CHAPTER 23

RES JUDICATA AND COLLATERAL ESTOPPEL ISSUES IN CLASS LITIGATION

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I. Introduction

Res judicata (or claim preclusion) and collateral estoppel (or issue preclusion) bar future litigants from asserting claims or litigating issues that a court has already finally determined in connection with prior litigation. The need for such doctrines is clear. Without them, litigants could endlessly relitigate the same claims and issues with no hope of eventual finality. But implementation of these doctrines in the class action context—in both litigated and settled cases—raises complex issues. This chapter discusses the doctrines that govern claim and issue preclusion in the class action context.

II. Preclusive Effect of Judgments in Litigated Class Actions

In general, litigated judgments have the same preclusive effect in class actions as in any other action. As the U.S. Supreme Court stated in *Cooper v. Federal Reserve Bank of Richmond*, "[t]here is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation."[1] Traditional claim and issue preclusion principles apply. With respect to claim preclusion, the Supreme Court in *Cooper* explained that "[a] judgment in favor of the plaintiff class extinguishes their claim, which merges into the judgment granting relief[, while] [a] judgment

1. 467 U.S. 867, 874 (1984) (citing, *inter alia*, *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921)).

in favor of the defendant extinguishes the claim, barring a subsequent action on that claim."[2] With respect to issue preclusion, the Court observed that "[a] judgment in favor of either side is conclusive in a subsequent action between them on any issue actually litigated and determined, if its determination was essential to that judgment."[3]

Federal courts must give judgments litigated either in the same court or in other federal courts full preclusive effect.[4] Pursuant to 28 U.S.C. § 1738, federal courts must afford state court judgments "the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered."[5] As multiple federal and state class actions concerning the same or similar factual allegations frequently proceed in parallel, not only to one another but also to individual actions, courts and litigants must understand precisely who is bound by class action judgments and what preclusive effects those judgments will have. The following sections explore these topics.

A. PERSONS OR ENTITIES BOUND BY PRIOR JUDGMENT

Once a court has certified a class, any litigated judgment entered in the action will bind all members of that class.[6] In class actions brought under Rule 23(b)(3), absent class members have the opportunity to opt out of the class. If they do so, a litigated judgment entered in the action will not apply to them. Rules 23(b)(1) and 23(b)(2), on the other hand, do not expressly allow for opt-outs. Even so, where plaintiffs seek solely nonmonetary relief, judgments in actions brought under these provisions will bind absent class members. However, where plaintiffs seek monetary relief as well in such actions, some courts have held that a judgment cannot preclude later individual damages actions. Because class members had no opt-out opportunity, preclusion of later actions would violate these individuals' due process rights.[7] Other courts have refused to dilute preclusion principles in this manner

2. *Id.*

3. *Id.*

4. *Id.* at 872–74.

5. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984); *see also Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 466 (1982) ("Section 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged.").

6. *See, e.g.*, *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) ("[T]he judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it.").

7. *See, e.g.*, *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992) ("Because Brown had no opportunity to opt out of the MDL 633 litigation [in which settlement was reached in a class certified under Rules 23(b)(1) and 23(b)(2)], we hold there would be a violation of minimal due process if Brown's damage claims were held barred by *res judicata*."); *Payton v. County of Kane*, No. 99-C-8514, 2005 WL 1500884, *3 (N.D. Ill. June 10, 2005). Where plaintiffs have brought 23(b)(1) or 23(b)(2) class actions seeking *only* declaratory or injunctive relief, courts have again differed in their approach with respect to

and have avoided the dilemma by refusing to certify 23(b)(1) or 23(b)(2) classes, where plaintiffs seek any monetary damages.[8] This issue seems destined for eventual Supreme Court resolution.[9]

The court entering a litigated judgment in a class action generally does not determine the preclusive effects of that judgment.[10] However, that court will describe the class bound by the judgment. Pursuant to Rule 23(c)(3), "the judgment in a class action must: (A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and (B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members."

B. CLAIM PRECLUSION

Claim preclusion bars "successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit."[11] In the class action context, a judgment for or against a certified class extinguishes the claims brought on behalf of that class, through merger into the judgment.[12]

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later individual damages actions. Some have refused to preclude these later damages suits because preclusion would violate due process. *See, e.g.*, *Frank v. United Airlines, Inc.*, 216 F.3d 845, 851–52 (9th Cir. 2000). However, other courts have refused to certify classes seeking only injunctive or declaratory relief because the class representative could not adequately represent members of the putative class whose individual damages claims the class action might preclude. *See, e.g.*, *Colindres v. QuitFlex Mfg.*, 235 F.R.D. 347, 369–72, 374–76 (S.D. Tex. 2006); *but see Ammons v. La-Z-Boy*, No. 1:04-CV-67-TC, 2008 WL 5142186, *16 (D. Utah Dec. 5, 2008).

8. *See, e.g.*, *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 413 (5th Cir. 1998) ("[A]s claims for individually based money damages begin to predominate, the presumption of cohesiveness decreases while the need for enhanced procedural safeguards to protect the individual rights of class members increases, thereby making class certification under (b)(2) less appropriate." (citations omitted)); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 897 (7th Cir. 1999) ("It is an open question in this circuit and in the Supreme Court whether Rule 23(b)(2) *ever* may be used to certify a no-notice, no-opt-out class when compensatory or punitive damages are in issue." (citation omitted; emphasis in original)).

9. The Supreme Court granted certiorari in *Ticor* but ultimately dismissed the writ as improvidently granted. 511 U.S. 117 (1994). The Court noted the issue again in *Adams v. Robertson*, 520 U.S. 83, 88–89 (1997), but refused to reach it in light of the Court's conclusion that it had not been properly presented in the lower courts.

10. *See, e.g.*, *Midway Motor Lodge v. Innkeepers' Telemanagement & Equip. Corp.*, 54 F.3d 406, 409 (7th Cir. 1995) ("In the law of preclusion . . . the court rendering the first judgment does not get to determine that judgment's effect; the second court is entitled to make its own decision . . . ."); *Brown v. R.J. Reynolds Tobacco Co.*, 576 F. Supp. 2d 1328, 1339 (M.D. Fla. 2008) ("It is the duty of the second trial court—which knows both what the earlier finding was and how it relates to a later case—to independently determine what preclusive effect a prior judgment may be given.").

11. *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001); *see also Taylor v. Sturgell*, 128 S. Ct. 2161, 2171 (2008) (same).

12. *Cooper*, 467 U.S. 867, 874.

In evaluating whether a class action judgment extinguishes claims brought in a later action, courts analyze whether the new claims arise from the same "operative nucleus of fact" at issue in the earlier litigation. As the Eleventh Circuit explained in *Adams v. Southern Farm Bureau Life Insurance Co.*, "[c]laim preclusion applies not only to the precise legal theory presented in the previous litigation, but to all legal theories and claims arising out of the same operative nucleus of fact."[13]

Determining whether claims arise out of the same operative nucleus of fact is not always straightforward. Despite the general rule articulated in cases like *Adams*, at least in the context of employment discrimination, the Supreme Court held in *Cooper* that a litigated judgment in favor of a defendant against a certified class asserting "pattern-or-practice" claims did not preclude individual class members from later asserting individual discrimination claims.[14] Although most have perceived *Cooper* as the key Supreme Court case on the operation of preclusion principles in class actions, at least one academic commentator has observed that *Cooper* clashes with the general rules of claim preclusion by not requiring plaintiffs to have asserted in the original proceeding all claims that arose from the same transaction or set of transactions.[15]

C. ISSUE PRECLUSION

Issue preclusion forecloses "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or a different claim."[16] Only issues "actually litigated and necessary to the outcome of the first action" have

13. 493 F.3d 1276, 1289 (11th Cir. 2007) (citation and internal quotation marks omitted); *see also, e.g.*, *Capitol Hill Group v. Pillsbury, Winthrop, Shaw, Pittman, LLC*, 569 F.3d 485, 490 (D.C. Cir. 2009); *Herman v. Meiselman*, 541 F.3d 59, 62 (1st Cir. 2008); *Channer v. DHS*, 527 F.3d 275, 280 (2d Cir. 2008); *Laurel Sand & Gravel, Inc. v. Wilson*, 519 F.3d 156, 162 (4th Cir. 2008); *United States v. Davenport*, 484 F.3d 321, 326 (5th Cir. 2007); *Okoro v. Bohman*, 164 F.3d 1059, 1062 (7th Cir. 1999); *Lane v. Peterson*, 899 F.2d 737, 742 (8th Cir. 1990); *Constantini v. Trans World Airlines*, 681 F.2d 1199, 1201–02 (9th Cir. 1982).

14. 467 U.S. 867.

15. Tobias Barrington Wolf, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 724–31 (2005):

> *Cooper* . . . is a Title VII opinion, not an opinion about the preclusive effects of class action judgments. The Court confronted a limited question [about Title VII] and it offered an answer informed primarily by Title VII policy, making no attempt to explain its result with reference to general preclusion principles . . . . [T]he opinion . . . provides little guidance for the array of preclusion problems that can arise . . . in . . . class action litigation.

16. *New Hampshire*, 532 U.S. at 748–49; *see also Taylor*, 128 S. Ct. at 2171 (same).

preclusive effect.[17] Under the doctrines of nonmutual collateral estoppel, issue preclusion can be invoked by or against non-parties to the initial proceeding.[18]

D. WHO MAY ASSERT ISSUE PRECLUSION?

Some courts have voiced concern about the doctrine of nonmutual collateral estoppel in the class action context, noting that opt-out opportunities in Rule 23(b)(3) cases might tempt some individuals to wait on the sidelines while others litigate a class action and then make offensive use of the preclusive effect of any ensuing judgment in later individual litigation.

In *Premier Electrical Construction Co. v. National Electrical Contractors Association*,[19] the Seventh Circuit held that opt-outs could not invoke the doctrine of offensive nonmutual collateral estoppel. The Seventh Circuit observed that

> [t]he more attractive it is to opt out—and giving the parties who opt out the benefit of preclusion makes it very attractive—the fewer settlements there will be, the less the settlements will produce for the class, and the more cases courts must adjudicate. This is not judicial economy at work![20]

The Seventh Circuit recited the difficulties with Rule 23's predecessor—difficulties that authors of the new Rule sought to avoid when they drafted it in 1966. Under the old rule, plaintiffs could style a case a "class action" without binding absent class members to any judgment.[21] If plaintiffs prevailed, absent class members would intervene and share in the rewards.[22] If not, then absent class members would wait for the next plaintiff to have a go.[23] As unfair as such a device may have been, the current rule would prove equally unfair, according to the Seventh Circuit, if it permitted opt-outs to use collateral estoppel. In that court's view, "[w]hether class members should get the benefit of a favorable judgment, despite

17. *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322, 326 (4th Cir. 2004) ("To apply collateral estoppel or issue preclusion to an issue or fact, the proponent must demonstrate that (1) the issue or fact is identical to the one previously litigated; (2) the issue or fact was actually resolved in the prior proceeding; (3) the issue or fact was critical and necessary to the judgment in the prior proceeding; (4) the judgment in the prior proceeding is final and valid; and (5) the party to be foreclosed by the prior resolution of the issue or fact had a full and fair opportunity to litigate the issue or fact in the prior proceeding.").

18. *See, e.g.*, *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327–28 (1979).

19. 814 F.2d 358, 366–67 (7th Cir. 1987) (Easterbrook, J.).

20. *Id.* at 366. *See also Polk v. Montgomery County*, 782 F.2d 1196, 1202 (4th Cir. 1986) (holding that a class member who opts out may not take advantage of a judgment favoring the class).

21. *Premier Electrical*, 814 F.2d at 362.

22. *Id.*

23. *Id.*

not being bound by an unfavorable judgment, was considered and decided in 1966. That decision binds us still."[24]

However, not all courts have shied away from permitting opt-out plaintiffs to invoke the doctrine of offensive collateral estoppel. In *Saunders v. Naval Air Rework Facility*,[25] the Ninth Circuit held that a class member who opts out of the damages portion of a class action under Rule 23(b)(2), but remains in the class to seek injunctive relief, may invoke collateral estoppel in later individual damages litigation.[26] As the Ninth Circuit observed,

> [t]he opt-out practice as we understand it, limited as it is to (b)(3) actions, assumes the relief sought in the independent action to be separate and apart from that awarded to the class by injunction or declaratory judgment. It does not assume the relitigation of that which has been settled by class-wide injunctive or declaratory relief.[27]

E. ISSUES INVOLVING CLAIMS THAT HAVE NOT BEEN CERTIFIED

The general rule of claim preclusion bars the relitigation of claims that plaintiffs asserted, or could have asserted, in earlier litigation based on the common nucleus of operative facts.[28] Some courts, however, have held that claim preclusion should apply in the class action context only to claims actually certified in the prior class action.[29] These courts appear to endorse a type of "claim splitting" in which class members may assert particular claims (for example, claims for declaratory or injunctive relief, or even claims for noneconomic damages) in one class proceeding, and yet remain free to assert other claims, arising from the very same facts, in a later individual action.[30] Other courts have expressed doubts about this principle, several holding that a putative class representative fails the adequacy and typicality prongs of Rule 23(a) by failing to assert the full array of potential claims arising

24. *Id.* at 364.

25. 608 F.2d 1308, 1312 (9th Cir. 1979).

26. Courts continue to debate whether these types of class actions can be certified under (b)(2). *See supra* note 8 and accompanying text. *See also generally Dukes v. Wal-Mart*, 509 F.3d 1168 (9th Cir. 2007), *vacated and en banc rehearing ordered by* 556 F.3d 919 (9th Cir. 2009). As *Saunders* demonstrates, courts have applied principles of issue preclusion to parties to a 23(b)(1) or 23(b)(2) class action in a later damages action; *see also Ammons*, 2008 WL 5142186, at *16; *McGee v. E. Ohio Gas Co.*, 200 F.R.D. 382, 392 & n.14 (S.D. Ohio 2001).

27. *Saunders*, 608 F.2d at 1312.

28. *See supra* note 13 and accompanying text.

29. *See, e.g.*, *Becherer v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 193 F.3d 415, 428–29 (6th Cir. 1999); *Scarver v. Litscher*, 371 F. Supp. 2d 986, 988 (W.D. Wisc. 2005); *Shuford v. Ala. State Bd. of Educ.*, 920 F. Supp. 1233, 1239 (M.D. Ala. 1996).

30. *Aspinall v. Philip Morris Cos., Inc.*, 813 N.E.2d 476, 488 n.19 (Mass. 2004) (holding that claim preclusion "would not operate to bar a member of a class certified to proceed . . . only on an economic theory of damages from future pursuit of claims for personal injury unsuitable for class treatment").

from a common nucleus of facts.[31] Several courts have applied this reasoning in holding the line against a recent trend of plaintiffs seeking to smooth their path to certification of 23(b)(3) classes by excluding personal injury claims.[32] Moreover, the reexamination clause of the 7th Amendment of the U.S. Constitution may complement traditional preclusion principles as an additional barrier to relitigation of any issues determined in an initial class action.[33]

Complicated preclusion also can arise if a court grants summary judgment to a defendant against the named plaintiff *before* making a class certification determination. Some courts insist that certification issues be decided before merits issues are considered at all.[34] However, other courts allow such summary judgment determinations prior to a certification decision.[35] Generally, if a court does allow for such merits determinations against the named plaintiffs prior to certifying a class, the judgment will not preclude future litigation by the absent class members.[36]

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31. *See, e.g.*, *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 209 F.R.D. 323, 339 (S.D.N.Y. 2002) ("Plaintiffs fail to cite, and this Court cannot find, any authority for the proposition that absent class members with personal injury or property claims can be adequately represented by class representatives seeking only injunctive relief."); *see also Thompson v. Am. Tobacco Co.*, 189 F.R.D. 544, 550–51 (D. Minn. 1999); *In re Teflon Prods. Liab. Litig.*, 254 F.R.D. 354, 366–68 (S.D. Iowa 2008); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 606–07 (S.D.N.Y. 1982); *Pearl v. Allied Corp.*, 102 F.R.D. 921, 922–24 (E.D. Pa. 1984); *Krueger v. Wyeth, Inc.*, No. 03CV2496 JLS, 2008 WL 481956, *2–4 (S.D. Cal. Feb. 19, 2008); *Small v. Lorillard Tobacco Co., Inc.*, 252 A.D.2d 1, 11–12 (N.Y. App. Div. 1998).

32. *See, e.g.*, *Stearns v. Select Comfort Retail Corp.*, 08-2746 JF, 2009 WL 4723366, *15–16 (N.D. Cal. Dec. 4, 2009); *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 209 F.R.D. at 339 (citing cases); *but see Beaulieu v. EQ Indus. Servs., Inc.*, 5:06-CV-00400-BR, 2009 WL 2208131, *19 (E.D.N.C. July 22, 2009).

33. *See, e.g.*, *Allison*, 151 F.3d at 422–25:

> In sum, the existence of factual issues common between the plaintiffs' disparate impact and pattern or practice claims precludes trial of the disparate impact claim in a class action severed from the remaining nonequitable claims in the case. The claims for injunctive relief, declaratory relief, and any equitable or incidental monetary relief cannot be litigated in a class action bench trial (in the same case prior to certification of any aspects of the pattern or practice claim) without running afoul of the Seventh Amendment. Nor may they be advanced in a *subsequent* class action without being barred by res judicata and collateral estoppel, because all of the common factual issues will already have been decided, or could have been decided, in the prior litigation. (citations omitted; emphasis in original).

However, at least one commentator has taken issue with the Fifth Circuit's interpretation of and application of the reexamination clause in this context. *See* Wolf, *supra* note 15, at 776–82.

34. *See, e.g.*, *Nance v. Union Carbide Corp.*, 540 F.2d 718, 723 n.9 (4th Cir. 1976) ("The language of Rule 23(c) makes it quite clear that the determination of class status is to be made before the decision on the merits." (internal quotation marks omitted)), *vacated in part on other grounds*, 431 U.S. 952 (1977); *see also* Chapter 1, "Precertification."

35. *See, e.g.*, *Cowen v. Bank United of Texas, FSB*, 70 F.3d 937, 941–42 (7th Cir. 1995); *Wright v. Schock*, 742 F.2d 541, 543–44 (9th Cir. 1984).

36. *See, e.g.*, *Muhammad v. Giant Food Inc.*, 108 F. App'x 757, 765 n.5 (4th Cir. 2004) ("While the rejection of the named employees' individual claims is binding as to those employees, it does not preclude later efforts to certify a class action against Giant or bar any individual claims that might be asserted in such an action."); *Cowen*, 70 F.3d at 941 (observing that, if summary judgment is granted against the named

F. ISSUES INVOLVING DENIALS OF CERTIFICATION OR DECERTIFICATION

Although individual plaintiffs can assert their own claims in individual actions after certification is denied, it is less clear whether plaintiffs may assert, in later state court proceedings, the same class claims that a federal court has previously declined to certify. The Supreme Court has not decided this issue, and a split exists among lower courts. The Third and Fifth circuits have allowed later state class actions to go forward, holding that the earlier federal decision not to certify class claims lacked finality (and, accordingly, preclusive effect) and necessarily involved discretion that a state court might choose to exercise differently.[37] On the other hand, the Seventh Circuit has held that its previous determination that manageability problems prevented certification of a nationwide class precluded both named plaintiffs and absent class members from seeking certification of nationwide class actions in various state courts on the same claims.[38] In so holding, the court stated that a contrary rule would enable plaintiffs to "roll the dice as many times as they please—when nationwide class certification sticks (because it subsumes all other suits) while a no-certification decision has no enduring effect."[39]

Moreover, some courts have held that actions in which a court ultimately *decertifies* the class may have some preclusive effects. For example, in *Engle v. Liggett Group, Inc.*,[40] the Florida Supreme Court considered a case in which a Florida trial court certified a class of individuals who had suffered from medical conditions allegedly caused by their addiction to cigarettes, a jury made numerous factual findings relevant to the defendants' conduct, and then a Florida court of appeals decertified the class based on predominance and superiority considerations. Although accepting the appellate court's decertification ruling, the Florida Supreme Court nevertheless determined that the "pragmatic solution" was to give certain of the jury's factual findings preclusive effect in the individual suits that would necessarily arise in the wake of that decertification, including, *inter alia*, (1) that cigarettes cause some of the diseases at issue; (2) that nicotine is addictive; (3) that the defendants placed cigarettes on the market that were defective and unreasonably dangerous; and (4) that the defendants made a false or misleading statement of

plaintiffs but no class is certified, "the defendant loses the preclusive effect on subsequent suits against him of class certification"); *Wright*, 742 F.2d at 544 (same).

37. *See J.R. Clearwater, Inc. v. Ashland Chem. Co.*, 93 F.3d 176, 179–80 (5th Cir. 1996); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 146 & n. 7 (3d Cir. 1998).

38. *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 767 (7th Cir. 2003). The Seventh Circuit derived the preclusive force of its certification denial from *issue* preclusion rather than *claim* preclusion. *Id.* Only the latter requires a final judgment in place before it is triggered. *Id.*

39. *Id.*

40. 945 So. 2d 1246 (Fla. 2006).

material fact with the intention of misleading smokers.[41] Ultimately, "[c]lass members [could] choose to initiate individual damages actions and the . . . common core findings [approved as noted would] have res judicata effect in those trials."[42] The Supreme Court denied certiorari in an appeal of the Florida Supreme Court's decision in *Engle*.[43]

Engle's holding on preclusive effect of findings in a decertified class action has spawned significant litigation, and many individual plaintiffs from the now-decertified class have filed individual lawsuits to take advantage of the Florida Supreme Court's "pragmatic solution." One federal district court has refused to accord preclusive effect to the jury findings at issue,[44] holding that (1) claim preclusion did not apply because the findings had never been merged into any judgment as to liability; (2) issue preclusion did not apply because the findings were too broad for application in the context of an individual plaintiff's lawsuit; and (3) application of the findings to individual cases would violate due process because it was impossible to determine which findings applied to which individual defendants. This decision is currently on appeal to the Eleventh Circuit.[45]

Thus, both state and federal courts continue to debate the issue and may not resolve it in the near future.

III. Preclusive Effect of Class Settlements

As class action defendants enter into settlements expecting to buy global peace, they have a particular interest in maximizing the preclusive effect of those settlements. As a settlement is simply a contract, it has, for the most part, the operative effect supplied by its terms. The more the parties can make explicit in the language of the settlement itself, the more secure they are with respect to its future implications.

A. SCOPE OF RELEASE

Settling parties in class actions generally have latitude to set the scope of the settlement's release. For example, settling parties in state court class action litigation

41. *Id.* at 1269.

42. *Id.*

43. 552 U.S. 941 (2007).

44. *Brown*, 576 F. Supp. 2d 1328.

45. Some state courts have declined to accord preclusive effect to factual findings made in class litigation where the class is later decertified. *See, e.g.*, *Spitzfaden v. Dow Corning Corp.*, 833 So. 2d 512, 524 (La. Ct. App. 2002); *Stern v. Carter*, 82 A.D.2d 321, 342 (N.Y. App. Div. 1981); *Mateza v. Polaroid Corp.*, 76-3379, 1981 WL 11479, *54 (Mass. Super. July 30, 1981).

can release claims that are exclusively federal[46] and vice versa.[47] Class action litigants may release claims through settlement even if the named plaintiffs never had standing to bring the released claims[48] or the claims were not ripe at the time of settlement.[49] Moreover, claims can be released even if they were not pursued by the named plaintiffs at all or are asserted against parties not named as defendants in the settled action.[50]

Before concluding the settlement, the settling parties also can amend the relevant pleadings to expand the class claims and allegations or to settle a broader set of claims than those at issue in the operative complaint.[51] However, if the parties have not shown that settlement as to these new claims is fair and adequate in light of the expanded release, the court might reject the settlement.[52] Moreover, the settlement must include appropriate notice and opt-out opportunities with respect to the new claims.[53] Despite these provisos, courts have approved extremely broad settlement releases.[54]

IV. Collateral Attacks on Class Judgment or Settlement

A collateral attack on a class judgment or settlement occurs when a putative class member challenges the validity of that judgment or settlement sometime *after* its entry. The collateral attack generally alleges that the earlier settlement or judg-

46. *See, e.g.*, *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996) (class settlement in state court can release exclusively federal claims); *see also Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991) (holding that a class settlement in a state court class action against a corporate defendant for securities violations could release federal securities claims, even though those claims were in the exclusive jurisdiction of the federal courts).

47. *See, e.g.*, *Ass'n for Disabled Am., Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 471 (S.D. Fla. 2002) ("[F]ederal class action settlements containing a release of state law claims are both common and presumptively valid[.]").

48. *See, e.g.*, *Monaco v. Mitsubishi Motors Credit of Am., Inc.*, 01-3700, 2002 U.S. App. LEXIS 6839 (3d Cir. Apr. 12, 2002) (claims can be released with respect to which named plaintiffs had no standing).

49. *See, e.g.*, *Williams v. GE Capital Auto Lease*, 159 F.3d 266 (7th Cir. 1998) (claims can be released although not ripe at time of settlement).

50. *See, e.g.*, *Reyn's Pasta Bella LLC v. Visa USA, Inc.*, 442 F.3d 741, 748 (9th Cir. 2006) ("A class settlement may . . . release factually related claims against parties not named as defendants . . . .").

51. *See, e.g.*, *Malchman v. Davis*, 761 F.2d 893, 900 (2d Cir. 1985); *Weinberger v. Kendrick*, 698 F.2d 61, 76–77 (2d Cir. 1982).

52. *See, e.g.*, *Weinberger*, 698 F.2d at 76–77.

53. *Id.*

54. *See, e.g.*, *Wal-Mart Stores, Inc. v. Visa USA, Inc.*, 396 F.3d 96, 106 (2d Cir. 2005) ("Broad class action settlements are common, since defendants and their cohorts would otherwise face nearly limitless liability from related lawsuits in jurisdictions throughout the country. Practically speaking, class action settlements simply will not occur if the parties cannot set definitive limits on defendants' liability." (citations and internal quotation marks omitted)).

ment does not bind absent class members because the named plaintiffs did not adequately represent them or the parties did not give them adequate notice of the settlement. These cases derive from the Supreme Court's decision in *Hansberry v. Lee*,[55] which set forth the principle that "there has been a failure of due process . . . in those cases where it cannot be said that the procedure adopted[ ] fairly insures the protection of the interests of absent parties who are to be bound by it."[56] Absent class members may raise these challenges even if the parties contested these issues in the initial class proceeding and obtained a ruling from the court. The law in this area is unsettled in many respects.

A. STANDARD OF REVIEW

When a court considers a collateral attack to a class action settlement or judgment, it must first determine how much deference to assign to the manner in which the initial court resolved the relevant issue when it first approved the class settlement. Courts have disagreed over what standard of review to apply.

The Ninth Circuit has adopted an approach grounded in claim preclusion principles and procedural due process—if a collateral attack plaintiff had a "full and fair" *opportunity* to raise the alleged defect in the class settlement court, that plaintiff may not raise the defect now by way of collateral attack.[57] In *Epstein v. MCA, Inc.*,[58] it held that the only question a court considering a collateral attack should ask is whether the initial court followed the appropriate procedures—for example, whether it held a fairness hearing or whether it followed the notice and opt-out procedures outlined in Rule 23. If the initial court did follow those procedures, the reviewing court should not engage in "collateral second-guessing of those determinations and that review."[59]

Conversely, the Second Circuit has held that a court should analyze the issues raised in a collateral attack by using, in effect, issue preclusion principles—if the parties did not *actually* litigate the asserted defect before the rendering court and obtain a ruling from that court, the court presiding over the collateral attack

55. 311 U.S. 32.

56. *Id.* at 42; *see also id.* at 42–43:

> It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties. (citations omitted).

57. *Epstein v. MCA, Inc.*, 179 F.3d 641, 648 (9th Cir. 1999) (applying claim preclusion principles and asking whether the collateral attack plaintiff had a "full and fair" opportunity to raise the alleged constitutional defect in the class settlement court).

58. *Id.*

59. *Id.*

should review the issue de novo.[60] In *Stephenson v. Dow Chemical Co.*,[61] the Second Circuit addressed a collateral challenge to a class settlement involving military personnel injured in Vietnam by Agent Orange and related chemicals. The settlement clearly stated that "[t]he Class specifically includes persons who have not yet manifested injury."[62] On direct appeal from the initial settlement, the Second Circuit had affirmed the class certification, the settlement approval, and the distribution plan outlined by the settlement, and had rejected both adequacy of representation and predominance objections.[63]

Yet almost 20 years later, in *Stephenson*, the Second Circuit ruled that individuals who had not manifested injuries at the time of the earlier settlement could still pursue claims against the chemical manufacturers because the named plaintiffs who had ostensibly settled their claims in the original class proceedings had not adequately represented them.[64] The court reasoned that its decision was consistent with the Ninth Circuit's decision in *Epstein* in that *Epstein* merely prohibited a collateral attack when the original certifying court had specifically found adequate representation of individuals situated similarly to those raising the collateral attack.[65] Accordingly, because the district court and appellate court handling the original Agent Orange settlement had not explicitly determined that the named plaintiffs adequately represented absent class members without manifested injuries, a court presiding over a collateral challenge by such absent class members need accord no deference to the earlier judicial settlement approvals.[66]

The Third Circuit has also weighed in on this area of the law, holding that "[n]o collateral review is available when class members have had a full and fair hearing and have generally had their procedural rights protected during the approval of the Settlement Agreement."[67] The Third Circuit has also stated that "[c]ollateral review is only available when class members are raising an issue that was not properly considered by the District Court at an earlier stage in the litigation."[68]

The Supreme Court has yet to weigh in definitively on this possible split in authority. The Supreme Court did affirm in part the ruling in *Stephenson*; however, it affirmed the ruling through a 4–4 per curiam decision, without Justice Stevens's participation, and thus set no binding precedent for the other appellate courts.[69]

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60. *See Wolfert v. Transamerica HomeFirst, Inc.*, 439 F.3d 165 (2d Cir. 2006) (applying issue preclusion principles and asking whether the asserted defect was actually litigated and determined in the rendering court).

61. 273 F.3d 249 (2d Cir. 2001).

62. *Id.* at 252.

63. *Id.* at 253.

64. *Id.* at 251.

65. *Id.* at 258 n.6.

66. *Id.* at 258.

67. *See In re Diet Drugs Prods. Liab. Litig.*, 431 F.3d 141, 145–47 (3d Cir. 2005).

68. *Id.*

69. *Dow Chem. Co. v. Stephenson*, 539 U.S. 111 (2003).

Courts may thus look to the Second Circuit's limitation of *Epstein* in *Stephenson* as the only way to reconcile the divergent decisions of the circuits: when the original court followed the appropriate procedures, absent class members similarly situated to plaintiffs who raised objections in the prior action may not raise those same objections later by way of collateral attack. However, if the original court did *not* follow appropriate procedures or if the collateral attack plaintiffs are *not* raising issues put forward by similarly situated individuals during the earlier action, the collateral attack court will review the issue de novo.

B. TYPES OF COLLATERAL ATTACKS

A collateral attack on a class settlement or judgment generally takes one of two forms: a claim of inadequate representation in the earlier action or a claim of inadequate notice of the earlier settlement.

1. Inadequate Representation

Prior judgments do not bind absent class members if deeming them so bound would violate their due process rights. As a matter of due process, named plaintiffs in the prior action must have adequately represented absent class members.[70]

Amchem Products, Inc. v. Windsor is the Supreme Court's most authoritative examination of adequate representation issues in class actions.[71] In *Amchem*, the parties attempted to settle a sprawling asbestos class that encompassed "hundreds of thousands, perhaps millions, of individuals tied together by this commonality: Each was, or some day may be, adversely affected by past exposure to asbestos products manufactured by one or more of 20 companies."[72] Among other holdings, the Supreme Court held that the named plaintiffs—who had manifested asbestos-related injuries—could not adequately represent a class that also consisted of class members whose injuries had not yet manifested. An intraclass conflict arose because "for the currently injured, the critical goal is generous immediate payments . . . [and] [t]hat goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future."[73] Following *Amchem*, courts have held that injured plaintiffs cannot represent classes consisting of injured and uninjured consumers, and vice versa.[74]

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70. *See, e.g.*, *Hansberry*, 311 U.S. at 42–43.

71. 521 U.S. 591 (1997).

72. *Id.* at 597.

73. *Id.* at 626.

74. *See, e.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999) ("[I]t is obvious after *Amchem* that a class divided between holders of present and future claims (some of the latter involving no physical injury and attributable to claimants not yet born) requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel."); *Stephenson*, 273 F.3d at 260 (same); *cf. Wall v. Sunoco*, 211 F.R.D. 272, 279–80 (M.D. Pa. 2002) (denying certification on adequacy grounds because the named plaintiff "claims to have present injuries while she is attempting to represent a class of presently asymptomatic persons.").

Class representatives also can fail to adequately represent absent class members in other ways, including, for example, failing to assert or lacking standing to assert claims possessed by other members of the putative class,[75] attempting to represent a class containing subgroups with inherent rivalries or historical antagonisms,[76] differing from other putative class members in the degree to which claims are vulnerable to certain defenses,[77] or retaining inadequate counsel.[78]

2. Inadequate Notice

In a class action brought under Rule 23(b)(3), the named plaintiffs must provide class members with meaningful notice and an opportunity to exclude themselves from the class.[79] Generally, due process requires that "the means employed [to give notice] . . . be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."[80] Notice must be "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."[81] It is "widely recognized that for the due process standard to be met it is not necessary that every class member receive actual notice, so long as class counsel acted reasonably in selecting means likely to inform persons affected."[82] Applying these standards, courts have held that notice was adequate even when challenged collaterally by class members who received notice after the opt-out date or never received notice at all.[83] But there

75. *See supra* note 31 and accompanying text; *see also, e.g.*, *In re FedEx Ground Package Sys., Inc., Employment Practices Litig.*, 662 F. Supp. 2d 1069, 1081–83 (N.D. Ind. 2009) (holding named representatives inadequate because they lacked standing to assert certain class claims); *Lantz v. Am. Honda Motor Co., Inc.*, No. 06 C 5932, 2007 WL 2875239, *6 (N.D. Ill. Sept. 27, 2007) (same); *Williams v. Boeing Co.*, No. C98-761P, 2005 WL 2921960, *6–9 (W.D. Wash. Nov. 4, 2005) (same).

76. *See, e.g.*, *Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 331 (1980) ("In employment discrimination litigation, conflicts might arise, for example, between employees and applicants who were denied employment and who will, if granted relief, compete with employees. . . . Under Rule 23, the same plaintiff could not represent these classes."); *Kamean v. Local 363, Int'l Bhd. of Teamsters*, 109 F.R.D. 391, 395 (S.D.N.Y. 1986); *Pruitt v. Allied Chem. Corp.*, 85 F.R.D. 100, 106 (E.D. Va. 1980).

77. *See, e.g.*, *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 313 n.26 (5th Cir. 2007) (observing that adequacy of representation may be an issue where named plaintiffs did not sign releases of claims against the defendant, but many of the putative class members did); *Spann v. AOL Time Warner, Inc.*, 219 F.R.D. 307, 320 (S.D.N.Y. 2003) (same).

78. *See, e.g.*, *Danner v. U.S. Civil Serv. Comm'n*, 635 F.2d 427, 433 (5th Cir. 1981) (affirming lower court holding that a class representative was inadequate in virtue of the fact that plaintiffs' counsel did not appear at the class certification hearing).

79. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974).

80. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950).

81. *Id.* at 314.

82. *In re Prudential Secs. Inc. Ltd. P'ships Litig.*, 164 F.R.D. 362, 368 (S.D.N.Y. 1996) (citing, *inter alia*, *Weigner v. City of New York*, 852 F.2d 646, 649 (2d Cir. 1988)).

83. *See, e.g.*, *Reppert v. Marvin Lumber & Cedar Co., Inc.*, 359 F.3d 53, 56–57 (1st Cir. 2004) (upholding dismissal of collateral challenge to settlement based on certain class members' failure to receive notice of settlement and noting that "[a]fter . . . appropriate notice is given, if the absent class members fail to opt

are limits, as some federal and state courts have refused to accord preclusive effect where they believed the notice plan in the original proceeding was inadequate.[84]

Among other things, the Supreme Court's decision in *Mullane v. Central Hanover Bank & Trust*[85] has been interpreted to require that the class members be provided notice of the types of claims that are being settled. For example, the Eleventh Circuit held in *Twigg v. Sears, Roebuck & Co.*[86] that the notice disseminated must inform recipients that the claims they possess are at issue. In *Twigg*, notice of a class settlement described the claims at issue as involving allegations that "Sears and other defendants violated federal and state law by allegedly making *unnecessary and/or improper* repairs to its customers' automobiles."[87] However, "[t]he notices do not alert a reader that the prior action included claims by Sears customers based upon being billed for services that Sears never performed."[88] As Twigg's claim was of the latter type, the Eleventh Circuit allowed his case to go forward and rejected Sears's contention that the earlier settlement should have preclusive effect.[89]

Far more notice plans have withstood collateral attacks than have succumbed to them, however. Some courts have simply found that the notice plans at issue were adequate.[90] Others have refused to consider the challenge because the original court

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out of the class action, such members will be bound by the court's actions, including settlement and judgment, even though those individuals never actually receive notice.").

84. *See, e.g.*, *State v. Homeside Lending, Inc.*, 826 A.2d 997, 1009–10 (Vt. 2003) (refusing to give preclusive effect to settlement of nationwide class action in Alabama because notice did not disclose to class members the true magnitude of the plaintiff's lawyers fee request, i.e., that many class members would pay more in attorney fees to class counsel than the economic benefit they received in the settlement); *Moody v. Sears, Roebuck & Co.*, No. 02 CVS 4892, 2007 WL 2582193, *6–10 (N.C. Super. May 7, 2007) (refusing to give preclusive effect to settlement of nationwide class in Illinois because, *inter alia*, notice was not properly distributed in North Carolina, notice was distributed right before the opt-out date, and the notice contained insufficient information about the relative amounts received by class members and class counsel), *rev'd by* 664 S.E.2d 569 (N.C. App. 2008) (*see infra* note 91); *see also In re Integra Realty Res., Inc.*, 262 F.3d 1089, 1106 (10th Cir. 2001) (citing cases); *Stephenson*, 273 F.3d at 261 n.8.

85. 153 F.3d 1222 (11th Cir. 1998).

86. 153 F.3d 1222 (11th Cir. 1998).

87. *Id.* at 1228 (emphasis in original).

88. *Id.*

89. *Id.* at 1229; *see also Fidel v. Farley*, 534 F.3d 508, 515 (6th Cir. 2008):

> Finally, we note that individual class members who do not receive timely notice are not without recourse. If an individual [class member] later claims he did not receive adequate notice and therefore should not be bound by the settlement, he can litigate that issue on an individual basis when the settlement is raised as a bar to a lawsuit he has brought. (citation and internal quotation marks omitted).

90. *See, e.g.*, *Learner v. Marvin Lumber & Cedar Co.*, No. 08-CV-177-JL, 2008 WL 5285028, *6 (D.N.H. Dec. 19, 2008) (recognizing that "the prevailing view holds that a party may collaterally attack a class action judgment on the grounds that it was entered with insufficient notice" but holding notice sufficient where it consisted of "notification by mail to all known members of the certified class, and the publication of this notice being placed in 33 newspapers of general circulation throughout the United States, including a toll-free number and the address of a web-site, established to provide potential class members

specifically considered and approved the notice plan as conforming to due process requirements.[91]

V. Conclusion

With all the complexities of preclusion issues in the class action context, the issue currently looming above all others as requiring prompt resolution is the extent to which classes certified under Rules 23(b)(1) or 23(b)(2) require notice and opt-out opportunities as a matter of due process, if they include claims not simply for declaratory or injunctive relief, but for monetary relief as well. The Supreme Court has noted this issue but has not yet decided it.[92] Both courts and litigants confront uncertainty about when a court may certify such classes. Similarly, it remains uncertain whether a court can or should accord full preclusive effect to a settlement under Rules 23(b)(1) or 23(b)(2) that embraces damages claims or related requests for relief. If absent class members are permitted to challenge it through collateral attack, the global peace for which the litigants bargained may be jeopardized.[93]

with information about the class action . . . ." (citation and internal quotation marks omitted)); *Patrowicz v. Transamerica HomeFirst, Inc.*, 359 F. Supp. 2d 140, 149–53 (D. Conn. 2005) (rejecting collateral attack on notice program where "the notice clearly stated that recipients must request exclusion in writing by sending certain basic information to the settlement administrator, whose address was clearly noted" and observing that "[a]ll that the Due Process Clause required is that absent Class members be informed of their right to opt out of the class and the procedures for doing so.").

91. *See, e.g.*, *Brooks v. Wachovia Bank, N.A.*, No. Civ. A. 06-00955, 2007 WL 2702949, *5 (E.D. Pa. Sept. 14, 2007) ("Once issues of due process protections for class members have been decided by a court, they may not be relitigated. . . . A judge of the Philadelphia Court of Common Pleas approved the *Parsky* settlement, including its method of notice. . . . Therefore, Plaintiff may not collaterally attack the *Parsky* settlement agreement."); *Caruso v. Candie's, Inc.*, 201 F.R.D. 306, 314–15 (S.D.N.Y. 2001); *Moody*, 664 S.E.2d at 581–82.

92. *See supra* note 9 and accompanying text.

93. *See supra* notes 7 and 8 and accompanying text.