. For a more detailed discussion of the ethical and tactical issues inherent in class settlements, *see* Chapter 7, "Settlements," and Chapter 32, "Ethical Issues in Class Actions."

50. *See Molski*, 318 F.3d at 954 ("In sum, the class members received nothing; the named plaintiff and class counsel received compensation for his injury and their time; and the defendant escaped paying any punitive or almost any compensatory damages."); *Crawford v. Equifax Payment Servs., Inc.*, 201 F.3d 877, 882 (7th Cir. 2000) (finding settlement was "substantively troubling" because the named plaintiff "and his attorney were paid handsomely to go away; the other class members received nothing (not even any value from the $5,500 'donation'), and lost the right to pursue class relief"); *Tornabene v. Gen. Dev. Corp.*, 88 F.R.D. 53, 60 (E.D.N.Y. 1980) ("'An attorney may be willing to settle a class action, without due regard for the best interests of class members in order to avoid the risk of defeat at trial.'" (quoting *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1605 (1976))).

51. *Molksi*, 318 F.3d at 947–49; *Crawford*, 201 F.3d at 882.

52. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998); *In re Gen. Motors Prods. Liab. Litig.*, 55 F.3d at 805 ("We affirm the need for courts to be even more scrupulous than usual in approving settlements where no class has yet been formally certified."); *see also Mars Steel Corp. v. Cont'l Ill. Nat'l Bank & Trust*, 834 F.2d 677, 681 (7th Cir. 1987) ("*Simer* and *Weinberger* emphasize . . . that when class certification is deferred, a more careful scrutiny of the fairness of the settlement is required. We agree."); *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) ("[D]istrict judges who decide to employ such a procedure are bound to scrutinize the fairness of the settlement agreement with even more than the usual care."); MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.45 (1995) ("Approval under Rule 23(e) of settlements involving settlement classes . . . requires closer judicial scrutiny than approval of settlements where class certification has been litigated.").

53. *Fowler v. Birmingham News Co.*, 608 F.2d 1055, 1059 (5th Cir. 1979); *Simer v. Rios*, 661 F.2d 655, 686 (7th Cir. 1981); *Grunin*, 513 F.2d at 121.

cumstances of a particular case.[54] Courts often consider whether the notice of the proposed settlement is sufficiently detailed in order to help absent class members be informed enough to decide whether to opt out of the settlement,[55] although the notice need not contain any and all information class members might want in making their decision, and courts rely on class members to undertake some investigation on their own.[56]

V. Due Process Defenses to Nationwide Classes

Nationwide class actions present unique due process problems because of the risk that a defendant may be subject to numerous and potentially conflicting state laws based on certification in a single forum or because plaintiffs without any connection to that state will have their claims adjudicated based on the laws of a foreign state.[57]

Once again, *Shutts* provides the framework for this analysis. In that case, the courts had applied Kansas law to a nationwide class even though 97 percent of the class members had no apparent connection to Kansas other than the litigation itself.[58] The Supreme Court ruled that the absence of contacts with Kansas, coupled with the substantive conflicts between Kansas law and the laws of the other affected jurisdictions, rendered the application of Kansas law "sufficiently *arbitrary* and *unfair* as to exceed constitutional limits."[59] The Court explained that "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither *arbitrary* nor *fundamentally unfair*."[60]

Equally impermissible is a court's attempt to meld the law of numerous states together in a class action. The landmark Seventh Circuit decision in *In re Rhone-Poulenc Rorer, Inc.*[61] reversed certification of a nationwide class because the district court had assumed that the negligence standards of the 50 states and the District of Columbia were essentially uniform and could be abstracted in a single jury

54. *In re Four Seasons Sec. Laws Litig.*, 502 F.2d 834, 840 (10th Cir. 1974); *Hill v. Art Rice Realty Co.*, 66 F.R.D. 449, 453 (N.D. Ala. 1974), *aff'd*, 511 F.2d 1400 (5th Cir. 1975); *Ballard v. Martin*, 79 S.W.3d 838, 852 (Ark. 2002); *see also Oppenlander v. Standard Oil Co.*, 64 F.R.D. 597, 602–03 (D. Colo. 1974).

55. *Barkema v. Williams Pipeline Co.*, 666 N.W.2d 612, 616 (Iowa 2003).

56. *Id.*; *Rubenstein v. Republic Nat'l Life Ins. Co.*, 74 F.R.D. 337, 348 (N.D. Tex. 1976).

57. For a more detailed discussion of issues related to nationwide classes, *see* Chapter 24, "Multistate Class Actions and Choice of Law."

58. 472 U.S. at 815.

59. *Id.* at 822 (emphases added).

60. *Id.* at 818 (emphases added) (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981)).

61. 51 F.3d 1293 (7th Cir. 1995).

instruction.[62] Writing for the majority, Judge Posner explained that the different states all "sing negligence with a different pitch,"[63] and therefore the claims could not constitutionally be adjudicated in a single nationwide class action.[64]

Litigants sometimes urge federal courts to enjoin state or federal lawsuits that raise issues similar to those in the immediate class action before the court, but due process substantially limits the court's power to issue so-called anti-suit injunctions in the class action context.[65] Aside from principles of comity and statutory restrictions, due process limits the reach of a court's injunctive powers to those parties subject to the court's personal jurisdiction. While a court may thus enjoin subsequent suits by the plaintiff against the defendant arising from the same subject matter before the court,[66] the court may generally not enjoin other plaintiffs outside the jurisdiction.[67] Superior methods for handling related suits in different jurisdictions include stay of proceedings, transfer under 28 U.S.C. § 1404(a), and consolidation under 28 U.S.C. § 1407.[68]

Due process thus precludes nationwide classes brought solely under a single state's substantive law when the out-of-state plaintiffs would not be able to sue under that law and prohibits plaintiffs from combining the varying and conflicting laws of other states.

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62. *Id.* at 1300.

63. *Id.* at 1301.

64. *Id.* at 1302. *See also Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 746 (7th Cir. 2008) ("The instructions to the jury on the law it is to apply will be an amalgam of the consumer protection laws of the twenty-nine jurisdictions and procedural rules by which particular jurisdictions expand or contract relief will be ignored."); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir. 2001) ("The complexity of the trial would be further exacerbated to the extent that the laws of forty-eight states must be consulted to answer such questions."); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 743 n.15 (5th Cir. 1996) ("[B]ecause we must apply an individualized choice of law analysis to each plaintiff's claims, the proliferation of disparate factual and legal issues is compounded exponentially." (citing *Georgine v. Amchem Prods.*, 83 F.3d 610, 627 (3d Cir. 1996))).

65. *See* 3 Herbert B. Newberg & Alba Conte, Newberg on Class Actions: A Manual for Group Litigation at Federal and State Levels § 9:25, at 360–65 (4th ed. 2002). *But see In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 333 F.3d 763, 767, 768–69 (7th Cir. 2003) ("[U]nnamed class members have the status of parties for many purposes and are bound by the decision whether or not the court otherwise would have had personal jurisdiction over them. *Just as they receive the fruits of victory, so an adverse decision is conclusive against them.*" (emphasis added) (citations omitted)); *In re Diet Drugs Liab. Litig.*, 282 F.3d 220, 236 (3d Cir. 2002) (upholding injunction against competing state class action, reasoning that "[i]n complex cases where certification or settlement has received conditional approval, or perhaps even where settlement is pending, the challenges facing the overseeing court are such that it is likely that almost any parallel litigation in other fora presents the genuine threat to the jurisdiction of the federal court").

66. *See Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 185–86 (1952).

67. *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832 (2d Cir. 1930) ("[N]o court can make a decree which will bind anyone but a party; a court . . . cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is *pro tanto brutum fulmen* and the persons enjoined are free to ignore it.").

68. Newberg, *supra* note 65, § 9:25, at 362–63.

VI. Due Process Objections to Changes in Substantive Law

Due process also animates the common rule that class action procedure may not be used in a way that alters the underlying substantive law. The Rules Enabling Act, in giving authority to the Advisory Committee to establish procedural rules, limited that authority to *procedural* rather than *substantive* rulemaking.[69] Accordingly, any procedural rule, such as Rule 23, that changes the *substantive* law is in violation of this key limit in the Rules Enabling Act.[70]

Defendants also often argue that in addition to the Rules Enabling Act's prohibition on changing substantive law, the due process clause precludes the certification of a class that would prevent a defendant from raising defenses it otherwise would have been able to assert in an individual action.[71] The Supreme Court has held that "[t]he fundamental requisite of due process of law is the opportunity to be heard."[72] And a litigant's "right to litigate the issues raised" is "guaranteed . . . by the Due Process Clause,"[73] including the right "to present every available defense."[74] Most recently, the Supreme Court held in *Philip Morris USA v. Williams* that "the Due Process Clause prohibits a State from punishing an individual

69. 28 U.S.C. § 2072 (2009).

70. *Stonebridge Life Ins. Co. v. Pitts*, 236 S.W.3d 201, 205 (Tex. 2007); *Compaq Computer Corp. v. Albanese*, 153 S.W.3d 254, 261 n.6 (Tex. App. 2004); *City of San Jose v. Superior Court*, 525 P.2d 701, 711 (Cal. 1974).

71. Preserving this federal constitutional challenge is particularly important after the Supreme Court's decision in *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, No. 08-1008, 2010 U.S. LEXIS 2929 (U.S. 2010). The plurality opinion in *Shady Grove* held that the New York rule at issue in that case—which prohibited class actions seeking penalties—did not apply in a federal diversity action. *Shady Grove* held that because the New York procedural rule conflicts with Rule 23, which "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action," Rule 23 governs. *Id.* at *11. Whether the Court's fractured opinion will invalidate other state restrictions remains to be seen, but in the meantime the federal constitutional protections remain an important safeguard against using the class device to enlarge substantive rights.

72. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970).

73. *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971).

74. *Lindsey v. Normet*, 405 U.S. 56, 66 (1972). *See also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (class certification should not "sacrifice[ ] procedural fairness"); *Nat'l Union Fire Ins. Co. of Pittsburgh v. City Sav., F.S.B.*, 28 F.3d 376, 394 (3d Cir. 1994) (an interpretation of a statute preventing "parties . . . from presenting defenses . . . to claims which ha[d] been filed against them" must be avoided); *W. Elec. Co. v. Stern*, 544 F.2d 1196, 1199 (3d Cir. 1976) (defendants have a federal due process "right to present a full defense," which includes the right to present "any relevant rebuttal evidence," such as that there was no violation "against one or more members of the class"); *Sanchez v. Wal-Mart Stores, Inc.*, No. Civ. 2:06-CV-02573-JAM-KJM, 2009 U.S. Dist. LEXIS 48428, at *12 (E.D. Cal. May 28, 2009) ("Beyond the Rule 23 requirements, certification of a class here would violate Defendants' constitutional rights to due process. 'Due process requires that there be an opportunity to present every available defense.'" (quoting *Lindsey*, 405 U.S. at 66)).

without first providing that individual with 'an opportunity to present *every* available defense.'"[75]

VII. Due Process Objections to Remedies

A. PUNITIVE DAMAGES AND OTHER STATUTORY PENALTIES

As discussed in Chapter 19,[76] the pursuit of aggregated civil penalties, statutory damages, and/or punitive damages in a class action presents complex due process issues. Courts have denied certification on the basis that the due process concerns with aggregating civil penalties or statutory damages render the class action a less superior method of adjudication than individual litigation.[77] Other courts have held that the individualized inquiries involved in the due process defenses to large aggregated damage awards outweigh any common issues and that classes seeking certification of penalties or punitive damages thus fail the predominance requirement under Rule 23(b)(3).[78]

Defendants also have asserted broader arguments that punitive damages are inappropriate in any class action. Recent Supreme Court precedent limits punitive damages to harm against actual parties that are present and participating in the litigation. For example, in *State Farm Mutual Life Insurance Co. v. Campbell*, the Supreme Court stated that the conduct giving rise to punitive damages "must have a nexus to the specific harm suffered by the plaintiff."[79] However, because class actions by their definition aggregate claims of a large group of plaintiffs, class actions necessarily have difficulty satisfying the constitutionally mandated "nexus" that the Supreme Court requires. *State Farm* also held that the precise punitive award in any case "must be based upon the facts and circumstances of the

75. 549 U.S. 346, 353 (2007) (emphasis added) (internal quotations and citation omitted). *See also Nelson v. Adams USA, Inc.*, 529 U.S. 460, 468 (2000); *Hovey v. Elliott*, 167 U.S. 409, 432 (1897); *Bell v. Farmers Ins. Exch.*, 9 Cal. Rptr. 3d 544, 480 (2004) (agreeing that "the trial management plan would raise due process issues if it served to restrict [defendant's] right to present evidence against [plaintiffs'] claims" (citation omitted)); Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1040–41 (2005) ("[T]here is a plausible reason to believe that using the class action device to deny a defendant its otherwise applicable right to raise defenses to individual claims, or to relieve class members of their obligation to prove otherwise required elements of their individual claims, would violate the defendant's rights to procedural due process."). *But see Hilao v. Estate of Marcos*, 103 F.3d 767, 786 (9th Cir. 1996).

76. *See* Chapter 19, "Aggregation or Stacking of Penalties or Punitive Measures."

77. *See, e.g.*, *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 233–35 (9th Cir. 1974); *Ratner v. Chem. Bank N.Y. Trust Co.*, 54 F.R.D. 412, 414 (S.D.N.Y. 1972).

78. *See, e.g.*, *Cooper v. Southern Co.*, 390 F.3d 695, 721 (11th Cir. 2004) (punitive claims "require *detailed*, *case-by-case fact finding*, carefully calibrated for each individual employee" (emphasis added)); *Lemon*, 216 F.3d at 581 (punitive awards require "a fact-specific inquiry into [each] plaintiff's circumstances"); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 418–20 (5th Cir. 1998).

79. 538 U.S. 408, 422 (2003).

defendant's conduct and the harm to the plaintiff."[80] This highly individualized inquiry is inherently at odds with class actions. Based on this argument, a number of lower courts have relied on *State Farm* in rejecting certification of claims for punitive damages.[81]

Philip Morris also commands that punitive damages must be tethered to the defendant's conduct towards a particular plaintiff.[82] The logical extension of this argument suggests that classwide determinations of punitive damages are inherently suspect under, if not precluded altogether by, the due process clause. Although *Philip Morris* was not a class action, the Supreme Court's opinion strongly implies that punitive damages cannot constitutionally be awarded on a representative basis: "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation."[83]

A final due process protection regarding punitive damages relates to the constitutionally permissible outer limit on the *amount* of punitive damages if they are allowed in a class action. In *State Farm*, the Supreme Court held that "[w]hen compensatory damages are substantial," a small ratio of 1:1 may be the highest allowed by the due process clause.[84] Courts have divided on what qualifies as a "substantial" amount of compensatory damages,[85] but the Supreme Court has observed that whether a damage award in a class action is "substantial" depends on the *aggregate* class recovery, and not the size of individual awards to class members.[86] Thus, even in class actions where compensatory awards to individual class members are small, if the aggregated amount of damages is "substantial," the punitive damages available to the class should be limited to the amount of compensatory damages.[87]

B. FLUID RECOVERY SCHEMES AND ALTERNATIVE DISPUTE RESOLUTION

Some courts have struck down so-called fluid recovery schemes whereby an aggregate damages award is determined at trial, but the actual amounts individual

80. *Id.* at 425.

81. *See, e.g.*, *In re Simon II Litig.*, 407 F.3d 125, 139 (2d Cir. 2005); *Johnson v. Ford Motor Co.*, 113 P.3d 82, 94–95 (Cal. 2005); *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1265 (Fla. 2006).

82. 549 U.S. at 353.

83. *Id.*

84. *State Farm*, 538 U.S. at 425. *Accord Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2634 n.28 (2008).

85. *Compare Action Marine, Inc. v. Cont'l Carbon Inc.*, 481 F.3d 1302, 1321, 1322 n.24 (11th Cir. 2007) (upholding a $17.5 million punitive award despite compensatory damages and attorney fees that amounted to $3.2 million) *with Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004) (holding that due process required remitting punitive damages to equal $600,000 compensatory damages).

86. *Exxon Shipping*, 128 S. Ct. at 2634 n.28.

87. *See id.*; *see also State Farm*, 538 U.S. at 425, 429 (holding that $1 million awarded in compensatory damages was "substantial," and "likely would justify a punitive damages award at or near the amount of compensatory damages").

plaintiffs are entitled to are adjudicated after the trial before special masters. Courts have based their holdings invalidating these distribution plans on both the defendant's right to a civil jury under the 7th Amendment and the due process clause.[88] For example, in *McLaughlin v. American Tobacco Co.*,[89] the district court approved a three-step plan, based on estimates and averaging, in which (1) collective damages would be proven on a classwide basis, (2) individual class members would make simplified claims, and (3) unclaimed damages would be distributed according to the principle of cy pres.[90] The Second Circuit held that the distribution scheme offended both the due process clause and the Rules Enabling Act.[91] The court explained that "[r]oughly estimating the gross damages to the class as a whole and only subsequently allowing for the processing of individual claims would inevitably alter defendants' substantive right to pay damages reflective of their actual liability," while the "mass aggregation of claims" caused the defendants to lose the right "to challenge the allegations of individual plaintiffs."[92]

In addition, the Seventh Circuit struck down such a scheme because even if there were a jury in the second phase, it would be a different jury and would therefore violate the 7th Amendment:

> [M]ost of the separate "cases" that compose this class action will be tried, after the initial trial in the Northern District of Illinois, in different courts, scattered throughout the country. The right to a jury trial in federal civil cases, conferred by the Seventh Amendment, is a right to have juriable issues determined by the first jury impaneled to hear them (provided there are no errors warranting a new trial), and not reexamined by another finder of fact.[93]

Some courts have rejected, as a violation of due process, distribution schemes that disburse any unclaimed balance of the class recovery to the "next best" class of persons, such as existing class members, charities, or the state.[94] Dividing the unclaimed balance among existing class members, for example, essentially ensures

88. *Compare In re Rhone-Poulenc*, 51 F.3d at 1303 (citing *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931); *McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298, 305 (5th Cir. 1993); *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1978)), *with Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1018 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 156 (1974) ("[T]he courts . . . have to reject [fluid class recovery] as an unconstitutional violation of the requirement of due process of law.").

89. 522 F.3d 215 (2d Cir. 2008).

90. *Id.* at 231.

91. *Id.*

92. *Id.* at 231–32.

93. *In re Rhone-Poulenc*, 51 F.3d at 1303.

94. *Van Gemert v. Boeing Co.*, 553 F.2d 812, 815 (2d Cir. 1977); *Eisen*, 479 F.2d at 1018. Of course, courts frequently employ cy pres awards where class members cannot be identified. *See, e.g.*, *In re Matzo Food Prods. Litig.*, 156 F.R.D. 600, 606 (D.N.J. 1994) ("Typically, the court employs *cy pres* where class members cannot be located or where individual recoveries would be so small as to make distribution economically impossible.").

that silent class members' compensation will be expropriated in windfall recoveries by class members who already collected their share of the damages.[95] This procedure may thus encourage "the bringing of class actions likely to result in large uncollected damage pools . . . [and] raises serious questions as to the adequacy of representation where the interests of the named plaintiffs lie in keeping the other class members uninformed."[96] Although courts are divided on this issue, some require that class recovery funds not distributed to class members as compensation for their claims be returned to the defendant.[97]

These principles apply similarly when parties engage in dispute resolution procedures, including arbitration, mediation, conciliation, negotiation, summary trials, and bifurcated trials, as well as use of ombudsmen, neutral experts, or settlement judges.[98] Class action litigants often use arbitration as an efficient means of resolving individual causation issues and determining damages suffered by individual class members.[99] Courts also routinely refer class action cases to mandatory, nonbinding arbitration or mediation prior to trial as an expeditious and economical alternative to traditional adjudication.[100] While due process does not require formal proceedings or fixed procedures, the alternative dispute resolution (ADR) methods must provide, at a minimum, an opportunity for a hearing and defense.[101] In some cases, informal ADR methods are not appropriate given the unique circumstances of the litigation.[102] Depending on the nature of the controversy, courts should balance the informality and nonadversarial nature of ADR methods with the protections inherent in more formal adjudicatory proceedings.[103]

95. *Van Gemert*, 553 F.2d at 815.

96. *Id.* at 816.

97. *See, e.g.*, *Wilson v. Sw. Airlines, Inc.*, 880 F.2d 807, 816 (5th Cir. 1989); *Kennedy v. Nicastro*, 546 F. Supp. 267, 270 (N.D. Ill. 1982). *But see Powell v. Georgia-Pacific Corp.*, 119 F.3d 703, 706–07 (8th Cir. 1997) (approving cy pres distribution of remaining class recovery balance to a scholarship fund); *In re Motorsports Merch. Antitrust Litig.*, 160 F. Supp. 2d 1392, 1395 (N.D. Ga. 2001) (approving cy pres distribution of remaining class recovery balance to various charitable organizations).

98. Newberg, *supra* note 65, § 9:67, at 461–63.

99. *See, e.g.*, Chapter 21, "Arbitration and Class Actions."

100. *See, e.g.*, *Rhea v. Massey-Ferguson, Inc.*, 767 F.2d 266, 268 (6th Cir. 1985); *Davison v. Sinai Hosp. of Balt., Inc.*, 462 F. Supp. 778, 779 (D. Md. 1978), *aff'd*, 617 F.2d 361 (4th Cir. 1980).

101. *Ballard v. Hunter*, 204 U.S. 241, 255 (1907).

102. *See, e.g.*, *In re Yahoo! Litig.*, 251 F.R.D. 459, 467–69 (C.D. Cal. 2008) (declining to enforce an unconscionable class action waiver clause); *Discover Bank v. Superior Court*, 113 P.3d 1100, 1165–66 (2005); *Gentry v. Superior Court*, 165 P.3d 556, 573 (Cal. 2007).

103. *See* Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. Chi. L. Rev. 366, 389–92 (1986); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. Chi. L. Rev. 494, 536–38 (1986).

VIII. Conclusion

As discussed above and throughout this volume, due process concerns arise at various stages of class action certification and adjudication, and practitioners should assert (and anticipate) these objections at every stage. The adequacy of the class representative and the proffered counsel, the existence of issues common to the class, and the requirement that the named plaintiffs' claims be typical of the class claim are all concerns required not only by Rule 23(a), but also by due process. And these due process rights are especially scrutinized in class settlements and defendant classes. In claims for monetary damages under Rule 23(b)(3), the rights to notice of the class, to opt out, and for the class to be "manageable" are similarly required not only by Rule 23, but also by due process. These notice and opt-out rights do not apply with equal force in mandatory classes, but many courts have held that they apply in hybrid classes, certified for both injunctive and monetary relief.

Particular issues arise in putative nationwide classes, and there are due process limits both on the certification of claims from multiple and conflicting jurisdictions and on allowing plaintiffs without any connection to the forum state to obtain certification of a class within that state. And a class action that would have the effect of changing the substantive law applicable to plaintiffs' claims not only is impermissible by virtue of the Rules Enabling Act but is barred by the due process clause as well. Finally, due process concerns arise when plaintiffs seek to certify penalties and/or punitive damages, as these penalties may render the proposed class inferior to individual actions and/or require numerous individualized inquiries that predominate over any common issues.

Particularly in class actions brought under state law in state courts, where the standards required by Rule 23 may not be as rigorous or developed, the due process arguments discussed in this volume may be important to protect clients' interests, as well as to preserve arguments for further review after adjudication in state appellate courts. Practitioners should raise these arguments at every stage of the proceedings to ensure that the arguments are preserved for later appeal.