Dueling Class Actions

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Abstract

Abstract: When multiple class action suits are filed on behalf of the same class members, numerous problems ensue. Dueling class actions are confusing to class members, wasteful of judicial resources, conducive to unfair settlements, and laden with complex preclusion problems.

The article creates a typology of different kinds of dueling class actions; explores the problems that plague each type; considers the effect the Supreme Court’s decision in Matsushita Electric Industrial Co. v. Epstein, 516 U.S. 367 (1996), has had on these problems; evaluates the efficacy of existing judicial tools to curb them; and proposes an array of possible solutions. The more modest “quick fixes” include: (1) creation of a registry of all class actions filed; (2) amendment of Rule 23 and state class action rules to bar the certification of dueling class actions and to require the appointment of a class action advocate; (3) amendment of the Anti-Injunction Act to enlarge the authority of federal courts to enjoin dueling class actions; (4) amendment of the multidistrict litigation statute to permit transference courts entertaining consolidated dueling class actions to retain the cases for trial; and (5) enactment of legislation requiring better notice to absent class members in dueling class actions. The article also explores more dramatic legislative solutions to permit the consolidation of all dueling class actions in a single forum.
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**INTRODUCTION**

Class actions are "unique creatures with enormous potential for good and evil." Even those who proclaim their virtues, however, would have to concede that two class actions on behalf of the same class are rarely better than one. Yet dueling class actions—two or more class actions commenced on behalf of the same class or overlapping classes, which present claims arising out of the same transaction or occurrence—are rampant.2

Dueling class actions lie at the intersection between two overlapping sets of cases: class actions and duplicative suits.3 First, consider dueling class actions as a subset of class actions generally. Because class counsel often have more money at stake than any individual class member, and hence more to lose by going to trial, class counsel generally face immense pressure to settle and even to collude with the defendant to settle the class claims cheaply in exchange for a generous fee. This problem is exacerbated in the dueling class action context, as the lawyer representing the class knows that if she does not settle with the defendant, class counsel in another action will. Hence, dueling class actions enhance the pressure to settle and increase the likelihood of inadequate settlements.

Additionally, both class members and the court rely on class counsel and the defendant to discover and present relevant information regarding the appropriateness of class treatment, the strength of the claims presented and the merits of any proposed settlement. Hence, the class and the court will be denied complete information once class counsel and the defendant reach a settlement as they now have a greater interest in gaining judicial approval than in providing complete information. These informational deficiencies are exacerbated in the dueling class action context as class members are bombarded with notices from the multiple suits. Not surprisingly, these class members may disregard notices sent in the later suit, mistakenly believing that they are copies of notices sent in the first suit.

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1 Johnson v. General Motors Corp., 598 F.2d 432, 439 (5th Cir. 1979) (Fay, J., specially concurring).


Dueling class actions not only suffer from the problems that bedevil class actions generally, but they also struggle with other complications inherent in duplicative litigation. For instance, scarce resources are wasted whenever a party files two suits seeking relief for the same wrong. This waste of resources problem is more serious when the duplicative suits are class actions because class litigation consumes substantial resources. Likewise, whenever one of two related suits goes to judgment or settles, the court entertaining the second suit must consider the extent to which the first judgment has preclusive effect. The preclusion issues that arise in dueling class actions are far more complex, however, as courts struggle to balance the interests of absent class members with the costs of re-litigation and the risk that parties dissatisfied with a decision rendered in one class action will attempt to avoid it by filing a dueling class action.

Judicial tools currently exist to ameliorate some of the problems posed by dueling class actions, but they all suffer from limitations or weaknesses. Thus, courts and legislatures must take action to reduce the number of dueling class actions and to relieve the problems they cause. A number of “quick fixes” are available including: (1) creation of a registry of all class actions filed, (2) amendment of Rule 23 and state class action rules to bar the certification of dueling class actions and to require the appointment of a class action advocate, (3) amendment of the Anti-Injunction Act to enlarge the authority of federal courts to enjoin dueling class actions, (4) amendment of the multidistrict litigation statute to permit transferee courts entertaining consolidated dueling class actions to retain the cases for trial and (5) enactment of legislation requiring better notice to absent class members in dueling class actions. Congress and the state legislatures should also explore more dramatic solutions to permit the consolidation of all dueling class actions in a single forum.

Part I of the Article presents a typology of the different kinds of dueling class actions, noting the two critical variables of jurisdiction and time. Part II elaborates on the myriad of problems posed by the different kinds of dueling class actions. Part III considers the effect that the Supreme Court’s decision in Matsushita Electric Industrial Co. v. Epstein\(^4\) has had on these problems, and Part IV evaluates the efficacy of existing judicial tools to curb them. Finally, Part V presents a range of possible legislative solutions, some modest and others bold, to reduce the number of dueling class actions and to ameliorate the problems they pose.

I. A TYPOLOGY AND AN ILLUSTRATION

A. A Typology: The Variables of Jurisdiction and Time

Because the problems posed by dueling class actions differ depending upon the type of class actions involved, it is helpful to categorize them. Dueling

class actions may be filed in the same jurisdiction or in different jurisdictions. They may be pending simultaneously or one may be filed only after another is dismissed. These two variables—jurisdiction and time—define the different types of dueling class actions.

If dueling class action suits are filed in the courts of a single jurisdiction—in one federal judicial district or in one state—consolidation and intrastate transfer vehicles are generally available to ensure that the suits are handled together. Once additional jurisdictions are introduced, however, it becomes more difficult to ensure that the dueling class actions are resolved in tandem.

Three variations exist. The competing suits may be filed in different federal judicial districts (the federal/federal cases), in the courts of different states (the state/state cases) or in both state and federal courts (the federal/state cases).

Given the availability of a variety of transfer vehicles in the federal system and a liberal consolidation rule, the federal/federal cases tend to be the least problematic. The Uniform Transfer of Litigation Act, approved by the National Conference of Commissioners on Uniform State Laws in 1991 and designed to alleviate problems in the state/state and federal/state cases, has not been enacted in any state. For now, then, the state/state and federal/state cases are most prone to the problems described in Part II below.

In terms of the second variable—time—many dueling class actions are pending simultaneously, with representatives filing two or more suits on behalf of the same class raising the same claim at the same time (simultaneous class actions). Another variation is possible, however. A class action filed in one jurisdiction may be dismissed, typically after the court denies class certification or disapproves a proposed settlement, only to be followed by the filing of another class action on behalf of the same class, raising the same claim (sequential class actions). Although the label "dueling" may seem

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5 See infra Part IV.A.

6 See Miller, supra note 2, at 516 (describing "three main situations" that arise as a result of the jurisdictional variable).

7 See Richard L. Marcus, Conflicts Among Circuits and Transfers within the Federal Judicial System, 93 Yale L.J. 677, 679-82 (1984) (describing federal transfer statutes); see also infra notes 253-58 and accompanying text.

8 Fed. R. Civ. P. 42(a) (requiring only a common question of law or fact in the pending actions for their consolidation).

9 See Miller, supra note 2, at 519-20 (explaining that the federal-court system is efficient because it is a unitary jurisdiction).


11 See id. (historical and prefatory notes).

12 See Robbin v. Fluor Corp., 835 F.2d 213, 214 (9th Cir. 1987) (holding that pendency of prior class action, which was voluntarily dismissed after denial of class certification, failed to toll the statute of limitations for present class action); Cox v. Shell Oil Co., No. 18844, 1995 WL 775363, at *4-5, 9 (Tenn. Ch. Nov. 17, 1995) (approving $950 million settlement for a class action claim following Texas court's prior refusal to approve $750
more appropriate for simultaneous class actions, sequential class actions also "duel" to the extent that the first class action may have a profound effect on subsequent ones, and the mere possibility of another class action influences the first one.

Some cases involve both simultaneous and sequential class actions: either simultaneous class actions are dismissed only to be followed by another class action, or a single class action is dismissed only to be followed by two or more simultaneous class actions (multi-temporal class actions). As will be seen in Part II, the simultaneous and sequential class actions raise some different problems, and the multi-temporal class actions have the potential to raise them all.

B. An Illustration: The General Motors Pickup Truck Litigation

When it came to light in 1992 that the side-mounted fuel tanks on General Motors ("GM") pickup trucks enhanced the risk of fire upon impact, numerous class action suits presenting similar claims were filed in various state and federal district courts throughout the country. GM removed several state class actions to federal court, and then petitioned the Judicial Panel on Multidistrict Litigation ("Panel") to transfer the federal actions to the United States District Court for the Eastern District of Michigan in Detroit. In February 1993, upon agreement of the parties, the Panel transferred the federal suits to the Eastern District of Pennsylvania for pretrial proceedings to be coordinated or consolidated with the actions pending there. The transfer

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13 Suits were filed in 26 federal courts and 11 state courts. See In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133, 138 (3d Cir. 1998).

14 See In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 779 (3d Cir. 1995).

15 See Andrew Blum, GM Lawsuits Pile up in Philly; Despite Slamming NBC, NAT'L L.J., Feb. 22, 1993, at 3.

16 See In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., No. 961, 1993 WL 65087, at *1 (J.P.M.L. Feb. 26, 1993) (transferring six actions to the Eastern District of Pennsylvania). After the Panel transferred all of the federal actions to the Eastern District of Pennsylvania, GM removed a number of other state class action suits to federal court, presumably with the expectation that they also would be transferred as tag-along actions. See Barnes v. General Motors Corp., Civ.A. No. 93-1128-MLB, 1993 WL 245740, at *1 n.1 (D. Kans. June 23, 1993) (discussing class action filed in Kansas state court on behalf of Kansas owners of GM pickup trucks, which was removed to federal court in April 1993); In re General Motors Corp. Pickup Truck Fuel Tank Prods. Liab. Litig., No. MDL 961, 1993 WL 153781, at *1 (E.D. Pa. May 13, 1993) (discussing class action filed in North Carolina state court, which was removed to the Eastern District of North Carolina in March 1993); In re General Motors Corp. Pickup Truck Fuel Tank Prods. Liab. Litig., MDL No. 961, Civ. No. 93-1811, 1993 WL 147245, at *1 (E.D. Pa. May 5, 1993) (discussing class action commenced in Tennessee state court, which was removed to the Eastern District of Tennessee). The Panel was aware at the time of seven other related actions, which it
order, however, did not affect Dollar v. General Motors Corp., a class action filed on behalf of all Texas owners of specified GM trucks in Texas state court, which GM had been unable to remove to federal court, or the other nonremovable state suits. Thus, federal and state class actions were pending simultaneously.

Following the Panel’s transfer, a consolidated amended class action complaint was filed in the Eastern District of Pennsylvania on behalf of a nationwide class, alleging federal and state law claims. The class sought both compensatory and punitive damages for economic losses and an injunction requiring GM to recall the trucks or pay for their repair. Personal injury and wrongful death claims were explicitly excluded.

Even while opposing class certification in papers filed with the district court in late June 1993, GM began to explore the possibility of a settlement with class counsel in both the federal and state actions. By mid-July—only four months after the filing of the consolidated class action complaint—GM and class counsel had reached a settlement in principle. On July 19, 1993, the

suggested should be treated as potential tag-along actions. See In re General Motors Corp. Pickup Truck, No. 961, 1993 WL 65087, at *1 n.1 (J.P.M.L. Feb. 26, 1993) (relying on Panel Rules 12 and 13). Ultimately, of the dozens of class actions filed against GM, the federal suits were either dismissed, remanded to state court, or transferred to the Eastern District of Pennsylvania. See In re General Motors Corp. Pickup Truck, 55 F.3d at 779.

17 Class Action No. 92-1089 (Tex. Dist Ct. 71st Judicial Dist., filed on Nov. 2, 1993).

18 See Blum, supra note 15, at 3 (describing Dollar as “the one class action that plaintiffs were able to retain in state court, after a legal battle”). The complaint in Dollar alleged violations of a Texas statute as well as fraud, negligent misrepresentation, breach of contract and breach of warranty. See Bloyed v. General Motors Corp., 881 S.W.2d 422, 426 (Tex. App. 1994), aff’d, 916 S.W.2d 949 (Tex. 1996). The Texas Court of Appeals did not mention any federal claims raised by the class in the complaint. See id.

19 Another class action filed in state court in Kansas, which was removed by GM, was remanded to state court. See Barnes v. General Motors Corp., Civ.A. No. 93-1128-MLB, 1993 WL 245740 (D. Kans. June 23, 1993) (remanding the action to the state court because of lack of federal subject-matter jurisdiction). Yet another state class action suit filed in Louisiana, White v. General Motors Corp., Class Action No. 42,865 (La. 18th Jud. Dist. Ct. Parish of Iberville, filed on Dec. 19, 1996) (final order and judgment) (on file with author), plays an important role in the GM saga. See infra notes 45-57 and accompanying text.

20 By the summer of 1993, 287 suits, including 23 class actions, had been transferred to the Eastern District of Pennsylvania as part of the multidistrict litigation. See Andrew Blum, GM Settlement Praised, Opposed, Nat’l L.J., Aug. 2, 1993, at 3.


22 See id.

23 See THE LEGAL INTELLIGENCER, June 29, 1993, at 4 (describing GM’s arguments against certification of the class).

24 See In re General Motors Corp. Pick-up Truck, 55 F.3d at 779 (noting intensive settlement discussions between the parties in June 1993).

25 See id. at 782. The proposed settlement covered 36 class actions. See Court Rejects
federal plaintiffs moved the district court for authorization to disseminate notice of the settlement to the class members.\textsuperscript{26} The district court promptly approved the motion, preliminarily concluding that the terms of the settlement were fair, reasonable and adequate, and certified a class for settlement purposes only.\textsuperscript{27} Individual notices were mailed to approximately 5.7 million federal class members, of whom only 6450 objected to the proposed settlement and 5203 opted out of the class.\textsuperscript{28}

Following a fairness hearing on October 26, 1993, the district court approved a settlement pursuant to which each class member would receive a $1000 certificate toward the purchase of a new GMC or Chevrolet light duty truck.\textsuperscript{29} Four days later, the district court summarily approved class counsel’s unopposed petition for an award of attorneys’ fees in the amount of $9.5 million and costs in the amount of $451,912.31 to be paid by GM.\textsuperscript{30} The Texas trial court also acted quickly when notified of the parties’ proposed settlement. A class was certified for settlement purposes only, notice was sent to members of the class, and a fairness hearing was held on October 27, 1993, the day after the federal hearing.\textsuperscript{31} On November 3, the trial court approved the settlement and awarded class counsel $9 million in attorneys’ fees and $500,000 in expenses.\textsuperscript{32}

In both the federal and Texas actions, objectors appealed the orders approving the settlements and awarding attorneys’ fees and expenses. The Texas Court of Appeals reached a decision first, reversing the state court


\textsuperscript{26} \textit{See In re General Motors Corp Pickup Truck}, 846 F. Supp. at 332.

\textsuperscript{27} See id.

\textsuperscript{28} See id. at 334 (treating the silence of more than 99% of the class members as a strong factor in favor of the settlement). The numbers of opt-outs and objectors in the Texas litigation were likewise very small. \textit{See Bloyed v. General Motors Corp.}, 881 S.W.2d 422, 430 (Tex. App. 1994) (noting the trial court’s conclusion that the low number of opt-outs and objectors favored approval of the settlement), \textit{aff’d}, 916 S.W.2d 949 (Tex. 1996).

\textsuperscript{29} \textit{See In re General Motors Corp. Pickup Truck}, 846 F. Supp. at 332-344. The certificates were transferable only in restricted circumstances. See id. at 333, 338 (concluding that about 50% of the class would actually use the certificates).

\textsuperscript{30} \textit{See In re General Motors Corp. Pickup Truck Fuel Tank Prods. Liab. Litig.}, No. MDL DKT. 961, 1993 WL 533155, at *1 (E.D. Pa. Dec. 20, 1993). The petition was submitted jointly by lead counsel and the steering committee. See id. at *1. In an opinion filed several weeks later, the district court conducted a more thorough review of the reasonableness and fairness of the petitions for fees and expenses, ultimately concluding that its decision to approve the petition was correct. \textit{See In re General Motors Corp. Pickup Truck Fuel Tank Prods. Liab. Litig.}, No. MDL 961, 1994 WL 30301, at *3 (E.D. Pa. Feb. 2, 1994) (justifying the fee arrangement under both the lodestar and percentage of recovery methods), vacated, 55 F.3d 768 (3d Cir. 1995).

\textsuperscript{31} \textit{See Bloyed}, 881 S.W.2d at 427.

\textsuperscript{32} See id. at 427-28.
judgment and finding that the settlement was "not fundamentally fair, adequate, and reasonable to the class members...." Many class members would have been unable to redeem or transfer the certificates but nevertheless would have released GM from liability. GM would have experienced a windfall because issuance of the certificates would have enabled it to sell many more trucks than it otherwise would have (at a hefty profit) and nothing would have been done to remedy the allegedly unsafe trucks. The Texas Court of Appeals also held that notice to the class was deficient in that it failed to disclose the amount of attorneys' fees sought by class counsel, and that the evidence did not support the $9 million fee award.

The Third Circuit Court of Appeals also vacated the settlement, citing problems with both the settlement itself, and the procedures and standards employed by the district court in approving it. Emphasizing that "actions certified as settlement classes must meet the same requirements under Rule 23 as litigation classes," the appellate court vacated the certification order. In reaching this decision, the court noted that the district court had failed to make findings that the class complied with Rule 23(a) and (b)(3). The court also expressed grave doubt about the adequacy of the representation, especially in light of the conflicts of interest between different groups of class members. In finding the settlement inadequate, the court expressed doubt about its value, the reaction of the class to it and the failure of the parties to develop the case

33 Id. at 426.
34 See id. at 431-33 (stating that a more fair and reasonable settlement could have provided for repair of the trucks by GM or for reimbursement in cash if truck owners wanted to make the repairs themselves).
35 See id. at 435-36 (asserting that because the attorneys' fees directly influence the net payment to class members, they need to know the amount of the fees to decide whether to opt out or object to the settlement).
36 See In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 777 (3d Cir. 1995). Although the court's disposition made it unnecessary for it to pass on attorneys' fees, the court clarified the governing standard for fee awards to guide the district court on remand. See id. at 779, 819-22 (concluding that percentage of recovery method would be more appropriate in the case than the lodestar method because the fee and the settlement comprised a common fund out of which the court should reward counsel's efforts for success or penalize for failure).
37 Id. at 788, 799 (stating that "there is no lower standard for the certification of settlement classes than there is for litigation classes").
38 See id. at 799-800.
39 See id. at 794, 800 (holding that formal findings under Rule 23 are mandatory for certification of settlement classes because their legitimacy "depends upon fidelity to the fundamentals of Rule 23"); see also Fed R. Civ. P. 23(a), (b)(3).
40 See In re General Motors Corp. Pick-up Truck, 55 F.3d at 800-04 (noting that the fleet owners would have had more difficulty using the coupons within the 15-month period than would the individual owners and expressing concern about the vigor of class counsel's representation).
before reaching the settlement. Nevertheless, the Third Circuit expressly left open the possibility that the district court on remand might certify a settlement class that complied with Rule 23 and approve a revised settlement.

GM and class counsel declined the Third Circuit’s invitation to present a better deal to the district court on remand. Rather, in early July 1996, they moved to intervene in yet another dueling class action brought on behalf of a statewide class of GM truck owners, already pending in the 18th Judicial District Court for the Parish of Iberville, Louisiana. It also requested that co-lead counsel and the Plaintiff’s Executive Committee in the federal proceedings be appointed to serve as counsel for the class along with other counsel. After these requests were granted, GM and class counsel presented a revised settlement to the Louisiana court. The court preliminarily approved the settlement, provisionally certified a nationwide class, ordered that notice be sent to the class, and scheduled a fairness hearing for November 6, 1996.

Fearful that the Louisiana court would approve a settlement that they viewed as essentially identical to the one the Third Circuit had deemed inadequate, a group of objectors moved the federal district court for the Eastern District of Pennsylvania to enjoin the Louisiana proceedings. The district court denied the injunction, and shortly thereafter, the Louisiana court entered a final judgment approving the settlement. On appeal, the Third Circuit was in the

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41 See id. at 806-14, 818-19 (calling the settlement “a sales promotion for GM” and citing evidence of significant class opposition to the settlement).

42 See id. at 804, 819 (doubting that the class could meet the certification requirements on the current record, but not precluding the possibility of certification on a more developed record).

43 The Louisiana class action suit had been filed on February 11, 1993. See White v. General Motors Corp., 718 So. 2d 480, 482 (La. Ct. App. 1998). On May 17, 1993, the Louisiana court granted plaintiffs’ motion for certification of a statewide class. See id. at 483. This decision was stayed by a Louisiana appellate court on August 9, 1993, after the federal district court preliminarily approved the nationwide settlement. See id. Notably, the claims initially raised in White on behalf of the Louisiana statewide class were “virtually identical” to those asserted on behalf of the nationwide class. See White v. General Motors Corp., Class Action No. 42,865 at 4 (La. 18th Jud. Dist. Ct. Parish of Iberville, filed on Dec. 19, 1996) (final order and judgment), rev’d, White, 718 So. 2d 480.

44 See White, 718 So. 2d at 484.

45 See id. at 485.


47 See id. The district court also denied the objectors’ motion to intervene in the federal action. See id. at *5-6.

48 See White, 718 So. 2d at 485 (stating that the trial court approved the settlement on December 19, 1996). A copy of the Louisiana court’s Final Order and Judgment, which was rendered on December 19, 1996, is attached as Appendix B to the opinion of the Court of Appeals of Louisiana in White, 718 So. 2d at 502-11.
awkward position of having to determine whether the district court had erred in declining to enjoin a state court action that already had proceeded to final judgment. Although expressing some discomfort with the procedure followed by GM and class counsel, the Third Circuit affirmed the denial of the injunction against the Louisiana action.50

While the last chapter of this saga has yet to be written, the GM case, which involved both simultaneous and sequential class actions filed in both federal and state courts, illustrates many of the problems that plague dueling class actions: duplication of effort, waste of judicial resources, inordinate pressure on class counsel to settle and difficult preclusion problems. These problems and others that frequently arise in the dueling class action context will be explored in Part II.

II. THE PROBLEMS

A. Pressure to Settle

In virtually every class action seeking money damages, the person with the most at stake financially is the attorney representing the class. The attorney’s interest in securing the highest fee and the class members’ interest in attaining the greatest recovery often diverge; the attorney has an incentive to settle the case prematurely, locking in a high fee without expending a lot of time or money.51 The class members, with so little at stake in the first place, have

49 The court noted that “the procedure followed by appellees gives us pause. . . .” In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133, 137 (3rd Cir. 1998).
50 See id. at 140-46.
51 See John C. Coffee, Jr., Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions 86 COLUM. L. REV. 669, 686-91 (1986) (arguing that class counsel has incentive to settle early and quickly under both the percentage of recovery and lodestar methods for determining attorneys’ fees) [hereinafter Coffee, Understanding the Plaintiff’s Attorney]; John C. Coffee, Jr., The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation, 48 LAW & CONTEMP. PROBS. 5, 35-36, 40-44 (1985) [hereinafter Coffee, The Unfaithful Champion]; Bruce L. Hay, Asymmetric Rewards: Why Class Actions (May) Settle for Too Little, 48 HASTINGS L.J. 479, 485-87, 493-97 (1997) (asserting that the principal reason for accepting low settlements lies in the different share class counsel has in the settlement and the trial award); Jonathan R. Macey & Geoffrey P. Miller, The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform, 58 U. CHI. L. REV. 1, 22-25 (1991) (arguing that although the attorney-client conflict depends on the type of litigation and procedure, it remains significant in all class and derivative lawsuits under the present regulatory system) [hereinafter Macey & Miller, The Plaintiffs’ Attorney’s Role]; George L. Priest, Procedural Versus Substantive Controls of Mass Tort Class Actions, 26 J. LEGAL STUD. 521, 530 (1997) (stating that the most serious criticism of the modern mass tort class action is directed at the conflict between class counsel and class members); Randall S. Thomas & Robert G.
insufficient incentive to closely monitor class counsel and her strategic choices.\textsuperscript{52} Thus, in a single class action, class counsel's own self-interest may cause her to prefer early settlement to trial.\textsuperscript{53}

\textsuperscript{52} See Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co., 834 F.2d 677, 681 (7th Cir. 1987) (noting that "the negotiator on the plaintiffs' side, that is, the lawyer for the class, is potentially an unreliable agent of his principals") (citations omitted); John C. Coffee, Jr., \textit{Class Wars: The Dilemma of the Mass Tort Class Action}, 95 COLUM. L. REV. 1343, 1346 (1995) (asserting that litigator's autonomy over important personal interests in litigation can be an illusory goal because of the weak economic incentives for the individual plaintiffs) [hereinafter, Coffee, \textit{Class Wars}]; John C. Coffee, Jr. & Donald E. Schwartz, \textit{The Survival of the Derivative Suit: An Evaluation and Proposal for Legislative Reform}, 81 COLUM. L. REV. 261, 318 (1981) (noting that most class members "have too small an individual interest in the litigation to give it close attention"); Mary Kaye Kane, \textit{Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer}, 66 TEX. L. REV. 385, 395-96 (1987) (asserting that if class member control were the only restraint on lawyer's self-interest, nothing in the class action would prevent lawyers from compromising clients' interests to get larger fees); Jonathan R. Macey & Geoffrey P. Miller, \textit{A Market Approach to Tort Reform Via Rule 23}, 80 CORNELL L. REV. 909, 912 (1995) [hereinafter Macey & Miller, \textit{A Market Approach to Tort Reform}]; Macey & Miller, \textit{The Plaintiffs' Attorney's Role}, supra note 51, at 3, 7-8, 20 (arguing that even if some plaintiffs wanted to monitor class counsel's conduct, they would hardly influence class counsel because he or she must act for the benefit of the class as a whole and not according to the individual wishes of its members).

\textsuperscript{53} See Weinberger v. Great Northern Nekoosa Corp., 925 F.2d 518, 524 (1st Cir. 1991) (noting the danger "that the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees") (citations omitted); see also, e.g., John C. Coffee, Jr., \textit{The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action}, 54 U. CHI. L. REV. 877, 888 (1987) [hereinafter Coffee, \textit{The Regulation of Entrepreneurial Litigation}]; Coffee, \textit{Understanding the Plaintiff's Attorney}, supra note 51, at 690 (noting that sophisticated defendants may exploit class counsel's tendency to settle early in their own interests); Coffee, \textit{The Unfaithful Champion}, supra note 51, at 36-37 (arguing that acceptance of early and inadequate settlements can occur under the lodestar formula even though the plaintiffs' counsel and the defendants believed that they acted in good faith); Hay, supra note 51, at 480-82 (arguing that excessively low settlement amounts are the product of attorney incentives that can be adjusted to remedy the problem); Macey & Miller, \textit{The Plaintiffs' Attorney's Role}, supra note 51, at 25 (noting that under the percentage of recovery method an attorney who settles early earns much more than an attorney who expends greater efforts); Julie Rubin, \textit{Auctioning Class Actions: Turning the Tables on Plaintiffs' Lawyers' Abuse or Stripping the Plaintiff Wizards of Their Curtain}, 52 BUS. LAW. 1441, 1445 (1997) (arguing that compensation formulas can leave unfulfilled the task of eliminating the attorney-client interest in class actions); Kurt A. Schwarz, Note, \textit{Due Process and Equitable Relief in State Multistate Class Actions After Phillips Petroleum Co. v. Shutts}, 68 TEX. L. REV. 415, 440-441 (1989) (arguing that the Shutts decision provided defendants with means to induce quickly favorable settlement in overlapping class actions).
At least prior to the Supreme Court's decision in *Amchem Prods., Inc. v. Windsor*, the willingness of some courts to certify for settlement purposes a class that could not satisfy the certification requirements for litigation, increased the pressure on class counsel to settle. After all, if the class could not be certified for litigation under the standard requirements, class counsel could not credibly threaten to take the case to trial and thus were forced to settle, bargaining “with at least one arm tied behind their backs.”

Add to this mix yet another class action filed on behalf of the same class, and the pressure to settle becomes even more irresistible. Each attorney understands that once the class members’ claims are resolved by judgment or settlement, any other suits pending on their behalf raising the same claim will be dismissed on claim preclusion grounds. Class counsel also knows that she will receive nothing if the class action she filed is dismissed. Thus, each lawyer for the class realizes that it is in her own self-interest to race toward judgment or settlement before any other lawyer representing the same class on the same claim gets there.

Even if the class has a very strong claim on the merits and class counsel

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54 521 U.S. 591, 592 (1997) (holding that a class action certified for settlement purposes only must still satisfy all of the Rule 23(a) and 23(b)(3) requirements).


56 See id. at 854 (noting the significance of settlement as a “defendant’s weapon” in the class action context); see also, e.g., Coffee, *Class Wars*, supra note 52, at 1379-80; John C. Coffee, Jr., *Rule of Law: The Corruption of the Class Action*, WALL ST. J., Sept. 7, 1994, at A15 (contending that the principle of the class action lawsuit has expanded beyond logical limits due to settlement pressures); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1136 (1996) (stating “although most class actions are settled anyway, licensing settlements when no class action trial is possible gives all the leverage in the settlement negotiation to one side, the defendant”). This pressure to settle class actions that cannot be tried exists even in the absence of dueling class actions. See Coffee, *The Corruption of the Class Action*, supra note 55, at 853-54 (discussing mass tort class actions).

57 See, e.g., Coffee, *The Regulation of Entrepreneurial Litigation*, supra note 53, at 910 (noting that “separate actions induce a rush to judgment”).

ordinarily would prefer to go to trial rather than settle at a discount, the attorney must acknowledge that she cannot control the pace at which the court will entertain her action. The existence of another simultaneous suit on behalf of the same class before a different court makes the race to judgment very risky. Thus, class counsel most likely will decide that it is in her own best interest to settle the action and guarantee that she is compensated for her work on the case.

The defendant is aware that class counsel is under substantial pressure to settle. Based on this knowledge, the defendant may make a “low ball” offer in an effort to settle the class claim for far less than it is worth. The defendant may even agree not to oppose class counsel’s application for exorbitant fees or may propose a side deal that assures class counsel a hefty fee, if class counsel agrees to the low-ball offer. The pressure on class counsel to collude with the defendant in this manner may be extreme. Even if class counsel is able to resist this pressure, the defendant may simply go knocking on the door of another lawyer representing the class to see if she will succumb. Thus, in Professor Jack Coffee’s words, the defendant is able to engage in a “reverse auction,” pitting the various class counsel against one another and agreeing to settle with the lawyer willing to accept the lowest bid on behalf of the class.

59 See Georgine v. Amchem Prods., Inc., 83 F.3d 610, 622 (3d Cir. 1996) (noting that “class counsel presented the suit and settlement together with counsel for the CCR defendants in one package, after having negotiated with CCR a side-settlement of over $200 million for cases in their ‘inventory’”), aff’d sub nom. Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); see also Susan P. Koniak, Feasting While the Widow Weeps: Georgine v. Amchem Prods., Inc., 80 Cornell L. Rev. 1045, 1078-86, 1128-37 (1995).


61 See Coffee, The Corruption of the Class Action, supra note 55, at 853 (stating that “defendants can effectively conduct a reverse auction among plaintiffs’ attorneys, seeking the lowest bidder from the large population of plaintiffs’ attorneys”); see also Romstadt v. Apple Computer, Inc., 948 F. Supp. 701, 703 n.2 (N.D. Ohio 1996) (noting that after the class representative in the first-filed class action rejected a proposed settlement offer, the defendant made “the same, or substantially the same,” offer to the class representative in a dueling class action pending in another state court), amended, 1996 U.S. Dist. LEXIS 20477 (N.D. Ohio Dec. 10, 1996); Marcel Kahan & Linda Silberman, Matsushita and Beyond: The
In many respects, class counsel face a dilemma similar to the classic “prisoner’s dilemma” of game theory.\footnote{See Coffee, Class Wars, supra note 52, at 1371-72 n.105.}

In the federal/state class action context, this irresistible pressure to settle is compounded by a relative inequality in bargaining power between class counsel and the defendant. If the state action raises only state law claims, and the simultaneous federal action raises claims within the federal court’s exclusive subject matter jurisdiction, then class counsel in the state case is at a severe disadvantage in trying to negotiate a global settlement with the defendant.\footnote{See, e.g., Coffee, The Corruption of the Class Action, supra note 55, at 852 (defining a “global settlement” as one by which the parties “agree to settle the plaintiffs’ attorneys’ entire inventory of existing cases at the prevailing market rate for such claims if the same attorneys will agree to bring and settle a class action on behalf of other (largely future) claimants on a less favorable basis”); Geoffrey C. Hazard, Jr., The Settlement Black Box, 75 B.U. L. Rev. 1257, 1258 (1995); Kahan & Silberman, Matsushita and Beyond, supra note 61, at 235-42.}

She cannot threaten to litigate the federal claims in an effort to compel the defendant to increase its settlement offer because she has not even alleged them in her complaint. Thus, if she wants to be the attorney who settles with the defendant, to ensure that she is compensated for her work on the case,\footnote{If the federal class action raising only federal claims were settled first, the state class action likely would be precluded if the state and federal claims were transactionally related. The result would be that the attorney representing the class in state court would receive no fee. Furthermore, some courts have held that a state court settlement judgment can preclude exclusively federal claims. See infra notes 201-21 and accompanying text, as well as Part III (discussing the Supreme Court’s decision in Matsushita).\footnote{See, e.g., Kahan & Silberman, Matsushita and Beyond, supra note 61, at 235-36 (noting the lack of bargaining power of the state class attorney who cannot litigate the exclusive federal claims); Koniak & Cohen, supra note 56, at 1136 (noting grave risk of abuse in class actions “that can be settled, but not tried”).}

Thus, if she wants to be the attorney who settles with the defendant, to ensure that she is compensated for her work on the case,\footnote{She may feel compelled to accept an inadequate settlement.}

B. Informational Deficiencies

Class action settlements induced by this pressure suffer from a number of informational deficiencies that harm the ability of class counsel, class members and the court to assess the adequacy of the proposed settlement. Dueling class actions suffer from these problems in addition to some unique informational deficiencies.

1. Class Counsel

Because class counsel in dueling class actions are under such enormous pressure to settle with the defendant quickly, they often begin negotiations...
before they have undertaken substantial discovery\textsuperscript{66} and therefore are not well-positioned to assess the strength and value of the class's claim.\textsuperscript{67} This informational deficiency is more severe in federal/state dueling class actions where the federal class action raises claims within the exclusive subject matter jurisdiction of the federal courts. In such cases, class counsel in the state litigation has no reason to perform a pretrial investigation of the federal claims,\textsuperscript{68} has no incentive to take discovery on the facts underlying the federal claims, and yet is under pressure to settle the exclusively federal claims as part of a global settlement with the defendant.\textsuperscript{69} Since she has virtually no information regarding the strength or value of these federal claims, she lacks the information needed to assess the adequacy of any proposed settlement offer by the defendant with respect to the federal claims.

While the lawyer representing the class in the state action could seek information about the federal claims from the lawyer representing the class in the federal action, the lawyer in the federal action has little to gain and much to lose by providing such assistance. After all, if the attorney in the state suit reaches a settlement that releases the exclusively federal claims, the state judgment could have preclusive effect, barring the federal action and the payment of fees to the lawyer representing the class in federal court.\textsuperscript{70}

2. Class Members

The informational deficiencies suffered by class members are far more severe than those suffered by class counsel. Consider the problems faced by class members generally before adding the complication of a dueling class action. Class members depend upon class counsel to provide them with information regarding the terms of any proposed settlement. Once class counsel has reached an agreement in principle with the defendant, however, she has a strong self-interest in gaining judicial approval of the settlement. Thus, class counsel may be more interested in limiting the number of class members who opt out\textsuperscript{71} and assuring judicial approval of the deal rather than

\textsuperscript{66} See, e.g., In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 788-89 (3d Cir. 1995) ("With an early settlement, both parties have less information on the merits. . . . Without the benefit of more extensive discovery, both sides may underestimate the strength of the plaintiffs' claims.").


\textsuperscript{68} See FED. R. CIV. P. 11(b) (requiring counsel to perform a pre-filing inquiry into the facts and law underlying the claim).

\textsuperscript{69} See Kahan & Silberman, Matsushita and Beyond, supra note 61, at 235-37, 245-46.

\textsuperscript{70} See infra Part III (explaining how state class action settlement potentially precludes exclusive federal claims pending in federal court).

\textsuperscript{71} Settlement agreements occasionally protect the defendant from individual suits by providing that the defendant may disavow the settlement if more than a specified number of
providing full and fair disclosure of the settlement terms.

The court has a special responsibility to ensure that the class receives adequate notice of the proposed settlement.\textsuperscript{72} Nevertheless, just as class counsel’s own interests may conflict with full disclosure to the class, the court may also have an interest in approving a settlement to clear its docket and gain prestige as the court that supervised the settlement of a complex class action.\textsuperscript{73} Accordingly, the court may approve a notice that omits certain facts that might cause class members to consider objecting or opting out of the class. For instance, courts have approved notices to class members that failed to disclose meaningful information, such as the amount of fees to be paid to class counsel,\textsuperscript{74} the terms of the distribution plan,\textsuperscript{75} that simultaneous class actions

\textsuperscript{72} Three separate portions of Rule 23 discuss the court’s responsibility to ensure that the class receives adequate notice. \textit{See} FED. R. CIV. P. 23(c)(2), 23(d)(2), 23(e).

\textsuperscript{73} \textit{See}, e.g., \textit{In re Oracle Secs. Litig.}, 132 F.R.D. 538, 545 (N.D.Cal. 1990) (noting that “the court, which approves the settlement, clears its docket of troublesome litigation”); Coffee, \textit{Class Wars}, \textit{supra} note 52, at 1445 (“Eager for docket-clearing settlement, trial courts face a temptation to close their eyes to conflicts and improprieties that they would not tolerate in other contexts.”); Samuel Issacharoff, \textit{Class Action Conflicts}, 30 U.C. DAVIS L. REV. 805, 829 (1997) (“No matter how virtuous the judge, the fact remains that courts are overworked, they have limited access to quality information, and they have an overwhelming incentive to clear their docket.”); Konia, \textit{supra} note 59, at 1122; Konia & Cohen, \textit{supra} note 56, at 1122-24 (stating that “[j]udicial self-interest may lead judges to seek power, prestige, and autonomy . . .”); Macey & Miller, \textit{The Plaintiffs’ Attorney’s Role}, \textit{supra} note 51, at 45-46; Thomas & Hansen, \textit{supra} note 51, at 433.

\textsuperscript{74} \textit{See}, e.g., Mendoza v. United States, 623 F.2d 1338, 1352 (9th Cir. 1980) (stating that it was not an abuse of discretion to approve the settlement notice as such); \textit{In re The Prudential Ins. Co. Sales Practices Litig.}, 962 F. Supp. 450, 530 (D.N.J. 1997) (stating that class notice was sufficient), \textit{aff’d sub nom. Krell v. Prudential Ins. Co.}, 148 F.3d 283 (3d Cir. 1998), \textit{cert. denied}, 119 S.Ct. 890 (U.S. 1999); cf. Bennett v. Behring Corp., 96 F.R.D. 343, 354 (S.D. Fla. 1982) (rejecting objector’s contention that the notice failed “to provide specific information as to fees” and identifying paragraph in notice that disclosed amount of fees sought), \textit{aff’d}, 737 F.2d 982 (11th Cir. 1984). \textit{But see} General Motors Corp. v. Bloyed, 916 S.W.2d 949, 957 (Tex. 1996) (setting aside settlement “because the class members did not receive adequate notice of . . . the projected amount of attorneys’ fees and expenses”).

\textsuperscript{75} \textit{See}, e.g., Torrisi v. Tucson Elec. Power Co., 8 F.3d 1370, 1373-74 (9th Cir. 1993); \textit{In re Cement & Concrete Antitrust Litig.}, 817 F.2d 1435, 1440-41 (9th Cir. 1987), \textit{rev’d on other grounds sub nom. California v. ARC Am.Corp.}, 490 U.S. 93 (1989); \textit{In re “Agent Orange” Prod. Liab. Litig.}, 818 F.2d 145, 170 (2d Cir. 1987); \textit{In re Corrugated Container
filed on behalf of the same class were pending elsewhere,\textsuperscript{76} that additional
theories of liability not pressed in the class action could have been pursued
against the defendant,\textsuperscript{77} or that some class members had objected to the
proposed settlement.\textsuperscript{78}

Not only are class members sometimes deprived of information necessary to
make an informed decision regarding the opportunity to opt out, but class
members who wish to object to a proposed settlement often are frustrated in
their efforts to take discovery in an attempt to uncover collusion or other facts
that might demonstrate the inadequacy of the settlement.\textsuperscript{79} Concerned that


\textsuperscript{76} See, e.g., Bell Atlantic Corp. v. Bolger, 2 F.3d 1304, 1317 (3d Cir. 1993) (discussing
the adequacy of notice in the context of dueling derivative actions); \textit{In re Corrugated
Container Antitrust Litig.}, 643 F.2d at 224; \textit{In re: The Prudential Ins. Co. Sales Practices
Litig.}, 962 F. Supp. at 529 (holding notice “need not describe parallel state court
proceedings or all potential state law causes of action”); Romstadt v. Apple Computer, Inc.,
Ohio Dec. 10, 1996); Hefty v. All Other Members of the Certified Settlement Class, 638
some class notices have disclosed the pendency of dueling class actions. See Weinberger v.
Kendrick, 698 F.2d 61, 70 (2d Cir. 1982); cf. \textit{Mars Steel Corp. v. Continental Illinois Nat’l
Bank \\& Trust Co.}, 834 F.2d 677, 683 (7th Cir. 1987) (detailing the adequacy of class notice
and stating that “taken as a whole the notice is not seriously misleading”).

\textsuperscript{77} See \textit{Prudential Ins. Co. Sales Practices Litig.}, 962 F. Supp. at 529 (stating that “the
Class Notice . . . clearly advises class members . . . that ‘Prudential will be released from all
claims that have been or could have been asserted by Class Members’ if the Proposed
Settlement is approved.”).

\textsuperscript{78} See, e.g., Maywalt v. Parker \\& Parsley Petroleum Co., 67 F.3d 1072, 1079 (2d Cir.
1995), \textit{aff’d sub nom. Olick v. Parker \\& Parsley Petroleum Co.}, 145 F.3d 513 (2d Cir.
353-54.

\textsuperscript{79} See, e.g., \textit{Mars Steel Corp.}, 834 F.2d at 684 (noting that “[d]iscovery of settlement
negotiations in ongoing litigation is unusual because it would give a party information about
an opponent’s strategy”); City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974)
(rejecting objectors’ contention that they should have been given “authority of discovery
from which they could fashion an effective presentation” at the fairness hearing); \textit{In re Ford
(E.D. La. Oct. 28, 1994) (stating that “discovery into the negotiations of the proposed
settlement is improper unless there is some independent evidence of collusion”) (footnote
omitted); White v. NFL, 822 F. Supp. 1389, 1429 (D. Minn. 1993), \textit{aff’d}, 41 F.3d 402 (8th
Cir. 1994). \textit{But see In re General Motors Corp. Engine Interchange Litig.}, 594 F.2d 1106,
1124 (7th Cir. 1979) (stating that “the conduct of the negotiations was relevant to the
fairness of the settlement and that the trial court’s refusal to permit discovery or examination
of the negotiations constituted an abuse of discretion”) (footnote omitted); \textit{In re Prudential-
(expressing concern about limited opportunity counsel representing some 2000 opt-outs had
for taking discovery).
such satellite discovery would unduly complicate the litigation\textsuperscript{80} or give a party access to an adversary’s litigation strategy\textsuperscript{81} or privileged information,\textsuperscript{82} courts often deny objectors the opportunity to take discovery, especially of settlement negotiations.\textsuperscript{83}

Now consider the additional informational deficiencies that result when a second class action is introduced. First, the tension between class counsel’s own interest and her obligation to provide full disclosure to the class is heightened in the simultaneous class action context; class counsel knows that attorneys’ fees will be paid only to the attorney who first obtains judicial approval of a settlement. A notice that raises too many concerns or causes too many class members to object may nix the deal. Thus, the attorney representing the class in a dueling class action may allow her own self-interest to interfere with her obligation to disclose all of the details of the settlement to the class.

Second, the pendency of dueling class actions raises the possibility that class members will receive multiple notices. If two or more simultaneous class actions are proceeding at roughly the same pace, class members may receive a notice in each suit of the pendency of the class action. If the class member opts out of the first suit, it may be quite confusing to receive another notice later that looks an awful lot like the first notice.\textsuperscript{84} The class member may disregard the second notice, mistakenly assuming that it is a duplicate of the first, thereby failing to opt out of a separate class action entirely. This likelihood is increased if the notices fail to mention the existence of other simultaneous actions.

The same problem arises in the case of sequential class actions. A class member may receive a notice in one class action and decide, based on the

\textsuperscript{80} See, e.g., Bolger, 2 F.3d at 1315 (quoting the Seventh Circuit, noting that, “[t]he temptation to convert a settlement hearing into a full trial on the merits must be resisted”); Mars Steel Corp., 834 F.2d at 684; Grinnell Corp., 495 F.2d 448, 464 (2d Cir. 1974) (discussing the threat of new counsel coming in and “thwart[ing] the settlement process” by requesting documents and starting the “case anew”); In re Ford Motor Co. Bronco II Prods., 1994 WL 593998, at *3.

\textsuperscript{81} See, e.g., Mars Steel Corp., 834 F.2d at 684; McKersie v. IU Intern. Corp., No. 86 C 1683, 1987 WL 14009, at *3 (N.D. Ill. July 9, 1987) (discussing the possibility of sanctions if plaintiff’s discovery requests are “nothing more than a ‘fishing expedition’ designed to harass”); cf. Hickman v. Taylor, 329 U.S. 495, 512-13 (1946) (discussing the awkwardness of an attorney having to appear as a witness in her client’s case).

\textsuperscript{82} See McKersie, 1987 WL 14009, at *1-*2 (granting a protective order against a discovery request by “disgruntled class members” that “reaches matters . . . protected under the attorney-client privilege”).

\textsuperscript{83} Courts may also be concerned that such discovery would uncover information that might compel the court to disapprove the settlement.

\textsuperscript{84} See Carlow v. Amchem Prods., Inc., 10 F.3d 189, 204 (3d Cir. 1993) (noting the “likelihood that the members of the West Virginia class will be confused as to their membership status in the dueling lawsuits”).
information disclosed, whether to opt out or not. Yet, if the proposed settlement in the first suit is disapproved or if the suit is dismissed for other reasons, no follow-up notice is sent to class members.\textsuperscript{85} When the second of the sequential class actions is filed and notice is disseminated, class members again may assume that this is the same suit and that their previous opt-out is still effective. But failure to opt out of this second suit will not be excused by such confusion.\textsuperscript{86} Thus, class members in dueling class actions suffer all of the standard informational deficiencies that arise whenever a class action settles, as well as some that are unique to the dueling class action setting.

3. The Court

Even if a trial court is truly committed to scrutinizing a class action settlement, it is often at an informational disadvantage. After all, American judges are supposed to be passive and rely upon the parties to bring to their attention all relevant facts and competing arguments.\textsuperscript{87} If the defendant and class counsel reach a settlement, obviously they will present it to both the class

\textsuperscript{85} Rule 23(e) provides that “[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.” \textit{Fed. R. Civ. P.} 23(e). But courts have differed on whether notice is required when the dismissal or settlement precedes class certification. \textit{See, e.g.}, Rice \textit{v.} Ford Motor Co., 88 F.3d 914, 919 n.8 (11th Cir. 1996) (noting that “[i]n this Circuit, the applicability of Rule 23(e) to proposed classes prior to their certification is an open question”) (citations omitted); Glidden \textit{v.} Chromalloy Am. Corp., 808 F.2d 621, 626-27 (7th Cir. 1986) (construing Rule 23(e) to apply “to all complaints containing class allegations, unless the district court declines to certify the class,” but reiterating that “Rule 23(e) does not invariably require notice when a case is settled prior to certification”); Shelton \textit{v.} Pargo, Inc., 582 F.2d 1298, 1314 (4th Cir. 1978) (holding that “if it has found neither collusion nor prejudice, it is within the discretion of the District Court . . . to approve the dismissal without requiring . . . a notice as mandated by 23(e)”); \textit{see also} 2 \textsc{Herbert B. Newberg \& Alba Conte, Newberg on Class Actions} § 11.66 (3d ed. 1992); 7B \textsc{Charles Alan Wright et al., Federal Practice and Procedure} § 1797, at 366 (2d ed. 1986). \textit{But see} Speaks \textit{v.} New York Life Ins. Co., 693 So. 2d 340, 344 (La. Ct. App. 1997) (stating that a trial court’s failure to require notice of the dismissal of a class action before certification “might constitute reversible error where it could be shown that class members were injured as a result”).

\textsuperscript{86} \textit{See In re} Prudential Secs. Inc. Partnership Litig., MDL No. 1005, 1996 WL 739258 (2d Cir. 1996) (concluding that the district court did not abuse its discretion in denying absent class members’ motion to enlarge their time to opt out notwithstanding their confusion regarding the need to opt out; appellants had opted out of an earlier, related class action filed in a different jurisdiction and had not received notice of the later class action) (unpublished disposition).

\textsuperscript{87} \textit{See, e.g.}, \textsc{Stephan Landsman, The Adversary System: A Description and Defense} 2-4 (1984) (discussing the neutral and passive fact finder); \textsc{Macey \& Miller, The Plaintiffs’ Attorney’s Role, supra} note 51, at 66 (noting court’s passivity in reviewing typicality and adequacy of named representative).
and the court in the most favorable light, downplaying any possible weaknesses or problems with the deal.\textsuperscript{88} In the absence of an adversarial proceeding, the court is very poorly situated to uncover any potential conflicts between class counsel and the class, or among various class members, or to otherwise assess the fairness of the proposed settlement.

This problem is less severe when the parties reach a settlement after having engaged in some adversarial proceedings before the court. If, for example, the court holds a hearing to determine whether to certify the class \textit{before} the parties have reached a settlement, then the defendant typically will object to class certification.\textsuperscript{89} This will bring to the court’s attention the problems with adequacy of representation, conflicts among members of the class, typicality of the named representative and commonality of the issues.\textsuperscript{90} This adversarial hearing should provide the court with sufficient information to determine whether the named representative and class counsel will adequately represent the class and whether conflicts exist among the class members. If class counsel and the defendant later reach a settlement and jointly present it to the court, the court will still suffer from the informational disadvantage described above. But at least it may have some confidence that the deal was negotiated by class counsel and deemed “adequate” following an adversarial hearing.\textsuperscript{91}

Likewise, if the settlement is reached after the parties have engaged in other adversarial proceedings in the litigation, such as filing pleadings, taking discovery or making and defending against dispositive motions, then the court has access to some information regarding the relative merits of the underlying claims and defenses. In such cases, the court is better situated to assess the

\textsuperscript{88} See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621 (1997); Kamilewicz v. Bank of Boston Corp., 100 F.3d 1348, 1352 (7th Cir. 1996) (Easterbrook, J., dissenting) (parties “may even put one over on the court, in a staged performance”).

\textsuperscript{89} See THOMAS E. WILGGING ET AL., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 36 (Federal Judicial Center 1996) (“In three of the four study courts, defendants opposed certification in slightly over 50% of the cases with a motion or sua sponte order regarding class certification.”).

\textsuperscript{90} See, e.g., General Tel. Co. v. Falcon, 457 U.S. 147, 155-60 (1982) (identifying problems with the typicality of the named representative’s claim in a contested class action); Andrews v. AT&T, 95 F.3d 1014, 1019-21 (11th Cir. 1996) (discussing defendant’s opposition to class certification, including challenges to the named representative’s standing to bring suit, the adequacy of his representation, and satisfaction of the predominance requirement); Kayes v. Pacific Lumber Co., 51 F.3d 1449, 1463-65 (9th Cir. 1995) (addressing typicality and adequacy of representation requirements in contested class action).

\textsuperscript{91} See Coffee, Class Wars, supra note 52, at 1381-82; Kahan & Silberman, Matsushita and Beyond, supra note 61, at 243; cf. Koniak & Cohen, supra note 56, at 1165 (noting that “as class action courts now hold fairness hearings, these hearings are not adversary proceedings”).
adequacy of a subsequent settlement.92
But even these prior adversarial proceedings will not ameliorate the special informational deficiencies faced by a state court assessing the adequacy of a settlement in the federal/state dueling class action context. In such cases, the defendant will want a global settlement, releasing it of all liability arising out of the alleged wrong, whether the liability arises under state or federal law. Even if the state court has some sense of the relative strengths and weaknesses of the state claims and defenses based on the proceedings before it, the court will not have seen the pleadings regarding the claims within the federal court’s exclusive jurisdiction. Those pleadings and the discovery and motions associated with them will have been handled only in the simultaneous federal class action. Thus, a state court presented with a settlement in a federal/state dueling class action context will not receive the information necessary to assess the fairness of the settlement from class counsel or the defendant and will not be able to piece it together from prior litigation before the court.93 Nor will the state court have the background experience with the exclusive federal claims that a federal judge might have, which would prove useful in assessing the fairness of a settlement that releases such claims.94
In such federal/state cases and in all cases in which class counsel and the defendant reach a settlement before engaging in substantial adversarial proceedings, the court is at a grave informational disadvantage. This is because neither class counsel nor the defendant will bring the deal’s problems to the court’s attention, nor will the court have access to prior litigation materials that might tip it off to such problems. In such cases, the only parties that have an incentive to raise problems with the settlement are absent class members and counsel in simultaneous class actions. Yet, class members will rarely have enough at stake in the litigation to object to the settlement.95

92 See Kahan & Silberman, Matsushita and Beyond, supra note 61, at 243. But see Coffee, Rescuing the Private Attorney General, supra note 58, at 247 (stating that “the time so expended may be largely pointless, being consumed by discovery, motion practice, and other makework that is not intended to advance the litigation, but only to justify the predetermined settlement”).
93 Kahan & Silberman, Matsushita and Beyond, supra note 61, at 243 (discussing the phenomenon of class counsel and defense counsel withholding any information that may indicate the settlement is unfair).
94 See, e.g., In re MCA, Inc. Shareholders Litig., No. CIV.A. 11740, 1993 WL 43024, at *4 (Del. Ch. Feb. 16, 1993) (expressing reluctance to assess the merits of federal claims as “outside the jurisdiction of this Court”), aff’d, 633 A.2d 370 (Del. 1993); Kahan & Silberman, Matsushita and Beyond, supra note 61, at 245 n.103 (“In some cases, the difficulty is further enhanced by the state court judge’s lack of expertise with the governing federal law.”); Stephen E. Morrissey, State Settlement Class Actions That Release Exclusive Federal Claims: Developing a Framework for Multijurisdictional Management of Shareholder Litigation, 95 COLUM. L. REV. 1765, 1766-67 (1995).
95 If they did have a lot at stake, the class members likely would have chosen to opt out instead.
Without sufficient investment in the litigation, it is unlikely that class members will monitor class counsel, review the fairness of the settlement and raise objections before the court.  

Who then objects when the court conducts a fairness hearing? Typically, the class representatives in dueling class actions object while their counsel undertake the effort of identifying the potential deficiencies in the proposed settlement. While such counsel may have a sufficient stake to engage in a serious review of the settlement, their limited access to important information (such as the compensation to be paid to class counsel and the details of the settlement negotiations) impairs their ability to remedy the informational deficiencies faced by the court. Additional problems are created when courts must to rely on objectors and their counsel for information. Just as class counsel may agree to a settlement to protect their fees, it is likely that class counsel in a dueling class action, appearing on behalf of objectors, are also operating out of self-interest. Needless to say, both the defendants and the class counsel who negotiated the settlement will seek to discount the significance of the objections by emphasizing the self-interest of the objecting counsel. After all, the objecting counsel will only be compensated if they succeed in the dueling class action.

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97 See, e.g., Mars Steel Corp. v. Continental Illinois Nat’l Bank & Trust Co., 834 F.2d 677, 684 (7th Cir. 1987); Weinberger v. Kendrick, 698 F.2d 61, 65 (2d Cir. 1982) (noting that one group of objectors were named plaintiffs in a dueling class action); City of Detroit v. Grinnell Corp., 495 F.2d 448, 464 (2d Cir. 1974) (expressing concern that “no class action would ever be settled, so long as there was at least a single lawyer around who would like to replace counsel for the class and start the case anew”); In re MCA, 598 A.2d at 689 (agreeing with class counsel in parallel federal action that it would be unfair to bar meritorious federal claims in favor of a minimal state settlement); Macey & Miller, The Plaintiffs’ Attorney’s Role, supra note 51, at 47-48; cf. Spencer Williams, Mass Tort Class Actions: Going, Going, Gone?, 98 F.R.D. 323, 329 (1983) (noting that “[w]ith surprising regularity, the primary opponents of class treatment of mass tort litigation are the plaintiffs’ lawyers”).

98 See In re Federal Skywalks Cases, 97 F.R.D. 380, 388 (W.D. Mo. 1983) (suggesting that a member of the class counsel team was seeking a moratorium on judicial approval of the class settlement in an effort to extract an advantage for an individual client); Koniak & Cohen, supra note 56, at 1107 (“Lawyers are sometimes motivated to challenge proposed settlements in the hope of reaping some later economic benefit, such as success in one’s own bid to be class counsel in a later suit or continued income from individual suits . . . ”).
that they have filed. That suit, however, will be barred if this settlement is approved. Presented with allegations of self-interest and manipulation, the court may not know whom to believe. Accordingly, the court may disregard the information provided by the objectors, the only parties with an incentive to uncover flaws in the proposed settlement.  

Even though courts may view with skepticism the objections raised by counsel in dueling class actions, it is better for courts to receive this information than not. To this limited extent, then, dueling class actions may actually alleviate some of the informational deficiencies inherent in class action settlements. If, however, the problems posed by dueling class actions outweigh these informational benefits, then lawmakers must work to limit the number of dueling class actions and to ensure that courts receive complete and accurate information regarding the class and its representatives, the strength of its claims and the fairness of any proposed settlement.  

C. Waste of Resources

Dueling class actions not only suffer from the problems faced by class actions generally, but also from the problems that inhere in all duplicative suits. For example, whenever two or more suits are pending between the same parties on the same claim, a number of resources are wasted. First, scarce judicial time and energy are wasted when two courts supervise two suits on essentially the same claim. Second, the defendant must pay its counsel to defend it in each lawsuit even if the same claim is pressed on behalf of the same plaintiffs, multiplying the defendant’s costs. Third, plaintiffs’ attorneys duplicate one another’s efforts if they file similar suits on behalf of the same party or class. Finally, non-party witnesses are forced to endure the inconvenience of multiple depositions, multiple subpoenas seeking the same documents and multiple trials at which they may be compelled to testify. These problems common to duplicative litigation have caused many scholars and legislators to address the multi-party, multi-forum phenomenon.  

99 See Mars Steel Corp., 834 F.2d at 684 (upholding exclusion of evidence offered by objectors before the court preliminarily approved the settlement; noting that the excluded evidence was “of little value at best,” and “offered in the main by persons having financial or professional relationships” with class counsel in a dueling class action); Bowling v. Pfizer, Inc., 143 F.R.D. 141, 152 (S.D. Ohio 1992).

100 See infra Parts V.A.1, A.2.b. (presenting proposals to ensure that courts receive more complete information).

Class actions rarely go to trial, so one need not be too concerned about witnesses being compelled to give trial testimony in dueling class actions. But the other resource concerns identified earlier pervade dueling class actions. In fact, they are pronounced because the costs of defending against class actions and the judicial costs in overseeing them are usually very high.

D. Preclusion Problems

Whenever two or more suits raise claims arising out of the same transaction and one of them goes to judgment, the court in the other suit must determine the preclusive effect, if any, of the judgment.\textsuperscript{102} When the duplicative suits are dueling class actions, the preclusion issues are more complex and time-consuming for three reasons.

First, courts address issues that are unique to class action litigation, such as the preclusive effect of a decision declining to certify the class, or whether a plaintiff in a later suit was a class member in the action that went to judgment. Second, because absent class members are not parties to the class action, courts must determine whether to preclude them from litigating not only claims that were presented in the first class action, but also claims that might have been, but were not, raised. Finally, courts must protect the due process rights of absent class members. In grappling with these issues, courts attempt to balance the interests of absent class members in pursuing their rights with the costs of re-litigation and the risk that parties dissatisfied with a decision rendered in one class action will attempt to avoid it by filing a dueling class action. Thus, the usual tension between an individual's right to pursue all avenues of legal recourse and the policies underlying preclusion law is enhanced when the first suit is a class action because the court entertaining the second suit must protect class members not individually represented in the prior litigation. This tension is even greater in the dueling class action context due to the high costs of re-litigation.

Let us begin with an examination of the unique preclusion issues that arise surrounding the certification decision. What effect does a decision by a court declining to certify a class in one action have in simultaneous or sequential class actions filed on behalf of the same class?\textsuperscript{103} Because only parties or their

\textsuperscript{102} Seeinfra notes 314, 318 and 357 for reference to several legislative proposals.

\textsuperscript{103} For a thorough history of preclusion doctrine as applied to class actions, see generally Geoffrey C. Hazard et al., \textit{Historical Analysis of the Binding Effect of Class Suits}, 146 U. Pa. L. Rev. 1849 (1998).

\textsuperscript{103} Some courts in the dueling class action context have failed to address the issue altogether, presumably because the later suit was filed by a different representative and/or no party in the second suit raised the issue. See, e.g., Martin v. American Med. Sys., Inc., No. IP94-2067-C-HG, 1995 WL 680630, at *3 (S.D. Ind. Oct. 25, 1995) (noting denial of class certification in another class action filed on behalf of same class, but failing to discuss issue preclusion); \textit{Bowling}, 143 F.R.D. at 155 n.14 (noting that federal court in California had denied a motion to certify a nationwide class action, but declining to mention issue
privies are bound by decisions against them\(^{104}\) and because absent class members are not bound by decisions entered in class litigation until the class is certified,\(^{105}\) an order denying certification ordinarily will not be binding in dueling class actions filed by different putative class representatives.\(^{106}\) Even if the representative is the same, or privity exists, a court nevertheless may decline to extend issue preclusive effect to an order denying certification if the underlying litigation in the first suit (maintained by the plaintiff on her own behalf) remains pending because the order will lack the requisite finality.\(^{107}\)

Even if the decision denying certification is deemed final, a court will give it issue preclusive effect only if the issues decided in reaching the certification decision are identical to the issues raised in the dueling class action.\(^{108}\) Thus, if the second suit is filed on behalf of a slightly different class, the court will have to determine whether the identity of issues requirement is met.\(^{109}\)

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\(^{104}\) See Richards v. Jefferson County, 517 U.S. 793, 798-99 (1996) (discussing privity and class action exceptions to general rule that only parties are bound by a judgment); Hansberry v. Lee, 311 U.S. 32, 42 (1940).

\(^{105}\) See Glidden v. Chromalloy Am. Corp., 808 F.2d 621, 626-27 (7th Cir. 1986); Roberts v. American Airlines, Inc., 526 F.2d 757, 762-63 (7th Cir. 1975).

\(^{106}\) See, e.g., Martin, 1995 WL 680630, at *3-10 ; Furey v. Geriatric & Med. Ctrs., Inc., Nos. CIV.A.92-5113, CIV.A.93-2129, 1993 WL 283884, at *1 (E.D. Pa. July 29, 1993) (noting that “[t]he fact that the plaintiffs named in [the first class action] complaint have been precluded from seeking recovery on behalf of the putative class does not—indeed, could not lawfully—preclude other members of the class from bringing an action on behalf of the class”).

\(^{107}\) In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133, 146 (3d Cir. 1998) (stating that “denial of class certification . . . lacks sufficient finality to be entitled to preclusive effect”); Morgan v. Deere Credit, Inc., 889 S.W.2d 360, 367 (Tex. App. 1994)(“A class certification order cannot usually be characterized as final or irrevocable because it is subject to redetermination as the litigation progresses.”); see also J.R. Clearwater Inc. v. Ashland Chem. Co., 93 F.3d 176, 178-79 (5th Cir. 1996); cf. Barnes v. American Tobacco Co., 176 F.R.D. 479, 484 (E.D. Pa. 1997) (having denied a previous motion to certify a class, the court accepted the plaintiffs’ contention that the prior opinion’s findings regarding satisfaction of the 23(a) requirements were “law of the case”), aff’d, 161 F.3d 127, 155 (3d Cir. 1998), cert. denied, 119 S.Ct. 1760 (1999). Under revised Federal Rule 23(f), “A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class certification under this rule . . . .” Fed. R. Civ. P. 23(f).

\(^{108}\) See In re General Motors Corp. Pick-up Truck, 134 F.3d at 146.

\(^{109}\) Courts have had to consider whether the two classes were the same in a variety of different contexts. See, e.g., In re “Agent Orange” Prod. Liab. Litig., 996 F.2d 1425, 1437-38 (2d Cir. 1993) (finding that members of the second class were members of the first class action, and hence barred from relitigating their claims); Haitian Ctrs. Council Inc., v.
Likewise, the court in the second action will have to determine whether the standards for certification in the two jurisdictions are sufficiently similar to meet the identity of issues requirement. Even identical language in the class certification rules of the two jurisdictions may fail to guarantee that this requirement for issue preclusion is met if the rules are interpreted and/or applied differently in the different jurisdictions. Indeed, in one case, the Fifth Circuit noted that because the certification decision is a discretionary one, "each court—or at least each jurisdiction—[should] be free to make its own determination in this regard." Thus, the protections and limitations built into preclusion doctrine—designed to protect non-parties and to ensure that only issues actually litigated are precluded—provide litigants with opportunities to "repackage" class actions rejected by one court and file them in another.

McNary, 969 F.2d 1326, 1337 (2d Cir. 1992) (concluding that members of the second class were not bound by findings made in the first class action even though they were included in the "overly broad" definition of the first class), vacated as moot sub nom. Sale v. Haitian Ctrs. Council Inc., 509 U.S. 918, 918-19 (1993); Johns v. Rozet, 141 F.R.D. 211, 215 & n.2 (D.D.C. 1992) (stating that the "class to be certified [in the second suit] is essentially identical" and noting that the "minor difference [between the two classes] does not affect the merits or the nature of the motion for class certification in any significant way"); In re Dalkon Shield Punitve Damages Litig., 613 F. Supp. 1112, 1113 & n.2 (E.D. Va. 1985) (noting that the classes in the two actions were "virtually identical" although one was "slightly broader").

110 See In re General Motors Corp. Pick-up Truck, 134 F.3d at 146 (noting that "our construction of Rule 23 and application to the provisional settlement class is not controlling on the Louisiana court, because it is not bound by our interpretation of Rule 23. Rather, the Louisiana court properly applied . . . the parallel Louisiana class certification rule"); Cullen v. Margiotta, 811 F.2d 698, 732-33 (2d Cir. 1987) (declining to bar the plaintiffs from relitigating the certifiability of the class; stating that "[s]ince the standards governing the propriety of the suit as a class action in the state court and the federal court differed significantly, the state court ruling did not decide the issue presented in this case"). See generally JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 14.10, at 679-89 (3d ed. 1999) (discussing the requirement for collateral estoppel that the issues litigated be identical); id. § 16.8, at 771-74 (discussing the binding effect of a class action judgment).

111 See Morgan, 889 S.W.2d at 367-68 (denying issue preclusive effect to a federal decision declining to certify a mandatory class action even though the Texas and federal rules were identical because "[c]ollateral estoppel does not apply when the standards of proof for the maintenance of a class action are different in federal and state court"); see also Koniak & Cohen, supra note 56, at 1114 n.206 (stating that "even if one court rejects class certification, there is generally no collateral estoppel effect on the ability of a second court in a different jurisdiction to consider certifying the class").

112 Ashland Chem. Co., 93 F.3d at 180; see also 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4434, at 327 (1981) (stating that "[i]f preclusion is to be denied, it should be on the ground that many procedural matters may be so far discretionary that a second court should be free to make its own determination") (footnote omitted).
court.\textsuperscript{113}

If the court in the first class action certifies the class and subsequently enters final judgment in the class action, different issues and problems arise. Are absent class members barred from suing the defendant on the same claim outside the confines of the first class action, or may they somehow avoid claim preclusive effect? Courts addressing this question must balance the class members’ rights against the policies underlying preclusion law: finality, efficiency and consistency.\textsuperscript{114}

To understand the complexity of the preclusion issues that arise in dueling class actions, first consider the issues that arise whenever a person who was arguably a member of the class attempts to sue individually (rather than on behalf of a dueling class action). The court must first determine whether the plaintiff in the second suit was an absent class member in the first class action. In addressing this question, courts sometimes grapple with multiple and inconsistent class definitions used in different documents in the first suit.\textsuperscript{115} A court applying even a single definition may encounter difficulty in some circumstances.\textsuperscript{116}

\begin{footnotesize}
\textsuperscript{113} Notwithstanding all of these hurdles and caveats, some courts have estopped plaintiffs from litigating the issue of class certification, having litigated once and lost. See, e.g., Lee v. Criterion Ins. Co., 659 F. Supp. 813, 822 (S.D. Ga. 1987) (concluding that a party cannot avoid res judicata effect of federal court’s denial of class certification by filing suit in state court “and point to largely illusory differences between statutes that are designed for essentially identical purposes”); Bartlett v. Miller & Schroeder Muns., Inc., 355 N.W.2d 435, 438 (Minn. Ct. App. 1984) (noting that the trial court struck “the class action allegations based on collateral estoppel due to denial of certification in federal district court”); see also 18 WRIGHT ET AL., supra note 112, § 4455, at 473 (1981) (stating that “[w]ould-be representatives who have failed in an attempt to secure certification of a class action may be precluded from a second attempt to advance the same claims as a class action”) (footnote omitted); cf. In re Piper Aircraft Distrib. Sys. Antitrust Litig., 551 F.2d 213, 219 (8th Cir. 1977) (stating that “[t]here are strong arguments . . . for applying the rule of collateral estoppel to a class action determination when the plaintiff is engaging in multidistrict litigation,” but declining to accord such effect to an order denying class certification followed by a voluntary dismissal of the action by plaintiff).


\textsuperscript{115} See, e.g., W. Alton Jones Found. v. Chevron, U.S.A., Inc., 97 F.3d 29, 36, 37 (2d Cir. 1996) (noting that the “documents incorporated into the judgment defined the plaintiff-class in conflicting ways”; concluding that the plaintiff in the second suit was not precluded even though it was “covered by the literal definition of the plaintiff-class in a class action settlement”); City of St. Paul v. FMC Corp., No. CIV.3-89-0466, 1990 WL 265171, at *3 (D. Minn. Feb. 27, 1990) (noting that the stipulation of dismissal did not specifically address how parties with both direct and indirect purchasers were to be treated).

\textsuperscript{116} See, e.g., Twigg v. Sears, Roebuck & Co., 153 F.3d 1222, 1225-26, 1229 (11th Cir. 1998) (noting disagreement between parties on whether plaintiff was a member of class in earlier litigation; declining to resolve issue because notice to class members was inadequate to satisfy due process); Burka v. New York City Transit Auth., 32 F.3d 654, 658 (2d Cir.
Assuming that the court concludes that the plaintiff in the second suit was a class member in the first class action, it must then determine whether the claim presented in the second suit is the same as the claim presented in the class action.

The [general] rule [of claim preclusion] provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose . . . ." The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment.117

In determining the scope of the claim litigated in the first action, many jurisdictions apply an expansive "transactional" test118 that states, "the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose."119 Thus, if an individual sues her employer for race discrimination and seeks an injunction barring discriminatory conduct in the future, the judgment in the action (whether favorable or not) will bar the plaintiff from bringing a second suit seeking money damages for the harm suffered as a result of the defendant's discriminatory conduct.120 Preclusion doctrine bars the plaintiff from splitting

1994) (holding that party was barred from relief under consent order settling class action because party pursued identical relief in prior action); Haitian Ctrs. Council Inc., v. McNary, 969 F.2d 1326, 1337-38 (D. Cir 1992) (concluding that plaintiffs were not members of the class in the prior action because different relief was sought; criticizing overbroad class definition in prior suit); Louisiana Seafood Management v. Foster, 46 F. Supp. 2d 533, 542-45 (E.D. La. 1999) (concluding that the identity of parties requirement was met in dueling class action setting).

117 Commissioner v. Sunnen, 333 U.S. 591, 597 (1948) (quoting Cromwell v. County of Sac, 94 U.S. 351, 352 (1876)).

118 See, e.g., Porn v. National Grange Mut. Ins. Co., 93 F.3d 31, 34 (1st Cir. 1996) (determining, "pragmatically," what factual grouping constitutes a transaction); State v. Smith, 720 P.2d 40, 41 (Alaska 1986) (stating that "[a] mere change in legal theory" does not constitute a different transaction); Orsile v. DeMatteo, 539 A.2d 95, 97 (Conn. 1988) (noting that the transactional test will preclude a second claim even if different relief is sought); Currier v. Cyr, 570 A.2d 1205, 1209 (Me. 1990) ("The doctrine of res judicata demands that a plaintiff seeking legal relief plead all theories of recovery then available to him."); Smith v. Russell Sage College, 429 N.E.2d 746, 749 (N.Y. 1981) (concluding that two claims arose from the same transaction, even if the second was "embellished by later events").

119 Restatement (Second) of Judgments § 24(1) (1982).

120 See, e.g., Mirin v. Nevada ex rel. Pub. Serv. Comm'n., 547 F.2d 91, 94 (9th Cir. 1976); Lambert v. Conrad, 536 F.2d 1183, 1185 (7th Cir. 1976); Powell v. Doyle, No.
her claim and suing for different kinds of relief in different suits.

But if the first suit, seeking injunctive relief, was brought as a class action, the question arises whether an individual class member may bring a second suit seeking money damages. The Supreme Court's decision in Cooper v. Federal Reserve Bank of Richmond\(^{121}\) casts some light on this question. There, individuals representing a class of employees alleged that a bank had engaged in a pervasive pattern of racial discrimination.\(^{122}\) The district court found such a pattern only with respect to two pay grades.\(^{123}\) When class members who were employed in other pay grades filed another suit alleging discrimination, the Fourth Circuit held that their claims were precluded by the district court decision.\(^{124}\) The Supreme Court reversed, concluding that "the rejection of a claim of classwide discrimination does not warrant the conclusion that no member of the class could have a valid individual claim."\(^{125}\) In other words, the class members were not precluded from litigating the issues underlying their individual claims because they were different from the issues determined in the class action.

The Cooper Court implicitly assumed that the individual claims were not barred by the doctrine of claim preclusion even though they appeared to involve the same transaction or series of connected transactions that were litigated in the class action. Language in the Court's opinion makes this assumption understandable. If the individual claims were barred by the judgment in the class action, then "every member of the class [would feel compelled] to intervene to litigate the merits of his individual claim,"\(^{126}\) a result obviously at odds with the purposes of Rule 23. Thus, without specifically so stating, the Court suggested that the doctrine of claim preclusion should be adapted to accommodate the class action. Professors Wright, Miller and Cooper have elaborated on this suggestion:

The basic effort to limit class adjudication as close as possible to matters common to members of the class frequently requires that nonparticipating members of the class remain free to pursue individual actions that would be merged or barred by claim preclusion had a prior individual action been brought for the relief demanded in the class action. An individual who has suffered particular injury as a result of practices enjoined in a class action, for instance, should remain free to seek a damages remedy

\(^{122}\) See id. at 869-70.
\(^{124}\) See id. at 673-75.
\(^{125}\) Cooper, 467 U.S. at 878.
\(^{126}\) Id. at 880.
even though claim preclusion would defeat a second action had the first action been an individual suit for the same injunctive relief.\textsuperscript{127}

Because “individual” claims would present many individual issues, it would be difficult or impossible to raise them in the context of the class action while still satisfying the predominance requirement of Rule 23(b)(3) or the more stringent requirements of (b)(1) or (b)(2). Thus, the most sensible option—and the option taken by most courts—is to proceed with the class claims in the context of the class action, and to permit individuals to sue on the “individual” claims separately, claim preclusion notwithstanding.\textsuperscript{128}

In the dueling class action context—when the later suit is filed as a class action rather than as an individual suit—and the claim presented could have been raised in the first class action, the applicability of the “class action gloss” on claim preclusion is more complex. Applying the class action gloss protects absent class members who may well have believed that the class representative had authority only regarding the claims alleged and presented.\textsuperscript{129} On the other

\textsuperscript{127} 18 WRIGHT ET AL., supra note 112, § 4455, at 474 (footnote omitted); see also Bogard v. Cook, 586 F.2d 399, 408-09 (5th Cir. 1978) (holding that plaintiff was not precluded by judgment in prior class action from pursuing individual claim because (1) the class action notice had not informed class members that they could seek money damages and (2) inclusion of individual monetary claims might have made the class action unmanageable).

\textsuperscript{128} See, e.g., Hiser v. Franklin, 94 F.3d 1287, 1291 (9th Cir. 1996) (stating and applying the “general rule . . . that a class action suit seeking only declaratory and injunctive relief does not bar subsequent individual damage claims by class members, even if based on the same events”); Cameron v. Tomes, 990 F.2d 14, 17-18 (1st Cir. 1993) (holding that suit challenging plaintiff’s conditions of confinement in state treatment center was not barred by judgment in prior class action challenging conditions in same center); Hilliard v. Shell W. E & P, Inc., 885 F. Supp. 169, 172, 173 (W.D. Mich. 1995) (holding that “Michigan’s broad rule [of claim preclusion] should not be applied in the context of a class action . . . [because] protection of the class members should override the finality that Michigan’s broad rule would afford”; stating that “a class action settlement should not bar all claims that could have been litigated between the parties but only those claims that were actually litigated”); Garvey v. Wall, 696 A.2d 71, 76 (N.J. Super. Ct. App. Div. 1997) (noting that “the invocation of res judicata or the entire controversy doctrine to bar a class member from litigating a claim which could have been but was not in fact litigated in the class action may be unfair”); cf. Coates v. Kelley, 957 F. Supp. 1080, 1085 (E.D. Ark. 1997) (stating that “the fact that the [prior] litigation was a class action does not in any way change the preclusion analysis”). But see King v. South Cent. Bell Tel. & Tel. Co., 790 F.2d 524, 531 (6th Cir. 1986) (holding that the judgment approving a settlement in a prior class action precluded an absent class member from later pressing her arguably individual claim). Apparently “every federal court of appeals that has considered the question has held that a class action seeking only declaratory or injunctive relief does not bar subsequent individual suits for damages.” \textit{In re} Jackson Lockdown/MCO Cases, 568 F. Supp. 869, 892 (E.D. Mich. 1983).

\textsuperscript{129} See Hiser, 94 F.3d at 1292 (concluding that a sequential class action challenging a prison’s refusal to photocopy legal documents was not barred by a consent decree in a prior class action concerning prisoners’ access to courts because photocopying had not been expressly addressed in first suit); Barnes v. American Tobacco Co., 176 F.R.D. 479, 485
hand, the gloss could enable parties dissatisfied with the results in one class action to present a slightly repackaged claim on behalf of the same class in a sequential class action brought in another jurisdiction. Again, the tension between the protection of absent class members and the policies underlying preclusion law is palpable.

The Second Circuit in National Super Spuds, Inc. v. New York Mercantile Exchange\textsuperscript{130} gave this issue careful attention. There, a class action was brought in federal court on behalf of purchasers of potato future contracts who suffered financial harm when they liquidated the contracts during a specified period of time (the “class period”).\textsuperscript{131} Richards, an absent class member, not only held contracts that he liquidated during the class period, but also contracts that he was \textit{unable} to liquidate \textit{after} the class period had expired.\textsuperscript{132} He commenced a state court class action on behalf all who held contracts that remained unliquidated after the class period. In the meantime, class counsel in the federal class action entered into a stipulation of settlement with the defendants, which stated:

\begin{quote}
[t]he settling defendants . . . shall be released from any and all claims of every nature and description asserted, or which might have been asserted by plaintiffs and the class members or any of them against the settling defendants . . . based upon, arising out of, or in any way respecting any act or omission relating to any of the matters or transactions set forth in the Complaint.\textsuperscript{133}
\end{quote}

According to counsel for one of the defendants, the release was intended to bar future claims regarding both liquidated and unliquidated contracts, including the claims presented in Richards’s state court class action.\textsuperscript{134} The settlement, however, offered compensation only to those whose contracts had been liquidated.

The class notice, sent to all persons who had liquidated contracts during the class period, described the formula for distributing the proceeds of the settlement among the class members, but did not mention the scope of the release.\textsuperscript{135} Richards objected, noting that the broad release might bar his state court class action. Class counsel explained to the court that he did not purport to represent those whose contracts were not liquidated and did not intend to settle their claims, but that the defendants wanted to leave the language of the

\begin{footnotes}
\item[130] 660 F.2d 9 (2d Cir. 1981).
\item[131] \textit{See id.} at 11.
\item[132] \textit{See id.} at 12-13.
\item[133] \textit{Id.} at 13 (quoting the formal stipulation of settlement).
\item[134] \textit{See id.} at 14.
\item[135] \textit{See id.}
\end{footnotes}
release broad enough so that they could argue to the state court that Richards’ class action was barred. Without deciding whether the release would in fact preclude the state court class action, the district court rejected Richards’ objections and approved the settlement.\textsuperscript{136}

On appeal, the Second Circuit reversed, holding that approval of the settlement was improper and stating that “[t]he most fundamental principles underlying class actions limit the powers of the representative parties to the claims they possess in common with other members of the class.”\textsuperscript{137} Here, the class action was brought on behalf of those who liquidated their contracts during the class period; the complaint mentioned nothing about other contracts, nor did the order certifying the class or the notice to the class. Since the named representatives in the federal action did not hold unliquidated contracts, they could not have amended the complaint to represent those holding unliquidated contracts had they wanted to.

If the case had gone to trial, any judgment would have barred only members of the class who had not opted out from bringing claims based on the liquidated contracts. But it “would not have barred members of the class from bringing any other claim they might be able to assert against the defendants, including claims based on contracts unliquidated at the close” of the class period.\textsuperscript{138} In other words, the class action gloss on claim preclusion would apply because the class representatives’ authority was circumscribed.\textsuperscript{139}

Since a judgment after trial would not have extinguished claims not asserted in the class complaint, the National Super Spuds court reasoned that a judgment approving a settlement should not be able to do so either: “Having received authority to represent class members solely with respect to liquidated contracts, plaintiffs had no power to release any claims based on any other contracts.”\textsuperscript{140} While assuming that a settlement could prevent class members from asserting claims relying on a different theory from the one relied on in the class action, the court noted that the claims purportedly extinguished by the proposed settlement “depend[ed] not only upon a different legal theory but upon proof of further facts . . .”\textsuperscript{141} Thus, under National Super Spuds, not only does the class action gloss on claim preclusion apply when the second suit is a class action, but a release issued in connection with the settlement of a class action can release claims not pressed in the initial class action only if they “depend upon the very same set of facts . . .”\textsuperscript{142}

\textsuperscript{136} See id. at 15-16 (describing the district court opinion).

\textsuperscript{137} Id. at 16.

\textsuperscript{138} Id. at 18 (emphasis in original).

\textsuperscript{139} See also Hiser v. Franklin, 94 F.3d 1287, 1292 (9th Cir. 1996); City of St. Paul v. FMC Corp., No. CIV.3-89-0466, 1990 WL 265171, at *6 (D. Minn. Feb. 27, 1990).

\textsuperscript{140} National Super Spuds, 660 F.2d at 17-18 (footnote omitted).

\textsuperscript{141} Id. at 18 n.7.

\textsuperscript{142} Id.
Not all courts agree. Indeed, in Matsushita Electric Industrial Co. v. Epstein, the United States Supreme Court held that a state court judgment approving a settlement that released exclusively federal claims barred a dueling class action raising those claims in federal court because the preclusion law of the rendering state so required. Although the Supreme Court’s decision in Matsushita is subject to criticism, it highlights the critical role played by state preclusion law in determining the preclusive effect of state court judgments in dueling class actions. Some courts have held that a state court judgment approving a settlement that purports to release claims within the federal court’s exclusive jurisdiction is entitled to claim preclusive effect if the federal claims arose from the same nucleus of fact as the state claims. In other words, a settlement may bar claims that were not and could not have

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143 See, e.g., In re VMS Secs. Litig., 21 F.3d 139, 141-42 (7th Cir. 1994) (enforcing against absent class member the release, granted in connection with the settlement of the class action, of all claims arising out of the purchase of an investment, whether or not they were litigated in the context of the class action, including individual suitability claims); Thompson v. Edward D. Jones & Co., 992 F.2d 187, 190 (8th Cir. 1993) (upholding injunction barring absent class member from suing on claims that arose out of same limited partnership investments that were the subject of prior class action notwithstanding her claim that “her suitability claims are inherently individual in nature”); TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456, 460 (2d Cir. 1982) (concluding that “in order to achieve a comprehensive settlement that would prevent relitigation of settled questions at the core of a class action, a court may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class action”); Steinmetz v. Toyota Motor Credit Corp., 963 F. Supp. 1294, 1300 (E.D.N.Y. 1997) (concluding that second class action, raising a claim not expressly raised in the first class action on behalf of the same class, was barred because the release granted in connection with the settlement of the first class action was clear and broad); Ivy v. Dole, 610 F. Supp. 165, 168 (E.D. Va. 1985) (concluding that the consent decree entered in a prior class action “not only resolved the common class claims, but it also disposed of the individual claims as well”), aff’d, 811 F.2d 1505 (4th Cir. 1987).


145 See Matsushita, 516 U.S. at 378.

146 See infra notes 237-45 and accompanying text.

147 See, e.g., Grimes v. Vitalink Communications Corp., 17 F.3d 1553, 1563 (3d Cir. 1994) (stating that “[s]ince this judgment places the court’s stamp of approval on a broad release of all claims arising from the merger transaction, including any exclusive federal claims, the subsequent federal court is precluded from entertaining a case involving claims arising from the same nucleus of operative facts”); cf. TBK Partners, Ltd., 675 F.2d at 460 (holding that claims for appraisal were barred by release issued in connection with federal class action notwithstanding plaintiffs’ contention that the claims “could not have been asserted on behalf of the class”); Lowenschuss v. Resorts Int’l, Inc., No. CIV.A.89-1071, 1989 WL 73254, at *6 n.15 (E.D. Pa. June 29, 1989) (noting that “[a] state court possesses the authority to approve a settlement that releases claims within the exclusive jurisdiction of the federal courts”) (citations omitted), aff’d, 947 F.2d 936, 936 (3d Cir. 1991).
been brought in the first action if they are sufficiently closely related to the claims presented. Other courts have held that a state court judgment cannot bar an exclusively federal claim because the first court lacked subject matter jurisdiction to entertain it. Because, under the Full Faith and Credit Statute, the preclusion law of the rendering state determines the preclusive effect of a state court judgment, these differing decisions regarding the preclusive effect of a state court judgment may not reflect inconsistent approaches, but rather different state preclusion laws.

This analysis is further complicated by careful attention to due process and the protection it provides to absent class members. Even if claims presented in dueling class actions are identical, absent class members may avoid the preclusive effect of a judgment entered in one such action if they were not afforded due process therein. In class actions seeking only or predominately

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148 See, e.g., Fox v. Maulding, 112 F.3d 453, 458 (10th Cir. 1997) (noting that “Oklahoma follows the general rule that a claim will not be barred by res judicata if the court in the earlier action did not have jurisdiction to adjudicate the claim”); Wolf v. Gruntal & Co. Inc., 45 F.3d 524, 527 (1st Cir. 1995) (“Res Judicata is not implicated if the forum which issued the prior judgment lacked jurisdiction over the putatively precluded claim.”); Cullen v. Margiotta, 811 F.2d 698, 732 (2d Cir. 1987); Abramson v. Pennwood Inv. Corp., 392 F.2d 759, 762 (2d Cir. 1968); see also Clark v. Bear Stearns & Co., 966 F.2d 1318, 1321 (9th Cir. 1992) (holding that arbitration panel's dismissal of state negligence and fraud claims did not have preclusive effect over federal claims for want of subject-matter jurisdiction). But see 18 Wright et al., supra note 112, § 4470, at 688 (“[S]ettlement of state court litigation has been held to defeat a subsequent federal action if the settlement was intended to apply to claims in exclusive federal jurisdiction as well as other claims.”).

149 28 U.S.C. § 1738 (1994). ("[J]udicial proceedings [of any court of any State] shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State... .") This statute has existed in essentially unchanged form since its enactment just after the ratification of the Constitution... and its re-enactment soon thereafter... ."


151 Compare Nottingham Partners v. Dana, 564 A.2d 1089, 1104-07 (Del. 1989) (concluding that the state chancery court had authority to approve a settlement that released claims within the federal court's exclusive jurisdiction as long as the claims released and the claims presented in the state litigation “arose under the same set of operative facts”) and Marrese, 470 U.S. at 382 n.2 (indicating that lower federal courts should first look to state law, rather than federal law, in determining the preclusive effect of state judgments), with Davis v. Sun Oil Co., 953 F. Supp. 890, 894 (S.D. Ohio 1996) (stating that “under Ohio law, claim preclusion requires that the rendering court possess subject-matter jurisdiction over the original claim”), aff'd, 148 F.3d 606, 613 (6th Cir. 1998), cert. denied, 119 S.Ct. 543 (1998); National Amusements, Inc. v. City of Springdale, 558 N.E.2d 1178, 1180 (Ohio 1990) (noting that Ohio res judicata law applies only to claims that were or might have been litigated in the first lawsuit).
money damages, due process requires that the named representative adequately represent the interests of the absent class members. In such actions, due process further requires that absent class members receive notice, an opportunity to be heard and an opportunity to opt out.\textsuperscript{152}

In certifying the class, however, the court in the first class action already will have found that the representation was adequate.\textsuperscript{153} Given that finding, the court in the later action will have to determine whether the absent class members are barred, as a matter of issue preclusion, from relitigating the issue of adequacy of representation. Courts have differed on this question.\textsuperscript{154} Some courts have addressed collateral challenges to the adequacy of representation without mentioning issue preclusion at all,\textsuperscript{155} while others have expressly stated that issue preclusion does not bar absent class members from relitigating

\textsuperscript{152} See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 n.3, 812 (1985); see also Sam Fox Pub’g Co. v. United States, 366 U.S. 683, 691 (1961); Hansberry v. Lee, 311 U.S. 52, 40, 42-43 (1940); 7B WRIGHT ET AL., supra note 81, § 1789, at 238, 244-45, 247; Note, Collateral Attack on the Binding Effect of Class Action Judgments, 87 HARV. L. REV. 589, 594 (1974); cf. Richards v. Jefferson County, 517 U.S. 793, 800-02 (1996) (assuming arguendo that Hansberry “may be read to leave open the possibility that in some class suits adequate representation might cure a lack of notice”) (citations omitted). In Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999), the Court noted that “[t]he inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damage claims gathered in a mandatory class.”

\textsuperscript{153} Federal Rule 23(a)(4) requires the court to find that “the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Ctv. P. 23(a)(4). Most state court rules contain a similar provision, as due process requires adequacy of representation. See Shutts, 472 U.S. at 809 (1985); Hansberry v. Lee, 311 U.S. 32 (1940).

\textsuperscript{154} Scholars are also in disagreement. Compare, e.g., Kahan & Silberman, Matsushita and Beyond, supra note 61, at 264 (concluding that “as long as the court entertaining a proposed class action affords class members fair opportunity to raise the issue, adequacy of representation should be raised directly, and not be permitted to be raised collaterally”) with Konik & Cohen, supra note 56, at 1170-71 (stating “the general rule that absent class members are entitled to have a second court rule on whether they were adequately represented in the class suit” and arguing “that the first proceeding should not count as a full and fair opportunity to litigate misconduct connected to the settlement”) (footnote omitted). The Supreme Court in Matsushita failed to address this question. See infra note 220 and accompanying text.

\textsuperscript{155} See, e.g., In re “Agent Orange” Prod. Liab. Litig., 996 F.2d 1425, 1435-37 (2d Cir. 1993) (holding that plaintiffs who did not develop symptoms from Agent Orange until after the settlement of another class action were adequately represented by the first class); King v. South Cent. Bell Tel. & Tel. Co., 790 F.2d 524, 530 (6th Cir. 1986); Gonzales v. Cassidy, 474 F.2d 67, 72-73 (5th Cir. 1973) (finding the representation of a prior class to be inadequate). But see Brown v. Ticor Title Ins. Co., 982 F.2d 386, 390-91 (9th Cir. 1992) (declining to “second-guess a prior decision that counsel adequately represented a class” and requiring that the absent class member challenging adequacy of representation “show not only that the prior representative ‘failed to prosecute or defend the action with due diligence and reasonable prudence,’ but also that ‘the opposing party was on notice of facts making that failure apparent’”) (citations omitted).
the issue of adequacy. Various other courts have held that class members who appear at a hearing in the first action and contest the adequacy of representation are bound by the court’s findings and barred from collaterally attacking the judgment on the basis of adequacy of representation. At least one court has held that absent class members subject to in personam jurisdiction are bound by a finding of adequacy of representation even if they did not participate at the fairness hearing.

Moreover, some courts have noted that even if the first court properly concluded at the time of class certification that the representation was adequate, the final judgment would still be subject to collateral attack upon a showing that the representation was not in fact adequate. Similar issues

156 See, e.g., Epstein v. MCA, Inc., 126 F.3d 1235, 1241 (9th Cir. 1997) (doubting that Delaware law “would allow an individual objector to bind an absentee on the issue of adequacy of representation” and concluding that, even if it did, such a result would violate due process), withdrawn and substituted by 179 F.3d 641 (9th Cir. 1999); Battle v. Liberty Nat’l Life Ins. Co., 770 F. Supp. 1499, 1512-13 (N.D. Ala. 1991) (stating that an absent class member is “not bound by the initial court’s determination that she received due process”) (footnote omitted), aff’d, 974 F.2d 1279 (11th Cir. 1992); Research Corp. v. Edward J. Funk & Sons Co., 15 Fed. R. Serv. 2d (Callaghan) 580, 581 (N.D. Ind. 1971) (stating that the court in the first class action was “ill-equipped to test the adequacy of the representation of absent class members . . . . [an issue which] can best be answered realistically with respect to a particular person”) (quoting Note, Binding Effect of Class Action, 67 Harv. L. Rev. 1059, 1060 (1954)).

157 See, e.g., In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133, 142-43 (3d Cir. 1998) (refusing to vacate a Louisiana court judgment where appellants did not exercise their opt out rights and actively participated in the settlement approval process); Dosier v. Miami Valley Broad. Corp., 656 F.2d 1295, 1299 (9th Cir. 1981) (holding that “a class member who is represented by counsel during a class action settlement hearing is bound by the settlement agreement”); see also Note, Collateral Attack, supra note 152, at 604 (arguing that “whenever the issue of adequacy of representation has been actually litigated . . . a finding of adequacy by the trial court should be res judicata as to the quality of representation up to that point in the course of the litigation”). But see In re Real Estate Title & Settlement Servs. Antitrust Litig., 869 F.2d 760, 764 n.1 (3d Cir. 1989) (declining to preclude a collateral attack on a judgment for lack of due process because the basis for the appellate court’s decision was unclear); RESTATEMENT (SECOND) OF JUDGMENTS § 42(1)(e) (1982) (stating that “[a] person is not bound by a judgment for or against a party who purports to represent him if . . . (e) The representative failed to prosecute or defend the action with due diligence and reasonable prudence, and the opposing party was on notice of facts making that failure apparent”).

158 Grimes v. Vialink Communications Corp., 17 F.3d 1553, 1560-61 (3d Cir. 1994) (holding that the Delaware court had in personam jurisdiction over the plaintiff, “who did not make an appearance at the hearing to voice objections to the adequacy of the negotiated settlement,” so the plaintiffs were bound by the release that the court approved).

159 See, e.g., Gonzalez, 474 F.2d at 72, 75. In that case, the court engaged in a two-part inquiry: “(1) Did the trial court in the first suit correctly determine, initially, that the representative would adequately represent the class? and (2) Does it appear, after the termination of the suit, that the class representative adequately protected the interest of the
arise when plaintiffs seek to avoid the preclusive effect of a prior judgment by challenging the sufficiency of the notice, if any, provided in the first suit\textsuperscript{160} or the denial of an opportunity to opt out.\textsuperscript{161}

In sum, dueling class actions give rise to a daunting array of complex preclusion problems that challenge courts to balance the rights of class members with the risk that dissatisfied litigants will attempt to avoid the result in one class action by filing a slightly repackaged dueling class action before a different court. Because dueling class actions also waste scarce resources, impose inordinate pressure on class counsel to settle and cause informational deficiencies, courts and legislatures should take action to reduce the number of dueling class actions and to ameliorate the problems they pose. Before considering the various alternatives available to lawmakers, let us first explore more fully how the Supreme Court's decision in \textit{Matsushita} bears on these problems.

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\textsuperscript{160} See, \textit{e.g.}, Besinga v. United States, 923 F.2d 133, 135-37 (9th Cir. 1991) ("[W]here it is clear that the trial court and the parties in [the prior class action] failed to comply with Rule 23(c)(2)'s mandate that notice be provided to absent class members, it would defy logic and law to hold that such putative class members are bound by res judicata."); Anderson v. John Morrell & Co., 830 F.2d 872, 877-78 (8th Cir. 1987) (holding that class members were not bound because they did not receive notice); \textit{King}, 790 F.2d at 529-30 (upholding sufficiency of notice notwithstanding the finding that the notification of the proposed settlement "may have been subject to some misinterpretation") (quoting the district court); Gert v. Elgin Nat'l Inds. Inc., 773 F.2d 154, 159 (7th Cir. 1985); Wright v. Collins, 766 F.2d 841, 847-48 (4th Cir. 1985); Weinberger v. Kendrick, 698 F.2d 61, 70-71 (2d Cir. 1982); \textit{In re Cherry's} Petition to Intervene, 164 F.R.D. 630, 637 (E.D. Mich. 1996).

\textsuperscript{161} See, \textit{e.g.}, Eubanks v. Billington, 110 F.3d 87, 95 (D.C. Cir. 1997) ("[W]here both injunctive and monetary relief are sought, the need to protect the rights of individual class members may necessitate procedural protections beyond those ordinarily provided under (b)(1) and (b)(2)."); Brown v. Ticor Title Ins. Co., 982 F.2d 386, 392 (9th Cir. 1992) (holding that because "Brown had no opportunity to opt out of the MDL 633 litigation, \ldots where there would be a violation of minimal due process if Brown's damage claims were held barred by res judicata"); Nottingham Partners v. Dana, 564 A.2d 1089, 1101 (Del. 1989); Holmes v. Continental Can Co., 706 F.2d 1144, 1152 (11th Cir. 1983); Colt Indus. Shareholder Litig., 565 N.Y.S.2d 755, 762 (Ct. App. 1991).
III. THE SUPREME COURT WEIGHS IN: MATSUSHITA ELECTRIC INDUSTRIAL CO. V. EPSTEIN

In a trilogy of recent decisions—Matsushita Electric Industrial Co. v. Epstein,\textsuperscript{162} Amchem Products, Inc. v. Windsor,\textsuperscript{163} and Ortiz v. Fibreboard Corporation\textsuperscript{164}—the Supreme Court has finally begun to address some of the difficult questions posed by class actions. While Amchem and Ortiz consider the thorny problems raised by settlement class actions,\textsuperscript{165} Matsushita directly addresses dueling class actions, grappling with the difficult preclusion issues that arise in dueling federal/state class actions.

Matsushita involved dueling class actions filed by shareholders of MCA, Inc. challenging a tender offer for MCA’s common stock by Matsushita Electric Industrial Company. One day after the public announcement that Matsushita and MCA were negotiating a possible acquisition and before a merger agreement was even drafted, plaintiffs filed the first class action suit in Delaware Chancery Court.\textsuperscript{166} The suit alleged that MCA’s directors breached their fiduciary duty by failing to maximize shareholder value and sought injunctive and declaratory relief.\textsuperscript{167} Two months later, MCA and Matsushita finalized the terms of the merger and announced that a wholly-owned subsidiary of Matsushita would make a tender offer for all MCA outstanding shares.\textsuperscript{168}

Several days after the tender offer was announced another class action was filed. Filed in the United States District Court for the Central District of

\textsuperscript{162} 516 U.S. 367 (1996).
\textsuperscript{163} 521 U.S. 591 (1997).
\textsuperscript{164} 527 U.S. 815 (1999).
\textsuperscript{165} Although the Amchem Court noted that “[s]ettlement is relevant to a class certification,” 521 U.S. at 619, it explained that some specifications of [Rule 23]—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context . . . . Subdivisions (a) and (b) focus court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives. That dominant concern persists when settlement, rather than trial, is proposed.
\textit{Id.} at 620-21.
\textsuperscript{166} See \textit{In re MCA, Inc. Shareholders Litig.}, 598 A.2d 687, 690 (Del. Ch. 1991) (stating the procedural background of the case). Within two days of the public announcement, three class actions were filed against MCA and its directors, which were consolidated by the Chancery Court on October 2, 1990. \textit{See In re MCA, Inc. Shareholders Litig.}, No. CIV.A. 11740, 1993 WL 43024, at *1 (Del. Ch. Feb. 16, 1993), aff’d, 633 A.2d 370 (Del. 1993).
\textsuperscript{167} See \textit{In re MCA}, 598 A.2d at 692.
\textsuperscript{168} See \textit{id.} at 690 (describing the terms of the merger agreement).
California, this suit, Epstein v. MCA, Inc.,\textsuperscript{169} alleged that Matsushita's tender offer violated federal securities laws because it offered a better deal to Lew Wasserman, MCA's chairman and chief executive officer, than to other MCA shareholders.\textsuperscript{170} Shortly after Epstein was commenced, the plaintiffs in the Delaware action amended their complaint to allege a failure to disclose the side deal made with Wasserman and to join Matsushita as a defendant.\textsuperscript{171} The state complaint did not allege, however, that the Wasserman deal violated the federal securities laws.\textsuperscript{172} Days later, in December 1990, the parties to the state action filed a stipulation and settlement agreement.\textsuperscript{173} This agreement provided for the dismissal of the Delaware action with prejudice and released all claims by class members arising out of the tender offer, including the federal claims raised in Epstein.\textsuperscript{174} In consideration of the release, the defendants offered to pay the Delaware class counsel attorneys' fees of up to $1 million.\textsuperscript{175} The defendants further agreed to have an MCA wholly-owned subsidiary, Pinelands, adopt a modified poison pill plan that ostensibly would have encouraged third parties to make a bid for Pinelands.\textsuperscript{176} Since the MCA shareholders received a Pinelands stock dividend, a weakening of the poison pill would have redounded to their benefit.\textsuperscript{177} On the same day that the settlement agreement was filed with the Delaware court, the court provisionally certified the class and set a hearing date.\textsuperscript{178}

Finding nothing in the record to suggest that MCA's directors breached their fiduciary duty to the shareholders, the Chancery Court concluded that "the asserted state law claims are, at best, extremely weak."\textsuperscript{179} But it also found that the federal claims raised in the federal action, which would have been

\textsuperscript{170} See id. at 648. Matsushita and Wasserman had entered into a separate agreement pursuant to which Wasserman's MCA shares would not be purchased in the tender offer but rather would be exchanged, in a tax-free swap, for preferred stock in a wholly-owned subsidiary of Matsushita. See id. at 647-48. Four additional federal class actions were filed in the California district court, all of which were consolidated with Epstein. See In re MCA, 1993 WL 43024 at *1 (summarizing the Epstein case). Lew Wasserman and the author are not related.
\textsuperscript{171} See Epstein, 50 F.3d at 660.
\textsuperscript{172} See In re MCA, 598 A.2d at 690.
\textsuperscript{173} See id.
\textsuperscript{174} See id.
\textsuperscript{175} See Epstein F.3d at 660 (noting the absence of a "monetary benefit for class members").
\textsuperscript{176} See id.
\textsuperscript{177} See id.
\textsuperscript{178} See In re MCA, 598 A.2d at 691. Before the hearing was held, the tender offer was successfully completed and MCA merged into a Matsushita subsidiary. See id.
\textsuperscript{179} Id. at 694.
released as part of the state settlement, "clearly ha[d] arguable merit."\textsuperscript{180} Noting the "illusionary" value of the revised poison pill and lack of any "real monetary benefit" to the class members, the court rejected the settlement agreement.\textsuperscript{181} Because the federal claims pressed in \textit{Epstein} were the only claims with any "substantial merit," the Chancery Court concluded that it would be "unfair to compel the release of the federal claims by approving the settlement in its present form."\textsuperscript{182}

Just weeks before the Delaware Chancery Court refused to approve the settlement, the federal district court in California denied the \textit{Epstein} plaintiffs' motion for class certification.\textsuperscript{183} Months later, it dismissed one of the federal claims, finding that no private right of action existed under SEC Rule 10b-13.\textsuperscript{184} After denying a second motion for class certification, the district court granted summary judgment to the defendants on the remaining federal claims.\textsuperscript{185} The \textit{Epstein} plaintiffs subsequently appealed to the Ninth Circuit Court of Appeals.

The state action had been dormant for over a year following the Chancery Court's rejection of the proposed settlement.\textsuperscript{186} But after the federal district court granted summary judgment to the defendants and while the federal appeal was pending, the parties in the Delaware action submitted a second settlement proposal. This proposal offered the class $2 million in cash less any award of attorneys' fees.\textsuperscript{187} Class members were afforded the opportunity to opt out, but only eighteen of 25,000 shareholders did.\textsuperscript{188} Reiterating its conclusion that the state claims were "extremely weak" and finding, in light of the district court's action, that the federal claims had only "minimal economic value," the court found the recovery offered to the class "adequate (if only barely so) to support the proposed settlement."\textsuperscript{189} Acknowledging that "suspicions [of collusion between class counsel and the defendant] abound," the court nevertheless approved the settlement, concluding that

\textsuperscript{180} \textit{id.} at 695.
\textsuperscript{181} \textit{See id.} at 696.
\textsuperscript{182} \textit{id.}
\textsuperscript{184} \textit{See id.}
\textsuperscript{185} \textit{See id.}
\textsuperscript{186} \textit{See Epstein, 50 F.3d at 660.}
\textsuperscript{187} \textit{See In re MCA, 1993 WL 43024, at *3.}
\textsuperscript{188} \textit{See id.} Relatives of the \textit{Epstein} plaintiffs were among the objectors. \textit{See id.} Presumably Epstein himself did not object in state court for fear that he would be bound, in the federal action, by a determination by the Delaware court that the representation by the named representative in the state action was adequate. \textit{See supra} notes 157-61 and accompanying text.
\textsuperscript{189} \textit{id.} at *4.
"[s]uspicion... is not enough." The Supreme Court of Delaware affirmed. Two years after the Delaware Chancery Court approved the second settlement, the Ninth Circuit Court of Appeals reversed the district court's entry of summary judgment for the defendant, holding that the plaintiffs were entitled to partial summary judgment on the Rule 14d-10 claim regarding Wasserman. Of course, if the Delaware settlement precluded the federal class members from pressing their exclusively federal claims, this holding would have been meaningless for the parties. But the Ninth Circuit concluded that the Delaware judgment approving the settlement did not preclude the federal claims raised in Epstein. The court noted that other courts had applied an issue preclusion test to determine the effect of a state court judgment approving a settlement on exclusively federal claims. Under this test, "a state court may release exclusively federal claims that would have been extinguished by the issue preclusive effect of an adjudication of the state claims." Without deciding whether to follow this test, the court resolved not "to break new ground in giving preclusive effect to a state court judgment that extinguishes exclusively federal claims that are factually unrelated to the state claims pleaded in the class action." Although the federal and state claims presented in the two actions arose out of the same transaction—Matsushita's acquisition of MCA—the court concluded that they were based upon different underlying facts and therefore, the federal claims were not precluded by the judgment in the state action.

The Ninth Circuit also refused to give effect to the release as a matter of contract law. Distinguishing cases filed by individual litigants, who may release whatever claims they choose in settling non-class litigation, the court emphasized that class members are bound by a settlement without having

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190 Id. at *5. The court awarded $250,000 in attorneys' fees and expenses, a fraction of the $691,058 sought. See id. at *5-*6.
193 See id. at 668.
194 See id. at 662-64 (discussing Grimes v. Vitalink Communications Corp., 17 F.3d 1553 (3d Cir.), Nottingham Partners v. Trans-Lux Corp., 925 F.2d 29 (1st Cir. 1991), and TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456 (2d Cir. 1982)).
195 Id. at 664; see also id. at 663 ("[I]f a judgment after trial cannot extinguish claims not asserted in the class action complaint, a judgment approving a settlement in such an action ordinarily should not be able to do so either.") (quoting National Super Spuds, Inc. v. New York Mercantile Exch., 660 F.2d 9, 18 (2d Cir. 1981)).
196 Id. at 664 (footnote omitted) (emphasis added).
197 See id. at 664-66.
198 See id. at 666-67.
individually consented to its terms.\textsuperscript{199} The class representatives, who give the consent on behalf of the absent class members, "lack the 'power to give a release of the class rights' on their own, absent judicial approval of the release and entry of a judgment."\textsuperscript{200} Moreover, a state court cannot require absent class members "to contractually release their exclusively federal claims in order to enjoy the benefits of a state class action, when the court has no jurisdictional power to dispose of those claims either directly or indirectly through the doctrine of issue preclusion."\textsuperscript{201}

In an opinion by Justice Thomas, the Supreme Court reversed the Ninth Circuit's ruling.\textsuperscript{202} The Court began with the proposition that under the Full Faith and Credit Statute,\textsuperscript{203} the Delaware judgment approving the settlement was entitled to the same respect in federal court that it would have received in the Delaware courts.\textsuperscript{204} The Court applied the two-step framework employed in \textit{Marrese v. American Academy of Orthopedic Surgeons}\textsuperscript{205} in deciding whether the Delaware judgment precluded the exclusively federal claims of the Epstein plaintiffs.\textsuperscript{206} First, the Court looked to Delaware law to ascertain the preclusive effect of the judgment.\textsuperscript{207} Because Delaware courts had not considered the preclusive effect of a state judgment in a subsequent action that could be brought only in federal court, the Court turned for guidance to the "general state law on the preclusive force of settlement judgments."\textsuperscript{208} Discussing several Delaware opinions, the Court concluded that "a Delaware court would afford preclusive effect to the settlement judgment in this case, notwithstanding the fact that respondents could not have pressed their

\textsuperscript{199} See \textit{id}. ("[T]he settlement of a class action is fundamentally different from the settlement of traditional litigation [involving individual plaintiffs].").

\textsuperscript{200} Id. at 667 (quoting National Super Spuds, Inc. v. New York Mercantile Exch., 660 F.2d 9, 18 (2d Cir. 1981)).

\textsuperscript{201} Id. The Ninth Circuit also held that the district court abused its discretion in denying the Epstein plaintiffs' motion for class certification. See \textit{id}. at 668-69 (finding that "[t]his case fits the requirements of both Rule 23(a) and Rule 23(b)(3) like a glove").


\textsuperscript{204} See \textit{Matsushita}, 516 U.S. at 373, 375.

\textsuperscript{205} 470 U.S. 373 (1985).

\textsuperscript{206} See \textit{Matsushita}, 516 U.S. at 375 (citing \textit{Marrese}, 470 U.S. at 381-83). The \textit{Marrese} "analytical framework" provides that in determining whether a state court judgment precludes an exclusively federal claim, a court must first look to state preclusion law. If state law would accord the state judgment preclusive effect, the court must determine whether the federal statute that created the federal claim expressly or implicitly repealed § 1738, the Full Faith and Credit Statute. See \textit{id}.

\textsuperscript{207} See \textit{id}. at 375-79.

\textsuperscript{208} Id. at 375 (citing \textit{Marrese}, 470 U.S. at 382-83 n.2).
Exchange Act claims in the Court of Chancery."209

Second, because Delaware law indicated that the claim would be barred from litigation in a Delaware court, the Court had to determine whether, "as an exception to § 1738," it 'should refuse to give preclusive effect to [the] state court judgment.'210 The Court phrased the issue as "whether § 27 of the Exchange Act,211 which confers exclusive jurisdiction upon the federal courts for suits arising under the Act, partially repealed § 1738."212 Because § 27, the exclusive jurisdiction section, does not mention § 1738, the Court had to consider whether § 27 impliedly created an exception to the Full Faith and Credit Statute.213 In analyzing this question, the Court focused on the concerns underlying the grant of exclusive jurisdiction, the intent of Congress,214 and whether an "irreconcilable conflict" existed between § 27 of the Exchange Act and the Full Faith and Credit Statute.215 The Court found nothing in § 27 to suggest that Congress intended to "contravene the common-law rules of preclusion or to repeal [§ 1738]."216 Nor did it find any intent to prevent state court litigants "from voluntarily releasing [their] Exchange Act claims in [a] judicially approved settlement . . . ."217 Finally, the Court found that the exception to §1738 for lack of subject matter jurisdiction did not apply because the Delaware court had proper subject matter jurisdiction over the state claims in the underlying suit.218

In separate opinions, Justices Stevens and Ginsburg stated that they would have remanded to the Ninth Circuit for an initial determination of the content of Delaware preclusion law.219 Further, Justice Stevens noted that the "Ninth Circuit remains free to consider whether Delaware courts fully and fairly litigated the adequacy of class representation,"220 an issue the Epstein plaintiffs

209 Id. at 378 (relying on Nottingham Partners v. Dana, 564 A.2d 1089, 1106 (Del. 1989), In re Union Square Assocs. Secs. Litig., C.A. No. 11028, 1993 WL 220528, at *3 (Del. Ch. June 16, 1993), and In re MCA, Inc. Shareholders Litig., 598 A.2d 687, 691-92 (Del. Ch. 1991)).

210 Id. at 375 (quoting Marrese, 470 U.S. at 383).


212 Matsushita, 516 U.S. at 380.

213 See id. (finding that because § 27 does not expressly refer to § 1738, "any modification of § 1738 by § 27 must be implied").

214 See id. (citing Marrese, 470 U.S. at 386).

215 See id. at 381 (stating that to find an implied repeal of § 1738 by § 27, there must be an "irreconcilable conflict" between the two statutes, a "relatively stringent standard") (citations omitted).

216 Id. (quoting Allen v. McCurry, 449 U.S. 90, 97-98 (1980)).

217 Id.

218 See id. at 386-87.

219 See id. at 387 (Stevens, J., concurring in part and dissenting in part); see id. at 394-95 (Ginsburg, J., concurring in part and dissenting in part).

220 Id. at 387 (Stevens, J., concurring in part and dissenting in part). Justice Ginsburg elaborated on this point by stressing the "centrality of the procedural due process protection
raised in federal court.\textsuperscript{221}

On remand, the Ninth Circuit in \textit{Epstein II} \textsuperscript{222} concluded that the Delaware judgment was not entitled to full faith and credit because it violated the due process rights of the absent class members to adequate representation.\textsuperscript{223} The court first rejected the argument that the Supreme Court’s decision in \textit{Matsushita} failed to leave this issue open on remand.\textsuperscript{224} The court then considered whether the Delaware settlement judgment precluded the \textit{Epstein} plaintiffs ‘from “relitigating’ the issue of adequacy of representation under Delaware issue preclusion law.”\textsuperscript{225} The Ninth Circuit decided that the \textit{Epstein} plaintiffs were not precluded because “the issue of adequacy of representation was not litigated during the settlement proceedings.”\textsuperscript{226} The court continued:

Even if adequacy of representation had actually been litigated by objectors at the fairness hearing, and even if Delaware law would allow an individual objector to bind an absentee on the issue of adequacy of representation—however improbable that might seem—we still could not give full faith and credit to such a judgment because it would violate due process of law. . . . “[O]bjectors are objectors, not class representatives.” Binding absentees to any part of a class action judgment

\begin{itemize}
\item 221 See \textit{id.} at 388-89 (Ginsburg, J., concurring in part and dissenting in part) (noting that although the Ninth Circuit decided the case without reaching the issue, the \textit{Epstein} plaintiffs argued that they were not adequately represented by the Delaware representatives).
\item 222 \textit{Epstein v. MCA, Inc.}, 126 F.3d 1235 (9th Cir. 1997) (“\textit{Epstein II}”), withdrawn and substituted, 179 F.3d 641 (9th Cir. 1999). See Kahan & Silberman, \textit{The Inadequate Search}, supra note 58, at 786-92, for a critique of \textit{Epstein II}.
\item 223 See \textit{Epstein II}, 126 F.3d at 1255-56 (finding that the Delaware judgment deprives the \textit{Epstein} plaintiffs of their due process rights because of the “disabling conflict” of interest between the Delaware counsel and the class).
\item 224 See \textit{id.} at 1238-40. In particular, the Ninth Circuit relied on footnote five of the majority opinion in \textit{Matsushita}, in which the Court noted that it was not addressing the due process question: “We need not address the due process claim [of inadequate representation] . . . because it is outside the scope of the question presented in this Court.” \textit{id.} at 1238 (quoting \textit{Matsushita}, 516 U.S. at 379 n.5). The Ninth Circuit also relied on Justice Ginsburg’s separate opinion, which stated that the issue of adequacy of representation “remain[s] open for airing on remand.” \textit{id.} at 1239 (quoting \textit{Matsushita}, 516 U.S. at 399 (Ginsburg, J., concurring in part and dissenting in part)).
\item 225 \textit{id.} at 1240.
\item 226 \textit{id.}. In support of this conclusion, the Ninth Circuit noted that the notice to absent class members did not list the adequacy of the named plaintiffs or their counsel as an issue to be presented at the hearing. See \textit{id.} thus, the absent class members lacked notice that they could have objected to the adequacy of representation at the settlement hearing. See \textit{id.}
\item In addition, the Delaware Vice Chancellor did not make a finding, supported by reason and evidence, that the requirements of the Delaware class action rule were satisfied. See \textit{id.} at 1241 n.6.
\end{itemize}
"is an act of judicial power," and that power can only be exercised over absentees when their interests have, in fact, been adequately represented by parties lawfully authorized to represent them.\textsuperscript{227}

Thus, while the objectors themselves would have been bound by a determination that the representation was adequate, the absent class members who had not authorized the objectors to represent them were not so bound.\textsuperscript{228} Finally, on the "merits" of the adequacy question, the Ninth Circuit, in \textit{Epstein II}, concluded that class counsel had not adequately represented the interests of the absent class members.\textsuperscript{229}

Upon rehearing, a "reconstituted" panel of the Ninth Circuit\textsuperscript{230} withdrew the earlier panel’s opinion and ruled instead that the \textit{Epstein} plaintiffs were bound by the Delaware judgment releasing the exclusively federal claims.\textsuperscript{231} The \textit{Epstein III} panel rejected the earlier panel’s ruling that the due process question had been left open by the Supreme Court on remand, finding that Matsushita was "explicitly and implicitly premised upon the validity of the Delaware judgment" under due process.\textsuperscript{232} Even if the due process issue were left open, however, the Ninth Circuit concluded that the "absent class members’ due process right to adequate representation is protected not by

\begin{footnotesize}
\begin{enumerate}
\item[227] \textit{Id.} at 1241 (emphasis in original) (citations omitted).
\item[228] \textit{See id.} at 1242 (ruling that the "appearance [of individual objectors] at the hearing did not bind anyone but themselves to an adjudication of adequacy of representation"). The court also rejected the argument that the absent class members had a duty to intervene to protect their rights, and having failed to do so, were barred from collaterally attacking the adequacy of representation. \textit{See id.} at 1242-44. Further, the court found that the mere existence of procedures like Rule 23 does not foreclose an absentee from raising the issue of adequacy of representation in a collateral attack. \textit{See id.} at 1245-48.
\item[229] \textit{See id.} at 1250-55 (noting the "disabling conflict" of interest between class counsel and the class, and the counsel’s willingness to "basically ‘roll[] over’ during settlement negotiations").
\item[230] Two days after the Ninth Circuit decided \textit{Epstein II} upon remand from the Supreme Court, Judge Norris, the author of that opinion, resigned from the court. \textit{See Epstein v. MCA, Inc.}, 179 F.3d 641, 643-44 (9th Cir.), \textit{cert. denied}, 120 S. Ct. 497 (1999) ("\textit{Epstein III}"). Matsushita then filed a petition for rehearing. \textit{See id.} at 644. Judge Thomas replaced Judge Norris and the reconstituted panel granted the petition for rehearing. \textit{See id.} Judge O’Scannlain, who dissented in \textit{Epstein II}, wrote the court’s opinion in \textit{Epstein III}. \textit{See id.} at 642. Judge Wiggins, who had joined the majority in \textit{Epstein II}, switched sides and concurred in the result in \textit{Epstein III}. \textit{See id.} at 650 (Wiggins, C.J., concurring in the result). Judge Thomas, who was not part of the original panel, dissented from the substituted decision. \textit{See id.} at 651 (Thomas, C.J., dissenting).
\item[231] \textit{See id.} at 650 (ruling that "the Delaware judgment was not constitutionally infirm and must be accorded full faith and credit").
\item[232] \textit{Id.} at 644. Judge Wiggins, who concurred in the result, found that "while the Supreme Court did not conclusively resolve the due process issue before the remand, it did send unmistakable signals on that very issue." \textit{Id.} at 650 (Wiggins, C.J., concurring in the result).
\end{enumerate}
\end{footnotesize}
collateral review, but by the certifying court initially, and thereafter by appeal within the state system and by direct review in the United States Supreme Court." 233 Relying on a sentence from *Hansberry v. Lee*, 234 the court concluded that “[d]ue process requires that an absent class member’s right to adequate representation be protected by the adoption of the appropriate procedures by the certifying court and by the courts that review its determinations; due process does not require collateral second-guessing of those determinations and that review.” 235 Thus, the absent class members were bound because the Delaware court had found that the representation was adequate. 236

Such waffling by the Ninth Circuit on the due process question reveals an initial flaw in the majority’s opinion in *Matsushita*: its apparent failure to make clear that the due process issue remained open on remand. While the Supreme Court expressly declined to address the due process issue, 237 it failed to make sufficiently clear that the issue remained open on remand to the Ninth Circuit. More importantly, the Court should have clarified that even a determination by the Delaware courts that class representation was adequate would not have barred absent class members from collaterally attacking the judgment for lack of due process. Put differently, the Court should have reiterated what it has stated before, that class action judgments may be collaterally attacked by absent class members if they were not adequately represented 238—even if the rendering court has found the representation to be adequate. 239

*Matsushita* not only failed to clarify the availability and scope of a due process challenge on remand, but it apparently mistakenly determined the

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233 *Id.* at 648 (citations omitted); see also *id.* at 651 (Wiggins, C.J., concurring).

234 311 U.S. 32, 42 (1940) ("[T]here has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it.").

235 Epstein III, 179 F.3d at 648.

236 See *id.* at 651 (Wiggins, C.J., concurring).

237 See Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 379 n.5 (1996) ("We need not address the due process claim, however, because it is outside the scope of the question presented in this Court.") (citations omitted).

238 See *Hansberry v. Lee*, 311 U.S. 32, 40-46 (1940); accord Gonzales v. Cassidy, 474 F.2d 67, 76 (5th Cir. 1973) (allowing absent class members to collaterally attack judgment on the ground of inadequate representation even though absent class members’ counsel was aware of the suit and could have intervened).

239 Professors Kahan and Silberman conclude that “[w]hen class members have an opportunity to object to the settlement and to opt out of it, there is little reason to allow a party who refuses to avail itself of these opportunities to attack the settlement collaterally.” Kahan & Silberman, *Matsushita and Beyond*, supra note 61, at 268. But absent class members may not realize that the representation is inadequate before the opt-out period expires. Furthermore, even if they realize it by the time the settlement is presented for judicial approval, they should not be compelled to raise their objections in what may be a distant, inconvenient court to preserve their right to sue.
content of Delaware preclusion law. The Delaware Supreme Court decision in
Nottingham Partners v. Dana,240 on which Justice Thomas relied for the
proposition that Delaware courts would accord preclusive effect to the
settlement judgment, adopted the following issue preclusion test: ""a court may
permit the release of a claim based on the identical factual predicate as that
underlying the claims in the settled class action even though the claim was not
presented and might not have been presentable in the class action.""241 The
Nottingham court did not say, however, that it would go further and permit the
release of a claim based on the same transaction or occurrence.242 Yet, as
Justice Ginsburg noted, ""[i]n its endeavor to forecast Delaware preclusion law,
the Court appears to have blended the 'identical factual predicate' test applied
by the Delaware Supreme Court ... with the broader 'same transaction' test
advanced by Matsushita.""243

Thus, the Court's opinion in Matsushita, ostensibly based on Delaware
preclusion law, goes further than the Delaware Supreme Court likely would
have gone in according the settlement preclusive effect. In determining the
effect of state court settlements on exclusively federal claims, future courts
should pay more careful attention to the difference between the issue
preclusion, or ""identical factual predicate,"" test and the ""same transaction"" test.
Federal courts should consider certifying unsettled questions of state
preclusion law to the state's highest court for decision.244

What impact will Matsushita have on the phenomenon of dueling class
actions? In placing its imprimatur on state court settlements that release
exclusively federal claims, and in misreading Delaware preclusion law,
Matsushita likely will increase the sheer number of federal/state dueling class
actions and the concomitant problems. The Court's emphasis on state
preclusion law will add an important factor for consideration in forum
selection. While casting light on the general approach to be taken when
preclusion issues arise in the dueling class action context, Matsushita left
unresolved many of the specific and difficult preclusion questions that arise in

240 564 A.2d 1089 (Del. 1989).
241 Id. at 1106 (quoting TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456, 460
(2d Cir. 1982)) (emphasis added); see also National Super Spuds, Inc. v. New York
Mercantile Exch., 660 F.2d 9, 18 n.7 (2d Cir. 1981) (stating that ""[w]e assume that a
settlement could properly be framed so as to prevent class members from subsequently
asserting claims relying on a legal theory different from that relied upon in the class action
complaint but depending upon the very same set of facts") (emphasis added); Abramson v.
Pennwood Inv. Corp., 392 F.2d 759, 762 (2d Cir. 1968) (stating that ""where both the state
and federal suits are based on the same transactions, collateral estoppel would apply with
regard to the facts determined in the state action") (emphasis added).
242 See Nottingham Partners, 564 A.2d at 1107 (affirming the Vice Chancellor's finding
that ""both actions arose under the same set of operative facts").
244 Three-fourths of the states now have certification procedures in place. See CHARLES
ALAN WRIGHT, LAW OF FEDERAL COURTS 334 & n.57 (5th ed. 1994).
such circumstances. Among these is the critical question of whether objectors are free to challenge the adequacy of representation in collateral proceedings. Ultimately, Matsushita illustrates the difficulty courts have in striking the proper balance between the rights of absent class members, on the one hand, and the need for finality, efficiency and consistency, on the other.

IV. THE INADEQUACY OF EXISTING JUDICIAL TOOLS

Courts already have a variety of techniques for eliminating or reducing the problems associated with duplicative litigation. Although each of these devices may be useful in the dueling class actions context, none is adequate—either alone or in conjunction with others—to ameliorate all of the problems posed by dueling class actions.

A. Transfer and Consolidation

If all dueling class actions filed on behalf of the same class could be transferred to a single court and consolidated into a single proceeding, a number of the problems described in Part II would disappear. Surely such transfer and consolidation would alleviate some of the pressure on class counsel to settle, while minimizing the waste of resources inherent in duplicative suits. By eliminating the possibility that more than one lawyer, or group of lawyers in consolidated actions, could represent the class in court, consolidation would also eliminate the possibility that the defendant could conduct a “reverse auction.” Furthermore, by reducing the pressure on class counsel to settle quickly, consolidation would enable class counsel to obtain the discovery necessary to assess the strength and value of the class claims and would reduce the likelihood that class counsel would withhold relevant information from the class. Likewise, consolidation would greatly reduce or eliminate the possibility that class members would be confused by notices they receive in different class actions. Moreover, by decreasing the pressure on

245 Matsushita, 516 U.S. at 379 n.5 (declining to consider the due process claim “because it is outside the scope of the question presented in this Court”).
246 See supra Part II.A. The interests of class counsel and the absent class members in reaching an early settlement would continue to diverge, however. See supra notes 79-82 and accompanying text (noting that even in a single, or consolidated, class action suit, class counsel is likely to settle early because class members have insufficient incentive to closely monitor class counsel, and counsel is still motivated to lock in a high fee without expending a lot of time or money).
247 See supra Part II.C (discussing the waste of judicial resources and parties’ money in adjudicating dueling class actions).
248 See supra notes 61-62 and accompanying text.
249 This risk would not be eliminated as the class counsel’s incentive in gaining judicial approval of the settlement would be greater than her interest in affording the class complete information. See supra note 71 and accompanying text.
250 See supra note 84-86 and accompanying text (arguing that class members who choose
class counsel to settle early, consolidation would increase the amount of information available to the court.\textsuperscript{251} Finally, consolidation of all suits filed on behalf of the same class would eliminate the preclusion problems that arise when one of the dueling class actions reaches judgment.\textsuperscript{252}

Transfer and consolidation only work, however, when all dueling class actions are pending in the courts of a single jurisdiction. If all dueling class actions are filed in the courts of a single state, for instance, ordinarily they can be consolidated in a single proceeding.\textsuperscript{253} Likewise, if all dueling class actions are filed in federal court—albeit in different judicial districts—transfer to a single district followed by consolidation should be available. Two principal mechanisms are available in federal court. First, pursuant to § 1404(a), a class action may be transferred to the district in which a dueling class action is pending “[f]or the convenience of parties and witnesses, in the interest of justice,” if the transferee court is one in which the suit “might have been brought” originally.\textsuperscript{254} Once the dueling class actions are transferred to a single judicial district, they can be consolidated as long as they “involv[e] a

to opt out of the first suit may be confused by the notice of the second suit and disregard the second notice, thereby failing to opt out of a separate class action entirely).

\textsuperscript{251} See supra Part II.B.3 (arguing that pressure to settle on the class counsel acts as an incentive not to disseminate information to the court).

\textsuperscript{252} See supra Part II.D (describing the complex and time-consuming preclusion issues in dueling class actions). Because all suits filed on behalf of the same class would be consolidated into one, the question of the preclusive effect the first suit would have on competing suits would not arise.

\textsuperscript{253} See, e.g., CAL. CIV. PROC. CODE § 1048(a) (West 1980) (same as Federal Rule 42(a)); CAL. CIV. PROC. CODE § 404 (West 1973 & Supp. 1997) (permitting coordination of “civil actions sharing a common question of fact or law . . . pending in different courts” if the actions are “complex”); FLA. R. CIV. P. 1.270(a) (same as Federal Rule 42(a)); 735 ILL. COMP. STAT. ANN. 5/2-1006 (West 1993) (permitting consolidation of actions pending in the same court “as an aid to convenience, whenever it can be done without prejudice to a substantial right”); ILL. CT. R. 384 (permitting transfer of civil actions pending in different judicial circuits if they “involv[e] one or more common questions of fact or law” and if “consolidation would serve the convenience of the parties and witnesses and would promote the just and efficient conduct of such actions”); N.Y. C.P.L.R. 602(a) (McKinney 1976) (similar to Federal Rule 42(a)); N.Y. C.P.L.R. 602(b) (McKinney 1976) (permitting the supreme court to “remove to itself an action pending in another court and consolidate it . . . with that in the supreme court”); PA. R. CIV. P. 213(a) (similar to Federal Rule 42(a)); TEX. GOV’T CODE ANN. § 74.121(a) (West 1998) (permitting certain intracounty transfers); TEX. R. CIV. P. 174(a) (same as Federal Rule 42(a)).

\textsuperscript{254} 28 U.S.C. § 1404(a) (1993). The Supreme Court has stated that, “‘[i]f when a suit is commenced, plaintiff has a right to sue in that district, independently of the wishes of the defendants, it is a district “where [the action] might have been brought” [under § 1404(a)].’” Hoffman v. Blaski, 363 U.S. 335, 344 (1960) (citation omitted; see also 28 U.S.C. § 1406(a) (1993) (permitting transfer of an action filed in the wrong district “if it be in the interest of justice . . . to any district . . . in which it could have been brought”).
common question of law or fact," a quite permissive standard. Second, the Judicial Panel on Multidistrict Litigation has the authority to transfer "civil actions involving one or more common questions of fact . . . pending in different districts . . . to any district for coordinated or consolidated pretrial proceedings . . . for the convenience of parties and witnesses and [to] promote the just and efficient conduct of such actions." Although the multidistrict litigation statute ("MDL") contemplates remand of the cases to the transferor court at the conclusion of the pretrial proceedings, the transferee court ultimately disposes of most MDL cases, either by way of dispositive motion, settlement, or trial. Thus, dueling class actions filed in the federal system likely can be resolved together unless a trial is required. Although transfer and consolidation vehicles can alleviate most problems associated with dueling class actions filed within a single judicial system, these tools are currently unavailable when the dueling class actions are filed in different jurisdictions. The National Conference of Commissioners on Uniform State Laws approved the Uniform Transfer of Litigation Act in 1991 to "provide for the transfer of litigation from a court in one judicial system to a court in another judicial system." Adoption of the Act would have "enable[d] courts of a state to make and receive transfers in cooperation with any other court, state, federal, or foreign." The Act has yet to be enacted in any state.

257 See id. (stating that "[e]ach action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated").
258 See, e.g., Patricia D. Howard, A Guide to Multidistrict Litigation, 124 F.R.D. 479, 480 (1989) (noting the "great success of the transferee judges in terminating by settlement, summary judgment, or other type of dismissal, the actions assigned to them by the Panel"); Stanley A. Weigel, The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts, 78 F.R.D. 575, 583 (1978) (noting that "less than five percent of the actions transferred by the Panel have been remanded").
259 The Supreme Court recently held that a transferee court can no longer invoke § 1404(a) to assign a transferred case to itself for trial. See Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 40 (1998) (stating that "none of the arguments raised can unsettle the straightforward language [of § 1407(a)] imposing the Panel’s responsibility to remand, which bars recognizing any self-assignment power in a transferee court"). For a discussion of proposed legislation to alter the result in Lexecon, see infra Part VA.4.
261 Id. at 189 (Prefatory Note).
262 Id. at 190.
263 See supra note 11 and accompanying text (noting that no state had enacted the Act as of June 9, 1999). Transfer under the Uniform Transfer of Litigation Act would require the consent of both the transferring and receiving courts. See § 102, 14 U.L.A. at 192 ("A
Likewise, the American Law Institute ("ALI")'s Complex Litigation Project made statutory recommendations for a variety of vehicles to facilitate transfer and consolidation of actions pending in federal and state courts simultaneously. One example is a proposal to expand removal jurisdiction to permit state suits transactionally related to a pending federal action to be removed and transferred to federal court.\textsuperscript{264} Other proposals provide for the transfer of federal actions to state court for consolidation with related actions pending there\textsuperscript{265} and the formulation of an interstate transfer mechanism.\textsuperscript{266} Unless and until these proposals are adopted, however, transfer and consolidation can only alleviate the problems associated with dueling class actions pending in courts in the same judicial system.

B. Injunctions

A court entertaining a class action may, in some circumstances, enjoin the parties from initiating additional suits or prosecuting dueling actions previously filed. Like consolidation of dueling class actions filed on behalf of the same class, an injunction enjoining the parties (and absent class members) from commencing or prosecuting dueling class actions would reduce or eliminate many of the problems described in Part II. Nevertheless, a variety of concerns limit the injunction's utility.

To begin with, both the language of Rule 23 and the due process clause strongly suggest that courts entertaining class actions seeking monetary relief cannot enjoin absent class members from presenting their claims in other proceedings. Rule 23(c)(2) affords members of a 23(b)(3) class the opportunity to opt out of the class action.\textsuperscript{267} Although not explicitly assuring class members the opportunity to sue independently,\textsuperscript{268} the provision implies

\textsuperscript{264} See American Law Institute, Complex Litigation: Statutory Recommendations and Analysis § 5.01(a), at 220-21 (1994) [hereinafter ALI Complex Litigation Project] (stating that "the Complex Litigation Panel may order the removal to federal court and consolidation of one or more civil actions pending in one or more state courts, if the removed actions arise from the same transaction [or] occurrence").

\textsuperscript{265} See id. § 4.01, at 177-78 (allowing the Complex Litigation Panel to designate a state court as the transferee court based on various factors such as the location where the controversy arose, fairness to the parties, and appropriateness of the state court in relation to other possible transferee courts).

\textsuperscript{266} See id. § 4.02, at 201 (stating that "consideration should be given to the formulation of an Interstate Complex Litigation Compact or a Uniform Complex Litigation Act").

\textsuperscript{267} Fed. R. Civ. P. 23(c)(2), (b)(2).

\textsuperscript{268} See Edward F. Sherman, Class Actions and Duplicative Litigation, 62 Ind. L.J. 507,
such a right. Likewise, in *Phillips Petroleum Corp. v. Shutts*\(^{269}\) the Supreme Court stated that due process guarantees absent class members, seeking wholly or predominately monetary relief, an opportunity to opt out.\(^{270}\) Since the right to opt out and sue independently need not include the right to sue on behalf of a class,\(^{271}\) these concerns alone should not limit the utility of an injunction against dueling class actions.

Other concerns, however, are more difficult to overcome. Principles of federalism and comity greatly restrict courts' authority to enjoin parallel proceedings in the federal/state and state/state contexts.\(^{272}\) In the federal/state cases, the Anti-Injunction Act\(^ {273}\) bars federal courts from enjoining proceedings already pending in a state court "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."\(^{274}\) The Supreme Court has admonished that "[a]ny

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555 (1987) (questioning whether the right to opt out necessarily "entails full and absolute freedom to conduct duplicative litigation ... It might be argued ... that it is only exclusion from the class, and not the right to pursue one's own suit independently, that is guaranteed by the Rule"); see also *In re Glenn W. Turner Enters. Litig.*, 521 F.2d 775, 781 (3d Cir. 1975).

\(^{269}\) 472 U.S. 797 (1985).

\(^{270}\) See id. at 812 (stating that "we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court"). Twice the Supreme Court accepted cases raising the question whether due process assures absent class members a right to opt out of any class action asserting monetary claims, but ultimately dismissed *certiorari* as improvidently granted. *See Adams v. Robertson*, 520 U.S. 83, 88-89 (1997) (stating that a court may have read the section dealt with in *Shutts* as barring personal jurisdiction over non-resident defendants, not the broader mandate of due process requiring that all members have the right to opt out of the class); *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 124 (1994).

\(^{271}\) *Accord Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 203 (3d Cir. 1993) (upholding an injunction against a competing class action filed in state court, while recognizing class members' rights to opt out and sue individually).

\(^{272}\) In the federal/federal cases, courts ordinarily apply the first-in-time rule as a matter of comity: the court entertaining the class action filed first-in-time has authority to enjoin the parties from initiating or prosecuting duplicative cases. *See Sherman, supra* note 268, at 518-519; *cf. Davis v. Coopers & Lybrand*, Nos. 90 C 7173, 91 C 1809, 91 C 1955, 90 B 15485, 91 A 169, 1991 WL 154460, *8 n.6 (N.D. Ill. July 30, 1991) (stating that when "there has been a race to the courthouse to file the first class action in what appears to be a promising situation ... no automatic 'first in time, first in right' presumption is called for in choosing the proper class representative and class counsel").


\(^{274}\) Id. The statute, however, does not bar a federal court from enjoining parties from instituting state proceedings. *See Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1965) (explaining that § 2283 only bars an already instituted suit, not injunctions against all state court proceedings); see also 17 *CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE* § 4222 (2d ed. 1999 Supp.) (explaining that a federal court can issue an
doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy."

None of the three exceptions in the Anti-Injunction Act authorize federal courts to enjoin dueling class actions pending in state court absent special circumstances. A federal statute need not expressly refer to the Act, nor expressly authorize an injunction of a state court proceeding to qualify under the “expressly authorized” exception. But the statute “must have created a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding.” No federal statute governing class actions generally qualifies under this exception.

The Supreme Court in *Vendo Co. v. Lektro-Vend Corp.* narrowly

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276 See *Vendo Co.*, 433 U.S. at 633 (stating that the absence of express language is not determinative if there is adequate evidence that Congress intended to authorize an injunction of state court proceedings); *Mitchum v. Foster*, 407 U.S. 225, 237 (1972) (stating that to qualify under the “expressly authorized” exception, a federal law does not have to specifically reference that statute); *Amalgamated Clothing Workers of Am. v. Richman Bros. Co.*, 348 U.S. 511, 516 (1955) (admitting that there is no formula for the “expressly authorized” exception and that an authorization need not refer expressly to § 2283); see also 17 WRIGHT ET AL., supra note 274, § 4224 (explaining that §2283 has been read to be implied in carrying out Congress’ acts).

277 *Mitchum*, 407 U.S. at 237.

278 The only authorities that might be relied upon are Rule 23(b) and (c), which contemplate mandatory federal class actions with no opportunity to opt out, *Fed. R. Civ. P.* 23(b)(1), (b)(2), (c)(2), and Rule 23(d), which authorizes the district court to make appropriate orders to manage the case. *Fed R. Civ. P.* 23(d). But because Federal Rules are not Acts of Congress, the first exception is unavailable. See, e.g., *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 144 n.6 (3d Cir. 1998) (stating that “Rule 23(b)(3) does not constitute a predicate act of Congress exempting this action from the Anti-Injunction Act”); *In re Baldwin-United Corp.*, 770 F.2d 328, 335 (2d Cir. 1985); Piambino v. Bailey, 610 F.2d 1306, 1331 (5th Cir. 1980); *In re Glenn W. Turner Enters. Litig.*, 521 F.2d 775, 781 (3d Cir. 1975); see also 7B WRIGHT ET AL., supra note 85, § 1798.1 (finding it inappropriate for 23(d) to serve as an express exception to § 2283, because it is not an Act of Congress); Sherman, *supra* note 268, at 529-30; Sherman, *supra* note 101, at 936 & n.49 (stating that there is no express class action exception in Rule 23).


279 433 U.S. 623, 630 (1977) (plurality opinion).
interpreted § 2283’s “in aid of jurisdiction” exception to authorize injunctions against pending state actions only when the federal court obtained jurisdiction over property prior to the state court action.\textsuperscript{280} The Court has “never viewed parallel in personam actions as interfering with the jurisdiction of either court.”\textsuperscript{281} The Eighth Circuit applied this line of cases to class actions in \textit{In re Federal Skywalks},\textsuperscript{282} holding that the district court entertaining the federal class action erred in enjoining pending parallel state court actions.\textsuperscript{283} Some courts since \textit{Skywalks} have read the Supreme Court precedent a bit more loosely to make the “in aid of jurisdiction” exception available to a district court entertaining a class action or other complex case on the verge of settlement.\textsuperscript{284} Although scholars have argued that this exception deserves a

\textsuperscript{280} See \textit{id.} at 641-42; see also Toucey v. N.Y. Life Ins. Co., 314 U.S. 118, 134-35 (1941) (describing a line of cases holding that “the court, whether federal or state, which first takes possession of a res withdraws the property from the reach of the other”) (citations omitted). Courts have also invoked this exception in actions removed to federal court to ensure that the state court proceeds no further with the action. See \textit{In re General Motors Corp. Pick-up Truck}, 134 F.3d at 145; see \textit{generally} 17 WRIGHT ET AL., supra note 245, § 4225 (analyzing the “in aid of its jurisdiction” exception).

\textsuperscript{281} \textit{Vendo Co.}, 433 U.S. at 642; cf. Martin Redish, \textit{The Anti-Injunction Statute Reconsidered}, 44 U. Chi. L. Rev. 717, 754 (1977) (arguing that the “in aid of jurisdiction” exception should be construed “to empower the federal court to enjoin a concurrent state proceeding that might render the exercise of the federal court’s jurisdiction nugatory”).

\textsuperscript{282} 680 F.2d 1175 (8th Cir. 1982).

\textsuperscript{283} See \textit{id.} at 1182-83. The court also rejected the argument that the district court had authority to enjoin the state actions because the situation was analogous to federal interpleader. See \textit{id.} at 1182. Even though the defendant might have been required to pay only one punitive damage award, the claim did not qualify as a limited fund, which was a jurisdictional prerequisite to interpleader. See \textit{id.} It is unclear from the opinion whether the state actions were filed on behalf of a class or individuals.


Perhaps the best known, \textit{In re Baldwin-United Corp.}, 770 F.2d at 328, upheld an injunction against parallel proceedings where the parties to the federal class action had signed stipulations of settlement after two years of judicial involvement in settlement negotiations, and after the court had scheduled a fairness hearing. See \textit{id.} at 338. The Second Circuit reasoned that, had the settlements been finally approved and judgment entered, the district court clearly would have had authority to enjoin the commencement of a parallel action. See \textit{id.} at 336. The court further determined that such an injunction “would properly have forestalled relitigation of those judgments.” \textit{Id.} Although the settlements here had not yet been finally approved, the potential state suit “threatened to ‘seriously impair the federal court’s flexibility and authority’ to approve settlements in the multidistrict litigation.” \textit{Id.} (quoting Atlantic Coastline R.R. v. Brotherhood of Locomotive
broader interpretation, under current case law, the mere pendency of dueling class actions does not justify an injunction under the second exception. The third exception to the Anti-Injunction Act permits a federal court to enjoin pending state proceedings "to protect or effectuate its judgments." In other words, a court may enjoin a state court from re-litigating matters that were fully adjudicated in federal court. Thus, when a federal court enters a

Eng'r's, 398 U.S. 281, 295 (1970)). In an effort to reconcile its decision with Vendo, the Second Circuit concluded that

[T]he need to enjoin conflicting state proceedings arises because the jurisdiction of a multidistrict court is "analogous to that of a court in an in rem action or in a school desegregation case, where it is intolerable to have conflicting orders from different courts." In effect... the district court had before it a class action proceeding so far advanced that it was the virtual equivalent of a res over which the district court required full control.

Id. at 337 (quoting 17 WRIGHT ET AL., supra note 274, § 4225).

In addition, federal courts that have retained jurisdiction to supervise implementation of their orders have invoked the "in aid of jurisdiction" exception to enjoin state actions that would interfere with that implementation. For instance, courts exercising continuing jurisdiction in school desegregation and legislative reapportionment cases have issued antitrust injunctions. See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 501 F.2d 383, 384 (4th Cir. 1974) (concluding that injunction relief was necessary and thus, a proper exception to § 2283); Oliver v. Kalamazoo Bd. of Educ., 510 F. Supp. 1104, 1107-08 (W.D. Mich. 1981) (explaining that the court's desire for prompt desegregation, the need to prevent contrary rulings and the prevention of relitigation of issues all allow for an exception to § 2283); Moss v. Burkhart, 220 F. Supp. 149, 163 (N.D. Okla. 1963) (holding that the lawsuit may not be brought elsewhere because of the need for effective adjudication and harmonious state-federal relations), aff'd, 378 U.S. 558 (1964); see also 17 WRIGHT ET AL., supra note 274, § 4225.

285 See, e.g., Larimore, supra note 278, at 292-94 (advocating a more expansive view of the exception "that properly redirects the focus of the necessary-in-aid exception toward the need for an injunction in any particular case"); Redish, supra note 281, at 754 (suggesting that "whenever a federal court has jurisdiction in a case before it, the exception should be construed to empower the federal court to enjoin a concurrent state proceeding that might render the exercise of the federal court's jurisdiction nugatory") (footnote omitted); Sherman, supra note 268, at 548 (advocating a "functional analysis that weighs the degree of invasion of state interest against the efficiency and purpose of unitary federal resolution"); 17 WRIGHT ET AL., supra note 274, § 4225 (arguing that "it should be permissible for a federal court to enjoin state proceedings that would interfere with efficient disposition of a federal class action"); cf. Diane P. Wood, Fine-Tuning Judicial Federalism: A Proposal for Reform of the Anti-Injunction Act, 1990 BYU L. REV. 289, 319 (advocating that the Act be rewritten to "codify the general policies that have always governed federal court injunctions against state court proceedings").


288 See Kerr-McGee Chem. Corp. v. Hartigan, 816 F.2d 1177, 1179 (7th Cir. 1987)
final judgment in a class action, it may enjoin dueling class actions pending in state court that raise the same claim on behalf of the same class. The utility of such an injunction in minimizing the problems posed by dueling class actions is obviously very limited, as authority to enter it does not arise until the federal court enters a "judgment."^{289} By this time, scarce resources already will have been wasted, the pressure to settle already will have been brought to bear and informational deficiencies already will have had their effect.^{290} Moreover, in determining whether to issue an injunction at this point, the federal court will have to confront daunting preclusion problems arising in connection with dueling class actions.^{291}

Even if a court issues an injunction against pending state suits, its scope may be narrow. The circuits are split on whether the re-litigation exception protects the full claim preclusive effect of the federal judgment or only those matters that actually were decided by the federal court.^{292} Under the narrower

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^{289} The Second Circuit has held that the re-litigation exception authorizes federal courts to enter injunctions protecting "interlocutory as well as final decrees." Sperry Rand Corp. v. Rothlein, 288 F.2d 245, 248-49 (2d Cir. 1961) (stating that "[n]othing in the concluding phrase of 2283 . . . limits its scope to final judgments"). Although other courts have paid only "polite lip service" to this decision, 17 WRIGHT ET AL., supra note 274, § 4226, Wright and Miller suggest that the term "judgments" in the Act should be read to include orders from which an appeal would lie, including truly final judgments, preliminary injunctions, partial summary judgments made final and appealable by the Rule 54(b) procedure, and orders appealable under the Cohen collateral order doctrine, but not orders certified for discretionary interlocutory appeal under 28 U.S.C. § 1292(b). Id. at 550-51. Until recently, orders denying class certification were not final appealable orders, however, and thus a federal court that denied class certification could not invoke the re-litigation exception to enjoin a dueling class action filed in state court. See, e.g., In re General Motors Corp. Pick-up Truck, 134 F.3d 133, 146 (3d Cir. 1998); J.R. Clearwater Inc. v. Ashland Chem. Co., 93 F.3d 176, 179 (5th Cir. 1996). Since December 1998, however, under Rule 23(f), Courts of Appeals may, in their discretion, permit appeals from orders granting or denying class certification. FED. R. CIV. P. 23(f).

^{290} See supra Part II.A-C.

^{291} See supra Part II.D. If the state court already has concluded that the federal judgment is not entitled to preclusive effect, the federal court asked to enjoin the state suit to "protect . . . its judgment[]" must give the state court judgment on this issue full faith and credit. See Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518, 523-24 (1986).

^{292} Compare Staff v. Bouchard Transp. Co., 878 F.2d 638, 643 (2d Cir. 1989) (adopting restrictive view of exception by finding that the re-litigation exception is more narrowly tailored that res judicata), and Deus v. Allstate Ins. Co., 15 F.3d 506, 524 (5th Cir. 1994) (applying restrictive view in case where plaintiff had been denied opportunity to amend pleading in federal action to state claim for fraud) with Western Sys., Inc. v. Ulloa, 958 F.2d 864, 870-71 (9th Cir. 1992) (adopting a broader view, since a narrower view is contrary to the purposes of § 2283); see also Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 148-49 (1988); 17 WRIGHT ET AL., supra note 274, § 4226; George A. Martinez, The
interpretation, a federal court would lack the authority to enjoin dueling state
class actions that raise claims that were settled rather than decided by the
federal court. Thus, in the common context of the settlement class action,
the third exception to the Anti-Injunction Act is unavailable. In summary, the
federal courts’ authority to enjoin dueling state class actions is quite limited,
and even when available, may be “too little, too late” to resolve the problems
that plague dueling class actions.

Just as the Anti-Injunction Act bars federal courts from enjoining pending
state court proceedings, the Supremacy Clause along with well-established
common law principles bar state courts from enjoining federal court
proceedings. The only exception recognized by the Supreme Court is when
the state court has custody of property and is proceeding in rem or quasi in
rem.

Anti-Injunction Act: Fending Off the New Attack on the Relitigation Exception, 72 NEB. L. REV. 643, 645 (1993) (arguing that the relitigation exception to the Act should be construed to permit federal courts to protect the full claim preclusive effect of their judgments).

293 See, e.g., Santopadre v. Pelican Homestead & Savings Ass’n, 937 F.2d 268, 273 (5th Cir. 1991) (stating that issues were “actually litigated” for purposes of the relitigation exception only if they were raised by the pleadings and submitted to the trier of fact); Sanchez v. Sea Containers, Ltd., 874 F.2d 66, 68 (1st Cir. 1989); Delta Air Lines, Inc. v. McCoy Restaurants, Inc., 708 F.2d 582, 586 (11th Cir. 1983); Summit Design Servs., Inc. v. La Place Sand Co., 1999 U.S. Dist. LEXIS 317, at *3 (E.D. La. January 8, 1999) (denying injunction against state litigation that raised same issues as federal action because federal action was settled rather than litigated); Wolfe v. Safecard Servs., Inc., 873 F. Supp. 649, 649 (S.D. Fla. 1995) (stating that the relitigation exception “allows a federal court to enjoin a state court proceeding only if the parties to the original action disputed, and the trier of fact actually resolved, the issues involved in the subsequent case”) (citation omitted).

294 U.S. CONST. art. VI, cl. 2.

295 See Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 21 n.24 (1983) (explaining that the Court does not suggest that a state court’s injunction could have prevented the petitioner from instituting the federal action); General Atomic Co. v. Felter, 434 U.S. 12, 12 (1977) (holding that “it is not within the power of state courts to bar litigants from filing and prosecuting in personam actions in the federal courts”); id. at 17 (stating that “the rights conferred by Congress to bring in personam actions in federal courts are not subject to abridgment by state-court injunctions, regardless of whether the federal litigation is pending or prospective”); Donovan v. City of Dallas, 377 U.S. 408, 413 (1964) (stating that “state courts are completely without power to restrain federal-court proceedings in in personam actions”). For a brief discussion of early nineteenth century law on this issue, see 17 WRIGHT ET AL., supra note 274, § 4212 (citing the historical implications that favor the interpretation of state courts not being allowed to enjoin federal court proceedings).

296 See Donovan, 377 U.S. at 412 (citing Princess Lida v. Thompson, 305 U.S. 456, 465-68 (1939)) (citing exceptions to the general rule that state and federal courts would not interfere with each other including that the court having custody of property in an in rem or quasi in rem hearing maintains exclusive jurisdiction over it); see also Toucey v. New York Life Ins. Co., 314 U.S. 118, 136 (1941) (stating that “where a state court first acquires
Just as injunctions are of limited utility in the federal/state context, they fail to remedy the problems raised by dueling class actions pending in the courts of more than one state.\textsuperscript{297} State courts have consistently held that they lack authority to enjoin the courts of other states from entertaining duplicative suits between the same parties.\textsuperscript{298} Although state courts may enjoin parties over whom they have \textit{in personam} jurisdiction from proceeding with actions pending in the courts of other states, they exercise this power sparingly.\textsuperscript{299} When a state court does issue an injunction, the second state must determine whether to enforce the injunction in its courts. Although the Full Faith and Credit Clause\textsuperscript{300} and Statute\textsuperscript{301} might appear to require enforcement of such

\textit{control of the res, the federal courts are disabled from exercising any power over it") (citation omitted).}

\textsuperscript{297} When multiple suits are filed in the courts of a single state, the first-in-time rule ordinarily applies. \textit{See, e.g.,} First Tennessee Bank, N.A. v. Snell, 718 So. 2d 20, 22 (Ala. 1998) (holding that a “prior-filed class action prevails over a later-filed class action involving substantially identical class action allegations and requires the abatement of the later-filed action”); \textit{Ex parte} Harris, 711 So. 2d 467, 468 (Ala. 1998) (holding that a court lacked subject-matter jurisdiction over a class action when a substantially identical class action had been previously filed in another court); Schnell v. Porta Sys. Corp., Civ. A. No. 12,948, 1994 WL 148276, *3 (Del. Ch. Apr. 12, 1994) (noting a “preference for litigating a dispute in the first forum chosen”).

\textsuperscript{298} \textit{See, e.g.,} St. Paul Surplus Lines Ins. Co. v. Mentor Corp., 503 N.W.2d 511, 515 (Minn. Ct. App. 1993) (explaining that the court that acquires jurisdiction first may dispose of the entire controversy); State \textit{ex rel.} New York, C. & St. L. R. Co. v. Nortoni, 55 S.W.2d 272, 273 (Mo. 1932) (finding that in the case between a foreign tribunal and state court, the state court may issue an injunction if the foreign court’s jurisdiction is unreasonable); 21 C.J.S. \textit{Courts} § 227 (1990) (explaining that a court that has jurisdiction may enjoin another action when the same parties are involved); \textit{see also} White v. Toney, 823 S.W.2d 921, 923 (Ark. Ct. App. 1992) (concluding that without addressing the injunction “[t]he pendency of the Louisiana action on the same subject was no impediment to the exercise of the [Arkansas] probate court’s jurisdiction, since identical cases in different states can be pending in each court at the same time.”).

\textsuperscript{299} \textit{See, e.g.,} State \textit{ex rel.} General Dynamics Corp. v. Luten, 566 S.W.2d 452, 458 (Mo. 1978) (stating that “the power of one State’s court of equity to restrain persons within control of its process from the prosecution of suits in another State is clear, but on comity considerations, it should be employed with great caution”); 21 C.J.S. \textit{Courts} § 227 (1990) (stating that “a court which has acquired jurisdiction of the parties has power . . . to enjoin them from proceeding with an action in a court of another state . . . with respect to a controversy between the same parties of which it obtained jurisdiction prior to the foreign court. This power of a court should be exercised sparingly”) (footnotes omitted); Miller, \textit{supra} note 2 at 523 (1996) (explaining that courts are usually sensitive to interstate comity and usually require a convincing reason for an injunction); Sherman, \textit{supra} note 101, at 927-28 (noting the “comity barriers” to interstate injunctions).

\textsuperscript{300} U.S. \textit{Const.} art. IV, § 1 (stating that “Full Faith and Credit shall be given in each State to the . . . judicial Proceedings of every other State”).

injunctions, some state courts have declined to do so.\textsuperscript{302} The Supreme Court recently acknowledged that it has “not yet ruled on the credit due to a state court injunction barring a party from maintaining litigation in another state.”\textsuperscript{303} The Court further noted without criticism that “[s]tate courts that have dealt with the question have, in the main, regarded anti-suit injunctions as outside the full faith and credit ambit.”\textsuperscript{304}

Thus, like the transfer and consolidation vehicles currently in place, the anti-suit injunction will help alleviate the problems associated with dueling class actions only when all of the dueling class actions are pending in the courts of a single judicial system. Accordingly, the problems that arise in federal/state and state/state cases cannot be solved by these traditional vehicles.

C. \textit{Stays and Abstention}

Just as an injunction against all dueling class actions would alleviate many of the problems that otherwise would occur, stays of all dueling class actions would have the same beneficial effect. But one cannot expect such stays to issue in all dueling class actions.

Whenever two or more related suits are pending, each court may stay its own hand in deference to the other proceeding. Typically, in federal/federal\textsuperscript{305} and state/state cases,\textsuperscript{306} courts apply the first-in-time rule and defer to the action that was filed first. Likewise, in federal/state cases, state courts typically will defer to previously filed federal actions.\textsuperscript{307} All such stays are

\begin{footnotesize}
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\item Baker v. General Motors Corp., 522 U.S. 222, 236 n.9 (1998).
\item Id. (citations omitted); see also id. at 236 (noting that “antisuit injunctions regarding litigation elsewhere, even if compatible with due process as a direction constraining parties to the decree, in fact have not controlled the second court’s actions regarding litigation in that court”) (citations and footnote omitted).
\item See, e.g., Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1203 (2d Cir. 1970) (stating that “in the absence of sound reasons the second action should give way to the first”); William Gluckin & Co. v. International Playtex Corp., 407 F.2d 177, 178 (2d Cir. 1969) (holding that the first suit has priority absent a balance of convenience favoring the second action). In federal/federal cases, the court also has the option to transfer and consolidate the proceedings. See supra notes 254-59 and accompanying text.
\item See, e.g., Acierno, 679 A.2d at 458 (finding that the trial court erred in giving preference to the state action filed first and that the race to the courthouse should not be determinative); DeAngelis v. Salton/Maxim Housewares, Inc., 641 A.2d 834, 838 (Del. Ch.
\end{enumerate}
\end{footnotesize}
discretionary, however, and in addition to considering the dates of filing, courts consider other factors, such as whether the parties, claims or issues, and remedies are identical, the relative congestion of the courts' dockets, the relative ease of access to proof; the availability of compulsory processes for witnesses, the possibility of a view of the premises, if appropriate; the governing law, and the presence of "special equities." Given the breadth of the courts' discretion and the malleability of these factors, the first-in-time rule is not firm and does not solve the dueling class action problem.

Moreover, in federal/state cases, the Supreme Court has stated that federal courts have a "virtually unflagging obligation... to exercise the jurisdiction given them." Only "exceptional" circumstances and the "clearest of

1993) (noting that Delaware courts "will stay after-filed suits when previously-filed suits stating similar claims are pending in another court... particularly... when the primary claims... are based on federal laws and a federal suit is already pending") (citation omitted), rev'd on other grounds sub nom. Prezant v. DeAngelis, 636 A.2d 915 (Del. 1994); Florida Crushed Stone Co. v. Travelers Indem. Co., 632 So. 2d 217, 220 (Fla. Dist. Ct. App. 1994) (stating that "it is... an abuse of discretion to refuse to stay a subsequently filed state court action in favor of a previously filed federal action which involves the same parties and the same or substantially similar issues"); City of Miami Beach v. Miami Beach Fraternal Order of Police, 619 So. 2d 447, 447 (Fla. Dist. Ct. App. 1993) (stating that "when a previously filed federal action is pending between the same parties or privies on the same issues, a subsequently filed state court action ordinarily should be stayed"); Howerton v. Grace Hosp., 476 S.E.2d 440, 443 (N.C. Ct. App. 1996).

308 See Florida Crushed Stone Co., 632 So. 2d at 220 (stating that state court must stay a subsequently filed state court action in favor of previously filed federal action involving same parties and same issues); American Home Prods. Corp., 668 A.2d at 73-74 (stating that if these three requirements are met, then the defendant is entitled to a stay, barring the finding of special equities); Howerton, 476 S.E.2d at 443; Project Engineering, 833 S.W.2d at 724 (upholding denial of stay because there was not a complete identity of parties or issues).

309 See City of Miami Beach, 619 So. 2d at 448 (observing that the trial court may deny a stay "where the need for state-federal comity is outweighed by... the congestion of the federal docket").

310 See Acierno, 679 A.2d at 458 (citation omitted) (finding that the state court could provide adequate and timely relief by deciding state law issues).

311 American Home Prods. Corp., 668 A.2d at 74 (maintaining that a defendant may be entitled to a stay once he has met prerequisites unless the plaintiff demonstrates special equities); see also William Gluckin & Co., 407 F.2d at 178 (noting that barring special circumstances, priority should be given to the court in which the action was first filed); Lawyers Mut. Liab. Ins. Co. v. Nexsen Pruet Jacobs & Pollard, 435 S.E.2d 571, 573 (N.C. Ct. App. 1993) (finding that the special circumstances of the convenience for witnesses and availability of compulsory process favored retention of jurisdiction); see also Miller, supra note 2, at 521-22 (noting that decisions to abstain in state/state cases reflect considerations of comity, efficiency and a variety of discretionary matters).

justifications”314 will warrant a dismissal or a stay “due to the presence of a concurrent state proceeding for reasons of wise judicial administration.”315 Hence, in federal/state cases, federal courts ordinarily will not defer to dueling class actions pending in state court, especially if the federal suit raises claims within the federal court’s exclusive jurisdiction.

D. Auctions

In his article, Overlapping Class Actions, Professor Geoffrey Miller invites courts to experiment with litigation auctions to control dueling class actions.316 Miller and Professor Jonathan Macey advocate such auctions as a means to reduce the agency costs that inhere in “large-scale, small-claim” class action suits and shareholders’ derivative suits:317

Upon the filing of a class action complaint, the judge would conduct an initial investigation to determine whether the case would be appropriate for auction. If the judge decided to go forward, he or she would conduct an auction of the claim. Anyone, including the defendant, could bid for the litigation; if the defendant made the high bid, the case would settle.

314 Colorado River, 424 U.S. at 819; see also Moses H. Cone Mem. Hosp., 460 U.S. at 16, 25 (citation omitted) (explaining that the court’s other task is to find “clearest of justifications” under which it may surrender jurisdiction).
315 Colorado River, 424 U.S. at 818; see also Moses H. Cone Mem. Hosp., 460 U.S. at 15 (citation omitted). In determining whether a dismissal or stay in these circumstances is appropriate, the federal court should consider the inconvenience of the federal forum, the desirability of avoiding piecemeal litigation, the order in which jurisdiction was obtained by the courts, especially if the courts have asserted jurisdiction over property, the progress that has been made in the two actions, the source of governing law, and the inadequacy of the state court proceeding to protect the federal litigant’s rights. See Colorado River, 424 U.S. at 818; Moses H. Cone Mem. Hosp., 460 U.S. at 19-27; see also Travelers Indem. Co. v. Madonna, 914 F.2d 1364, 1367-68, 1372 (9th Cir. 1990) (also considering the prevention of forum-shopping and the “substantial similarity” of the two actions).
316 See Miller, supra note 2, at 543-46.
317 See Macey & Miller, The Plaintiffs’ Attorney’s Role, supra note 51, at 105-116; Macey & Miller, A Market Approach to Tort Reform, supra note 52, at 914 (noting that the auction approach is the optimal method to reduce agency costs); Jonathan R. Macey & Geoffrey P. Miller, Auctioning Class Action and Derivative Suits: A Rejoinder, 87 NW. U. L. REV. 458, 460-62 (1993) [hereinafter Macey & Miller, Auctioning Class Action Suits] (advocating judicial experimentation with auctions in large-scale, small claim cases). Other scholars also have considered the auction approach in connection with class actions. See, e.g., Coffee, Understanding the Plaintiff’s Attorney, supra note 51, at 691-93 (discussing the auction approach but ultimately concluding that such an approach is “unpromising”); Leo Herzel & Robert K. Hagan, Plaintiffs’ Attorneys’ Fees in Derivative and Class Actions, 7 LITIG. 25, 27, 60 (Winter 1981) (supporting the idea of an auction approach for class action suits).
The judge would award the claim to the highest bidder, deduct expenses, and distribute the remaining funds to the class members upon filing of proper proofs of claim. Meanwhile, the winning bidder would prosecute the case (unless the defendant submits the high bid) much like a standard class action.\textsuperscript{318}

Professors Macey and Miller posit that by reducing agency and transaction costs and ensuring vigorous prosecution of the claim by its owner, the auction approach would increase the size of settlements. Anticipating these enhanced settlement values, bidders would increase their bids, which would redound to the benefit of the class members. The auction would tend to direct the claim to the most efficient user, who again would share some of the anticipated gains with the class members in the form of a higher bid. Private enforcement of the law would also improve, as defendants would realize that they could not buy a cheap settlement with a generous fee. Defendants could also be expected to comply with the law more readily \textit{ex ante} to avoid the prospect of vigorously prosecuted private litigation.\textsuperscript{319}

Although courts have experimented with variants of the auction model,\textsuperscript{320}

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{318}] Miller, \textit{supra} note 2, at 544 (footnotes omitted); see also Macey & Miller, \textit{The Plaintiffs' Attorney's Role}, \textit{supra} note 51, at 106-08. Other scholars advocate a variation of this approach where the defendant would be prohibited from bidding at the auction. See, e.g., Thomas & Hansen, \textit{supra} note 51, at 448-49 (theorizing that the defendant's participation in the auction approach would incline rational nondefendant bidders to bid lower than they would otherwise).
\item[\textsuperscript{319}] See Macey & Miller, \textit{The Plaintiffs' Attorney’s Role}, \textit{supra} note 51, at 108-10 (discussing the advantages of the auction approach); see also Macey & Miller, \textit{A Market Approach to Tort Reform}, \textit{supra} note 52, at 913-14; Rubin, \textit{supra} note 53, at 1448-50 (discussing the benefits that the auction approach can bring to class action litigation).
\item[\textsuperscript{320}] See, e.g., Raftery v. Mercury Fin. Co., No. 97 C 624, 1997 WL 529553, at *3 (N.D. Ill. Aug. 15, 1997) (holding that counsel fees would be taken into consideration in proposals to represent the class); \textit{In re Amino Acid Lysine Antitrust Litig.}, 918 F. Supp. 1190, 1201 (N.D. Ill. 1996) (auctioning off only the right to litigate the claim, not the claim itself, to the attorney willing to take the case for the smallest percentage of the recovery); \textit{In re Wells Fargo Sec. Litig.}, 156 F.R.D. 223, 225 (N.D. Cal. 1994) (holding that class counsel for securities claim would be selected by competitive bidding and that the two firms who were previously acting as de facto class counsel could not submit a joint bid); \textit{In re Oracle Sec. Litig.}, 131 F.R.D. 688 (N.D. Cal. 1990) (holding that the selection of class counsel in securities action would be determined by competitive bidding); \textit{In re Oracle Sec. Litig.}, 132 F.R.D. 538, 539 (N.D. Cal. 1990) (accepting a bid from a law firm to act as class counsel despite the firm being the only entity to submit a valid bid). The alternative proposed in \textit{In re Amino Acid Lysine Antitrust Litig.} has been criticized by a number of scholars. See Macey & Miller, \textit{The Plaintiffs’ Attorney’s Role}, \textit{supra} note 51, at 113 (noting that “this approach would reintroduce a substantial element of agency costs, in that the winning attorney would have an incentive to settle early in order to obtain a larger profit on the fee”) (footnote omitted); Rubin, \textit{supra} note 51, at 1454-55 (acknowledging the same deficiency in this approach); see also Macey & Miller, \textit{A Market Approach to Tort Reform}, \textit{supra} note 317, at 914; Macey & Miller, \textit{Auctioning Class Action Suits}, \textit{supra} note 52, at 461. Yet
\end{enumerate}
\end{footnotesize}
even Professors Macey and Miller acknowledge that the auction approach is no "panacea for the problems attending large-scale, small-claim litigation."\(^{321}\) In fact, they identify a panoply of problems with the auction approach (many of which, they believe, can be overcome).\(^{322}\) The authors acknowledge that "the mass-tort setting poses problems for the auction approach not found in the securities-law context, including issues of proof and conflict of laws as well as federal-state jurisdictional problems."\(^{323}\) Of greatest relevance here is their concession that

The auction approach would . . . face inevitable problems of multidistrict litigation. If suit is filed in one federal district court, the trial court would not have the power to conduct a nationwide auction that would preclude the prosecution by plaintiffs’ attorneys of the same claim in other districts . . . . But even if . . . [transfer and consolidation] procedures effectively consolidate litigation as between federal district courts, it is unclear how the auction procedure would deal with cases in which class . . . claims are filed simultaneously in state as well as federal courts.\(^{324}\)

In other words, the auction approach would not work in the dueling class action context.

This conclusion appears justified. While the court investigates the appropriateness of the auction procedure and arranges to conduct an auction, the pressure to settle on lawyers representing the class in other actions would remain or even increase. Assuming an auction was held, even the sale of the claim would not itself forestall other dueling class actions. Unless the court viewed the auction proceeds as a res, a federal court would have no authority

\(^{321}\) Macey & Miller, The Plaintiffs’ Attorney’s Role, supra note 51, at 110.

\(^{322}\) See id. at 110-16 (discussing the various problems that inhere in the auction approach). Other scholars have also recognized these problems. See Coffee, Understanding the Plaintiff’s Attorney, supra note 51, 691-93 (concluding that the “auction approach seems unpromising” in part because it would eliminate the incentive for attorneys to detect and investigate legal violations in the first instance); Coffee, The Unfaithful Champion, supra note 51, at 77-79 (discussing additional problems that inhere in the auction process); Rubin, supra note 53, at 1450-55 (discussing problems and limitations associated with auction approach); Thomas & Hansen, supra note 51, at 436, 446-53 (agreeing that the problems Macey and Miller identify can be overcome, but finding the costs of an auction system to be much greater than Macey and Miller recognize).

\(^{323}\) Miller, supra note 2, at 545; see also Macey & Miller, A Market Approach to Tort Reform, supra note 52, at 915-17.

\(^{324}\) Macey & Miller, The Plaintiffs’ Attorney’s Role, supra note 51, at 115 (footnote omitted).
under the “in aid of jurisdiction” exception\(^{325}\) to enjoin dueling class actions pending in state courts. Likewise, it is unlikely that the relitigation exception\(^{326}\) would be available as the court would not have entered a final judgment entitled to preclusive effect or full faith and credit until after litigation or settlement of the underlying claim by its owner. Thus, while the auction procedure may hold promise in reducing agency costs in single class action suit, it does not appear to hold the answer to the dueling class actions problem.

Taken together, then, the tools currently available to judges are inadequate to redress the problems posed by dueling class actions. Having identified the limits of these existing tools, one may now begin to consider the legislative changes necessary to curb the problems.

V. PROPOSALS FOR CHANGE

A number of relatively modest changes in the law would ameliorate many of the problems posed by dueling class actions without effecting a dramatic change in the relationship between state and federal courts or their respective workloads. These “quick fixes,” however, would not eliminate all of the problems. If all simultaneous dueling class actions could be consolidated into a single action, virtually all of the problems described in Part II could be avoided, but such a dramatic legislative solution would create a host of problems of its own. Let us begin by considering some relatively modest recommendations.

A. The “Quick Fixes”

1. Registry for All Class Actions

Many of the problems caused by dueling class actions could be eliminated or relieved if the courts entertaining the class actions were aware that dueling class actions were pending and if the courts communicated with other courts entertaining such suits. Such awareness and communication could be fostered by the development and maintenance of a central registry for all class actions. The Uniform Child Custody Jurisdiction Act (“UCCJA”) provides a helpful analogue.\(^{327}\)

The UCCJA, and the more recently approved Uniform Child Custody

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\(^{326}\) See id.

Jurisdiction and Enforcement Act ("UCCJEA"),\textsuperscript{328} were designed to avoid jurisdictional competition and to foster cooperation among the courts of the several states concerning child custody.\textsuperscript{329} To this end, the UCCJA requires the clerks of the state courts to maintain a registry of certified copies of custody decrees of other states, as well as communications regarding the pendency of custody proceedings in other states.\textsuperscript{330} The UCCJEA further requires the parties to custody litigation to provide to the court, in the form of a pleading or affidavit, information regarding other proceedings concerning the child "that could affect the current proceeding . . . ."\textsuperscript{331} Numerous provisions in the two statutes authorize courts entertaining custody proceedings to communicate with courts in other states, to assist such courts in obtaining evidence and to seek the assistance of courts in other states.\textsuperscript{332} The goal of all of these provisions (as well as the jurisdictional provisions in the statutes) is to ensure that the courts of only one state have responsibility for the custody of any child.\textsuperscript{333}

In the child custody context, where a small number of contestants seek custody of any given child, the creation of fifty state registries coupled with affirmative disclosure obligations, ensures that all courts will learn of other actions involving the same child. In class actions, on the other hand, class members are very numerous. More than one class action could be filed on behalf of the same class without the named representatives or their lawyers being aware of the other suits. Thus, multiple registries in the several states, coupled with a federal registry, likely would not ensure notice to the courts.

Instead, Congress should enact a statute to establish a single registry to be maintained by the Clerk of the Judicial Panel on Multidistrict Litigation.\textsuperscript{334}

\textsuperscript{328} The UCCJEA, which revises the law on child custody jurisdiction, was adopted by the National Conference of Commissioners on Uniform State Laws in 1997. See generally UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT, 9-1A U.L.A. 257 (Supp. 1999) [hereinafter UCCJEA].

\textsuperscript{329} See UCCJA § 1, 9-1A U.L.A. at 271; UCCJEA § 101 commentary, 9-1A U.L.A. at 261-62.

\textsuperscript{330} See UCCJA § 16, 9-1A U.L.A. at 625-26.

\textsuperscript{331} UCCJEA § 209(a)(2), 9-1A U.L.A. at 281-82. The UCCJA imposes similar duties. See UCCJA § 9(c), 9-1A U.L.A. at 544-45 (requiring the parties to inform the court of any custody proceedings concerning the child in any other state).


\textsuperscript{333} See Petition of Edilson, 637 P.2d 362, 365 n.3 (Colo. 1981) (stating that the basic policy of the UCCJA is that only one state should have responsibility for the custody of a child); Hegler v. Hegler, 383 So. 2d 1134, 1136 (Fla. App. 1980); see also UCCJEA prefatory note, 9-1A U.L.A. at 238-39.

\textsuperscript{334} See 28 U.S.C. § 1407 (1994) (establishing the "judicial panel on multidistrict litigation" and authorizing this panel to transfer civil actions that involve common questions of fact to a common district for consolidation of pretrial proceedings). Rule 1 of the Rules of Procedure of the Panel defines the "Clerk of the Panel" as "the official appointed by the
Congress should require that all counsel commencing plaintiff class actions in any court within the United States provide to the Clerk of the Panel:

(a) a copy of any complaint containing class action allegations, with the paragraphs defining the class highlighted or otherwise noted;

(b) the names, addresses, phone numbers, fax numbers and e-mail addresses (if available) of:

(i) the representative parties commencing the action;

(ii) all counsel purporting to represent the class;

(iii) all parties named as defendants; and

(iv) all counsel representing such defendants (as soon as known); and

(c) a sworn statement averring that counsel has consulted the registry to determine if another class action on behalf of the same (or an overlapping) class, or against the same defendant, has been commenced, and that:

(i) no other such class action has been commenced, or

(ii) if another such class action has been commenced, that the complaint in the class action to be registered:

a. alleges the status of all such other class actions (whether pending, dismissed, resolved, or otherwise); and

b. verifies that the benefits to the class to be gained by prosecution of the action being registered outweigh the problems likely to arise as a result of the pendency of dueling class actions,\(^{335}\) with such paragraphs highlighted or otherwise noted.

In making this verification, class counsel should consider (a) the extent to which the classes in the dueling actions overlap, (b) the similarity of the claims raised and the relief sought, (c) whether the court entertaining the other class action would have subject matter jurisdiction over all of the claims asserted, (d) the potential for consolidation of the dueling class actions, (e) the availability of an injunction to bar prosecution of the other dueling class action, (f) the respective qualifications of the class representatives and their counsel in

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Panel to Act as Clerk of the Panel and shall include those deputized by the Clerk of the Panel to perform or assist in the performance of the duties of the Clerk of the Panel.” R. PRO. J.P.M.L. 1.

\(^{335}\) This section of the registry proposal imposes a substantive verification requirement, which is designed to dovetail with the change in the existing certification standards of Rule 23 proposed in Part V.A.2.a.
the dueling class actions, and (g) the quality of the representation provided to
date by class counsel in the dueling class action.\footnote{336}

The legislation should further require counsel to notify the clerk of any
significant changes in the status of a registered class action, including the filing
of a motion for class certification, the resolution of such a motion, preliminary
or final approval of a proposed settlement in the action, dismissal or entry of
summary or final judgment. It should also require counsel to consult the
registry immediately before moving for class certification and to file with the
court in which the motion is made a sworn statement averring that no other
class action on behalf of the same (or an overlapping) class, or against the
same defendant, has been commenced. If such other class action has been
commenced, counsel’s sworn statement should explain why the benefits to the
class to be gained by prosecution of the action outweigh the problems expected
to arise as a result of the pendency of dueling class actions.

The legislation should also authorize courts entertaining class actions to
strike class action allegations, remove class counsel from an action or hold
class counsel in contempt if, after affording class counsel notice and an
opportunity to be heard, the court finds that class counsel has failed to comply
with these registry provisions. Finally, the legislation should direct the clerk of
the Panel to maintain the registry. The clerk should make available all
information regarding registered actions that counsel would need to comply
with the legislation and make available to courts any registered information or
pleadings requested. Any and all communications between courts facilitated
by the registry should be conducted on the record.

The registry would serve at least two purposes. First, it would inform
prospective class counsel of the existence of other actions already brought on
behalf of the same class. It would also require class counsel to notify the court
(in the class action complaint) of the dueling class actions and explain the need
for another class action on behalf of the same class. At the very least, this
legislation should lead some lawyers, who would have been unaware of
duplicative litigation, to decline to file a dueling class action, thereby
minimizing the likelihood of this phenomenon.

Second, the registry would ensure that courts receive notice regarding
dueling class actions in the complaint and upon filing of a motion for class
certification. Coupled with the next “quick fix” (which would bar certification
of dueling class actions unless the court concluded that the benefits would
outweigh the anticipated problems),\footnote{337} the registry should substantially reduce
the number of dueling class actions that are filed or certified. Even if the
number of dueling class actions remains unaffected, however, notice regarding
dueling class actions should enable courts to remedy or avoid many of the
problems that currently plague dueling class actions.

\footnote{336}{These are the same factors that courts deciding whether or not to certify a dueling
class action will apply under the proposal made in Part V.A.2.a.}

\footnote{337}{See infra Part V.A.2.a.}
For instance, early notice might prompt a court to transfer a suit to the district or county where the first suit is pending for consolidated proceedings.\textsuperscript{338} A court might also choose to stay the proceeding before it in deference to the other suit, or, in certain cases (and if other modest legislative changes are made),\textsuperscript{339} to enjoin the dueling action. Even if the court took no such action, awareness of the other suit should prompt it to scrutinize the notice provided to the class more carefully to ensure that class members are not confused by, and are fully informed of, the pendency of the dueling class actions. Thus, the registry should help resolve a number of the problems posed by dueling class actions.\textsuperscript{340}

2. Amendment of Rule 23 and State Class Action Rules

a. \textit{Rules to Limit Certification of Dueling Class Actions}

Rule 23(a)\textsuperscript{341} and the state rules of civil procedure should be amended to bar the certification of a class action if a certified dueling class action is pending, unless a court finds that the benefits to the class to be gained by prosecution of the action outweigh the problems expected to arise from the pendency of dueling class actions. In making this finding, the court should consider the same factors that counsel would take into account in making the verification required in Part V.A.1.\textsuperscript{342}

If courts decline to certify dueling class actions because the benefits fail to outweigh the potential problems, the number of dueling class actions would be reduced and the resulting problems would be eliminated. This modification would survive a constitutional challenge, as would-be representatives could still put forth their individual claims even if class certification were denied, and the absent class members' potential claims would remain unaffected.\textsuperscript{343}

\textsuperscript{338} This option would exist if the dueling class action were pending within the same judicial system.

\textsuperscript{339} For a list of these legislative changes, see infra Part V.A.3.

\textsuperscript{340} The registry proposal is not a panacea, however, for settlement class actions generally. Defendants can still hold “reverse auctions” before a single class action complaint is filed. The registry proposal could be modified to require prospective class counsel to register pre-complaint negotiations with a defendant, but such a requirement would be much harder to enforce and, by increasing the number of filings, could make administration of the registry more burdensome.

\textsuperscript{341} \textit{Fed. R. Civ. P. (23)(a) (providing “Prerequisites to a Class Action”).}

\textsuperscript{342} In addition the court should consider the availability of an injunction to bar prosecution of the dueling class action.

\textsuperscript{343} Even if Rule 23 and the state certification rules are not amended as proposed, courts presented with certification motions should scrutinize them carefully and decline to certify dueling class actions where the benefits are not apparent. In other words, if the registry proposal is adopted and courts learn about the pendency of dueling class actions, they may be able to reduce the number of dueling class actions by declining to certify ones that do would not add any benefit, whether or not the certification standards are amended formally.
Enactment of this rule would likely prompt a race to the courthouse door (or at least a race to class certification). Courts can ensure that the class is represented by the most effective counsel (rather than the quickest) by scrutinizing class certifications motions more carefully and rigorously applying the certification requirements, especially the adequacy of representation requirement.\(^{344}\) The appointment of a class advocate, discussed below, will further deter unscrupulous or incompetent lawyers from seeking to represent the class.

b. Rules to Require Appointment of a Class Advocate

Rule 23 and the state certification rules should be further amended to require class counsel and the defendant, upon the presentation of a settlement to the court for approval, to post a bond to cover the costs of a court-appointed advocate. This advocate will scrutinize the fairness and adequacy of the proposed settlement and make a report to the court. This proposal, previously advanced by Professor John Leubsdorf,\(^{345}\) would counter the informational deficiencies that result once class counsel and the defendant reach an agreement and lose any incentive to identify for the court weaknesses in the proposed settlement.\(^{346}\)

Requiring class counsel and the defendant to pay the fees of the advocate, in and of itself, should deter the presentation of grossly unfair settlements. Appointment of the advocate and provision to her of reasonable access to all relevant information should ensure that the court is better informed before ruling on the fairness of any proposed settlement.\(^{347}\) Although perhaps providing courts with the same kinds of information now furnished by objectors and class counsel in dueling class actions, the court-appointed advocate would be free from charges of self-interest, and her conclusions would be free from suspicion.

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\(^{344}\) See Fed. R.Civ. P. 23(a)(4) (requiring that the representative parties of the class will fairly and adequately protect the interests of the class).

\(^{345}\) In a statement to the Advisory Committee on Civil Rules at a public hearing on proposed amendments to Rule 23, Professor Leubsdorf advocated an amendment to require "courts to appoint a lawyer to challenge any proposed settlement in any class action in which the estimated value of the relief (including attorney fees) exceeds $1,000,000." John Leubsdorf, Statement at the Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure 9 (Nov. 22, 1996) (transcript on file with the author) [hereinafter Statement of John Leubsdorf]; see also DEBORAH R. HENSLER, ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 34 (Executive Summary) (Rand Inst. 1999) (suggesting that judges should seek assistance from "knowledgeable but disinterested parties," including neutral experts and accountants); Koniat & Cohen, supra note 56, at 1109 n.190 (supporting Leubsdorf's proposal).

\(^{346}\) See Statement of John Leubsdorf, supra note 345, at 9 (arguing that named plaintiffs and defendants unite in arguing the merits of a proposed settlement to the court).

\(^{347}\) See id. at 9 (noting that an appointed advocate should be instructed to bring to the court's attention all reasonable arguments supporting rejection of the settlement offer).
3. Amendment of the Anti-Injunction Act

If adopted, the certification standards described above should greatly reduce the number of dueling class actions. If that proposal is not adopted, however, or if it is less effective than contemplated in reducing the number of dueling class actions, Congress should authorize federal courts to enjoin dueling class actions pending in state court. Although not a panacea, the availability of an injunction against pending parallel class actions would reduce the number of dueling class actions and the attendant problems. Congress would need to craft language to amend the Anti-Injunction Act, which has been read to narrowly limit the authority of federal courts to enjoin parallel in personam actions pending in state court. Other suggestions have been made to expand the authority of federal courts to enjoin concurrent state actions. For present purposes, however, the Act need only be amended to authorize federal courts entertaining certified class actions to enjoin any other transactionally related class action that would interfere with the effective and efficient disposition of the federal class action. Such language would not authorize injunctions against individual actions by absent class members who opt out of the federal class action, but would authorize the court to bar them from suing on behalf of others.

In exercising this power, courts should use their discretion, taking into account the factors described in Part V.A.2.a. The Court should also consider how far the other class actions have progressed, and other relevant considerations. If the named representatives in the dueling class action to be enjoined are non-parties to the federal action, the court can enjoin them only if they are subject to the court’s jurisdiction. To maximize the utility of the anti-suit injunction, Congress should grant the lower federal courts authority to enjoin the parties to dueling class actions

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349 See supra Part IV.B.
350 See supra note 285 and sources cited therein.
351 This recommendation borrows the “transactionally related” language from the from the ALI COMPLEX LITIGATION PROJECT. See generally ALI COMPLEX LITIGATION PROJECT, supra note 264, § 5.04(a) (authorizing transferee court to enjoin “transactionally related proceedings”). The remaining language comes from 17 WRIGHT ET AL., supra note 274, § 4225, at 533 (using the language “efficient disposition of a federal class action”), and Wood, supra note 281, at 320 (stating that an injunction may be appropriate when “necessary to ensure the effectiveness of a class action”).
352 See ALI COMPLEX LITIGATION PROJECT, supra note 264, § 5.04(b)(1), at 263.
353 See Sherman, supra note 101, at 934-35 (identifying the “interests of nonparties” as a factor for consideration when deciding whether to grant an antisuit injunction); see also ALI COMPLEX LITIGATION PROJECT, supra note 264, §5.04(b)(4), at 263 (identifying “whether parties to the action to be enjoined were permitted to exclude themselves from the consolidated proceeding”).
wherever they may be found within the country.\textsuperscript{354} This jurisdictional provision could be modeled on the nationwide service and injunction provision in the federal interpleader statute.\textsuperscript{355} These amendments to the Anti-Injunction Act coupled with the notice provided by the registry legislation, would give federal courts greater authority to limit the number of simultaneous dueling class actions and to deal more effectively with the class actions before them.

4. Amendment of Section 1407

Another “quick fix” would be to amend § 1407 to permit the transferee court entertaining dueling class actions to retain for trial actions that are transferred and consolidated for pretrial purposes.\textsuperscript{356} Such legislation is necessary to overcome the barrier to consolidated trials posed by the language of the current statute and the Supreme Court’s decision in \textit{Lexecon v. Milberg Weiss Bershad Hynes & Lerach}.\textsuperscript{357} Discretion to retain transferred class actions for trial is desirable for a variety of reasons. First, it fosters consistency by ensuring that related cases are handled together. Second, it preserves judicial resources by permitting consolidated trials. Third, it allows the cases to be tried before a judge who is familiar with the facts, the attorneys and the procedural history.\textsuperscript{358} The arguments against consolidated trials of individual claims are

\textsuperscript{354} Cf. ALI COMPLEX LITIGATION PROJECT, \textit{supra} note 264, § 5.04 cmt. b, n.7, at 268-69 (recognizing that authorizing a transferee court the power to issue a binding order on persons not parties to the litigation would greatly expand jurisdictional power); id. § 3.08, at 147 (providing that a transferee court may exercise jurisdiction over any parties to the full extent permitted by the Constitution) (citation omitted).


\textsuperscript{356} The House of Representatives attempted to implement this “quick fix” in September of 1999, when it passed the Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 1999, H.R. 2112, 106th Cong., § 2 (1999) (allowing a transferee judge to retain jurisdiction over certain multidistrict cases). In October of that year the Senate passed a substitute bill. See Multidistrict Jurisdiction Act of 1999, S. 1748, 106th Cong., (1999); the House rejected the amendment and agreed to a conference. 145 CONG. REC. H12,020 (daily ed. Nov. 16, 1999). The idea of amending section 1407 is widely supported by a number of scholars. See, e.g., ALI COMPLEX LITIGATION PROJECT, \textit{supra} note 264, § 3.02, at 62-70 (proposing a Complex Litigation Panel and authorizing transferee court to retain transferred cases for trial); HENSLER ET AL., \textit{supra} note 345, at 29 (suggesting that “Congress could amend the statute . . . to give the panel authority to assign multiple competing federal class actions to a single federal judge for all purposes, including trial”) (footnote omitted); Conway, \textit{supra} note 2, at 1107-08, 1108 n.45 (advocating amendment of § 1407 to provide for consolidated adjudication of multistate cases in state courts).

\textsuperscript{357} 523 U.S. 26, 39-40 (holding that a transferee court may not invoke section 1404(a) to assign a transferred case to itself for trial).

\textsuperscript{358} See Conway, \textit{supra} note 2, at 1103.
unconvincing in this context.\textsuperscript{359}

While an amendment of § 1407 to permit retention for trial of consolidated cases would help ameliorate some of the problems posed by dueling class actions in the federal/federal cases, it is a solution of quite limited utility since it does nothing to address the problems that arise in state/state and state/federal cases.\textsuperscript{360}

5. Better Notice toAbsent Class Members and Class Counsel in Dueling Class Actions

Congress should enact legislation to address specifically some of the informational deficiencies previously described in Part II.B.2. and Part II.B.3. In particular, Congress could direct courts entertaining plaintiff class actions to require that notice to the class be written in plain, easily understood language and that it include (among other things) the status of dueling class actions and complete information regarding attorneys’ fees.\textsuperscript{361} If the dueling class actions have been dismissed, the notice should explain why. If they are still pending, the notice should set forth the effects that settlement or judgment in the class action \textit{sub judice} would have in the other actions. Whenever class members have already received a notice regarding a dueling class action, the first page of the new notice should disclose, in red ink and bold typeface, that the notice should not be discarded because it provides information regarding a different suit. If the notice informs class members of a proposed settlement agreement, it should identify not only the benefits that will accrue to the class as a result of the settlement, but also the rights that class members will waive or lose in accepting the settlement.\textsuperscript{362}

In addition, before sending any type of notice to the class, class counsel should be required to consult the registry described in Part V.A.1 to determine whether any dueling class actions exist. If dueling class actions exist, counsel should be required to send a copy of the notice to class counsel and the named representatives in the dueling class actions. Given such notice, the recipients


\textsuperscript{360} If Congress does not amend § 1407 as recommended, transferee courts entertaining dueling class actions could choose to decertify all but one of them (since certification orders are conditional under Rule 23(c)(1)).

\textsuperscript{361} The proposed Class Action Fairness Act of 1999, S. 353, 106th Cong. § 2 (1999), would add a new § 1713 to Title 28 of the United States Code, which would require the inclusion of specific types of information in any written notice (“either through the mail or publication in printed media”) provided to the class (such as “the legal consequences of being a member of the class action,” the benefits and drawbacks of accepting a proposed settlement agreement, “the dollar amount of any attorney’s fee class counsel will be seeking,” and “an explanation of how any attorney’s fee will be calculated and funded”); \textit{see also} HENSLER ET AL., \textit{supra} note 345, at 35 (recommending “plain-English notices”).

\textsuperscript{362} See S. 353.
should be motivated to identify weaknesses, if any, in a proposed settlement and to object, thereby bringing such weaknesses to the court’s attention. Although the court might have reason to question the objectors’ intentions in this situation, it nevertheless would receive more information regarding the adequacy of the proposed settlement than it otherwise would (unless the court-appointed advocate proposal is adopted).

Taken together, these “quick fixes” should provide courts and class members with more complete information regarding dueling class actions, and should give courts more control over the actions before them. These steps should also reduce the number of dueling class actions, both because lawyers who consult the registry may decline to file, and because courts should refuse to certify any dueling class actions that would not substantially benefit the class. Even if the number of dueling class actions remains unchanged, however, fully informed courts, equipped with greater authority under the Anti-Injunction Act, would be able to stay litigation before them, enjoin litigation pending elsewhere or transfer for trial dueling class actions consolidated for pretrial purposes. Finally, the appointment of a class advocate should help overcome many of the informational deficiencies that currently exist and facilitate better-informed judicial scrutiny of class action settlements.

B. More Dramatic Possibilities

An alternative solution for eliminating all (or virtually all) of the problems that arise in state/state and federal/state dueling class actions (identified in Part II) would be to enact legislation that permits the consolidation of all transactionally related class actions before a single court. Such consolidation would conserve judicial and other resources, alleviate the pressure that existing dueling class actions place on class counsel, remedy many of the informational deficiencies and avoid a myriad of preclusion problems. But proposals to effect such consolidation, especially in the federal/state cases, are controversial and hence would be difficult to implement. Let us begin with the somewhat less formidable state/state cases.

363 See supra notes 98-100 and accompanying text.

364 See Conway, supra note 2, at 1101 (“The problems resulting from competing class actions may best be solved by consolidation of the actions in one court.”); see also ALI COMPLEX LITIGATION PROJECT, supra note 264, chs. 3-5, at 21-303 (examining and discussing federal intrasystem consolidation, consolidation of complex litigation in state courts, and federal-state intersystem consolidation); MANUAL FOR COMPLEX LITIGATION § 30.3, at 235 (3d ed. 1995) (noting that “[c]onsolidation for trial of class and individual actions may be useful”).

365 If class counsel and the defendant in the consolidated class action reached a settlement early on in the litigation, some of the informational deficiencies described in Part II.B would still exist. See supra note 249 and accompanying text. (“The risk [that class counsel would withhold relevant information from the class] would not be eliminated[,] as the class counsel’s incentive in gaining judicial approval of the settlement would be greater than her interest in affording the class complete information.”).
1. Consolidation of State/State Dueling Class Actions

Currently, no vehicle exists for transferring a case from the court of one state to the court of another state, making consolidation of state/state dueling class actions pending in different states impossible. Two legislative solutions are possible, however: (1) enactment by the states of uniform legislation authorizing interstate transfers and consolidation or (2) adoption of an interstate compact that authorizes interstate transfers and consolidation.\(^{366}\) Regardless of the vehicle chosen, the entity charged with the interstate transfer decision should proceed cautiously, so as to preserve interstate federalism and protect litigants' due process rights\(^{367}\) and expectations regarding where their suits will be heard.\(^{368}\)

Both the National Commissioners on Uniform State Laws and the Reporter to the ALI Complex Litigation Project have proposed model legislation that permits interstate transfers and consolidation. Although neither model was specifically designed to address dueling class actions, both are sufficiently broad enough to permit the transfer and consolidation of state/state dueling class actions.

The Uniform Transfer ofLitigation Act, approved by the National Commissioners on Uniform State Laws in 1991, would authorize state courts to transfer an action or part of an action to a court of another jurisdiction as long as the transferee court consented.\(^{369}\) Under the Act, a state court could transfer an action "to serve the fair, efficient, and effective administration of justice and the convenience of the parties and witnesses."\(^{370}\) This broad

\(^{366}\) See ALI COMPLEX LITIGATION PROJECT, supra note 264, § 4.02, at 201 (recommending "formulation of an Interstate Complex Litigation Compact or a Uniform Complex Litigation Act").

\(^{367}\) Due process problems would arise if an action were transferred to a state court that lacked personal jurisdiction over some or all of the parties. See generally ALI COMPLEX LITIGATION PROJECT, supra note 264, at app.B, § 8, at 455 (REPORTER'S STUDY: A MODEL SYSTEM FOR STATE-TO-STATE TRANSFER AND CONSOLIDATION) (hereinafter REPORTER'S STUDY) (recommending that the transferee court "exercise jurisdiction over any parties to the consolidated action . . . to full extent of the power permitted by the United States Constitution"). These problems are least severe in plaintiff class actions because "[t]he burdens placed by a State upon an absent class-action plaintiff are not of the same order or magnitude as those it places upon an absent defendant." Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 808 (1985).

\(^{368}\) REPORTER'S STUDY, supra note 366, § 8 cmt. e, at 541-43 (discussing that "fairness [to the individual litigant] is an essential element of any due process analysis," and that "the potential unfairness that may result by placing some cases in a distant state court" could be addressed by the application of a "Fifth Amendment jurisdiction standard to state-to-state transfer").

\(^{369}\) UNIF. TRANSFER OF LITIG. ACT §§ 101-103, 204, 14 U.L.A. 191-94, 201 (Supp. 1999) ("A . . . court . . . may transfer all or part of the action to a court . . . which consents to the transfer and can exercise jurisdiction over the matters transferred.").

\(^{370}\) Id. § 104, 14 U.L.A. at 194.
language would permit a state court to transfer a dueling class action to another state in which a transactionally related class action was pending. If the legislation were enacted in all fifty states, this uniform law would permit the transfer and consolidation of simultaneous state/state class actions that would greatly minimize the problems described in Part II above. Given that no state has yet adopted the Act,\footnote{See supra note 11 and accompanying text.} it will need a substantial "push" if it is to be enacted.

The Reporter’s Study to the ALI Complex Litigation Project advocates a markedly different approach to uniform transfer legislation.\footnote{REPORTER'S STUDY, supra note 366, intro. note, cmt. b, at 457-59.} It contemplates creation by the states of an Interstate Complex Litigation Panel ("ICL Panel"), composed of judges from participating states, who would determine whether to transfer and consolidate actions pending in multiple states.\footnote{The proposal contemplates a Panel, consisting of one judge from each state that enacts the uniform legislation. The Panel members would appoint a Chief Judge, who would appoint subpanels of three members. Id. § 2, at 473-74.} The ICL Panel would have authority to order transfer and consolidation if the "common questions of fact predominate, and... transfer and consolidation w[ould] promote substantially the just, efficient, and fair conduct of the actions and is superior to their separate adjudication."\footnote{Id. § 1, at 459. A suggestion to transfer could be brought to the Panel: "(1) on motion of any party to any potentially affected action; (2) at the suggestion of the state court in which any such action is assigned; or (3) on the Panel’s own initiative." Id. § 5, at 496.} Like the standard in the Uniform Act, this standard is sufficiently elastic to permit transfer and consolidation of most dueling class actions.

The Reporter’s proposed ICL Panel offers a number of advantages over the consensual model proposed in the Uniform Transfer of Litigation Act. For example, the ICL Panel would be able to act more expeditiously than individual judges in the transferor and transferee courts acting independently.\footnote{See id. intro. note, cmnts. a & b, at 455-59; id. § 2, cmt. a, at 474-75; id. § 2, cmt. b, at 476-79.} Unlike the Uniform Transfer of Litigation Act, which would require consent of both state courts before the transfer could be made, the Reporter’s model would permit the ICL Panel to transfer actions without seeking such consent. Once a state adopted the uniform legislation creating the ICL Panel, it would be bound by the decisions made by the ICL Panel, whether or not one of its judges served on the subpanel that ordered the transfer.\footnote{Id. intro. note, cmt. b, at 457-59 ("Consent would be given at the time of adopt[ion]... and would not be required again at the time of consolidation.... All member states would be represented on the Panel, but the various subpanels making individual consolidation decisions would not necessarily include a representative from each of the involved states.").} Such a mandatory system would ensure that litigation was consolidated
whenever efficiency would be achieved, notwithstanding "the pressures to favor local litigants and lawyers, or to avoid the burden of massive consolidated proceedings." Furthermore, the ICL Panel would be able to decide, in one sitting, whether or not to transfer numerous cases pending in different states to a single transferee court, whereas under the Uniform Transfer of Litigation Act, each transferor court would independently have to decide whether or not to order the transfer. Finally, the ICL Panel would develop expertise over time, which would inform its transfer and consolidation decisions.

Of course, states might prefer to retain greater control over the transfer decisions to be made in individual cases. If so, they would be better off enacting the Uniform Transfer of Litigation Act, which would enable them to decide whether to transfer or accept transfers on a case-by-case basis.

As an alternative to uniform legislation altogether, the states could adopt an interstate compact codifying either of the two interstate transfer vehicles described above. Adoption of a compact would have two obvious advantages over uniform legislation. First, it would eliminate the problems that arise when states enacting uniform laws employ language that differs from that proposed by the Commissioners. When states join a compact, they adhere to a single agreement, thereby eliminating inconsistencies in language or policy. Second, while a uniform act can be rescinded by any state at will, a compact is binding unless formally renounced under its terms. Thus, greater uniformity and commitment would be achieved through a compact.

Disadvantages exist as well. Most obvious, adoption of an interstate compact is a cumbersome process, requiring enactment by every state of

377 Id.
378 See id.
379 A hybrid of the two proposed uniform laws would require consent of the Panel, the transferor court and the transferee court. Such an approach, while preserving state autonomy, would be less efficient and less likely to result in transfers than either of the two proposed schemes. See id. intro. note, cmt. b, n.2, at 459.
380 See ALI COMPLEX LITIGATION PROJECT, supra note 264, § 4.02, at 201. For a discussion of the enactment process for an interstate compact, see Kevin J. Heron, The Interstate Compact in Transition: From Cooperative State Action to Congressionally Coerced Agreements, 60 ST. JOHN'S L. REV. 1, 9-17 (1985) ("While the procedures for creating interstate compacts may vary ... all interstate compact scenarios include negotiation, preparation of the compact document, and ratification by potential party states.").
381 See ALI COMPLEX LITIGATION PROJECT, supra note 264, § 4.02 cmt. b, at 203-07 (noting that such problems are avoided and greater uniformity is assured when states join a compact, because "the compact is created through the enactment of identical, or nearly identical, legislation by participating states"); cf. Rhonda Wasserman, Divorce and Domicile: Time to Sever the Knot, 39 WM. & MARY L. REV. 1, 59-62 (1997) (describing problems that arise when states enact slightly different versions of the same uniform law).
382 See ALI COMPLEX LITIGATION PROJECT, supra note 264, § 4.02 cmt. b, at 203-07.
identical legislation and approval by the Congress (in some cases) and the President.\textsuperscript{383} Furthermore, states may prefer the flexibility of uniform legislation over a compact.\textsuperscript{384}

The differences between the consensual model and the ICL Panel model or between uniform legislation and interstate compact are significant and deserve attention, but are not so important that they should paralyze the states from acting altogether. The problems that plague dueling state/state class actions could be remedied by any of these models. Either a concerted effort should be made to publicize the need for a general interstate transfer and consolidation vehicle, or a scaled-down version should be proposed to permit interstate transfer of dueling class actions only, rather than complex litigation generally. Perhaps legislation with a narrower focus—with less risk of inundating transferee courts with mountains of litigation—would more likely be adopted. The proposals described above could be easily tailored to address dueling class actions to the exclusion of other complex litigation.

2. Consolidation of Federal/State Dueling Class Actions

Crafting a transfer and consolidation vehicle for federal/state cases is even more complicated because of daunting federalism concerns and complex jurisdictional hurdles. A preliminary issue that must be resolved is whether to seek consolidation in state or federal court. Both options will be explored.

a. Consolidation in State Court

Congress should adopt legislation (by amending 28 U.S.C. § 1407 or otherwise) permitting the transfer of a class action pending in federal court to a state court in which a transactionally related class action is pending. Such legislation should vest the decision to transfer in the Judicial Panel on Multidistrict Litigation.\textsuperscript{385} Federal-to-state transfers should be limited to cases in which: (1) a substantial part of the events or omissions giving rise to the dueling class actions occurred in a single state,\textsuperscript{386} (2) at least one class action is

\textsuperscript{383} See Heron, supra note 380, at 9-17 (outlining the enactment process for interstate compacts). Congressional consent is required under the Constitution, U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . unless actually invaded, or in such imminent Danger as will not admit of delay."). if the compact affects "the political power or influence" of particular states or "encroach[es] . . . upon the full and free exercise of federal authority." Virginia v. Tennessee, 148 U.S. 503, 520 (1893); see also ALI COMPLEX LITIGATION PROJECT, supra note 264, § 4.02 cmt. b & n.4, at 203-07 ("Congressional consent is required only if the compact encroaches on federal supremacy.").

\textsuperscript{384} See ALI COMPLEX LITIGATION PROJECT, supra note 264, § 4.02 cmt. b, at 203-07.

\textsuperscript{385} See id. §§ 3.02, 4.01, at 62, 177-78 (recommending that federal-to-state transfer decisions be made by a Complex Litigation panel, which would replace the existing Panel); Conway, supra note 3, at 1100 (suggesting that "Congress confer upon the Panel discretionary authority to direct litigation to and from state courts").

\textsuperscript{386} Cf. 28 U.S.C. § 1391(a) (1994) (permitting venue in "a judicial district in which a
pending in the courts of that state, and (3) the law of that state likely would govern.\textsuperscript{387} To minimize federalism concerns and potential Tenth Amendment problems, the legislation should require the Panel to obtain the consent of the transferee court.\textsuperscript{388}

Assuming that consolidation of dueling federal/state class actions is desirable, there are at least three reasons why these cases should be consolidated in state court rather than federal court. First, from an institutional competency perspective, since state law will likely apply, it is desirable to have a state court sitting in that state interpret and apply its own law.\textsuperscript{389} Second, from a federalism perspective, it is respectful of state autonomy to have state courts handle cases arising within their jurisdiction and governed by their law, especially when at least one plaintiff purporting to sue on behalf of the class has filed suit in that state’s court. Finally, from a practical perspective, with federal dockets as crowded as they are,\textsuperscript{390} it makes sense to shift this subset of dueling class actions to the state courts for consolidation.\textsuperscript{391} The availability of a state transferee court will be most helpful if some or all of the dueling class

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\textsuperscript{387} Mr. Conway argues “that a necessary factor should be a likelihood that, after transfer, the substantive law of the transferee court will govern much of the litigation.” Conway, supra note 2, at 1100; see also id. at 1111-12. Actions stating claims that arise under federal law and, \textit{a fortiori}, claims within the federal courts’ exclusive jurisdiction, would not be subject to transfer to state court. As an example of an appropriate case for transfer to state court, consider the \textit{Hyatt Skywalk} litigation, in which all plaintiffs were injured when two skywalks collapsed in a Kansas City, Missouri hotel. The trial court that certified the class action presumed that Missouri law would govern. \textit{See In re Federal Skywalk Cases}, 93 F.R.D. 415, 424-25 (W.D. Mo. 1982), \textit{vacated}, 680 F.2d 1175, 1175 (8th Cir. 1982), cert. \textit{denied sub nom. Stover v. Rau}, 459 U.S. 988, 988 (1982); see also ALI COMPLEX LITIGATION PROJECT, supra note 264, § 4.01(a)(1), at 177.

\textsuperscript{388} The ALI Complex Litigation Project would require the Panel to obtain consent from the “appropriate judicial authority in the state in which the designated transferee court is located . . . .” ALI COMPLEX LITIGATION PROJECT, supra note 264, § 4.01(a), at 178. For a discussion of the Tenth Amendment concerns, see \textit{infra} notes 398-400 and accompanying text.


\textsuperscript{391} Of course, the state courts also are overburdened. Thus, before ordering the transfer, the Panel should consider the state transferee court’s caseload, its ability to handle the consolidated class actions, and the efficiency gains to be achieved through consolidation, see Conway, supra note 3, at 1110, and must obtain the consent of the transferee court.
actions pending in state court are non-removable. In such federal/state dueling class actions, if consolidation is to occur at all, the federal cases must be transferred to state court.

Although Congress could vest authority to make federal-to-state transfers in the individual federal transferor courts, it would be preferable to have the Panel handle such decisions (for the same reasons that the Reporter advocated an ICL Panel to make state/state transfer decisions). First, unlike the Panel, the transferor court might be subject to pressure from the parties or counsel involved or from docket pressure, to make transfer decisions that might not be optimal from a more global perspective. Second, with time, the Panel would develop experience and expertise in determining which dueling federal/state class actions would be handled most effectively in state court, and which state courts scrutinize class actions settlements most carefully. Third, the Panel could consider in a single-sitting motions to transfer numerous dueling federal class actions arising from the same transaction, thereby ensuring that all the actions were treated alike. On the other hand, if the transfer and consolidation decisions were vested in the individual transferor courts, one federal class action might be transferred for consolidation and another might not, thereby frustrating efforts to consolidate all of the dueling class actions arising out of the same transaction and inviting the problems described in Part II.

Both the Constitution and the federal diversity statute permit actions between citizens of different states to be filed in federal court, but the Constitution does not mandate the availability of diversity jurisdiction. Thus, because Congress could abolish the lower federal courts or eliminate diversity jurisdiction altogether, it may enact legislation authorizing the transfer to

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392 Since these non-removable class actions could not be consolidated with other dueling class actions in federal court, the only option for consolidation of all federal/state class actions would be in state court.

393 Individual federal district courts handle transfer decisions under the existing transfer statutes 28 U.S.C. §§ 1404 and 1406 (1994).

394 See supra notes 373-78 and accompanying text (maintaining that an ICL panel would be able to act more expeditiously and efficiently).

395 See U.S. CONST. art. III, § 2 (“The judicial Power shall extend to all Cases ... between Citizens of different States ...”); 28 U.S.C. § 1332(a) (1994) (“The district courts shall have original jurisdiction of all civil actions ... between citizens of different States ...”).

396 See Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850) (“[H]aving a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies.”); ALI COMPLEX LITIGATION PROJECT, supra note 264, § 4.01 cmt. c, at 183; John Harrison, The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III, 64 U. Chi. L. Rev. 203, 209 (1997) (stating that under “the traditional understanding ... Congress may give [the inferior federal courts] all the jurisdiction the Constitution permits, or none at all, or anything in between, as far as Article III [(of the U.S. Constitution)] is concerned”). For a thorough discussion of the fascinating question of the limits on Congressional control of federal jurisdiction, see ERWIN CHEMERINSKY, FEDERAL
state court of class actions filed in federal court on the basis of diversity. 397

The Tenth Amendment to the Constitution398 is not an impediment, either. Since the legislation would require the Panel to obtain the state transferee court’s consent, it would not compel the states “to enact and enforce a federal regulatory program.”399 Even if such consent were not required, however, the proposal would withstand scrutiny because it does nothing more than require state courts to entertain actions arising under state law; it does not require state executive officers to administer federal law.400

b. Consolidation in Federal Court

Since the federal-to-state transfer vehicle described above would permit transfer to state court of only a subset of all dueling federal/state class actions, another vehicle is necessary to permit consolidation of the remaining actions. The federal/state dueling class actions that are not subject to transfer and consolidation in state court under the proposal described in Part V.B.2.a. should be consolidated before a single federal district court. To accomplish this, Congress should amend the removal and multidistrict transfer statutes to permit consolidation of dueling federal/state class actions in federal court.401

JURISDICTION, ch. 3 (3d ed. 1999).

397 See ALI COMPLEX LITIGATION PROJECT, supra note 264, § 4.01 cmt. c n.4, at 184.

398 “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.


400 See Printz v. United States, 521 U.S. 898, 928-35 (1997); New York, 505 U.S. at 178-79 (“No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate.”); FERC, 456 U.S. at 759-71 & n.24 (examining “the extent to which state sovereignty shields the States from generally applicable federal regulations,” and finding that a federal public utilities pricing act did “not involve the compelled exercise of [the State’s] sovereign powers”); Testa, 330 U.S. at 389-94 (1947); cf. Alden v. Maine, 527 U.S. 706 (1999).

401 Numerous proposals have been made to permit the consolidation of complex cases or class actions in federal court. See, e.g., Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 1999, H.R. 2112, 106th Cong. § 3 (1999) (proposing the addition of § 1369 to Chapter 85 of title 28, United States Code, to grant diversity jurisdiction over actions arising from a single incident that involve minimal diversity between adverse parties and damages in excess of $75,000 per class member); ALI COMPLEX LITIGATION PROJECT, supra note 264, §§ 5.01, 5.03, at 220-22, 256-57 (authorizing removal by the Complex Litigation Panel of actions pending in state court if they arise from the same transaction or occurrence as an action pending in federal court and share a common question of fact with that action, and extending supplemental jurisdiction over claims that arise from the same
The Panel should be vested with authority to remove to federal court class actions pending in state court if: (1) an action filed on behalf of a class in state court is transactionally related to an action filed on behalf of a class pending in federal court, and (2)(a) minimal diversity exists between the defendant and at least one class member and the amount in controversy (gauged on the basis of the defendant’s liability to the class) exceeds the sum or value of $500,000, exclusive of interest and costs, or (2)(b) the state class action complaint contains a claim arising under federal law. The Panel should not remove state class actions under this provision if consolidation of dueling federal/state class actions in state court is possible under the vehicle proposed in Part V.B.2.a. Constitutional concerns regarding subject matter jurisdiction would be avoided by requiring that state class actions, to be removable, either contain a claim arising under federal law or involve minimal diversity. Due process concerns would be avoided by providing an opportunity for class members to opt out.

Any party to the class action (including absent class members) or the state court on its own motion could recommend an action to the Panel for removal, or the Panel could act on its own motion. While the general removal statute vests the removal decision in the defendant (at least in the first instance), the

402 This provision is substantially more expansive than the standard removal provision, 28 U.S.C. § 1441 (1994), which, when coupled with the diversity statute, 28 U.S.C. § 1332 (1994), and the Supreme Court’s decision in Zahn v. International Paper Co., 414 U.S. 291, 291 (1973), permits removal of class actions filed on the basis of diversity only if complete diversity exists between the named representatives and the defendants and if each class member individually satisfies the $75,000 jurisdictional amount requirement.

403 The Supreme Court has upheld the constitutionality of the federal interpleader statute, 28 U.S.C. § 1335 (1994), which grants the federal district courts original jurisdiction of civil actions of interpleader if the property has a value of at least $500 and two or more adverse claimants to the property are of diverse citizenship, regardless of whether some claimants are co-citizens. See State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 530-31 (1967) (approving the “minimal diversity” requirement for interpleader). Cf. Richard A. Epstein, The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal, 10 J.L. & Com. 1, 33-49 (1990) (examining and critiquing the constitutionality of the jurisdictional provisions of an earlier draft of the ALI Complex Litigation Project).


proposed statute would vest the removal decision in the Panel.\textsuperscript{406} Thus, removal of a state dueling class action under this new provision would not be of right, but rather in the Panel’s discretion. In exercising that discretion, the Panel should consider, among other factors, the interests of the class members in keeping the litigation in state court, the relative convenience to the parties and witnesses of the state court and the prospective federal transferee district.\textsuperscript{407} To avoid unnecessary disruption of state court litigation, the state action would be stayed only if the Panel ordered the removal.

The Panel should order removal only if it intends to transfer the state class action to the federal judicial district in which the dueling federal class action is pending for consolidation. Section 1407 should be amended to authorize the transfer and consolidation of class actions removed under this provision with the dueling class action pending in the federal transferee district. If the claims asserted in dueling class actions are governed by the laws of different states, the Panel should instruct the transferee court to consider the appropriateness of subclasses under Rule 23(c)(4).\textsuperscript{408}

Taken together, the interjurisdictional transfer mechanisms described in Part V.B. would permit consolidation of most state/state and federal/state dueling class actions. Although these proposals are controversial, they deserve serious attention as they afford the opportunity to ameliorate the problems that plague dueling class actions.

CONCLUSION

Whenever two or more class actions are filed on behalf of the same class, seeking the same relief for the same wrong, numerous problems result: (1) scarce resources are wasted, (2) counsel are subject to intense pressure to settle, (3) class counsel, class members and the court all are compelled to make important decisions without complete information, and (4) courts are required to grapple with complex and difficult preclusion questions. These problems seriously undermine the utility of the class action vehicle.

Numerous options exist to eliminate or greatly minimize these problems. Legislation requiring maintenance of a class action registry and modification of court rules to bar certification of marginally useful dueling class actions would reduce the number of dueling class actions. Appointment of a class advocate would provide the court with much better information regarding the adequacy of any proposed settlement. Other modest proposals would assure better information to class members and courts and minimize the likelihood or negative effects of simultaneous class actions.

\textsuperscript{406} See ALI COMPLEX LITIGATION PROJECT, supra note 264, § 5.01 cmt. a, at 222-24 ("[T]he removal question must be decided by the Complex Litigation Panel . . . ").

\textsuperscript{407} Cf. id. § 5.01(a), at 221 (listing seven factors for the Panel to consider in making its removal and consolidation decision).

\textsuperscript{408} Fed. R. Civ. P. 23(c)(4) ("When appropriate . . . a class may be divided into subclasses and each subclass treated as a class . . . ").
Consolidation of all dueling class actions is an alternative mechanism for eliminating the problems posed by dueling class actions. Congress and the state legislatures should enact the interjurisdictional transfer vehicles proposed here to permit such consolidation and to revitalize the class action as an effective tool in the administration of justice.