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THE CURIOUS COMPLICATIONS WITH BACK-END OPT-OUT RIGHTS

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ABSTRACT

In recent years, class members have been afforded delayed, or “back-end,” opportunities to opt out of a class action once the terms of the settlement are disclosed. These back-end opt-out rights may afford only limited rights to sue outside the confines of the class action. For example, opt-out plaintiffs may be permitted to seek compensatory, but not punitive damages. Does the federal court that approved the settlement have authority to enjoin back-end opt-out plaintiffs from seeking relief in state court that exceeds the limits built into the back-end opt-out right?

Three sets of curious complications may arise if the federal court seeks to enter such an injunction. First, if diversity is lacking between the opt-out plaintiff and the defendant, and the plaintiff

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sues on only state law claims, the federal court may lack subject matter jurisdiction to grant an injunction. The federal court may also lack personal jurisdiction over an opt-out plaintiff who has no contacts with the state in which the federal court sits. Second, federalism complications are likely to crop up. Both the Anti-Injunction Act and the Younger abstention doctrine limit the authority of federal courts to issue injunctions against pending state court proceedings. Finally, equitable and practical considerations may counsel against micromanagement of state court litigation by a federal judge.

The objective in identifying these complications is not to question the wisdom of back-end opt-out rights, but rather to facilitate their use. This Article suggests a variety of steps that courts and counsel can take to enforce the limits built into back-end opt-out rights without unnecessarily intruding upon the prerogatives of state court judges, exposing back-end opt-out plaintiffs to onerous litigation in fora with which they have no contacts, or rendering their preserved rights meaningless. Among other recommendations, this Article urges federal and state courts to collaborate in the enforcement of back-end opt-out rights.

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INTRODUCTION

Much ink has been spilt critiquing the class action vehicle and exploring creative means to ensure that the named representative, class counsel, the court, and even the defendant protect the interests of absent class members. Although the Federal Rules of Civil Procedure contain numerous requirements designed to achieve this objective,¹ these protections often prove inadequate or illusory. Commentators have recommended a host of reforms to bring the interests of class counsel into closer alignment with the interests of the class and to address other problems endemic to aggregate litigation. Among other things, scholars have recommended changing the method by which class counsel and counsel representing class members who opt out are compensated;² barring the simultaneous negotiation of a settlement of the merits and a fee award;³ auctioning off the class claim to the highest bidder, thereby

1. See, e.g., FED. R. CIV. P. 23(a) (requiring commonality, typicality, and adequate representation); FED. R. CIV. P. 23(c)(2)(B) (affording members of class actions certified under Rule 23(b)(3) an opportunity to opt out); FED. R. CIV. P. 23(e)(1) (requiring judicial oversight of settlement fairness); FED. R. CIV. P. 23(g)(1)(B) (obligating class counsel to “fairly and adequately represent the interests of the class”); FED. R. CIV. P. 23(g)(2)(B) (requiring the court to choose as class counsel the applicant “best able to represent the interests of the class”); see also Private Securities Litigation Reform Act of 1995, 15 U.S.C. §§ 77z-1(a)(3)(B)(i), 78u-4(a)(3)(B)(i) (2000) (requiring the court to appoint as lead plaintiff the class member “most capable of adequately representing the interests of class members”).

2. See, e.g., DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 490-93 (2000); Kevin M. Clermont & John D. Currihan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529, 598-99 (1978); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 927-31 (1987) [hereinafter Coffee, *Entrepreneurial Litigation*]; John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, LAW & CONTEMP. PROBS., Summer 1985, at 5, 46-48, 65-69 [hereinafter Coffee, *Unfaithful Champion*]; Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2127-30 (2000).

3. See, e.g., Coffee, *Unfaithful Champion*, *supra* note 2, at 71; Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1251 (1982). *But see* Evans v. Jeff D., 475 U.S. 717, 738 n.30 (1986) (“The Court is unanimous in concluding that the Fees Act should not be interpreted to prohibit all simultaneous negotiations of a defendant’s liability on the merits and his liability for his opponent’s attorney’s fees.”); Marek v. Chesny, 473 U.S. 1, 6-7 (1985) (“If defendants are not allowed to make lump-sum offers that would, if accepted, represent their total liability, they would understandably be reluctant to make settlement offers.”).

uniting ownership and control of the suit;⁴ developing a more collaborative or consultative relationship between the trial judge and class counsel;⁵ emphasizing the defendant's obligation to ensure that absent class members are adequately represented;⁶ and requiring greater judicial scrutiny of the settlement and taking other steps to ensure that the fairness hearing provides a meaningful constraint on class counsel.⁷

To ensure that absent class members can make an informed decision about whether to participate in a class action or to opt out and sue separately, scholars have advocated that class members be afforded a delayed opportunity to opt out. In particular, commentators have suggested that absent class members should have an opportunity to opt out when they learn of the details of the proposed settlement,⁸ when they hear objectors' challenges to the terms of the settlement,⁹ or when they see the judicially-crafted distribution plan and can determine how much they will actually recover.¹⁰ Expressing concern for future claimants who may not even know

4. See, e.g., 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, 105-18 (1991) [hereinafter Macey & Miller, *Plaintiffs' Attorney's Role*]; Geoffrey P. Miller, *Overlapping Class Actions*, 71 N.Y.U. L. REV. 514, 543-46 (1996); cf. Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650, 652 (2002) (identifying problems with the auction model and proposing the lead counsel model as an alternative); Randall S. Thomas & Robert G. Hansen, *Auctioning Class Action and Derivative Lawsuits: A Critical Analysis*, 87 NW. U. L. REV. 423, 424-26 (1993) (identifying the costs of an auction model).

5. See Mary Kay Kane, *Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer*, 66 TEX. L. REV. 385, 404-09 (1987) (encouraging more informal cooperation between the courts and class action lawyers).

6. See Debra Lyn Bassett, *The Defendant's Obligation to Ensure Adequate Representation in Class Actions*, 74 UMKC L. REV. 511, 521-22, 530-40 (2006).

7. See HENSLER, *supra* note 2, at 486-90, 493-97; William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435, 1475-81 (2006).

8. See, e.g., Geoffrey P. Miller, *Rethinking Certification and Notice in Opt-Out Class Actions*, 74 UMKC L. REV. 637, 646-49 (2006); George Rutherglen, *Better Late Than Never: Notice and Opt Out at the Settlement Stage of Class Actions*, 71 N.Y.U. L. REV. 258, 260, 270-71, 281, 293 (1996); Mark C. Weber, *A Consent-Based Approach to Class Action Settlement: Improving Amchem Products, Inc. v. Windsor*, 59 OHIO ST. L.J. 1155, 1158 (1998).

9. See Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. REV. 439, 490 n.109 (1996).

10. See, e.g., Coffee, *Entrepreneurial Litigation*, *supra* note 2, at 925; Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 CORNELL L. REV. 811, 836 (1995); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 967 (1995).

they have been injured until after the initial opt-out period has expired, some commentators have suggested that absent class members should have an opportunity to opt out after they learn of the existence or the extent of their injuries.¹¹

In 2003, the Supreme Court adopted a modest delayed opt-out reform by amending the Federal Rules of Civil Procedure to provide district courts with explicit authority to decline to approve a settlement “unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.”¹² Among the factors a district court may consider in exercising its discretion are “changes in the information available to class members since expiration of the first opportunity to request exclusion.”¹³ The Advisory Committee Notes acknowledge that if initial class certification and settlement of the case occur proximately in time, the court may order simultaneous notice of certification and settlement, which “avoids the cost and potential confusion of providing two notices and makes the single notice more meaningful.”¹⁴ Nevertheless, the Rule recognizes the

11. See, e.g., John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1448-53, 1465 (1995) [hereinafter Coffee, *Class Wars*]; Cramton, *supra* note 10, at 835-36; Schuck, *supra* note 10, at 967. Even advocates of back-end opt-out rights recognize that opting out is not a perfect solution. See Coffee, *Entrepreneurial Litigation*, *supra* note 2, at 930 (noting that opt-outs result in duplicative litigation and expose the client to attorney opportunism). Critics of the back-end opt-out right question its necessity and utility, while highlighting its costs. See David Rosenberg, *Adding a Second Opt-Out to Rule 23(b)(3) Class Actions: Cost Without Benefit*, 2003 U. CHI. LEGAL F. 19, 67-69.

12. FED. R. CIV. P. 23(e)(3). The Advisory Committee Notes to the 2003 amendments acknowledge that, in settlement class actions, class members will not have received an earlier opportunity to opt out. FED. R. CIV. P. 23(e)(3) advisory committee's notes. The most recent discussion draft of the American Law Institute's Principles of the Law of Aggregate Litigation would go further than Rule 23(e)(3) and provide:

In any class action in which the terms of a settlement are not revealed until after the initial period for opting out has expired, class members should ordinarily have the right to opt out after the dissemination of notice of the proposed settlement. If the court chooses not to grant a second opt-out right, it must make a written finding that compelling reasons exist for refusing to grant a second opt-out.

PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.11 (Discussion Draft No. 2, 2007). The Civil Rules Advisory Committee considered and rejected a presumptively available second opportunity to opt out. DAVID F. LEVI, ADVISORY COMM. ON THE FED. RULES OF CIVIL PROC., REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 11-13 (2001), <http://www.uscourts.gov/rules/comment2002/8-01CV.pdf>.

13. FED. R. CIV. P. 23(e)(3) advisory committee's notes.

14. *Id.*

potential need for a second opportunity to opt out if the initial opt-out right was afforded before the terms of the settlement were known.¹⁵ The Advisory Committee Notes implicitly encourage the parties to include a delayed opt-out right in the settlement agreement itself: “An agreement by the parties themselves to permit class members to elect exclusion at this point by the settlement agreement may be one factor supporting approval of the settlement.”¹⁶

When settlement agreements provide for delayed opt-out rights, sometimes referred to as “downstream” or “back-end” opt-out rights, they may deny absent class members the same unlimited opportunity to sue the defendant that the class members would have had if they had opted out at the time of initial certification. Instead, absent class members exercising back-end opt-out rights may be permitted to sue the defendant in tort, but not for punitive damages; to sue for only certain conditions; or to seek binding arbitration without the opportunity to litigate in court.¹⁷

Although commentators have debated the extent to which back-end opt-out rights protect absent class members,¹⁸ few have discussed how the limitations built into back-end opt-out rights should be enforced, leaving many unanswered questions. For example, if a federal court approves a class action settlement, but a state court entertains the independent action filed by the opt-out plaintiff, which court determines the scope of the restrictions on the right to sue? Which court determines whether evidence that the plaintiff seeks to offer, purportedly in support of a permissible claim, may be excluded because it also supports a claim barred by the settlement agreement? Stated more generally, which court has authority to enforce the limits inherent in the back-end opt-out right?

15. *Id.* (“A decision to remain in the class is likely to be more carefully considered and is better informed when settlement terms are known.”).

16. *Id.*

17. *See infra* notes 52, 56-57, 61-62 and accompanying text (describing the limitations imposed on those exercising downstream opt-out rights in the fen-phen litigation).

18. *See supra* notes 8-11 and accompanying text; *see also* DAVID F. LEVI, ADVISORY COMM. ON THE FED. RULES OF CIVIL PROC., REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 129, 186-98 (2002), <http://www.uscourts.gov/rules/jc09-2002/CVRulesJC.pdf> (summarizing comments received on a proposed presumptively available second opportunity to opt out).

Although the class action court that approved the settlement may view itself as best equipped to interpret the terms of the settlement agreement and the restrictions on the opt-out right,¹⁹ three sets of curious complications may arise if the class action court attempts to regulate the subsequently filed state court action by enjoining the back-end opt-out plaintiff from proceeding with her state court suit. First, if diversity is lacking between the opt-out plaintiff and the defendant, and if the plaintiff sues on only state law claims, the federal court may lack subject matter jurisdiction to grant an injunction. The federal court may also lack personal jurisdiction over a back-end opt-out plaintiff who has no contacts with the state in which the federal court sits. Second, even if the federal court has jurisdiction to proceed, federalism complications are likely to arise. Both the Anti-Injunction Act²⁰ and the *Younger* abstention doctrine²¹ limit the authority of federal courts to issue injunctions against pending state court proceedings. Finally, equitable and practical considerations may counsel against micromanagement of state court litigation by a federal judge.

The objective in identifying these complications is not to question the wisdom of back-end opt-out rights, but rather to facilitate their use by suggesting a variety of steps that courts and counsel can take to enforce the limits built into back-end opt-out rights without unnecessarily intruding upon the prerogatives of state court judges, exposing back-end opt-out plaintiffs to onerous litigation in fora with which they have no contact, or rendering their preserved rights meaningless.

Parts I and II of this Article provide the backdrop for a meaningful discussion of these complications. Part I identifies four different circumstances in which back-end opt-out rights have been granted. Part I demonstrates that, in some cases, downstream opt-out rights are granted to provide absent class members with full information about the settlement and a meaningful opportunity to decide whether they are better off remaining in the class or suing independently. In other cases, back-end opt-out rights are granted to permit class members to rethink their options if circumstances

19. See *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425, 1431 (2d Cir. 1993).

20. See *infra* Part IV.B.

21. See *infra* Part IV.C.

change after final approval of the settlement. For example, changes in class members' medical conditions or a shortfall in the fund set aside to pay their claims may alter class members' calculus about the benefits of class membership.

To illustrate the types of complications that bedevil back-end opt-out rights, Part II describes a massive class action lawsuit filed on behalf of millions of users of the diet drugs known as fen-phen, which were found to cause heart problems. Class members were afforded downstream opt-out rights if they first learned of their heart problems after the expiration of the initial opt-out period, if their medical condition worsened, or if the fund set aside to compensate them proved inadequate. Absent class members who exercised these downstream opt-out rights were permitted to sue the drug manufacturer in tort but were not permitted to seek punitive damages. When opt-out plaintiffs filed their individual suits and sought to introduce evidence of the defendant's willful and wanton conduct (which would have supported both preserved claims for negligence and barred claims for punitive damages), the defendant returned to the federal court that had overseen the class action and asked that court to enforce the limits built into the back-end opt-out rights. It was in this context that numerous curious complications arose.

With the fen-phen litigation providing a vivid illustration, this Article proceeds to analyze three different kinds of complications. Part III addresses jurisdictional complications and demonstrates that federal courts entertaining class actions can take simple steps to ensure that they will have ancillary subject matter jurisdiction to enforce the limits built into back-end opt-out rights. Part III then grapples with the more intractable personal jurisdiction problems that arise if a federal court seeks to enjoin back-end opt-out plaintiffs who lack minimum contacts with the state. Part III teases apart questions of consent, fairness, the right to collaterally attack a class action judgment for inadequate representation, and the jurisdictional reach of federal courts under the Fifth Amendment. Part III ultimately concludes that cases may exist in which the burden of appearing before the federal class action court to oppose a request for injunctive relief or to challenge the adequacy of representation would be so great, or an assertion of jurisdiction would otherwise be so unreasonable, that the court's exercise of

jurisdiction would violate the Fifth Amendment Due Process Clause. Part III also considers steps that the class action court may take to avoid this potential jurisdictional problem.

Part IV analyzes the federalism complications raised by both the Anti-Injunction Act²² and the *Younger* abstention doctrine.²³ In the context of this discussion, this Article demonstrates that although the Class Action Fairness Act (CAFA)²⁴ alters the federalism landscape, it fails to strengthen the case for federal injunctions against back-end opt-out plaintiffs. In discussing the statutory exceptions to the ban on anti-suit injunctions, Part IV reveals both the overbroad and underinclusive nature of the court's authority to enjoin state litigation and identifies proactive steps that the parties and the class action court can take to ensure that a federal injunction does not render meaningless the rights retained by back-end opt-out plaintiffs.

Finally, Part V addresses the equitable and practical complications that may arise when federal courts seek to micromanage litigation pending in state court. Part V demonstrates how an unduly broad or vague federal order may paralyze the state court from entertaining a back-end opt-out plaintiff's claim, disrupt the smooth flow of the state court trial, or render the back-end opt-out plaintiff's attorney overly cautious in the representation of her client out of fear of violating the federal injunction. Part V then suggests a variety of measures that the parties and both the federal and state courts can take to minimize federal interference with pending state court proceedings and to protect the rights preserved by back-end opt-out plaintiffs while ensuring that the limitations built into back-end opt-out rights are enforced. This Article concludes by summarizing its recommendations and urging federal and state courts to collaborate in the enforcement of back-end opt-out rights.

22. 28 U.S.C. § 2283 (2000); *see infra* Part IV.B.

23. *See Younger v. Harris*, 401 U.S. 37 (1971); *see infra* Part IV.C.

24. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

I. TYPOLOGY OF BACK-END OPT-OUT RIGHTS

Absent class members have been afforded back-end opt-out rights in at least four different circumstances. First, class members have been afforded an opportunity to opt out once they learned the terms of the settlement or the amount they would recover.²⁵ For example, in the Dalkon Shield litigation, the Fourth Circuit approved a settlement that contemplated creation of a claims resolution facility.²⁶ Class members would submit their claims to the facility, which would make an offer of settlement. If a class member declined to accept the settlement offer, she would be afforded “the option of deciding her claim by arbitration or by a jury trial at her option.”²⁷

Second, some courts have permitted class members to opt out if the terms of the settlement changed after expiration of the initial opt-out right.²⁸ For example, a class action was filed on behalf of county jail inmates who challenged the practice of routine strip searches without individualized suspicion.²⁹ The original settlement would have provided female inmates with twice as much money as male inmates. The court found that term of the settlement to be unconstitutional. The court concluded its opinion by stating that if the parties sought to amend the settlement to address this concern, the court “would require a new opportunity for female class members who have filed claims to opt out ... [b]ecause they ... would be negatively affected by such an amendment.”³⁰ These first two types of back-end opt-out rights are designed to provide absent class members with full information about the final settlement and a

25. See, e.g., *In re A.H. Robins Co.*, 880 F.2d 709, 743-45 (4th Cir. 1989); *Thomas v. Christopher*, 169 F.R.D. 224, 235, 244-45 (D.D.C. 1996), *rev'd in part sub nom. Thomas v. Albright*, 139 F.3d 227, 233-37 (D.C. Cir. 1998). *But see In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 518 n.18 (E.D.N.Y. 2003), *aff'd sub nom. Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 (2d Cir. 2005).

26. *In re A.H. Robins*, 880 F.2d at 743-44.

27. *Id.* For a discussion of *In re A.H. Robins* and the trustees' efforts to limit the number of claimants who chose to litigate, see Georgene Vairo, *Mass Tort Bankruptcies: The Who, the Why and the How*, 78 AM. BANKR. L.J. 93, 111-21 (2004).

28. See *Nilsen v. York County*, 382 F. Supp. 2d 206, 221 n.9 (D. Me. 2005). *But see Denney v. Deutsche Bank AG*, 443 F.3d 253, 271 (2d Cir. 2006).

29. See *Nilsen*, 382 F. Supp. 2d at 206.

30. *Id.* at 221 n.9 (citations omitted).

meaningful opportunity to decide whether they are better off remaining in the class or suing independently.

The third type of back-end opt-out right assures class members an opportunity to exclude themselves from the class in the event that the fund established by the settlement agreement for the payment of claims proves inadequate to satisfy all of the claims presented,³¹ or if actual awards are lower than the amounts promised in the original settlement agreement.³² For example, in a class action filed on behalf of patients treated with an antidepressant medication that allegedly caused liver damage, the settlement agreement afforded class members who suffered from specified hepatic injuries an opportunity to opt out if the fund created to pay their claims ran short due to an unexpectedly high number of qualifying claimants or claims.³³ This third type of back-end opt-out right takes into account ex post changes that may alter the class members' initial calculus about the benefits of class membership.

Finally, class members have been afforded the opportunity to opt out and sue defendants in tort if they developed or discovered medical problems after the expiration of the original opt-out period, or if their conditions worsened.³⁴ For instance, in a class action brought on behalf of patients whose artificial heart valves allegedly had a tendency to fracture, the settlement agreement afforded class members the opportunity to sue the manufacturer in tort in the event of a post-settlement heart valve fracture.³⁵ Like the third type of back-end opt-out right, the fourth type contemplates a material ex post change, not in the resources available to compensate class members, but rather in the class members' own medical condition.

Class members in the fen-phen litigation were also afforded several opportunities to opt out after the initial opt-out period

31. See, e.g., *In re Serzone*, 231 F.R.D. 221, 229-30 (S.D. W. Va. 2005); *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, No. CV 92-P-10000-S, 1994 WL 578353, at *7 (N.D. Ala. Sept. 1, 1994).

32. See *In re Serzone*, 231 F.R.D. at 230.

33. See *id.*

34. See, e.g., Nationwide Class Action Settlement Agreement with American Home Products Corp. §§ II.C, IV.D.3, *In re Diet Drugs Prods. Liab. Litig.*, No. 99-20593 (E.D. Pa. Nov. 18, 1999), available at <http://www.fen-phen-eresource.com/settlementagreement.cfm> [hereinafter Settlement Agreement]; *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 150, 166, 169-70 (S.D. Ohio 1992).

35. *Bowling*, 143 F.R.D. at 150, 166, 169-70.

expired. Part II of this Article examines the fen-phen litigation in detail to illustrate some of the curious complications that may arise with back-end opt-out rights.

II. AN ILLUSTRATION OF THE COMPLICATIONS: THE FEN-PHEN LITIGATION

A. *The Underlying Facts*

The fen-phen litigation involved a combination of prescription diet drugs, referred to as fen-phen, which millions of people took between 1995 and 1997.³⁶ In July 1997, after the Mayo Clinic announced a finding of valvular heart disease (VHD) among fen-phen users, the federal Food and Drug Administration (FDA) issued a Public Health Advisory regarding the drugs.³⁷ When additional cases of VHD among fen-phen users became known, the FDA requested the withdrawal of the drugs from the United States market and the manufacturers complied.³⁸

Approximately 18,000 lawsuits and over one hundred putative class actions were filed against Wyeth,³⁹ the manufacturer of two of

36. *In re Diet Drugs Prods. Liab. Litig. (Diet Drugs I)*, 282 F.3d 220, 225 (3d Cir. 2002). For a thorough account of the facts giving rise to the fen-phen litigation and the terms of the Settlement Agreement, see the memorandum of the district court written in support of its final certification order and the order approving the settlement. Memorandum and Pretrial Order No. 1415, at **1-33, *In re Diet Drugs Prods. Liab. Litig.*, No. 99-20593, 2000 WL 1222042 (E.D. Pa. Aug. 28, 2000), *aff'd*, 275 F.3d 34 (unpublished table decision) (3d Cir. 2001) [hereinafter Memorandum]. For later developments and a critical assessment of the lawyers representing some of the absent class members who submitted claims for payment and the doctors who supported their claims, see Alison Frankel, *Still Ticking: Mistaken Assumptions, Greedy Lawyers, and Suggestions of Fraud Have Made Fen-Phen a Disaster of a Mass Tort*, AM. LAW., Mar. 2005, at 92-97, 99, 133. For the argument that the fen-phen settlement “confers upon class members what closely resembles a put option,” and a discussion of “how the fen-phen settlement stands as the starting point for an option-based model that may bridge the usual conflict between autonomy and peace,” see Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 756, 759, 796-822 (2002) (footnote omitted).

37. Food & Drug Admin., Public Health Advisory, Reports of Valvular Heart Disease in Patients Receiving Concomitant Fenfluramine and Phentermine (July 8, 1997), <http://www.fda.gov/cder/news/phen/phenfen.htm>.

38. See *Diet Drugs I*, 282 F.3d at 225; Memorandum, *supra* note 36, at *2.

39. The manufacturer of the drugs, American Home Products Corporation, changed its name to Wyeth in March 2002. *In re Diet Drugs Prods. Liab. Litig. (Diet Drugs II)*, 369 F.3d 293, 298 n.1 (3d Cir. 2004).

the diet drugs involved: fenfluramine, which had been marketed under the brand name Pondimin, and dexfenfluramine, which had been marketed under the brand name Redux.⁴⁰ Wyeth removed many of the cases filed against it in state court to federal court. In December 1997, the Judicial Panel on Multidistrict Litigation (JPMDL) transferred all of the federal actions to the United States District Court for the Eastern District of Pennsylvania for coordinated and consolidated pretrial proceedings before Judge Louis Bechtel.⁴¹

B. The Terms of the Settlement: Four Opt-out Rights

In April 1999, following extensive discovery, Wyeth entered into global settlement negotiations with the plaintiffs in the federal multidistrict litigation and some of the plaintiffs in the state class actions. The parties reached a tentative settlement in November 1999, which contemplated a nationwide class of all persons in the United States who had ingested either or both of the diet drugs, as well as their representatives and dependents.⁴² The settlement contemplated a variety of forms of relief, including reimbursement of the purchase price of the drugs, reimbursement of the cost of an echocardiogram, medical screening, medical care or cash payments in lieu of care, compensation for injuries, and the creation of a medical research and education fund.⁴³

In November 1999, the district court entered an order conditionally certifying the nationwide settlement class in accordance with Federal Rules of Civil Procedure 23(b)(2) and 23(b)(3), and gave preliminary approval of the settlement.⁴⁴ The order afforded class

40. *In re Diet Drugs Prods. Liab. Litig. (Diet Drugs III)*, 385 F.3d 386, 389 (3d Cir. 2004); *Diet Drugs I*, 282 F.3d at 225.

41. *See Diet Drugs I*, 282 F.3d at 225.

42. *See id.* The class comprised five subclasses. *See* Settlement Agreement, *supra* note 34, §§ II.B, II.C. The district court has approved numerous amendments to the Settlement Agreement. *See* FenPhen1203.com, The Official MDL-1203 Web Site, <http://www.fenphen1203.com/index.html> (last visited Oct. 15, 2007).

43. *Diet Drugs I*, 282 F.3d at 225; *see also* Settlement Agreement, *supra* note 34, §§ IV.A, IV.B.

44. Pretrial Order No. 997 Conditionally Certifying Settlement Class, Preliminarily Approving the Settlement Agreement, Approving the Forms of Notice, and Scheduling the Fairness Hearing, *In re Diet Drugs Prods. Liab. Litig.*, No. 99-20593 (E.D. Pa. Nov. 23, 1999), available at <http://www.fenphen1203.com/748448.html> [hereinafter Preliminary Order]; *see*

members an opportunity to opt out as long as they did so by March 23, 2000.⁴⁵ Class members who exercised this initial opt-out right were free to initiate or maintain litigation against Wyeth “without any limitation, impediment or defense arising from the terms of the Settlement Agreement.”⁴⁶ But class members who opted out would have to prove that the diet drugs had caused their heart valve damage, an element of their claim that would not have to be proven if they stayed in the class.⁴⁷

In May 2000, after the expiration of the initial opt-out period, the district court held a fairness hearing. In August 2000, the court entered a final order certifying the class and approving the settlement.⁴⁸ The final order incorporated the “definitions and terms” of the Settlement Agreement into the order and enjoined all class members who had not or did not opt out in a timely manner from asserting or continuing to prosecute any claim covered by the settlement against Wyeth.⁴⁹ The order further provided that the federal district court “hereby retains continuing and exclusive jurisdiction over this action and each of the Parties, including [Wyeth] and the class members, to administer, supervise, interpret and enforce the Settlement.”⁵⁰

In addition to the initial opt-out right afforded by the district court’s preliminary certification order, the Settlement Agreement approved by the court in its final order afforded class members three additional opportunities to opt out, all of which contemplated ex post changes that might have altered the class members’ initial calculus. First, the Settlement Agreement afforded a “financial insecurity opt-out right” to class members with specified medical conditions if Wyeth failed to make timely payments to the Settlement Trust Funds created to fund the settlement, or if a court determined that the Settlement Trust Funds lacked sufficient

also *Diet Drugs I*, 282 F.3d at 226.

45. Preliminary Order, *supra* note 44; Settlement Agreement, *supra* note 34, § IV.D.2.

46. Settlement Agreement, *supra* note 34, § IV.D.2.c.

47. Frankel, *supra* note 36, at 95.

48. Pretrial Order No. 1415, *In re Diet Drugs Prods. Liab. Litig.*, No. 99-20593 (E.D. Pa. Aug. 28, 2000), available at <http://www.fenphen1203.com/files/13132034.pdf> [hereinafter Certification Order]; Memorandum, *supra* note 36; see also *Diet Drugs I*, 282 F.3d at 226.

49. Certification Order, *supra* note 48, ¶¶ 1, 7.

50. *Id.* ¶ 1.

assets to pay outstanding settlement-related obligations.⁵¹ This opt-out right protected those who had planned to participate in the settlement, but whose rights thereunder had become less secure. Class members exercising financial insecurity opt-out rights were barred from suing for consumer fraud or medical screening and monitoring but remained free to seek punitive or multiple damages.⁵²

Second, the Settlement Agreement afforded an intermediate opt-out right to members of the class who were diagnosed as having medically significant valvular regurgitation (referred to as “FDA Positive” regurgitation of blood through the valves)⁵³ after September 30, 1999, but before the end of the twelve-month screening period during which class members were entitled to echocardiograms.⁵⁴ This intermediate opt-out right protected those who may not have been aware of their valvular condition in time to exercise the initial opt-out right, but who later learned that they were FDA Positive and wished to pursue their claims independently. Eligible class members had to exercise this opt-out right no later than 120 days after the end of the screening period.⁵⁵ Class members who exercised this intermediate opt-out right were free to initiate or maintain litigation against Wyeth, but only for FDA Positive heart valve conditions.⁵⁶ Such class members were barred from suing for consumer fraud or medical screening and monitoring, and from seeking punitive, exemplary, or multiple damages.⁵⁷ In addition, these class members could not invoke any verdict or

51. Settlement Agreement, *supra* note 34, § III.E.9.

52. *Id.* §§ I.53.e, I.53.g, III.E.9. The sixth and seventh amendments to the Settlement Agreement afforded additional limited opt-out rights and extinguished certain other opt-out rights. Settlement Agreement § IV.D.5 (as amended through the sixth amendment) (on file with the author); Seventh Amendment to the Nationwide Class Action Settlement Agreement with American Home Products Corp. §§ XI.A, XII, *In re* Diet Drugs Prods. Liab. Litig., No. 99-20593 (E.D. Pa. Aug. 24, 2004), available at <http://www.fenphen1203.com/files/8664066.pdf> (Part 1), <http://www.fenphen1203.com/files/8664964.pdf> (Part 2).

53. FDA Positive heart valve conditions were defined as conditions in which the individual had “mild or greater regurgitation of the aortic valve and/or moderate or greater regurgitation of the mitral valve.” Settlement Agreement, *supra* note 34, § I.22.

54. *Id.* §§ II.C, IV.D.3. The twelve-month screening period began upon the final judicial approval date of the settlement. *Id.* § I.49.

55. *Id.* §§ I.19, IV.D.3.b.

56. *Id.* § IV.D.3.c.

57. *Id.* §§ I.53.e, I.53.g, IV.D.3.c.

judgment against Wyeth under the doctrines of claim or issue preclusion.⁵⁸

Third, the Settlement Agreement afforded a back-end opt-out right to class members who, before the end of 2015, developed levels of regurgitation serious enough to entitle them to compensatory damages under the Settlement Agreement (referred to as a “Matrix-Level Condition”) if they had been diagnosed with specified valvular problems by the end of the screening period, had timely registered for further settlement benefits, and had not yet claimed Matrix Compensation Benefits.⁵⁹ This back-end opt-out right protected those who were previously aware that they suffered from some valvular disease, but whose condition had worsened significantly. Eligible class members had to exercise this back-end opt-out right within 120 days after learning they had developed a Matrix-Level Condition.⁶⁰ Class members who exercised a back-end opt-out right were free to initiate or maintain litigation against Wyeth, but only for specified medical conditions.⁶¹ Like those with intermediate opt-out rights, class members exercising back-end opt-out rights were barred from suing for consumer fraud or medical screening and monitoring, from seeking punitive, exemplary, or multiple damages, and from using any prior verdict or judgment against Wyeth under preclusion doctrine.⁶² The Settlement Agreement further provided that:

If, at any time after a Class Member exercises an Intermediate [or Back-End] Opt-Out right, the Class Member initiates a lawsuit seeking to pursue a Settled Claim against [Wyeth] or any other Released Party, the Released Party shall have the right to challenge, *in such lawsuit only*, whether the opt-out was timely and proper, including whether the Class Member was eligible to exercise such an opt-out right.⁶³

58. *Id.* § IV.D.3.c. Wyeth agreed not to raise the statute of limitations, repose, or laches as a defense, or any defense based on “splitting” the cause of action, as long as the class member commenced suit within one year from the date on which she exercised the intermediate opt-out right. *Id.*

59. *Id.* §§ IV.C.2, IV.D.4.a.

60. *Id.* §§ I.19, IV.D.3.b.

61. *Id.* § IV.D.4.c.

62. *Id.* §§ I.53.e, I.53.g, IV.D.4.c. As with the intermediate opt-out rights, Wyeth agreed not to raise the statute of limitations and other defenses. *Id.* § IV.D.4.c.

63. *Id.* §§ IV.D.3.c, IV.D.4.c (emphasis added).

Finally, because the Settlement Agreement did not purport to settle claims based on primary pulmonary hypertension (PPH), a progressive disease that inevitably results in death,⁶⁴ class members suffering from PPH remained free to bring claims outside the settlement, even for punitive, exemplary, or multiple damages, as long as they had not received benefits for a Matrix-Level Condition.⁶⁵

Because Wyeth's objective was to reach a "global" settlement of the claims of fen-phen users, it reserved for itself the "option to terminate and withdraw from the Settlement Agreement, in its sole discretion, based upon the number of persons who have timely and properly elected during the Initial Opt-Out Period to be excluded from the Settlement Class."⁶⁶

C. Federal Judicial Regulation of Fen-phen Litigation in State Court

As might have been expected with a class numbering in the millions, many individuals chose to exercise their opt-out rights.⁶⁷ Notwithstanding the provision in the Settlement Agreement barring Wyeth from challenging the class members' eligibility to opt out in any suit other than an opt-out action, Wyeth returned on many occasions to the federal district court that had approved the settlement and asked it to enforce the limitations imposed on those opting out. Wyeth also asked the federal court to monitor fen-phen-related litigation pending in other courts. By this time, Judge Bechtel, who had approved the settlement, had retired⁶⁸ and the fen-phen class action had been assigned to Judge Harvey Bartle III.

64. See Memorandum, *supra* note 36, at **16-17 (describing PPH).

65. See Settlement Agreement, *supra* note 34, §§ I.46, I.53.

66. *Id.* § VII.E; see also *Diet Drugs I*, 282 F.3d 220, 237 n.13 (3d Cir. 2002).

67. According to one account, fifty thousand people exercised initial opt-out rights alone. See Frankel, *supra* note 36, at 95. Assuming a class size of approximately six million (the number of people who had taken the drugs), *id.* at 94, the opt-out rate would have been approximately 0.83 percent, lower than the mean and median opt-out rates for mass tort cases. See *infra* notes 152-54 and accompanying text.

68. See *In re Diet Drugs Prods. Liab. Litig.*, 220 F. Supp. 2d 414, 420 n.5 (E.D. Pa. 2002), *appeal dismissed*, 93 F. App'x 345 (3d Cir. 2004).

This section of the Article examines several of the instances in which Wyeth turned to Judge Bartle for assistance.⁶⁹

When absent class members exercising intermediate opt-out rights filed independent actions in state court, Wyeth returned to federal court seeking an order that would have required the state courts in which the class members sued to “determine eligibility for an intermediate opt-out ... as soon as practicable and to prohibit them from referring the issue for decision by the jury at trial.”⁷⁰ Recognizing that it had retained jurisdiction to enforce the settlement, the district court nevertheless emphasized that the Settlement Agreement itself explicitly provided that the state opt-out court, rather than the federal district court, had sole authority to “decide the issues of the timeliness and propriety, including the eligibility of the class member to opt-out.”⁷¹ The federal court disclaimed any authority to direct the state court how or when to determine the eligibility issue. The federal court went on to recognize the logistical difficulties that would arise if it presumed to exercise such authority:

Even if we had the authority to do so, we do not see how we could impose a timetable on the state courts. The progress and scheduling of the various steps in an opt-out case are clearly beyond our ken. The question of timeliness of the opt-out, for example, may be relatively easy to resolve at an early stage, based on undisputed facts. Other aspects may be much more complicated. The timing and manner of an opt-out ruling are likely to depend on a myriad of factors best known to the state court.... [I]t is for the opt-out court to work out when and how the opt-out issues are to be determined and what type of hearing, fact-finding, or other procedure is appropriate, consistent with fairness and local law. So much depends on the particulars of an individual case that it is not surprising that the Settlement Agreement requires any intermediate or back-end opt-out “challenge” by a Released Party, and that includes any

69. See *Diet Drugs I*, 282 F.3d 220, 228, 242 (3d Cir. 2002); Memorandum and Pretrial Order No. 2793, at **16-28, *In re Diet Drugs Prods. Liab. Litig.*, No. 99-20593, 2003 U.S. Dist. LEXIS 4744 (E.D. Pa. Mar. 14, 2003).

70. Memorandum and Pretrial Order No. 2654, at *1, *In re Diet Drugs Prods. Liab. Litig.*, No. 99-20593, 2002 U.S. Dist. LEXIS 23599 (E.D. Pa. Nov. 25, 2002) [hereinafter Memorandum & PTO 2654].

71. *Id.* at *5.

challenge to procedure or scheduling, to be decided “in such lawsuit only.”⁷²

The federal district court thus recognized, apart from the limitations on its authority built into the Settlement Agreement, the practical problems that would have arisen had it attempted to micromanage opt-out litigation in state courts under the guise of enforcing the settlement.

Given this recognition, it is surprising that the district court later entered numerous injunctions barring absent class members from introducing specified evidence in state court. In one of these cases, a class member, Merle Hall, filed suit against Wyeth in Texas state court, claiming that she had developed PPH as a result of her ingestion of Pondimin.⁷³ Because the Settlement Agreement did not bar independent claims for PPH,⁷⁴ Hall was free to seek both compensatory and punitive damages from Wyeth. Hall wished to offer evidence not only of PPH, but also of VHD and neurotoxicity, which she claimed was necessary to support her PPH claim under Texas law and relevant to her claim for punitive damages.⁷⁵ Because both VHD and neurotoxicity were settled claims under the Settlement Agreement,⁷⁶ and because Hall had not opted out, the federal court enjoined her from introducing any evidence in state court that related to VHD, neurotoxicity, or Wyeth’s conduct with respect thereto.⁷⁷ Rejecting Hall’s claim that the evidence was necessary under Texas law to prove her claim, the federal court concluded that “[a] party simply may not hide behind the substantive law, or the procedural or evidentiary rules of any state to undermine or evade the terms of the Settlement Agreement.”⁷⁸

Wyeth was concerned that plaintiffs who suffered from PPH would offer proof of the settled claims to bolster their claims for punitive damages. Wyeth was even more concerned, however, that opt-out plaintiffs who did *not* suffer from PPH and who were *not*

72. *Id.* at **5-6.

73. *In re* Diet Drugs Prods. Liab. Litig., No. 99-20593, 2003 WL 22518617, at *1 (E.D. Pa. Oct. 10, 2003).

74. *See supra* note 65 and accompanying text.

75. *See* Pretrial Order No. 2867, at *3, *In re* Diet Drugs Prods. Liab. Litig., No. 99-20593, 2003 U.S. Dist. LEXIS 9818 (E.D. Pa. May 22, 2003) [hereinafter PTO 2867].

76. Settlement Agreement, *supra* note 34, § 1.53.a.

77. PTO 2867, *supra* note 75, at *5.

78. *Id.* at *4.

permitted to seek punitive damages would seek to offer evidence of PPH and the grave health risks that fen-phen posed in an effort to inflame the jury so that it would indirectly award punitive damages by inflating the award of compensatory damages. The district court appreciated these concerns, noting that if counsel for the opt-out plaintiffs were permitted to offer proof supporting punitive damages, the “floodgates [would] open, and the prohibition against punitive damages in the court approved Settlement Agreement [would] be nothing but a dead letter, with potentially dire consequences for the settlement and the ability of the thousands of class members to obtain compensation.”⁷⁹

In light of these concerns, when absent class members who had exercised intermediate opt-out rights filed suit in the state courts of Texas, Mississippi, and Louisiana, the federal district court enjoined them from offering evidence in state court that related, directly or indirectly, to punitive damages, including evidence of: (1) PPH; (2) any other medical condition caused by fen-phen other than VHD or pulmonary hypertension;⁸⁰ (3) malicious or wanton conduct by Wyeth; (4) Wyeth’s marketing strategies; and (5) Wyeth’s profits, size, or financial condition.⁸¹

79. Memorandum and Pretrial Order No. 2717, at 6, *In re Diet Drugs Prods. Liab. Litig.*, No. 99-20593 (E.D. Pa. Jan. 29, 2003), available at <http://www.fenphen1203.com/files/13196153.pdf> [hereinafter Memorandum & PTO 2717], vacated by Pretrial Order No. 2828, *In re Diet Drugs Prods. Liab. Litig.*, No. 99-20593 (E.D. Pa. Apr. 8, 2003), available at <http://www.fenphen1203.com/files/13196681.pdf> [hereinafter PTO 2828], vacated by *Diet Drugs II*, 369 F.3d 293 (3d Cir. 2004).

80. Note the distinction between primary pulmonary hypertension (PPH), an inevitably fatal condition, and the more common pulmonary hypertension that is secondary to VHD, which is referred to as PH.

81. See Memorandum and Pretrial Order No. 3123, *In re Diet Drugs Prods. Liab. Litig.*, No. 99-20593 (E.D. Pa. Nov. 13, 2003), available at <http://www.fenphen1203.com/files/13247243.pdf> [hereinafter Memorandum & PTO 3123]; Pretrial Order No. 2883, *In re Diet Drugs Prods. Liab. Litig.*, No. 99-20593 (E.D. Pa. June 10, 2003), available at <http://www.fenphen1203.com/files/13236672.pdf>, vacated by *Diet Drugs II*, 369 F.3d 293 (3d Cir. 2004); Memorandum and Pretrial Order No. 2828, *In re Diet Drugs Prods. Liab. Litig.*, No. 99-20593, 2003 WL 22023361 (E.D. Pa. Apr. 8, 2003) [hereinafter Memorandum & PTO 2828], vacated by *Diet Drugs II*, 369 F.3d 293 (3d Cir. 2004); Memorandum and Pretrial Order No. 2680, *In re Diet Drugs Prods. Liab. Litig.*, No. 99-20593 (E.D. Pa. Dec. 11, 2002), available at <http://www.fenphen1203.com/files/13191257.pdf> [hereinafter Memorandum & PTO 2680], vacated by *Diet Drugs II*, 369 F.3d 293 (3d Cir. 2004); Memorandum and Pretrial Order No. 2625, *In re Diet Drugs Prods. Liab. Litig.*, No. 99-20593 (E.D. Pa. Oct. 16, 2002), available at <http://www.fenphen1203.com/files/13188244.pdf> [hereinafter Memorandum & PTO 2625], vacated by PTO 2828, *supra* note 79.

The federal district court rejected the argument that its involvement in the state case would “amount to improper interference with the evidentiary issues before the state court,”⁸² citing the district court’s retention of continuing jurisdiction over the action and its authority to ensure that class members who exercised intermediate opt-out rights did not “circumvent the Settlement Agreement by seeking protection under the state’s evidentiary rules.”⁸³ The district court also rejected the plaintiff’s argument that a discussion of Wyeth’s knowledge of health risks posed by fen-phen and its marketing strategy was necessary to establish causation:

The jury will decide the issue of causation based on the testimony of medical experts, irrespective of the nature of Wyeth’s behavior, be it wanton or innocent or somewhere in between. Beyond any doubt, as the state trial judge recognized, the real purpose of the proposed charge [to the jury] is to inject the issue of punitive damages into this case, and that violates ... the Nationwide Class Action Settlement Agreement.... The terms of the Settlement Agreement approved by this court ... prevail over state law, whether the latter is characterized as substantive, evidentiary, or procedural.⁸⁴

When Wyeth complained to the district court that the lawyer representing the Texas plaintiffs had violated the injunction, the court not only held the lawyer in civil contempt,⁸⁵ but also enjoined him from proceeding to trial in state court until he submitted a statement identifying, among other things, his trial exhibits, witness list, and points for charge. Although conceding that “it will be for the state trial judge to decide on the exact contours of the evidence, arguments, and statements to be presented to the court and to the jury” and expressing reluctance “to become involved in such detail,” the federal district court nevertheless concluded that “the obdurate behavior of [plaintiff’s lawyer] leaves us no alternative if the terms of the Settlement Agreement are to be upheld.”⁸⁶

82. Memorandum & PTO 2625, *supra* note 81, at 5.

83. *Id.*

84. Memorandum & PTO 2680, *supra* note 81, at 6-7.

85. Memorandum & PTO 2717, *supra* note 79, at 7.

86. *Id.* at 7-8, *vacated by* PTO 2828, *supra* note 79.

Later, the federal district court carefully reviewed over one hundred exhibits and numerous pages of contested deposition testimony to determine whether the materials were admissible or ran afoul of the Settlement Agreement, ordering redactions of pages, paragraphs, or even just a few words, to ensure that plaintiffs did not seek punitive damages indirectly.⁸⁷ The federal court closed its voluminous opinion, noting with apparent regret that “we will not be present at the trial and cannot rule in advance on every possible contingency.”⁸⁸

Ceding some authority, the district court initially left it for the state trial court to determine if references in exhibits to “pulmonary hypertension” meant PPH, the inevitably fatal condition (in which case the exhibit would be inadmissible), or the more common pulmonary hypertension that is secondary to VHD (in which case the exhibit might be admissible): “where the phrase ‘pulmonary hypertension’ or PH is used, we will defer to the trial judge who will be in a better position to make a ruling on proffered exhibits and testimony consistent with this court’s PTO.”⁸⁹

But even this forbearance ultimately gave way when the district court later enjoined opt-out plaintiffs suing in Georgia and Mississippi state courts from offering into evidence a Pondimin label that disclosed four cases of “pulmonary hypertension” (the “four cases” label) and a warning that the FDA had considered requiring Wyeth to include on the Redux label within a black border (the “black box” warning). Even though the district court had previously declined to prohibit the introduction of these exhibits in state court⁹⁰ and even though both the four cases label and the black box warning used the words “pulmonary hypertension” rather than PPH, the federal court ultimately concluded, after reviewing the record in the case, that both the label and the warning described PPH rather than PH. Because the opt-out plaintiffs were seeking damages only for VHD, the district court concluded that “any effort to inject PPH into their trials [could] only be for the purpose of obtaining punitive damages, in fact if not in name.”⁹¹ Conceding that it had earlier deferred to

87. Memorandum & PTO 2828, *supra* note 81, at *2, **4-20.

88. *Id.* at *19.

89. *Id.* at *3.

90. *See id.* at *8, **11-12.

91. Memorandum and Pretrial Order No. 3088, at *15, *In re Diet Drugs Prods. Liab.*

the state trial judge “to determine whether the evidence involving the four cases label and the black box warning related to PH or to PPH,” the federal court nevertheless concluded that it was now in a position to make that judgment itself, “having a more complete record.”⁹²

The fen-phen litigation dramatically illustrates some of the curious complications that may arise in the enforcement of the limitations built into back-end opt-out rights. With this illustration as a backdrop, this Article now analyzes three categories of complications: jurisdictional complications, federalism complications, and equitable and practical complications. These complications are likely to arise if a federal court approves a class action settlement affording limited back-end opt-out rights; absent class members who exercise such rights sue the defendant in state court, bringing only claims that arise under state law; and the defendant returns to the federal court that approved the settlement, requesting an injunction to bar the opt-out plaintiffs from seeking “more” relief than the limited downstream opt-out right afforded them.

III. JURISDICTIONAL COMPLICATIONS

A. *Subject Matter Jurisdiction*

In recent years, Congress has enacted laws, including CAFA⁹³ and the Securities Litigation Uniform Standards Act of 1998 (SLUSA),⁹⁴ that reflect deep skepticism about the ability of state courts to adjudicate nationwide class actions and even the suitability of state law to address certain types of problems. At the same time, however, the Supreme Court has barred the removal to federal court of state court actions over which original federal jurisdiction is lacking, even when the state actions threaten to frustrate previously issued federal orders.⁹⁵ The present jurisdic-

Litig., No. 99-20593, 2003 U.S. Dist. LEXIS 20205 (E.D. Pa. Oct. 30, 2003) [hereinafter Memorandum & PTO 3088], vacated by *Diet Drugs II*, 369 F.3d 293 (3d Cir. 2004).

92. *Id.* at *17.

93. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

94. Pub. L. No. 105-353, 112 Stat. 3227 (1998) (codified in scattered sections of 15 U.S.C.).

95. See *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 34 (2002); see also *infra* Part III.A.1.

tional issue arises against this backdrop of tension in the dynamic federalism landscape.

1. *Removal Jurisdiction*

The All Writs Act authorizes federal courts to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”⁹⁶ In *Syngenta Crop Protection, Inc. v. Henson*,⁹⁷ the Supreme Court unanimously decided that the Act does not authorize removal of a state court action over which the district court lacks original jurisdiction even where the state court action threatens to frustrate a federal court order.⁹⁸ Conceding that it had previously viewed the All Writs Act as “fill[ing] the interstices of federal judicial power when those gaps threate[n] to thwart the otherwise proper exercise of federal courts’ jurisdiction,”⁹⁹ the *Syngenta* Court went on to note that “[w]here a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling.”¹⁰⁰ Because the general removal statute authorizes removal only of actions “of which the district courts of the United States have original jurisdiction,”¹⁰¹ and because the removal statute is to be strictly construed,¹⁰² the Court concluded that a defendant may not invoke the All Writs Act to avoid compliance with the jurisdictional requirements of the removal statute.¹⁰³

96. 28 U.S.C. § 1651(a) (2000). See generally Joan Steinman, *The Newest Frontier of Judicial Activism: Removal Under the All Writs Act*, 80 B.U. L. REV. 773, 778-80 (2000).

97. 537 U.S. 28 (2002). See generally Lonny S. Hoffman, *Intersections of State and Federal Power: State Judges, Federal Law, and the “Reliance Principle,”* 81 TUL. L. REV. 283, 311-15 (2006); Lonny Sheinkopf Hoffman, *Removal Jurisdiction and the All Writs Act*, 148 U. PA. L. REV. 401 (1999) (critiquing the pre-*Syngenta* practice of removal under the All Writs Act); Lonny Sheinkopf Hoffman, *Syngenta, Stephenson, and the Federal Judicial Injunctive Power*, 37 AKRON L. REV. 605, 607-19 (2004) (analyzing *Syngenta*) [hereinafter Hoffman, *Syngenta*]; Steinman, *supra* note 96, at 794-854 (analyzing the pre-*Syngenta* practice of removal under the All Writs Act and concluding that it “is neither necessary nor authorized”).

98. *Syngenta*, 537 U.S. at 34.

99. *Id.* at 32 (quoting *Pa. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 41 (1985) (internal quotation marks omitted)).

100. *Id.*

101. 28 U.S.C. § 1441(a) (2000).

102. *Syngenta*, 537 U.S. at 32.

103. *Id.* at 32-33 (citation omitted).

Nor was the Court persuaded that “some combination of the All Writs Act and the doctrine of ancillary enforcement jurisdiction” supported the removal of an action pending in state court of which the federal district court lacked original jurisdiction.¹⁰⁴ Even if the federal court that approved the settlement of the class action had retained jurisdiction, as the federal court in the fen-phen class action had, that retention would not support an assertion of removal jurisdiction over a state law claim pending in state court. “[I]nvocation of ancillary jurisdiction, like invocation of the All Writs Act, does not dispense with the need for compliance with statutory [removal] requirements.”¹⁰⁵ Thus, if a defendant seeks to *remove* a non-diverse back-end opt-out plaintiff’s state law claim in an effort to enforce judicially approved limitations built into the opt-out right, the federal court will lack jurisdiction under *Syngenta*.

But if *Syngenta* made clear that a federal court would lack removal jurisdiction in these circumstances, a footnote in the case suggested that a federal court nevertheless would have authority to enter an injunction against the state court action: “[o]ne in [the defendant’s] position may apply to the court that approved a settlement for an injunction requiring dismissal of a rival action.”¹⁰⁶ Part III.A.2 addresses this doctrine of ancillary enforcement jurisdiction.

2. *Ancillary Jurisdiction*

Under the doctrine of ancillary jurisdiction,

a district court acquires jurisdiction of a case or controversy in its entirety, and, as an incident to the disposition of the matter properly before it, it may decide other matters raised by the case of which it could not take cognizance were they independently presented.... The situations in which ancillary jurisdiction has been invoked include proceedings involving ... settlement agreements, ... and injunction[s], among others.¹⁰⁷

104. *Id.* at 33.

105. *Id.* at 34.

106. *Id.* at 34 n.*.

107. 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3523, at 82-85 (2d ed. 1984 & Supp. 2006) (footnotes omitted).

In the words of a unanimous Supreme Court, the doctrine “recognizes federal courts’ jurisdiction over some matters (otherwise beyond their competence) that are incidental to other matters properly before them.”¹⁰⁸

The Supreme Court has distinguished between two types of ancillary jurisdiction: the authority to hear state law claims not otherwise within the federal court’s original jurisdiction if they are brought together with factually interdependent federal claims; and the federal court’s authority “to protect its proceedings and vindicate its authority.”¹⁰⁹

The first type of ancillary jurisdiction, which (together with pendent and pendent party jurisdiction) is now covered by the supplemental jurisdiction statute,¹¹⁰ is available only when the federal claims and the factually related state law claims are filed together in a single action. “[C]laims alleged to be factually interdependent with and, hence, ancillary to claims brought in an earlier federal lawsuit will not support federal jurisdiction over a *subsequent* lawsuit.”¹¹¹ This result follows because, in this scenario, no claims are pending over which the district court has original jurisdiction that can serve as an anchor for ancillary jurisdiction over the factually related claim (for violation of the settlement agreement, for example).¹¹² Once a federal court enters a final judgment in a class action lawsuit, therefore, it cannot exercise this type of ancillary jurisdiction over motions to enjoin opt-out plaintiffs from violating the terms of a settlement agreement.

The second type of ancillary jurisdiction is designed to ensure that a federal court can enforce its judgment. Without such authority, “the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution.”¹¹³ Yet even this type of ancillary jurisdiction does not

108. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 378 (1994).

109. *Id.* at 380; *see also* *Peacock v. Thomas*, 516 U.S. 349, 354 (1996).

110. *See* 28 U.S.C. § 1367 (2000).

111. *Peacock*, 516 U.S. at 355 (emphasis added).

112. *Id.*; *see also* *Nat’l Presto Indus., Inc. v. Dazey Corp.*, 107 F.3d 1576, 1580-81 (Fed. Cir. 1997) (stating that “[e]ntry of judgment ... terminates both the federal case and any basis for federal jurisdiction over the contractual agreement which occasioned the termination”) (citation omitted).

113. *Peacock*, 516 U.S. at 356 (quoting *Riggs v. Johnson County*, 73 U.S. (6 Wall.) 166, 187 (1867)); *see also* *Steinman*, *supra* note 96, at 824-27.

necessarily authorize a federal court to enjoin violations of a settlement agreement following entry of an order dismissing the underlying action with prejudice. For example, according to the Supreme Court in *Kokkonen v. Guardian Life Insurance Co.*,¹¹⁴ if no independent basis exists for federal subject matter jurisdiction over the motion to enforce the settlement agreement and if the federal court failed to reserve jurisdiction to enforce the settlement at the time it dismissed the underlying action or to incorporate the terms of the settlement into its order, the federal district court lacks jurisdiction to enforce the settlement agreement.¹¹⁵ Indeed, “[e]nforcement of the settlement agreement ... whether through award of damages or decree of specific performance, is more than just a continuation or renewal of the dismissed suit, and hence requires its own basis for jurisdiction.”¹¹⁶ Put differently, the settlement agreement, standing alone, is merely a contract,¹¹⁷ and the federal court would need an independent basis for jurisdiction to compel performance of the contract or to sanction its breach.¹¹⁸ Only the state courts would have authority to enforce the settlement agreement, unless an independent basis for federal subject matter jurisdiction exists.¹¹⁹

The federal courts of appeals have strictly applied *Kokkonen*, holding, for example, that even if the district court’s order of dismissal referred to the settlement agreement and even if the court approved the terms of the settlement, the federal court would lack ancillary jurisdiction to enforce the settlement agreement unless it retained jurisdiction or specifically incorporated the agreement into its order.¹²⁰ Likewise, “the district court’s incorpora-

114. 511 U.S. 375 (1994).

115. *Id.* at 376-82.

116. *Id.* at 378.

117. *D. Patrick, Inc. v. Ford Motor Co.*, 8 F.3d 455, 460 (7th Cir. 1993).

118. *See In re Valdez Fisheries Dev. Ass’n*, 439 F.3d 545, 549 (9th Cir. 2006); *Nat’l Presto Indus., Inc. v. Dazey Corp.*, 107 F.3d 1576, 1583 (Fed. Cir. 1997); *Lucille v. City of Chicago*, 31 F.3d 546, 548 (7th Cir. 1994).

119. *See Kokkonen*, 511 U.S. at 382.

120. *See, e.g., Hehl v. City of Avon Lake*, 90 F. App’x 797, 801 (6th Cir. 2004); *Shaffer v. GTE N., Inc.*, 284 F.3d 500, 503 (3d Cir. 2002); *McAlpin v. Lexington 76 Auto Truck Stop, Inc.*, 229 F.3d 491, 502 (6th Cir. 2000); *Caudill v. N. Am. Media Corp.*, 200 F.3d 914, 917 (6th Cir. 2000); *In re Phar-Mor, Inc. Sec. Litig.*, 172 F.3d 270, 274-75 (3d Cir. 1999); *Scelsa v. City Univ. of N.Y.*, 76 F.3d 37, 41 (2d Cir. 1996); *Miener v. Mo. Dep’t of Mental Health*, 62 F.3d 1126, 1127-28 (8th Cir. 1995); *Lucille*, 31 F.3d at 548.

tion in its dismissal order of only a single term of the parties' twenty-page settlement agreement is insufficient to support the court's exercise of ancillary jurisdiction over the entire agreement."¹²¹ Even if a district court retained jurisdiction to enforce the settlement, it would have ancillary jurisdiction only to enforce specific provisions in the settlement, rather than free-floating ancillary jurisdiction to enforce its "overarching ... purposes."¹²² Additionally, the courts of appeals have been reluctant to allow use of Rule 60(b)(6)¹²³ to reopen a dismissed suit to enforce a settlement agreement, noting that Rule 60 affords an extraordinary remedy only in exceptional circumstances.¹²⁴

On the other hand, the Supreme Court has recognized that even after a voluntary dismissal or entry of a final judgment, a district court retains ongoing jurisdiction to consider collateral issues, such as costs, attorneys' fees, Rule 11 sanctions, contempt sanctions, and other violations of its orders or judgment.¹²⁵ Thus, if a district court order of dismissal incorporates the terms of the settlement agreement, then "a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist."¹²⁶ Likewise, if the district court order of dismissal retained jurisdiction to enforce the settlement agreement, then the court would have jurisdiction to do so.¹²⁷ Some of the federal courts

121. *McAlpin*, 229 F.3d at 502.

122. *Pigford v. Veneman*, 292 F.3d 918, 924 (D.C. Cir. 2002) (citation omitted).

123. FED. R. CIV. P. 60(b)(6) (stating that "[o]n motion and upon such terms as are just, the court may relieve a party ... from a final judgment, order, or proceeding for ... (6) any other reason justifying relief from the operation of the judgment").

124. See, e.g., *McAlpin*, 229 F.3d at 502-03; *Futernick v. Sumpter Twp.*, 207 F.3d 305, 313-14 (6th Cir. 2000); *Neuberg v. Michael Reese Hosp. Found.*, 123 F.3d 951, 954-55 (7th Cir. 1997); *D.S. Atkinson, Inc. v. Lutin Cent. Servs. Co.*, No. 93-2294, 1994 U.S. App. LEXIS 40427, at *4 (1st Cir. Dec. 29, 1994) (per curiam); *Sawka v. Healtheast, Inc.*, 989 F.2d 138, 140-41 (3d Cir. 1993); cf. *Pigford*, 292 F.3d at 925-27 (approving of the use of Rule 60(b)(5) to modify the terms of the settlement agreement upon changed circumstances if the modification is "suitably tailored to the changed circumstances") (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 391 (1992)).

125. See *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395-96, 398 (1990); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 451 (1911); *Red Carpet Studios Div. of Source Advantage, Ltd. v. Sater*, 465 F.3d 642, 645 (6th Cir. 2006); *Retail Flooring Dealers of Am., Inc. v. Beaulieu of Am., LLC*, 339 F.3d 1146, 1150 (9th Cir. 2003); *Nat'l Presto Indus., Inc. v. Dazey Corp.*, 107 F.3d 1576, 1581 (Fed. Cir. 1997).

126. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994).

127. See *id.*; *Sandpiper Vill. Condo. Ass'n v. Louisiana-Pacific Corp.*, 428 F.3d 831, 841 (9th Cir. 2005); *In re Prudential Ins. Co. of Am. Sales Practice Litig. (Prudential I)*, 261 F.3d

of appeals have held that the district court lacks enforcement jurisdiction in the absence of express language of retention in the dismissal order,¹²⁸ even if statements on the record appear to demonstrate that the court actually intended to retain jurisdiction.¹²⁹ Other courts have been more permissive, upholding enforcement jurisdiction if the district court manifested an intent to retain jurisdiction.¹³⁰

Drawing on this body of case law, the lessons for a district court approving a class action settlement and for counsel drafting a settlement agreement and proposed order are clear. To ensure that it will have authority to enforce the limitations built into back-end opt-out rights or other terms of the settlement, the district court should expressly retain jurisdiction to enforce the terms of the settlement agreement or incorporate the terms of the agreement into its order of dismissal.

B. Personal Jurisdiction over Class Members Who Opt Out

It is axiomatic that “[a] district court must have personal jurisdiction over a party before it can enjoin its actions.”¹³¹ Therefore, even if a federal court has subject matter jurisdiction to entertain a request for an injunction to bar absent class members from violating the terms of a court-approved settlement agreement, it must determine whether it has personal jurisdiction to enjoin

355, 367-68 (3d Cir. 2001).

128. See, e.g., *Scelsa v. City Univ. of N.Y.*, 76 F.3d 37, 41 (2d Cir. 1996); *Hagestad v. Tragesser*, 49 F.3d 1430, 1433 (9th Cir. 1995); see also *Burum v. Mankata State Univ.*, No. 98-696, 2004 U.S. Dist. LEXIS 10714, at **4-6 (D. Minn. June 9, 2004); cf. *In re Bond*, 254 F.3d 669, 676 n.4 (7th Cir. 2001).

129. See, e.g., *Shaffer v. GTE N., Inc.*, 284 F.3d 500, 504 (3d Cir. 2002); *Hagestad*, 49 F.3d at 1433.

130. See, e.g., *Re/Max Int'l, Inc. v. Realty One, Inc.*, 271 F.3d 633, 645 (6th Cir. 2001); *Schaefer Fan Co. v. J&D Mfg.*, 265 F.3d 1282, 1287 (Fed. Cir. 2001); *Gilbert v. Monsanto Co.*, 216 F.3d 695, 699-700 (8th Cir. 2000) (upholding jurisdiction to enforce an oral settlement agreement even though the court had retained jurisdiction to enforce a written agreement); *Ford v. Neese*, 119 F.3d 560, 562 (7th Cir. 1997); *Bell v. Schexnayder*, 36 F.3d 447, 449 n.2 (5th Cir. 1994). *But see Shaffer*, 284 F.3d at 504.

131. *Compagnie des Bauxites de Guinea v. Ins. Co. of N. Am.*, 651 F.2d 877, 880 (3d Cir. 1981), *aff'd sub nom. Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982); see also *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 141 (3d Cir. 1998); *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 199 (3d Cir. 1993).

those class members who lack minimum contacts with the state in which the federal court sits.¹³² The starting place is *Phillips Petroleum Co. v. Shutts*, in which the Supreme Court considered whether a state court's adjudication of the claims of absent class members who lack minimum contacts with the forum state violates the Due Process Clause of the Fourteenth Amendment.¹³³

1. *Phillips Petroleum Co. v. Shutts*

The absent class members in *Shutts* received notice of the action and were afforded an opportunity to opt out, but did not opt in or otherwise affirmatively consent to the jurisdiction of the Kansas court.¹³⁴ The question in the case was whether the minimum contacts requirement, which bars a state from exercising personal jurisdiction over an absent defendant who has “no contacts, ties, or relations” with the forum, extends to absent plaintiff class members.¹³⁵ In other words, the Court considered whether due process permits a state court to adjudicate the claims of absent plaintiff class members who lack minimum contacts with the forum.

The Court began by noting that the claim of an absent class member, which would be extinguished by an adverse judgment, is a “constitutionally recognized property interest possessed by each of the plaintiffs.”¹³⁶ The Court further noted that the Due Process Clause protects “persons,” not “defendants,” so “absent plaintiffs as well as absent defendants are entitled to some protection from the jurisdiction of a forum State which seeks to adjudicate their claims.”¹³⁷ The real question, then, was whether the Due Process Clause provides identical protections to defendants and absent plaintiff class members.

132. See Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 IND. L.J. 597, 605 (1987) (noting that “only in the purely representational actions should the court’s judicial jurisdiction over the absentees be assumed, once jurisdiction is established over the parties before the court. Otherwise, the court’s right to adjudicate the claims of the absentees ... must be assessed directly.”).

133. 472 U.S. 797 (1985). For recent scholarly reflections on *Shutts*, see *Class Action Symposium: The Twentieth Anniversary of Phillips Petroleum Co. v. Shutts*, 74 UMKC L. REV. 487, 487-797 (2006).

134. *Shutts*, 472 U.S. at 801, 806.

135. *Id.* at 806-07 (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

136. *Id.* at 807.

137. *Id.* at 811.

As Professor Henry Monaghan has explained, the Court relied on two distinct but related rationales, fundamental fairness and consent, to support its conclusion that due process does not guarantee absent plaintiff class members the protection of the minimum contacts requirement.¹³⁸ In concluding that it does not violate fundamental fairness to assert jurisdiction over absent class members who lack minimum contacts, the Court noted that the burdens borne by absent plaintiff class members “are not of the same order or magnitude as those” borne by defendants.¹³⁹ Defendants face a host of substantial burdens:

An out-of-state defendant summoned by a plaintiff is faced with the full powers of the forum State to render judgment *against* it. The defendant must generally hire counsel and travel to the forum to defend itself from the plaintiff's claim, or suffer a default judgment. The defendant may be forced to participate in extended and often costly discovery, and will be forced to respond in damages or to comply with some other form of remedy imposed by the court should it lose the suit. The defendant may also face liability for court costs and attorney's fees.¹⁴⁰

Given the substantiality of these burdens, “the minimum contacts requirement of the Due Process Clause prevents the forum State from unfairly imposing them upon the defendant.”¹⁴¹

Absent plaintiff class members do not face these burdens, the Court opined.¹⁴² Unlike the defendant, absent plaintiff class members are not required to appear in court, retain counsel, or fend for themselves.¹⁴³ Rather, the court and the named representatives are charged with protecting their interests. Under the procedural rules of many states, the court may not certify the class unless it finds that the named representatives will adequately represent the interests of the absent class members and that their claims are

138. See Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1167 (1998).

139. *Shutts*, 472 U.S. at 808.

140. *Id.*

141. *Id.*

142. See *id.* at 809.

143. See *id.* at 809-10.

common in nature.¹⁴⁴ Nor may class counsel dismiss or settle the action without judicial approval.¹⁴⁵ Even the defendant “has a great interest in ensuring that the absent plaintiff’s claims are properly before the forum.”¹⁴⁶

The *Shutts* Court cited other relevant differences between defendants and absent plaintiff class members:

[A]bsent plaintiff class members ... are almost never subject to counterclaims or cross-claims, or liability for fees or costs. Absent plaintiff class members are not subject to coercive or punitive remedies. Nor will an adverse judgment typically bind an absent plaintiff for any damages, although a valid adverse judgment may extinguish any of the plaintiff’s claims which were litigated.¹⁴⁷

Given the differences in the positions of, and the burdens borne by, defendants and absent plaintiff class members, the Court concluded that it would not violate fundamental fairness to assert jurisdiction over absent class members who lack minimum contacts with the state as long as they are afforded certain due process protections:

[A] forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant. If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”... [D]ue 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”

144. *Id.* at 809; *cf.* FED. R. CIV. P. 23(a)(2), (4).

145. *Shutts*, 472 U.S. at 810; *cf.* FED. R. CIV. P. 23(e).

146. *Shutts*, 472 U.S. at 809; *see also* Bassett, *supra* note 6, at 521-22, 530-40.

147. *Shutts*, 472 U.S. at 810 (footnote omitted).

or “request for exclusion” form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.¹⁴⁸

According to *Shutts*, then, absent plaintiff class members may be bound by a judgment rendered by a court in a state with which they lack minimum contacts as long as they receive notice, an opportunity to participate, an opportunity to opt out, and adequate representation by the named representative.

The Court invoked a consent rationale to bolster its conclusion that it does not violate fundamental fairness to deny absent plaintiff class members the protection of the minimum contacts test. The defendant argued that absent plaintiff class members should not be deemed to consent to jurisdiction by virtue of their failure to opt out. Due process requires a more affirmative showing of consent, the defendant argued, such as execution of an “opt in” form.¹⁴⁹ Noting that “[a]ny plaintiff may consent to jurisdiction,” the Court identified as “[t]he essential question ... how stringent the requirement for a showing of consent will be.”¹⁵⁰ In light of the apparent efficacy of the opt-out opportunity in the *Shutts* litigation—3400 members of a class of 33,000 had opted out—the Court concluded:

[T]he Constitution does not require more to protect what must be the somewhat rare species of class member who is unwilling to execute an “opt out” form, but whose claim is nonetheless so important that he cannot be presumed to consent to being a member of the class by his failure to do so.¹⁵¹

Rather, the Court concluded that absent class members who decline to opt out are deemed to have consented to personal jurisdiction.

The consent rationale is subject to serious question. First, opt-out rights are almost never exercised. According to an empirical study

148. *Id.* at 811-12 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950) and citing *Hansberry v. Lee*, 311 U.S. 32, 42-43, 45 (1940)) (footnote omitted).

149. *Id.* at 806, 811 (describing the defendant’s consent argument).

150. *Id.* at 812 (citation omitted).

151. *Id.* at 813. The 10.3 percent opt-out rate in *Shutts* is exponentially higher than the average opt-out rate. *See infra* notes 152-54 and accompanying text.

performed by Professors Theodore Eisenberg and Geoffrey Miller, “on average, less than 1 percent of class members opt-out”¹⁵² Furthermore, “[t]he median percentage of class members opting out ... is a mere 0.1 percent.”¹⁵³ Even in mass tort cases, in which prospective recoveries may be large enough to justify individual lawsuits, the “median opt-out rate is 4.2 percent and the mean 4.6 percent.”¹⁵⁴ Second, according to an earlier empirical study performed by the Federal Judicial Center, notices of class action settlements rarely provide the information necessary for class members to estimate the amount of their own recovery.¹⁵⁵ Furthermore, class members often misunderstand the notices and fail to realize that inaction has legal consequences.¹⁵⁶ These problems are compounded by the fact that class action notices are not served by process servers but rather are mailed (or published) and may be mistaken for “junk mail.”¹⁵⁷ Given the extremely low rate of opting out and the great risk of misunderstanding, it is not reasonable to equate a failure to opt out with affirmative consent to jurisdiction. Rather, “[c]ommon sense indicates that apathy, not decision, is the basis for inaction.”¹⁵⁸ As Professor Tobias Barrington Wolff put it,

152. Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1532 (2004); see also Thomas E. Willging et al., *An Empirical Analysis of Rule 23 To Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 135 (1996) (reporting that “the median percentage of members who opted out was either 0.1% or 0.2% of the total membership of the class” in a study of four federal judicial districts).

153. Eisenberg & Miller, *supra* note 152, at 1546.

154. *Id.* at 1548.

155. Willging, *supra* note 152, at 132-33.

156. See, e.g., Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1, 17, 22-23 (1986); Monaghan, *supra* note 138, at 1185 (describing notices as “complex, all too often uninformative, ... misleading” and “frequently ‘incomprehensible’”) (citation omitted); Willging, *supra* note 152, at 134. The 2003 amendment to Rule 23 requires notices to be concise and to use “plain, easily understood language.” FED. R. CIV. P. 23(c)(2)(B).

157. Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. (forthcoming 2008) (manuscript at 39-40, on file with author).

158. Eisenberg & Miller, *supra* note 152, at 1561; see also John E. Kennedy, *The Supreme Court Meets the Bride of Frankenstein: Phillips Petroleum Co. v. Shutts and the State Multistate Class Action*, 34 U. KAN. L. REV. 255, 291-95 (1985); Miller, *supra* note 8, at 641 (viewing the consent rationale as “simply confabulation”); Monaghan, *supra* note 138, at 1170 & n.95, 1185-86; Wood, *supra* note 132, at 620 (stating that “[t]he *Shutts* consent finesse ... does violence to the general theory of consent”).

it is “untenable” to assume that a failure to opt out constitutes “a voluntary and autonomous choice to be subject to a court’s adjudicatory jurisdiction.”¹⁵⁹

Notwithstanding these doubts about the consent rationale, the lower federal courts have relied upon it to uphold settlements, deeming absent class members who decline to opt out to have consented to the court’s jurisdiction.¹⁶⁰ Moreover, some federal appellate courts have upheld federal injunctions enjoining absent class members from pressing claims in state court that were released or barred by a prior federal court judgment without even considering whether the absent class members were subject to the district court’s jurisdiction.¹⁶¹ Others have relied explicitly on *Shutts* to uphold federal injunctions barring absent class members from asserting claims resolved by the federal class action judgment or released in a judicially approved settlement.¹⁶²

Although *Shutts* certainly informs the personal jurisdiction analysis in this context, three curious complications require further attention: the appropriateness of deeming class members who exercise back-end opt-out rights to have consented to the court’s jurisdiction; the appropriateness of equating jurisdiction to bind absent class members by a judgment with jurisdiction to enjoin them from pressing their claims in the forum of their choice; and the jurisdictional reach of federal courts. The sections that follow address these complications in turn.

159. Wolff, *supra* note 157 (manuscript at 35, 39).

160. See, e.g., *In re Prudential Ins. Co. Am. Sales Practices Litig.*, 148 F.3d 283, 306 (3d Cir. 1998); *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 199 (3d Cir. 1993); *In re Prudential Ins. Co. Am. Sales Practices Litig.*, No. 95-4704, 1999 U.S. Dist. LEXIS 22477, at **6-7 (D.N.J. May 6, 1999); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 177 F.R.D. 54, 60 (D. Mass. 1997); *In re Bolar Pharm. Co. Generic Drug Consumer Litig.*, MDL No. 849, 1994 WL 326522, at *2 (E.D. Pa. July 5, 1994); see also 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1757, at 111 & n.14 (3d ed. 2005).

161. See, e.g., *In re Gen'l Am. Life Ins. Co. Sales Practices Litig.*, 357 F.3d 800 (8th Cir. 2004); *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355 (3d Cir. 2001); *Williams v. Gen. Elec. Capital Auto Lease, Inc.*, 159 F.3d 266, 274 (7th Cir. 1998).

162. See, e.g., *Carlough*, 10 F.3d at 199; *SR 7 Leasing, Inc. v. Curtis*, 189 F.R.D. 681, 684-85 (M.D. Ala. 1999); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 177 F.R.D. 216, 229 (D.N.J. 1997); *In re Bolar Pharm. Co.*, 1994 WL 326522, at *2; *In re Asbestos Sch. Litig.*, No. 83-0268, 1991 WL 61156, at *4 (E.D. Pa. Apr. 16, 1991), *aff'd*, 950 F.2d 723 (3d Cir. 1991); see also *Diet Drugs I*, 282 F.3d 220, 229-32 (3d Cir. 2002).

2. *Back-end Opt-out Plaintiffs and Consent*

Shutts distinguished between two groups of absent plaintiff class members: (1) those who receive notice and decline to opt out of the class; and (2) those who opt out. The former are deemed to consent to the court's jurisdiction by failing to exercise the right to opt out.¹⁶³ Regarding members of the latter group, however, nothing supports either an inference of consent or an argument that the court has jurisdiction to enjoin them from suing elsewhere in the absence of minimum contacts. Because the jurisdictional consequences of opting out are so important, one must determine whether it is appropriate to treat absent class members who exercise back-end opt-out rights as though they had declined to opt out. Put differently, does a person who exercises a back-end opt-out right nevertheless submit to the rendering court's jurisdiction?

The district court in the fen-phen litigation clearly treated those exercising downstream opt-out rights as though they had declined to opt out and therefore had consented to jurisdiction. In an opinion accompanying an injunction against an individual who exercised an intermediate opt-out right, the district court stated that she "remains a class member and is bound by the terms of the Settlement Agreement even though she has elected her opt-out right and has chosen to sue [the defendant] individually."¹⁶⁴ The court thus treated class members exercising intermediate opt-out rights as though they had declined to opt out because they failed to opt out initially. The Third Circuit agreed with this treatment:

Putative class members who wished to opt out entirely from the settlement, foregoing all benefits and any restrictions, were obliged to file their opt-out notices by March 30, 2000. Drug users who chose not to opt out initially became settlement class members, bound not to assert "settled claims" against Wyeth except as the agreement permits.¹⁶⁵

163. See *supra* notes 149-51 and accompanying text.

164. Memorandum & PTO 3123, *supra* note 81, at 2; see also Memorandum & PTO 2828, *supra* note 81, at *1.

165. *Diet Drugs II*, 369 F.3d 293, 299 (3d Cir. 2004) (footnote omitted).

The Third Circuit implicitly assumed that by failing to opt out initially, the absent class members who later exercised downstream opt-out rights had consented to the court's jurisdiction and had accepted the terms of the Settlement Agreement (including the bar on recovery of punitive damages and other restrictions on recovery outside the class action).¹⁶⁶ In fact, it is fair to say that the entire settlement was predicated on the class action court's ability to bind those who declined to opt out initially by the restrictions built into the Settlement Agreement.

Notwithstanding the courts' certitude, one should hesitate before deeming downstream opt-out plaintiffs to have consented to jurisdiction. After all, they may not have even known they had a medical problem before the cut-off date for the initial opt-out. Upon learning of their condition, they promptly opted out of the class action. From their perspective, back-end opt-out plaintiffs are very similar to class members who *did* opt out, and who did *not* consent to the court's jurisdiction. Granted, class action documents notified class members that if they did not opt out by the initial opt-out date, they would be bound by the restrictions in the settlement approved by the court. If they truly wanted to preserve their opportunity to sue for all forms of relief should they become ill, they could have opted out initially, even before they learned of their condition. As the Supreme Court recognized in *Amchem*, however, "[e]ven if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out."¹⁶⁷ The whole point of a back-end opt-out right, after all, is to afford absent class members an opportunity to make an informed decision *after* they know the nature of their condition. And by exercising a back-end opt-out right, class members are explicitly *declining* to submit their claims to the jurisdiction of the federal court adjudicating the class action. Therefore, at least a colorable argument exists that back-end opt-out plaintiffs do not consent to the class action court's jurisdiction.

Even if the consent rationale does not support jurisdiction to bind back-end opt-out plaintiffs by the terms of the settlement agree-

166. Settlement Agreement, *supra* note 34, §§ IV.D.3.c, IV.D.4.c.

167. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997).

ment, however, the fundamental fairness rationale likely does. Back-end opt-out plaintiffs are afforded all of the procedural protections required by *Shutts*: notice, the opportunity to opt out after they learn of their condition, and adequate representation.¹⁶⁸ In this context, there is some assurance that these protections are meaningful. For example, the opt-out plaintiffs' very decision to exclude themselves from the class action suggests the effectiveness of the notice. Furthermore, because back-end opt-out plaintiffs contemplate filing individual suits, they likely have access to counsel, which increases the likelihood that they understand the limitations built into the downstream opt-out right and the settlement agreement. Therefore, even if doubts remain about the consent rationale, the fairness rationale likely supports an assertion of jurisdiction to bind back-end opt-out plaintiffs by the terms of the settlement agreement.

3. *Jurisdiction to Enjoin*

If one questions whether back-end opt-out plaintiffs consent to the class action court's jurisdiction to bind them by the substantive terms of the settlement, then certainly one should question whether such plaintiffs consent to jurisdiction to enjoin them from suing elsewhere.¹⁶⁹ As Professor Joan Steinman observed, "[n]o Supreme Court case makes clear that the consent to jurisdiction that may be inferred from a failure to opt out ... encompasses consent to be enjoined from prosecuting related litigation."¹⁷⁰ It is extremely doubtful that a class member who exercises a downstream opt-out right, expressing her intent *not* to present her claim to the class action court, actually consents to its jurisdiction in a far more onerous injunction proceeding.

168. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 (1985).

169. See Monaghan, *supra* note 138, at 1153; see also *id.* at 1185 (questioning "why, in failing to opt out, absent class members had impliedly consented to the risk of future antisuit injunctions"); Linda S. Mullenix, *Class Actions, Personal Jurisdiction, and Plaintiffs' Due Process: Implications for Mass Tort Litigation*, 28 U.C. DAVIS L. REV. 871, 898 (1995).

170. Steinman, *supra* note 96, at 860; see also *id.* at 860-61 (stating that "it seems inappropriate to infer, from a mere failure to opt out, consent to the class action court's jurisdiction for the purpose of entering an anti-suit injunction against absent class members").

Nor does *Shutts's* fairness rationale¹⁷¹ support jurisdiction to enter an injunction in the absence of minimum contacts. Just because it is fair for a court to adjudicate an absent class member's substantive claim in the absence of minimum contacts does not necessarily mean that it is fair for that court to enjoin her from suing elsewhere or from presenting evidence in support of a claim that she expressly preserved by exercising a back-end opt-out right. In fact, there are at least two reasons why the fairness calculus may yield a different result in the injunction context: (1) absent class members threatened with an injunction will face additional risks, including punitive or coercive sanctions, and will receive fewer protections than class members in the underlying class action; and (2) absent class members threatened with an injunction who wish to collaterally attack the class action judgment for inadequate representation will have to do so before the class action court, even if it sits in a state with which they lack minimum contacts, rather than in a convenient forum of their choosing.¹⁷²

In explicating the fairness rationale, the *Shutts* Court distinguished between the burdens borne by defendants and absent plaintiff class members: "[A]bsent plaintiff class members ... are almost never subject to counterclaims or cross-claims, or liability for fees or costs. Absent plaintiff class members are not subject to coercive or punitive remedies. Nor will an adverse judgment typically bind an absent plaintiff for any damages"¹⁷³ When absent plaintiff class members *do* bear some or all of these burdens, it may no longer be constitutional to dispense with the minimum contacts requirement.

In *State v. Homeside Lending, Inc.*,¹⁷⁴ for example, the Vermont Supreme Court held that absent plaintiff class members who were required to pay attorneys' fees that exceeded their paltry recovery could not be bound by the judgment unless they had minimum contacts with the forum state: "where a class action can impose monetary burdens on plaintiff class members that can exceed any benefits, a state court has personal jurisdiction only over those class

171. *Shutts*, 472 U.S. at 808-11.

172. See *infra* notes 182-207 and accompanying text.

173. *Shutts*, 472 U.S. at 810 (footnote omitted).

174. 826 A.2d 997 (Vt. 2003).

members who have minimum contacts with the state under [*International Shoe*].”¹⁷⁵

Back-end opt-out plaintiffs typically are not subject to the type of financial liability imposed on the absent class members in *Homeside Lending*. But if they violate an injunction that bars them from pressing their claims in state court or from presenting certain evidence in support of their claims, they can be held in criminal or civil contempt. Then, these plaintiffs would be subject to punitive sanctions or “equity’s traditional coercive sanctions for contempt: fines and bodily commitment imposed pending compliance or agreement to comply.”¹⁷⁶ From this perspective, absent plaintiff class members facing punitive or coercive remedies look a lot like defendants: they have to show up in a distant forum to contest the scope of the injunction and to explain why they should not be held in contempt if they violate it.

Neither the class representative nor class counsel will appear in the injunction proceeding to protect the back-end opt-out plaintiff’s interests,¹⁷⁷ and the defendant, who in the underlying class action “ha[d] a great interest in ensuring that the absent plaintiff’s claims are properly before the forum,”¹⁷⁸ is now interested only in denying the plaintiff the opportunity to recover in state court. And the back-end opt-out plaintiff cannot opt out of the injunction proceedings.¹⁷⁹ Therefore, because back-end opt-out plaintiffs who are threatened with an injunction face more burdens and fewer protections than standard absent plaintiff class members, the *Shutts* fairness calculus¹⁸⁰ may tip in favor of extending to them the protection of the minimum contacts test.¹⁸¹

A further consideration reinforces this conclusion: a back-end opt-out plaintiff seeking to avoid the binding effect of a class action judgment by challenging the adequacy of representation afforded in the class action should be permitted to bring the collateral attack

175. *Id.* at 1005 (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945)).

176. *U.S. Dep’t of Energy v. Ohio*, 503 U.S. 607, 623 (1992).

177. See Steinman, *supra* note 96, at 861; *cf. Shutts*, 472 U.S. at 810.

178. Steinman, *supra* note 96, at 809.

179. *Id.* at 860.

180. *Shutts*, 472 U.S. at 808-11.

181. See *United States v. Int’l Bhd. of Teamsters*, 907 F.2d 277, 281 (2d Cir. 1990) (stating that “the All Writs Act requires ... that the persons enjoined have the ‘minimum contacts’ that are constitutionally required under due process”).

in a convenient forum of her choice, rather than having to raise it before the distant class action court in the injunction proceeding.

A vigorous debate rages in both the academy¹⁸² and the judiciary¹⁸³ on whether due process assures absent class members an opportunity to collaterally attack a class action judgment on grounds of inadequate representation if the class action court already determined that issue. Several statements in *Shutts* support the view that absent class members who lack minimum contacts with the forum retain the right to collaterally attack the judgment for inadequate representation in a forum of their choice.

First, as part of its fundamental fairness rationale, the *Shutts* Court stated that the judgment may bind absent class members only if “the named plaintiff *at all times* adequately represent[ed] the[ir] interests.”¹⁸⁴ Absent class members who are denied this fundamental due process protection and who lack minimum contacts are not subject to the court’s jurisdiction and are not bound by the judgment.¹⁸⁵ True, the class action court will have concluded at the time of certification that “the representative parties will

182. See, e.g., Bassett, *supra* note 6, at 522-30; David A. Dana, *Adequacy of Representation After Stephenson: A Rawlsian / Behavioral Economics Approach to Class Action Settlements*, 55 EMORY L.J. 279 (2006); Hoffman, *Syngenta*, *supra* note 97, at 619-38; Marcel Kahan & Linda Silberman, *Matsushita and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims*, 1996 SUP. CT. REV. 219; Susan P. Koniak, *How Like a Winter? The Plight of Absent Class Members Denied Adequate Representation*, 79 NOTRE DAME L. REV. 1787 (2004); Monaghan, *supra* note 138; Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287 (2003); Wolff, *supra* note 157 (manuscript at 60-70); Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717 (2005); Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX. L. REV. 383 (2000) [hereinafter Woolley, *Collateral Attack*]; Patrick Woolley, *Shutts and the Adequate Representation Requirement*, 74 UMKC L. REV. 765 (2006) [hereinafter Woolley, *Shutts*].

183. Compare *Wolfert v. Transamerica Home First, Inc.*, 439 F.3d 165, 171 (2d Cir. 2006), and *In re Diet Drugs Prods. Liab. Litig.*, 431 F.3d 141, 146 (3d Cir. 2005), with *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 258-59 (2d Cir. 2001), *aff'd in part by an equally divided court and vacated in part*, 539 U.S. 111 (2003), and *Gonzales v. Cassidy*, 474 F.2d 67, 72 (5th Cir. 1973); and compare *State v. Homeside Lending, Inc.*, 826 A.2d 997, 1016-18 (Vt. 2003) with *Epstein v. MCA, Inc.*, 179 F.3d 641, 648-49 (9th Cir. 1999).

184. *Shutts*, 472 U.S. at 812 (emphasis added).

185. See *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940); *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877); Woolley, *Shutts*, *supra* note 182, at 766 (stating that “absent class members who lack minimum contacts with the forum and have not expressly consented to territorial jurisdiction have a constitutional right to collaterally attack a class action judgment on grounds of inadequate representation”) (footnote omitted).

fairly and adequately protect the interests of the class.”¹⁸⁶ But that determination, even if correct when made, does not take into account the quality of representation provided later in the proceedings.¹⁸⁷ Even if objectors appear in the class action to challenge the adequacy of representation later in the proceedings, they do not represent the absent class members.¹⁸⁸ And absent class members who lack contacts with the forum cannot be compelled to raise their objections in the class action itself.¹⁸⁹

Second, *Shutts* stated that “an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course”¹⁹⁰ Precisely because absent class members bear few, if any, burdens, the Court concluded that it is fair to subject them to jurisdiction in the absence of minimum contacts.¹⁹¹ But if absent class members who lack minimum contacts are bound by the class action court’s findings of adequacy, they will have to monitor both the class action litigation and the quality of the representation provided, and raise their objections in the potentially distant class action court.¹⁹² Only if absent class members retain the opportunity to collaterally attack the class action judgment on adequacy grounds are they really free to “sit back.”¹⁹³

The availability of a right to collaterally attack a class action judgment for inadequate representation strongly counsels against an assertion of jurisdiction by the class action court to enjoin back-end opt-out plaintiffs from proceeding in state court. If the class action court were to exercise such jurisdiction, back-end opt-out

186. FED. R. CIV. P. 23(a)(4).

187. See *Gonzales*, 474 F.2d at 72, 75; RHONDA WASSERMAN, PROCEDURAL DUE PROCESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 186 (2004); Woolley, *Collateral Attack*, *supra* note 182, at 399; Woolley, *Shutts*, *supra* note 182, at 766 (stating that “a prediction under Rule 23(a)(4) that class representatives and class counsel will adequately represent the class is insufficient to satisfy the Due Process Clause”); see also RESTATEMENT (SECOND) OF JUDGMENTS § 41 cmt. a (1982) (permitting a represented party to challenge the adequacy of representation “by attacking the judgment by subsequent proceedings”).

188. WASSERMAN, *supra* note 187, at 187.

189. See Woolley, *Collateral Attack*, *supra* note 182, at 388, 395.

190. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985); see also *Monaghan*, *supra* note 138, at 1198.

191. See *supra* notes 139-48 and accompanying text; see also Woolley, *Collateral Attack*, *supra* note 182, at 397.

192. See Woolley, *Collateral Attack*, *supra* note 182, at 398.

193. See *id.*

plaintiffs who seek to avoid the class action judgment by challenging the adequacy of the representation afforded would have to raise their objections before the class action court in the injunction proceeding. These plaintiffs would be forced to come before the class action court even if they lack minimum contacts with the state in which the court sits, rather than appearing in a convenient forum of their choice.

Concern for preserving a right to contest the adequacy of representation in a convenient forum led the Court of Appeals for the Third Circuit to hold that a federal district court that certified a mandatory class action could not enjoin absent class members who lacked minimum contacts from pressing their individual claims in different fora.¹⁹⁴ The United States District Court for the Eastern District of Pennsylvania had certified a mandatory, multidistrict class action to adjudicate federal antitrust claims against several title insurance companies.¹⁹⁵ The claims were ultimately settled.¹⁹⁶ Two Arizona school boards, which had been absent class members in the federal litigation, later filed suit in an Arizona state court against the same defendants, alleging violations of Arizona antitrust law arising out of the same conduct.¹⁹⁷ The defendants asked the federal district court that approved the settlement to enjoin the Arizona school boards from proceeding in state court because the claims they sought to pursue were foreclosed by the settlement.¹⁹⁸ The district court entered the injunction notwithstanding the school boards' lack of minimum contacts with Pennsylvania.¹⁹⁹

In reversing, the Third Circuit reasoned that the school boards "ha[d] lost more than the absent plaintiffs lost in *Shutts*, and yet were given fewer procedural protections."²⁰⁰ Like the absent class members in *Shutts*, the absent class members in the real estate

194. *In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 762-63 (3d Cir. 1989); see also *Wolfert v. Transamerica Home First, Inc.*, 439 F.3d 165, 170 n.6 (2d Cir. 2006) (noting "the inconvenience of obliging inadequately represented absent class members to litigate their concern in a distant court, rather than a local court in which the class action judgment is sought to be enforced against them or collaterally challenged by them").

195. *In re Real Estate Litig.*, 869 F.2d at 763.

196. *Id.*

197. *Id.* at 764.

198. *Id.*

199. See *id.* at 764-65.

200. *Id.* at 762; see also *id.* at 768-69.

title litigation ran the risk that their monetary claims would be lost in the federal class action in Philadelphia.²⁰¹ But according to the Third Circuit, the *Shutts* class members would have been bound by the state court judgment only if they had been adequately represented in the class action; they possessed the right to collaterally attack that judgment in a convenient forum of their choosing if the representation was inadequate.²⁰² In the title insurance litigation, on the other hand, the absent class members would have been deprived of the opportunity to challenge the adequacy of representation in a convenient forum of their own choosing if the district court had authority to enjoin their independent actions in other fora.²⁰³ If the absent class members wished to avoid the binding effect of the class action settlement because the representation had been inadequate, they would have had to travel from Arizona to Philadelphia to litigate the inadequacy of representation in a forum with which they had no contacts.²⁰⁴ Thus, they would have lost more—the right to challenge adequacy in a convenient forum—than the *Shutts* plaintiffs had risked.²⁰⁵

Because the absent plaintiff class members in the title insurance litigation also received fewer procedural protections than the *Shutts* plaintiffs—they had not been afforded an opportunity to opt out of the class action—the Third Circuit reversed the injunction.²⁰⁶

[G]iven that the absent member in this case loses more than the plaintiffs lost in *Shutts*, if the member has not been given the opportunity to opt out in a class action involving both important injunctive relief and damage claims, the member must either have minimum contacts with the forum or consent to jurisdiction in order to be enjoined by the district court that entertained the class action.²⁰⁷

201. *See id.* at 767.

202. *Id.* (discussing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985) and citing *Hansberry v. Lee*, 311 U.S. 32, 42-44 (1940)).

203. *See id.*

204. *Id.*

205. *See id.*

206. *Id.* at 762-64, 768-69 (explaining that the district court certified the class under Rules 23(b)(1) and (b)(2) notwithstanding the presence of significant monetary claims, and noting that class members were denied an opportunity to opt out).

207. *Id.* at 769; *see also id.* at 762 (holding that “it would violate due process for the district court to enjoin the [absent class members], which have not had minimum contacts

Not all courts agree on the jurisdictional prerequisites for injunctive relief in these circumstances. In the *Bridgestone/Firestone* litigation, the Court of Appeals for the Seventh Circuit held that once it determined that a nationwide class could not be certified on the facts of the case, the federal district court should have enjoined absent class members from bringing another nationwide class action on behalf of the same class.²⁰⁸ Even though no class was certified and some or many of the absent (not-to-be) class members may have lacked minimum contacts with the state in which the district court sat and never were afforded an opportunity to opt out, the appellate court held that they were subject to personal jurisdiction by virtue of their status as class members, citing *Shutts*.²⁰⁹ Conceding that the absent (not-to-be) class members would be bound by the judgment only if they had been adequately represented, the Seventh Circuit relied on the district court's original determination of adequacy made in support of a certification decision that the Seventh Circuit itself reversed on other grounds.²¹⁰ Even though the absent (not-to-be) class members had not had an opportunity to opt out of the certification decision itself, the court concluded that they nevertheless were bound by the

with the forum nor consented to jurisdiction"). The court made clear that it was not deciding whether the district court would have had authority to enjoin the absent class members had they been afforded an opportunity to opt out of the class action. *Id.* at 770. In another action, the Third Circuit later held that even in a Rule 23(b)(3) class action, absent class members who lack minimum contacts with the forum cannot be enjoined from filing a parallel law suit in state court if they have not yet been afforded an opportunity to opt out. *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 201 (3d Cir. 1993). Likewise, when a federal court's certification of a nationwide class was vacated and a settlement of the class claims was disapproved, the federal court could not enjoin the class members who lacked contacts with the forum from presenting the same settlement to a state court because it lacked personal jurisdiction over them. *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 141 (3d Cir. 1998).

208. *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 769 (7th Cir. 2003).

209. *Id.* at 768. For a critical analysis of *In re Bridgestone/Firestone*, see Timothy Kerr, *Cleaning Up One Mess to Create Another: Duplicative Class Actions, Federal Courts' Injunctive Power, and the Class Action Fairness Act of 2005*, 29 *HAMLIN L. REV.* 217, 240-43 (2006); see also Wolff, *supra* note 157 (manuscript at 29) (characterizing Judge Easterbrook's analysis as "unsatisfying" but concluding that the "Seventh Circuit was correct in its core holding").

210. *In re Bridgestone/Firestone*, 333 F.3d at 768-69.

determination that a nationwide class could not be certified²¹¹ (but they remained free to press their own claims individually).²¹²

Although much of the Seventh Circuit's reasoning conflicts with the position taken herein, two important points reduce the conflict. First, the court recognized that one of the claims raised in the class action complaint arose under the civil RICO statute, which authorizes nationwide service of process.²¹³ Thus, the court arguably had jurisdiction over all class members who had minimum contacts with the *country*. Part III.B.4 explores the significance of the different limitations on personal jurisdiction imposed by the Fifth and Fourteenth Amendment Due Process Clauses. Second, the court further noted that the absent (not-to-be) class members did not seek to avoid the binding effect of the class action judgment by arguing that they had not been adequately represented.²¹⁴ Thus, entry of an injunction by the class action court did not have the effect of denying the absent (not-to-be) class members the opportunity to litigate the adequacy of representation in a forum of their choice.

4. Jurisdictional Reach of Federal Courts

The preceding sections of Part III.B questioned whether either of *Shutts's* rationales—fundamental fairness or consent—permits a class action court to enter an injunction against absent class members who lack minimum contacts with the state in which the federal court sits. This section considers the argument that because the jurisdictional reach of a federal court is broader than that of a state court, the federal court has authority to enjoin absent class members as long as they have minimum contacts with the country as a whole.

Although it is widely acknowledged that the restrictions on personal jurisdiction imposed by the Fifth and Fourteenth Amendment Due Process Clauses are different,²¹⁵ and that federal

211. *Id.* at 769.

212. *Id.*

213. *Id.* at 768 (citing 18 U.S.C. § 1965(b) (2000)).

214. *Id.* at 769 (noting that the district court's determination that the representation was adequate "was not challenged on the first appeal [from the certification order] and is not contested now").

215. See, e.g., Linda Sandstrom Simard, *Exploring the Limits of Specific Personal Jurisdiction*, 62 OHIO ST. L.J. 1619, 1642-44 (2001).

courts have broader authority than state courts,²¹⁶ in many cases the federal court's jurisdictional reach nevertheless mirrors that of the state court sitting next door. That is because Federal Rule of Civil Procedure 4(k)(1)(A) permits federal courts to rely upon state long-arm statutes for statutory authority to exercise jurisdiction; but when they do so, Rule 4 limits their jurisdictional reach "to the jurisdiction of a court of general jurisdiction in the state in which the district court is located."²¹⁷ Put differently, federal courts relying on state long-arm statutes are bound by the more restrictive Fourteenth Amendment due process standards and can exercise jurisdiction only over parties who have minimum contacts with the state in which the federal court sits. Professor Monaghan, who maintains that class action courts cannot enjoin absent class members from collaterally attacking judgments unless they have minimum contacts with the state,²¹⁸ has extended this reasoning to federal courts "because Rule 4(k)(1)(A) ... generally limits a federal court's in personam jurisdiction to that of the state court next door."²¹⁹

Although Rule 4(k)(1)(A) often means that the jurisdictional reach of federal courts is restricted by the narrower Fourteenth Amendment limits, that Rule plays no role when a class action court seeks to enjoin back-end opt-out plaintiffs from pressing claims in state court.²²⁰ Rule 4 governs service of a summons, which is to "be directed to the defendant."²²¹ If the class action court seeks to enjoin a back-end opt-out plaintiff from seeking recovery in state court, the opt-out plaintiff assumes a defensive posture in the injunction proceeding.²²² But she does not become a "defendant," and she is not served with a summons under Rule 4.²²³ Accordingly,

216. Many of the federal courts of appeals have held that the constitutionality of an exercise of jurisdiction under the Fifth Amendment may be based on the party's aggregated contacts with the United States as a whole. *See* WASSERMAN, *supra* note 187, at 249-50, 261 n.111 (citing cases).

217. FED. R. CIV. P. 4(k)(1)(A).

218. Monaghan, *supra* note 138, at 1153.

219. *Id.* at 1153 n.19; *see also id.* at 1166 n.75, 1167.

220. *See* FED. R. CIV. P. 4.

221. FED. R. CIV. P. 4(a).

222. *See* Woolley, *Collateral Attack*, *supra* note 182, at 395 n.37.

223. *See id.*

the federal court's jurisdictional reach is not restricted by Rule 4(k)(1)(A) or Fourteenth Amendment due process standards.²²⁴

If neither Rule 4(k)(1)(A) nor the Fourteenth Amendment limits the federal court's jurisdictional reach, then the court may assert jurisdiction over back-end opt-out plaintiffs as long as there is statutory authority and the assertion does not violate the Fifth Amendment Due Process Clause.²²⁵ The Supreme Court has declined to decide the appropriate standard for gauging assertions of personal jurisdiction by federal courts under the Fifth Amendment,²²⁶ but many of the federal courts of appeals have upheld jurisdiction based upon the defendant's aggregate contacts with the country as a whole, rather than upon her contacts with the state in which the court sits.²²⁷ Consequently, as long as statutory authority exists, a federal court's assertion of jurisdiction to enjoin a back-end opt-out plaintiff who resides anywhere in the United States (or a foreign plaintiff who has minimum contacts with the country as a whole) likely will satisfy the Fifth Amendment minimum contacts test even if neither the consent rationale nor the fundamental fairness rationale from *Shutts* obtains.²²⁸

224. See Wolff, *supra* note 157 (manuscript at 42, 57); Woolley, *Collateral Attack*, *supra* note 182, at 395 n.37.

225. See *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987); see also 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1068.1 (3d ed. 2002 & Supp. 2006).

226. See *Omni*, 484 U.S. at 102 n.5 (declining to decide whether "a federal court could exercise personal jurisdiction, consistent with the Fifth Amendment, based on an aggregation of the defendant's contacts with the Nation as a whole, rather than on its contacts with the State in which the federal court sits"); *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 113 n.* (1987).

227. See, e.g., *Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174, 1180 (9th Cir. 2004); *ISI Int'l, Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 548, 551 (7th Cir. 2001); *Tex. Trading & Milling Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300, 314-15 (2d Cir. 1981); see also WASSERMAN, *supra* note 187, at 249, 261 n.111 (citing cases); 4 WRIGHT & MILLER, *supra* note 225, § 1068.1.

228. See Steinman, *supra* note 96, at 861 (stating that "[i]f the court ... employ[s] the All Writs Act as its long-arm statute, the United States will be the sovereign with whom the absent class members must have minimum contacts"); Wolff, *supra* note 157 (manuscript at 42); see also 7AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1789.1, at 575-76 (3d ed. 2005) (footnotes omitted); Miller & Crump, *supra* note 156, at 29.

In upholding jurisdiction to enjoin the absent (not-to-be) class members from initiating another nationwide class, the Seventh Circuit in *Bridgestone/Firestone* relied upon the federal court's "power to issue nationwide process" and the presence of an alleged class claim

Two important caveats exist. First, even though the jurisdictional limits imposed by the Fifth Amendment are less stringent than the Fourteenth Amendment limits, in order for a federal court to take advantage of the more expansive limits, a statute or rule must authorize it.²²⁹ Federal Rule of Civil Procedure 23, the federal class action rule, does not address jurisdiction over absent class members in the underlying class action, let alone jurisdiction over back-end opt-out plaintiffs in the injunction proceeding.²³⁰ The All Writs Act, which authorizes federal courts to “issue all writs necessary or appropriate in aid of their respective jurisdictions,” might be viewed as authorizing jurisdiction to enjoin back-end opt-out plaintiffs nationwide if necessary in aid of the class action court’s jurisdiction.²³¹ In *United States v. New York Telephone Co.*, a divided Supreme Court concluded that “[t]he power conferred by the Act extends, under appropriate circumstances, to persons who, though not parties to the original action ... are in a position to frustrate the implementation of a court order or the proper administration of justice.”²³² Professor Monaghan strenuously questions whether “the Act should be construed as a general, ‘emergency all purpose’ nationwide long-arm statute.”²³³ In light of the fairness of binding back-end opt-out plaintiffs by the class action judgment established above in Part III.B.2, however, it seems reasonable to conclude that when the All Writs Act authorizes an injunction in aid of the class action court’s jurisdiction, it authorizes personal jurisdiction to enjoin absent class members against whom the injunction is issued subject to the Fifth Amendment due process limitations.²³⁴

Second, in assessing the constitutionality of assertions of jurisdiction under the Fourteenth Amendment, the Supreme Court requires not only that the defendant have minimum contacts with

arising under a federal statute that authorizes nationwide service of process. *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 768 (7th Cir. 2003).

229. See *Omni*, 484 U.S. at 104.

230. See *Miller & Crump*, *supra* note 156, at 31; cf. *Wolff*, *supra* note 157 (manuscript at 42).

231. 28 U.S.C. § 1651(a) (2000); see *infra* Part IV.A.

232. *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 174 (1977).

233. Monaghan, *supra* note 138, at 1190.

234. See *Steinman*, *supra* note 96, at 856-65; see also *Wolff*, *supra* note 157 (manuscript at 58).

the state, but also that the assertion of jurisdiction be “reasonable,” taking into account five reasonableness factors:

the burden on the defendant[;] ... the forum State’s interest in adjudicating the dispute; the plaintiff’s interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff’s power to choose the forum; the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.²³⁵

For example, even though a majority of the Court in *Asahi* concluded that the defendant had minimum contacts with the forum state, it held the assertion of jurisdiction unconstitutional because it was unreasonable to compel the defendant to appear on the facts of the case.²³⁶

Several federal courts have concluded that even if the aggregated contacts test is met, an assertion of jurisdiction under the Fifth Amendment must also be reasonable in light of the *World-Wide Volkswagen* reasonableness factors or a similar fairness test that considers the burden on the defendant.²³⁷ The Wright and Miller treatise also advocates consideration of the reasonableness of an assertion of jurisdiction even where Congress has adopted a nationwide service statute,²³⁸ as do other scholars.²³⁹ Thus, if a back-end opt-out plaintiff initiates a lawsuit on a state law claim in a state

235. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (citations omitted); see also 4 WRIGHT & MILLER, *supra* note 225, §§ 1067.2, 1067.6.

236. *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 113-16 (1987).

237. See, e.g., *Republic of Panama v. BCCI Holdings (Lux. Inc.) S.A.*, 119 F.3d 935, 945-48 (11th Cir. 1997); *Willingway Hosp., Inc. v. Blue Cross & Blue Shield of Ohio*, 870 F. Supp. 1102, 1107-11 (S.D. Ga. 1994); *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. 191, 203-04 (E.D. Pa. 1974); see also WASSERMAN, *supra* note 187, at 250.

238. 4 WRIGHT & MILLER, *supra* note 225, § 1068.1 (stating that personal jurisdiction pursuant to a nationwide service statute may be upheld whenever the other reasonableness factors, in combination, “outweigh the burden on the defendant”).

239. See, e.g., Maryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U. L. REV. 1, 85 (1984); see also Robert A. Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 VILL. L. REV. 1, 23, 32-38 (1988); Pamela J. Stephens, *The Federal Court Across the Street: Constitutional Limits on Federal Court Assertions of Personal Jurisdiction*, 18 U. RICH. L. REV. 697, 697-98, 722-23 (1984).

court at home, the federal class action court's jurisdiction to enjoin her from presenting certain claims or evidence might violate the Fifth Amendment Due Process Clause even if she has minimum contacts with the country. This violation might occur if litigation before the federal court would impose a great burden; if she would lose her opportunity to challenge, in a convenient court of her choosing, the adequacy of representation provided in the class action; or if other factors would render the assertion of jurisdiction unreasonable or unfair.

In conclusion, difficult and curious jurisdictional complications arise when federal courts seek to enjoin back-end opt-out plaintiffs from pressing their preserved claims in state court. Federal courts in this situation should consider the reasonableness, under the Fifth Amendment Due Process Clause, of an assertion of jurisdiction. In performing this reasonableness analysis, the court should consider, among other things, the burden the back-end opt-out plaintiff would face in having to appear in the class action court to litigate the preclusive effect of the class action judgment. If the back-end opt-out plaintiff seeks to avoid the binding effect of the judgment by arguing that the representation provided in the class action was inadequate, the court should consider her interest in contesting adequacy in a convenient forum with which she has some connection. In some cases, it may be that a grave burden on the back-end opt-out plaintiff would render an assertion of jurisdiction in the injunction proceeding by the class action court unconstitutional.

To avoid these jurisdictional complications, lawyers crafting settlement agreements and federal courts that approve them may include in the back-end opt-out form an express waiver of potential objections to the personal jurisdiction of the class action court in the event it issues an injunction to enforce the limits built into the back-end opt-out right. The Supreme Court has upheld the constitutionality of choice-of-forum clauses, which contractually waive objections to a court's jurisdiction.²⁴⁰ Part III.B.1 expressed

240. See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-95 (1991) (upholding a forum selection clause in a non-negotiated form contract); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9-10 (1972) (holding, in an admiralty case, that forum selection clauses are "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances") (footnote omitted); *Nat'l Equip. Rental, Ltd.*

serious doubts about the *Shutts* consent rationale, but a waiver of a jurisdictional objection incorporated into a back-end opt-out form would constitute express consent, rather than consent implied from inaction. Although reservations persist about absent class members' understanding of the material contained in class action notices,²⁴¹ class members who opt out often anticipate filing their own individual lawsuits. These class members may have access to counsel, who could ensure that the opt-out plaintiffs understand that they are consenting to the class action court's jurisdiction in the event it deems an injunction necessary to enforce the settlement agreement. In all events, if federal courts wish to exercise jurisdiction over back-end opt-out plaintiffs throughout the country, they should take steps to strengthen their authority to do so.

Finally, even if the back-end opt-out plaintiff waives the jurisdictional objection, the class action court should consider the reasonableness of compelling her to appear in a distant forum. The court should perform this reasonableness analysis in light of the federalism complications analyzed in Part IV.

IV. FEDERALISM COMPLICATIONS

Even if a federal district court has ancillary subject matter jurisdiction to enter an injunction and personal jurisdiction over absent class members exercising back-end opt-out rights, its authority to enjoin pending state court litigation is bounded by two federal statutes, the All Writs Act²⁴² and the Anti-Injunction Act,²⁴³ and by judge-made abstention doctrine.²⁴⁴ Lawmakers crafted these laws to reduce friction between state and federal courts by limiting federal interference with pending state court proceedings. Part IV considers whether federal courts can enforce the limits built into a judicially approved settlement agreement without unduly straining

v. *Szukhent*, 375 U.S. 311, 315-16 (1964) (stating that "it is settled ... that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether") (citations omitted).

241. *See supra* note 156 and accompanying text.

242. 28 U.S.C. § 1651 (2000).

243. 28 U.S.C. § 2283 (2000).

244. *See infra* Part IV.C.

federal-state relations or denying back-end opt-out plaintiffs the rights they reserve.

A. Authority Granted by the All Writs Act

The All Writs Act authorizes federal courts to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”²⁴⁵ The courts have interpreted the All Writs Act to authorize federal injunctions against state court actions “where necessary to prevent relitigation of an existing federal judgment,”²⁴⁶ and, even absent a federal judgment, when necessary to “preserv[e] ... the federal court’s jurisdiction or authority over an ongoing matter.”²⁴⁷ The All Writs Act permits a district court to enjoin state court actions even when the parties could invoke claim or issue preclusion in state court against any subsequent suit brought on the matter already litigated in federal court.²⁴⁸ In other words, a defendant who believes that a federal judgment precludes a state court action may raise claim preclusion as a defense in the state court *or* ask the federal court that issued the judgment to enjoin the state court action. Thus, at first blush, the All Writs Act appears to authorize a federal court to enjoin absent class members exercising back-end opt-out rights from seeking relief in state court that was barred by the terms of a settlement approved by a federal court.

B. Limits Imposed by the Anti-Injunction Act

The authority to issue injunctions conferred by the All Writs Act is limited by the Anti-Injunction Act, which prohibits federal courts from issuing injunctions “to stay proceedings 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.”²⁴⁹

245. 28 U.S.C. § 1651(a) (2000).

246. *In re Asbestos Sch. Litig.*, No. 83-0268, 1991 WL 61156, at *1 (E.D. Pa. Apr. 16, 1991) (citing *United States v. N.Y. Tel. Co.*, 434 U.S. 159 (1977)), *aff’d*, 950 F.2d 723 (3d Cir. 1991).

247. *Id.*

248. *See, e.g., In re Baldwin-United Corp.*, 770 F.2d 328, 335 (2d Cir. 1985).

249. 28 U.S.C. § 2283 (2000). The Anti-Injunction Act has existed in some form since 1793. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988). *See generally* 17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 4221-4226 (3d ed. 2007); Steinman,

The two statutes operate in tandem: the All Writs Act provides positive authority for the issuance of a federal injunction against state court proceedings but only if the injunction falls within one of the three statutory exceptions in the Anti-Injunction Act.²⁵⁰ The “necessary in aid of its jurisdiction” language in the two statutes has been construed similarly.²⁵¹

The Anti-Injunction Act bars only injunctions against pending state actions,²⁵² so if a district court, in its order approving a settlement, enjoins absent class members from commencing litigation on claims covered by the settlement, no Anti-Injunction Act problems arise.²⁵³ On the other hand, if a federal court seeks to enjoin an opt-out plaintiff from proceeding with a *pending* state court action, it must invoke one of the three statutory exceptions. A federal court cannot avoid the Anti-Injunction Act by purporting to allow the state action to proceed while nevertheless barring the parties from prosecuting it²⁵⁴ or from taking discovery on a particular issue.²⁵⁵

The Supreme Court has interpreted the Anti-Injunction Act’s exceptions to be “very narrow indeed,”²⁵⁶ and it has stated:

Any 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. The explicit wording of § 2283 itself

supra note 96, at 780-92.

250. See *Diet Drugs II*, 369 F.3d 293, 305 (3d Cir. 2004); *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 201 n.9 (3d Cir. 1993); *In re Baldwin-United*, 770 F.2d at 335.

251. See, e.g., *Ret. Sys. of Ala. v. J.P. Morgan Chase & Co.*, 386 F.3d 419, 425 & n.5 (2d Cir. 2004); *Diet Drugs I*, 282 F.3d 228, 239 (3d Cir. 2002); *Prudential I*, 261 F.3d 355, 365 (3d Cir. 2001).

252. *Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1965); *Standard Microsystems Corp. v. Tex. Instruments Inc.*, 916 F.2d 58, 61 (2d Cir. 1990); 17A WRIGHT ET AL., *supra* note 249, § 4222, at 63-64.

253. See, e.g., *In re Bolar Pharm. Co.*, MDL No. 849, 1994 WL 326522, at *6 (E.D. Pa. July 5, 1994) (noting that a federal injunction granted two years before the state suit was initiated “falls outside the scope of the [Anti-Injunction] Act”).

254. *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng’rs*, 398 U.S. 281, 287 (1970); *Prudential I*, 261 F.3d at 365-66; 17A WRIGHT ET AL., *supra* note 249, § 4222, at 62.

255. *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1201 (7th Cir. 1996) (stating that “a federal injunction which falls short of bringing a state suit to a complete halt may nonetheless violate the Anti-Injunction Act”).

256. *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 144 (3d Cir. 1998); *accord Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988).

implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion.²⁵⁷

Accordingly, in determining whether to enjoin an absent class member who exercises a back-end opt-out right from proceeding in state court, a federal district court should keep in mind the political objectives underlying the Anti-Injunction Act: the preservation of federalism and comity, and the reduction of intergovernmental friction.²⁵⁸

1. “Expressly Authorized by Congress” Exception

The first exception permits a federal court to enjoin a pending state court action if the injunction is “expressly authorized by Act of Congress.”²⁵⁹ Even given the Supreme Court’s very broad reading of this exception,²⁶⁰ it is not likely to authorize injunctions against state court litigation initiated by opt-out plaintiffs. After all, Federal Rule of Civil Procedure 23 is a rule of procedure, not an Act of Congress,²⁶¹ and because it explicitly “creates a mechanism leaving parties in a (b)(3) action free to continue with any state proceedings,” it cannot be read to authorize issuance of an injunction.²⁶² The Third Circuit conceded as much in the fen-phen

257. *Atl. Coast Line R.R.*, 398 U.S. at 297.

258. See *Chick Kam Choo*, 486 U.S. at 146; *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630 (1977) (plurality opinion); *Atl. Coast Line R.R.*, 398 U.S. at 286; see also 17A WRIGHT ET AL., *supra* note 249, § 4221, at 50-51.

259. 28 U.S.C. § 2283 (2000). See generally 17A WRIGHT ET AL., *supra* note 249, § 4224; Diane P. Wood, *Fine-Tuning Judicial Federalism: A Proposal for Reform of the Anti-Injunction Act*, 1990 BYU L. REV. 289, 297-301.

260. To qualify, an Act of Congress need not refer explicitly to § 2283, nor need it expressly authorize an injunction against state court proceeding. *E.g.*, *Vendo Co.*, 433 U.S. at 633 (plurality opinion); *Mitchum v. Foster*, 407 U.S. 225, 237-38 (1972); see 17A WRIGHT ET AL., *supra* note 249, § 4224, at 80-81. “The test ... is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding.” *Mitchum*, 407 U.S. at 238. Professor Martin Redish has criticized the *Mitchum* Court for “creat[ing] an oxymoronic ‘implied express’ exception.” Martin H. Redish, *Intersystemic Redundancy and Federal Court Power: Proposing a Zero Tolerance Solution to the Duplicative Litigation Problem*, 75 NOTRE DAME L. REV. 1347, 1358 n.61 (2000).

261. See, e.g., *In re Baldwin-United Corp.*, 770 F.2d 328, 335 (2d Cir. 1985); *Piambino v. Bailey*, 610 F.2d 1306, 1331-32 (5th Cir. 1980); *Steinman*, *supra* note 96, at 838-39.

262. *In re Glenn W. Turner Enters. Litig.*, 521 F.2d 775, 781 (3d Cir. 1975); see also *In re Gen. Motors. Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 144 n.6 (3d

litigation, noting that the “injunctions at issue here were not expressly authorized by statute.”²⁶³

Nor does the Class Action Fairness Act (CAFA)²⁶⁴ authorize injunctions to enforce the limits built into back-end opt-out rights. Although CAFA expresses a legislative judgment that federal courts are better equipped than state courts to oversee nationwide class actions, CAFA does not create exclusive federal jurisdiction over nationwide class actions and provides no vehicle for absent class members themselves to remove class actions filed in state court.²⁶⁵ Nor does CAFA expand diversity jurisdiction to permit back-end opt-out plaintiffs to press their individual state-law claims against non-diverse defendants in federal court or even contemplate such individual suits. And it fails to authorize any form of injunctive relief. A federal court seeking to enjoin back-end opt-out plaintiffs from pursuing relief barred by a judicially approved settlement agreement will have to look elsewhere for authority.

2. “To Protect Its Judgments” Exception

The Anti-Injunction Act also permits a federal court to enjoin a pending state court action “to protect or effectuate its judgments.”²⁶⁶ This exception, referred to as the relitigation exception,²⁶⁷ applies only when the federal court has rendered a judgment²⁶⁸ that would

Cir. 1998); *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 202 (3d Cir. 1993).

263. *Diet Drugs II*, 369 F.3d 293, 305 (3d Cir. 2004).

264. Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).

265. Earlier versions of CAFA would have permitted absent class members to remove state court class actions without the concurrence of class counsel, the defendant, or even other members of the class. *See* S. 1751, 108th Cong. § 5 (2003); *see also* Wolff, *supra* note 157 (manuscript at 6) (noting that Congress “left the choice of access to federal court in the hands of the very actors from which class members might require protection”: class counsel and the defendant).

266. 28 U.S.C. § 2283 (2000). *See generally* 17A WRIGHT ET AL., *supra* note 249, § 4226; George A. Martinez, *The Anti-Injunction Act: Fending Off the New Attack on the Relitigation Exception*, 72 NEB. L. REV. 643 (1993); Wood, *supra* note 259, at 304-08.

267. *See, e.g.*, *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988); *Nat'l Basketball Ass'n v. Minn. Prof'l Basketball, Ltd. P'ship*, 56 F.3d 866, 871 (8th Cir. 1995).

268. *In re Glenn W. Turner Enters. Litig.*, 521 F.2d 775, 780 (3d Cir. 1975). Orders that do not resolve the merits of the case, such as preliminary injunctions, denials of class certification, and dismissals for lack of standing, nevertheless may support the relitigation exception “provided that a critical issue concerning the case has been adjudicated properly.” *Canady v. Allstate Ins. Co.*, 282 F.3d 1005, 1015 (8th Cir. 2002); *accord*

preclude the state court action under the doctrines of claim or issue preclusion.²⁶⁹ Because the federal court seeking to enforce the limits built into a back-end opt-out right will have entered a final judgment, it should have authority under the relitigation exception to enter an injunction against the state court plaintiff. But the relitigation exception may be both overbroad and underinclusive for these purposes: it may permit a federal injunction against the prosecution in state court of claims that the opt-out plaintiff clearly preserved, and at the same time deny federal authority to enforce other limits built into the settlement agreement. These complications reflect complexity in preclusion doctrine as well as federalism concerns.

The doctrine of claim preclusion ordinarily bars relitigation not only of theories that actually were presented in support of a claim, but also of theories and evidence that might have been offered in support of the claim presented.²⁷⁰ Nevertheless, the Supreme Court in *Chick Kam Choo* stated that “an essential prerequisite for applying the relitigation exception [to the Anti-Injunction Act] is that the claims or issues which the federal injunction insulates from litigation in state proceedings *actually have been decided* by the federal court. Moreover, ... this prerequisite is strict and narrow.”²⁷¹ Some courts have read this language to mean that the scope of the relitigation exception is narrower than the doctrine of claim

In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 333 F.3d 763, 765-67 (7th Cir. 2003); *Nat'l Basketball Ass'n*, 56 F.3d at 871-72 (concluding that “a preliminary injunction carries enough significance and finality to invoke the relitigation exception”); cf. 17A WRIGHT ET AL., *supra* note 249, § 4226, at 117-24 (concluding that a denial of class certification “is not a ‘judgment’ within the meaning of the third exception”).

269. See, e.g., *Chick Kam Choo*, 486 U.S. at 147; *In re* Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133, 146 (3d Cir. 1998); *In re* Corrugated Container Antitrust Litig., 659 F.2d 1332, 1335 (5th Cir. 1981). The relitigation exception is available only if the state court has not already been called upon to enforce the federal judgment. If the state court has already considered and rejected the defendant’s argument that the state claim is precluded by the federal judgment, then the federal court from which an injunction is sought must give full faith and credit to the state court decision. See *Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 525-26 (1986); *Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877, 882 (11th Cir. 1989); *In re* Bolar Pharm. Co. Drug Consumer Litig., No. 849, 1994 WL 326522, at *9 n.6 (E.D. Pa. July 5, 1994).

270. See, e.g., *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981); *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876); RESTATEMENT (SECOND) OF JUDGMENTS §§ 18, 24 (1982).

271. *Chick Kam Choo*, 486 U.S. at 148 (citing *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281 (1970)) (emphasis added).

preclusion. According to the Court of Appeals for the Fifth Circuit, for example, “[i]t is insufficient that a claim or issue could have been raised in the prior action: The relitigation exception requires that the claims or issues that the federal injunction is to insulate from litigation in state proceedings ‘actually have been decided by the federal court.’”²⁷² The Second and Sixth Circuits have also read the exception narrowly.²⁷³ According to Professor Tobias Barrington Wolff, “this narrow approach expresses deference to the countervailing federalism interest according to which class members should rely upon the good faith of state courts to recognize appropriate defenses of merger or bar.”²⁷⁴

Not all federal courts have adopted this narrow reading of the relitigation exception. For example, the Ninth Circuit Court of Appeals has concluded that such a narrow reading of the relitigation exception

would in essence ... read res judicata entirely out of section 2283. Any issue which was ‘actually litigated’ by the parties in a prior proceeding will be barred by collateral estoppel ..., without any need to rely on res judicata This result seems ... to be contrary to the purposes of section 2283 ... [and] contrary to the language of *Choo*, which would bar relitigation of “claims or issues [that] actually have been decided.”²⁷⁵

Some commentators also appear to reject the narrow reading.²⁷⁶

272. *Regions Bank of La. v. Rivet*, 224 F.3d 483, 488 (5th Cir. 2000) (quoting *Chick Kam Choo*, 486 U.S. at 148). An earlier opinion of the Fifth Circuit that took a less categorical approach, *Deus v. Allstate Ins. Co.*, 15 F.3d 506, 525 (5th Cir. 1994), has been disavowed. *Tex. Commerce Bank Nat’l Ass’n v. Florida*, 138 F.3d 179, 182 (5th Cir. 1998).

273. See, e.g., *Selletti v. Carey*, 70 F. App’x 603, 605 (2d Cir. 2003); *Hatcher v. Avis Rent-A-Car Sys., Inc.*, 152 F.3d 540, 542-43 (6th Cir. 1998); *Am. Town Ctr. v. Hall 83 Assocs.*, 912 F.2d 104, 112 n.2 (6th Cir. 1990); *Staffer v. Bouchard Transp. Co.*, 878 F.2d 638, 643 (2d Cir. 1989) (stating that “[t]he relitigation exception does not protect the full res judicata effect of a federal court’s judgment; rather, it protects only matters that actually have been decided by a federal court”); see also *Nationwide Mut. Ins. Co. v. Burke*, 897 F.2d 734, 737 (4th Cir. 1990). For an analysis of some of these cases and a critique of this reading, see Martinez, *supra* note 266, at 657-61. The Supreme Court in *Parsons Steel* declined to resolve this issue. 474 U.S. at 526 n.4.

274. Wolff, *supra* note 157 (manuscript at 55).

275. *W. Sys., Inc. v. Ulloa*, 958 F.2d 864, 870 (9th Cir. 1992) (quoting *Chick Kam Choo*, 486 U.S. at 148); see also Martinez, *supra* note 266, at 661-62.

276. 17A WRIGHT ET AL., *supra* note 249, § 4426, at 111-12.

The Court of Appeals for the Third Circuit has applied the Ninth Circuit's broader reasoning in the class action context.²⁷⁷ Building on the proposition "that a judgment pursuant to a class settlement can bar later claims based on the allegations underlying the claims in the settled class action ... even though the precluded claim was not presented, and could not have been presented, in the class action itself,"²⁷⁸ the Third Circuit has held that the relitigation exception to the Anti-Injunction Act permits federal courts to enjoin litigation of claims that were released as part of a class action settlement even though they were not actually litigated.²⁷⁹ The Third Circuit went further in *In re Prudential Insurance Company of America Sales Practice Litigation (Prudential I)*,²⁸⁰ invoking the relitigation exception to bar opt-out plaintiffs from bringing claims that they clearly had preserved.²⁸¹ This section first explores the overbreadth complication before considering the relitigation exception's underinclusiveness.

In *Prudential I*, a federal district court settled a nationwide class action that alleged deceptive sales practices by the Prudential Insurance Company.²⁸² Class members who had more than one covered policy were afforded the opportunity to opt out regarding some policies and to remain in the class regarding others.²⁸³ Invoking this option, Marvin and Alice Lowe opted out regarding two insurance policies and remained in the class regarding two others.²⁸⁴ Following settlement in federal court of the nationwide class action and issuance of a federal injunction barring class mem-

277. See *Prudential I*, 261 F.3d 355, 366 (3d Cir. 2001).

278. *Id.*; see also *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 372-73 (1996) (concluding that the Full Faith and Credit statute applies to a state court judgment incorporating a settlement that releases claims within the federal courts' exclusive jurisdiction, which were not, and could not have been, adjudicated by the state court); *Grimes v. Vitalink Commc'ns Corp.*, 17 F.3d 1553, 1563 (3d Cir. 1994); *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982).

279. *Prudential I*, 261 F.3d at 366-67 (concluding that the release incorporated into the judgment "has both claim preclusive and issue preclusive effect ... [and] precludes class members from relying upon the common nucleus of operative facts underlying claims on the Class Policies to fashion a separate remedy against Prudential outside the confines of the Released Claims").

280. 261 F.3d 355 (3d Cir. 2001).

281. See *id.* at 366-69.

282. *Id.* at 358-60.

283. *Id.* at 360.

284. *Id.* at 361.

bers from commencing or maintaining suits against Prudential based on the facts underlying the class claims unless they opted out, the Lowes filed suit in state court, alleging violations of various laws regarding the two excluded policies.²⁸⁵ Although they sought damages for only the excluded policies, their complaint alleged facts regarding the policies covered by the class action purportedly because those facts were relevant to the claims on the excluded policies and supported their claim for punitive damages.²⁸⁶ Prudential returned to the federal district court that had approved the settlement and had issued the injunction, asking it to enjoin the Lowes from taking discovery or undertaking any other action that related to the facts and circumstances underlying the transactions released in the class action.²⁸⁷ The district court enforced its injunction, concluding that “allowing the Lowes to use evidence of sales practices and patterns relating to the Class Policies in their state action on the Excluded Policies ‘would impair the finality of the class settlement to an unacceptable degree’ and would effectively permit ‘the relitigation of the released claims.’”²⁸⁸

On appeal, the Lowes argued that the injunction precluded them from pursuing their claims on the excluded policies and “render[ed] meaningless” and illusory their right to opt out regarding some but not all policies.²⁸⁹ Recognizing that this argument was “not without force,” the Third Circuit nevertheless upheld the injunction, concluding that it “only prevents them from using evidence common to the purchase and sale of their Class Policies and their Excluded Policies in their state action on their Excluded Policies. It does not prohibit them from pursuing any and all claims on the Excluded Policies in the state court”²⁹⁰ In a tacit acknowledgment that the right to pursue the excluded claims could be quite limited if the class members were barred from using evidence relevant to the released claims, the court suggested that:

285. *Id.*

286. *Id.* at 361-63.

287. *Id.* at 363.

288. *Id.* at 365 (quoting the district court order).

289. *Id.* at 368.

290. *Id.*

In the future, ... it may be advisable for district courts to consider adding more specific language to settlement documents ... [to] advise class members that, even though they retain certain claims as to transactions excluded from a settlement, their ability to pursue those claims may be hindered by the terms of the release of claims that remain part of any class settlement.²⁹¹

Thus, the court read the relitigation exception to permit a federal injunction against the prosecution of claims that the opt-out plaintiffs clearly had preserved.

Given this broad reading of the relitigation exception, one might have expected the Third Circuit to have relied on it in the fen-phen litigation. In that case, the downstream opt-out plaintiffs, who were denied the opportunity to seek punitive damages under the Settlement Agreement, nevertheless sought to offer proof of malicious conduct and other evidence that might have supported a claim for punitive damages in state court proceedings.²⁹² Surprisingly, the Third Circuit did not rely on the relitigation exception to uphold the district court's injunction.²⁹³ Instead, it noted that the fen-phen Settlement Agreement did not purport to preclude the opt-out plaintiffs' *claims*; to the contrary, it preserved them.²⁹⁴ Because the Settlement Agreement limited only the types of damages that downstream opt-out plaintiffs could seek, "the District Court had to enforce a damages preclusion, not a claim preclusion. This was obviously more complicated because permitted claims could give rise to both allowable compensatory damages and forbidden punitive damages."²⁹⁵ In light of the preservation of the claims of the downstream opt-out plaintiffs, the Third Circuit concluded that "the concepts of issue and claim preclusion are not

291. *Id.* at 369 n.8.

292. *See supra* notes 79-81 and accompanying text.

293. *See Diet Drugs II*, 369 F.3d 293, 306 (3d Cir. 2004).

294. *See id.* (stating that "under the settlement agreement opt-outs' settled claims do not go to judgment"). Of course, the Settlement Agreement not only precluded downstream opt-out plaintiffs from seeking punitive damages, but it also precluded them from presenting certain claims outside the confines of the federal class action. *See supra* notes 52, 56-57, 61-62 and accompanying text. In at least one instance, the federal district court that approved the settlement enjoined a plaintiff who sued in state court on a preserved claim from seeking to offer evidence that allegedly supported a released claim. *See* PTO 2867, *supra* note 75.

295. *Diet Drugs II*, 369 F.3d at 306.

entirely apposite here” and declined to determine “whether the District Court had the authority to effectuate the settlement agreement’s punitive damages provision under the Anti-Injunction Act’s relitigation exception.”²⁹⁶ Note, however, that the under-inclusiveness of the relitigation exception in this context derived less from federalism concerns or a narrow reading of the relitigation exception, and more from a narrow reading of preclusion doctrine. In fact, as the next section demonstrates, the Third Circuit upheld injunctions against the opt-out plaintiffs under the “in aid of its jurisdiction” exception.

3. “*In Aid of Its Jurisdiction*” Exception

The Anti-Injunction Act permits a federal court to enjoin a pending state court action if the injunction is “necessary in aid of its jurisdiction.”²⁹⁷ The classic use of this exception involves an injunction issued by a federal court exercising in rem or quasi-in-rem jurisdiction against subsequently filed state court actions regarding the same res.²⁹⁸ Use of the “in aid of jurisdiction” exception is not limited, however, to in rem proceedings when the federal court acquires jurisdiction over a res.²⁹⁹ Beyond this context, the Court has held that the “in aid of jurisdiction” exception may be invoked “to prevent a state court from so interfering with a federal court’s consideration or disposition of a case as to seriously impair the federal court’s flexibility and authority to decide that case.”³⁰⁰

296. *Id.*

297. 28 U.S.C. § 2283 (2000). *See generally* 17A WRIGHT ET AL., *supra* note 249, § 4225; Wood, *supra* note 259, at 301-04.

298. *See* Toucey v. N.Y. Life Ins. Co., 314 U.S. 118, 134-36 (1941); Kline v. Burke Constr. Co., 260 U.S. 226, 229 (1922); United States v. Alpine Land & Reservoir Co., 174 F.3d 1007, 1014 (9th Cir. 1999); 17A WRIGHT ET AL., *supra* note 249, § 4225, at 91-93. The Court of Appeals for the Eighth Circuit rejected the argument that a punitive damages award sought by a class qualified as a limited fund sufficiently analogous to a res to support an injunction under this exception. *In re* Fed. Skywalk Cases, 680 F.2d 1175, 1182 (8th Cir. 1982).

299. *See, e.g.*, Battle v. Liberty Nat’l Life Ins. Co., 877 F.2d 877, 881 (11th Cir. 1989).

300. Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng’rs, 398 U.S. 281, 295 (1970); *see also* *In re* Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133, 144 (3d Cir. 1998); Carlough v. Amchem Prods., Inc., 10 F.3d 189, 202 (3d Cir. 1993); *In re* Baldwin-United Corp., 770 F.2d 328, 335 (2d Cir. 1985) (interpreting the All Writs Act); 17A WRIGHT ET AL., *supra* note 249, § 4225, at 94.

Although the mere pendency of a parallel in personam action has not itself been viewed as a sufficient threat to a federal court's jurisdiction to support an injunction under the "in aid of jurisdiction" exception,³⁰¹ some courts have concluded that such a threat may exist "where a federal court is on the verge of settling a complex matter, and state court proceedings may undermine its ability to achieve that objective."³⁰² This threat is heightened when the federal action "involves a substantial class of persons from multiple states, or represents a consolidation of cases from multiple districts."³⁰³ For example, in *In re Baldwin-United*,³⁰⁴ the Second Circuit Court of Appeals upheld an injunction entered by a federal district court that was on the verge of settling consolidated multidistrict class actions. When the district court learned that several state attorneys general were contemplating suits against the class action defendants that would have sought additional relief on behalf of members of the class, the district court enjoined the states from filing suits on behalf of, or derivative of the rights of, the class members that were to be released as part of the settlement.³⁰⁵ In upholding the injunction, the Second Circuit noted:

301. *See Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 641-42 (1977) (plurality opinion); *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 466 (1939); *In re Baldwin-United*, 770 F.2d at 336; *In re Glenn W. Turner Enters. Litig.*, 521 F.2d 775, 780 (3d Cir. 1975); *In re Asbestos Sch. Litig.*, No. 83-0268, 1991 WL 61156, at *2 (E.D. Pa. Apr. 16, 1991), *aff'd*, 950 F.2d 723 (3d Cir. 1991). For powerful critiques of the courts' narrow interpretation of this exception, see, for example, Redish, *supra* note 260, at 1358-61 (criticizing the narrow reading and proposing a "zero tolerance" model, which would permit no parallel proceedings in state and federal court); Wolff, *supra* note 157 (manuscript at 11-14) (criticizing a strict interpretation of the "in aid of jurisdiction" exception; advocating a more active inquiry into the congressional purposes underlying targeted jurisdictional grants and an effort to administer the "in aid of jurisdiction" exception with "explicit reference to those congressional policies").

302. *Standard Microsys. Corp. v. Tex. Instruments Inc.*, 916 F.2d 58, 60 (2d Cir. 1990); *see, e.g., Diet Drugs II*, 369 F.3d 293, 306 (3d Cir. 2004); *Carlough*, 10 F.3d at 204 (finding it "difficult to imagine a more detrimental effect upon the district court's ability to effectuate the settlement ... than would occur if the ... state court was permitted to make a determination regarding the validity of the federal settlement"); *In re Baldwin-United*, 770 F.2d at 337 (upholding an injunction against state court actions that would "frustrate the district court's efforts to craft a settlement in the multidistrict litigation before it"); *In re Asbestos Sch. Litig.*, 1991 WL 61156, at *2 (stating that "this court's ability to oversee a possible settlement would be 'seriously impaired' by the continuing litigation of parallel state actions"), *aff'd*, 950 F.2d 723 (3d Cir. 1991); *cf. In re Gen. Motors*, 134 F.3d at 144-45.

303. *Diet Drugs I*, 282 F.3d 220, 235 (3d Cir. 2002).

304. 770 F.2d 328 (2d Cir. 1985).

305. *Id.* at 333.

[T]he potential for an onslaught of state actions ... threatened to “seriously impair the federal court’s flexibility and authority” to approve settlements in the multi-district litigation.... 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 judge required full control.³⁰⁶

The Third Circuit, too, has highlighted the special challenges in these circumstances: “[i]n complex cases where certification or settlement has received conditional approval, or perhaps even where settlement is pending, the challenges facing the overseeing court are such that it is likely that almost any parallel litigation in other fora presents a genuine threat to the jurisdiction of the federal court.”³⁰⁷ In at least two cases, the Third Circuit has invoked the “in aid of jurisdiction” exception to enjoin class members from employing parallel state class actions to secure mass opt-outs from consolidated federal class actions.³⁰⁸

Although one can understand why an injunction against state court litigation might be necessary to protect the jurisdiction of a federal court entertaining a complex case on the verge of settlement, it is less obvious whether this exception would permit an injunction *after* the court entered a final judgment and absent class members then sought to exercise downstream opt-out rights. One might think that once a federal court has issued a final judgment approving a settlement, it would rely exclusively on the relitigation exception.³⁰⁹ In fact, the Ninth Circuit held that a district court that entered a final judgment approving a class action settlement and

306. *Id.* at 337 (quoting *Atl. Coast Line R.R. v. Bhd. of Locomotive Eng’rs*, 398 U.S. 286, 295 (1970)).

307. *Diet Drugs I*, 282 F.2d at 236; *see also Diet Drugs II*, 369 F.3d at 306; *Prudential I*, 261 F.3d 355, 365 (3d Cir. 2001); *Carlough*, 10 F.3d at 201-04; MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.42 (2004) (discussing authority to enjoin a related state case “if settlement in the certified federal class action is completed or imminent and the need to protect the class settlement is shown”) [hereinafter MANUAL FOR COMPLEX LITIGATION]; Kerr, *supra* note 209, at 247-50 (analyzing the Third Circuit’s approach to the “in aid of jurisdiction” exception); *cf. Ret. Sys. of Ala. v. J.P. Morgan Chase & Co.*, 386 F.3d 419, 421 (2d Cir. 2004) (holding “that the ‘necessary in aid of its jurisdiction’ exception ... does not permit a district court—even a district court managing complex, multidistrict litigation ... —to enjoin state court proceedings simply to preserve its trial date”).

308. *See Diet Drugs I*, 282 F.3d at 234-39; *Carlough*, 10 F.3d at 201-04.

309. 28 U.S.C. § 2283 (2000); *see supra* Part IV.B.2.

had only to “ensure that the terms of the settlement agreement [were] followed” lacked authority under the “in aid of its jurisdiction” exception to enjoin state court actions that sought relief arguably precluded by the judgment.³¹⁰

Not all courts agree, however. A number of federal courts have invoked the “in aid of jurisdiction” exception even *after* approval of a final settlement.³¹¹ In their view, when a judicially approved settlement bars absent class members from bringing certain claims or seeking certain types of damages, and some class members then file state court actions presenting claims that arguably were covered by the settlement or damages that arguably were forbidden by the settlement, a federal district court that expressly retained jurisdiction to administer and supervise the settlement may issue an injunction to enforce its terms.³¹² As the Third Circuit explained in the fen-phen litigation:

[T]he punitive damages release is a central pillar of the settlement agreement. Allowing state court actions to run afoul of that provision would fatally subvert it and render the agreement (and the Court’s jurisdiction) nugatory. The District Court’s ability to give effect to that provision is necessary in aid of its jurisdiction.³¹³

310. *Sandpiper Vill. Condo. Ass’n v. La.-Pac. Corp.*, 428 F.3d 831, 844-46 (9th Cir. 2005), *cert. denied sub nom.*, *La.-Pac. Corp. v. Lester Bldg. Sys.*, 126 S. Ct. 2970 (2006); *cf.* *Hoffman, Syngenta*, *supra* note 97, at 638-39 (questioning whether the scope of federal injunctive authority depends upon timing).

311. *See, e.g., Diet Drugs II*, 369 F.3d at 306; *Prudential I*, 261 F.3d at 367-68; *United States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007, 1015 (9th Cir. 1999); *Battle v. Liberty Nat’l Life Ins. Co.*, 877 F.2d 877, 881 (11th Cir. 1989); *see also* *United States v. Int’l Bhd. of Teamsters*, 907 F.2d 277, 280 (2d Cir. 1990) (upholding an injunction issued pursuant to the All Writs Act “as a necessary means of protecting the district court’s jurisdiction over implementation of the Consent Decree”).

312. *See, e.g., Prudential I*, 261 F.3d at 367-68; *In re “Agent Orange” Prod. Liab. Litig.*, 996 F.2d 1425, 1432 (2d Cir. 1993); *Battle*, 877 F.2d at 881; *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1332, 1334 (5th Cir. 1991) (concluding that state court actions pressing claims related to those settled in the federal class action “would be a challenge to [the federal court’s] jurisdiction”); *see also* *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1202-03 (7th Cir. 1996) (concluding that the Anti-Injunction Act did not deprive a federal court of authority to enjoin state court litigants from seeking discovery of a document that the federal court already had concluded was not discoverable).

313. *Diet Drugs II*, 369 F.3d at 306.

CAFA does not strengthen the case for federal injunctions against violations of the limits built into back-end opt-out rights. CAFA reflects a Congressional judgment that federal courts are better able to oversee nationwide class actions and to guard against potential collusion between class counsel and the defendant.³¹⁴ To ensure that more nationwide class actions are heard by federal courts, Congress enlarged both the original and removal jurisdiction of the federal courts;³¹⁵ at the same time, it declined to expressly authorize injunctions against either competing state court class actions or individual suits filed by back-end opt-out plaintiffs.³¹⁶ Because, in the interpleader context, Congress explicitly authorized the district courts to issue injunctions deemed necessary to support a new grant of federal jurisdiction,³¹⁷ one might conclude that in enacting CAFA, Congress made an apparent choice *not* to authorize injunctions against pending state court actions and to rely instead on the enlargement of federal jurisdiction.

Professor Wolff has argued that even though CAFA does not explicitly authorize federal injunctions, it should be read to permit injunctions against the type of collusive state court class actions that CAFA was designed to prevent.³¹⁸ In his view, “in aid of” the targeted and specialized grant of jurisdiction extended by CAFA, federal courts may enjoin dueling state class actions “that exhibit indicia of the malfeasance or collusion that the statute was designed to combat.”³¹⁹ In other words, in interpreting and applying the “in aid of jurisdiction” exception, federal courts should consider the policies underlying targeted grants of jurisdiction like CAFA, which may support federal injunctions against “the type of harm that the Act’s jurisdictional provision was designed to prevent—a state proceeding tainted by collusion or malfeasance.”³²⁰

314. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4, 4-5 (codified in scattered sections of 28 U.S.C.).

315. *Id.* §§ 4-5.

316. *See supra* note 265 and accompanying text.

317. 28 U.S.C. § 2361 (2000).

318. Wolff, *supra* note 157 (manuscript at 26-27).

319. *Id.* (manuscript at 8); *see also* Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 511-15, 530-31 (2000).

320. Wolff, *supra* note 157 (manuscript at 27); *see also id.* (manuscript at 26) (stating that “when absent class members and competing counsel file suit in federal court and seek to enjoin what they believe to be a collusive state-court proceeding, they are invoking the jurisdiction of the federal court for the very purpose for which it was created. An antisuit

Although Wolff convincingly argues that CAFA should inform the scope of federal authority to enjoin dueling class actions, his analysis does not support broader authority to enjoin back-end opt-out plaintiffs. Whereas Congress was concerned with collusive class action settlements, coupon settlements, excessive attorneys' fees, and discrimination among class members based on geographic location,³²¹ it expressed no concern over individual suits filed by back-end opt-out plaintiffs and the risks they might pose to comprehensive settlements reached in federal court. Thus, although CAFA may shift large numbers of class actions into federal court and increase the demand for federal injunctions against state litigation filed by back-end opt-out plaintiffs, it does not contemplate injunctions against violations of the limits built into back-end opt-out rights nor alleviate the federalism complications that arise in connection with back-end opt-out rights.

To minimize the complications that may arise under the Anti-Injunction Act when a federal court seeks to enjoin back-end opt-out plaintiffs from seeking relief in state courts, federal courts that approve class action settlements should take three steps. First, they should issue an injunction against state suits that present claims covered by the settlement agreement or seek damages barred by the settlement agreement *before* any such state suits are filed, thereby bypassing the Anti-Injunction Act. Second, they should retain continuing jurisdiction to supervise and enforce the settlement, which will strengthen the argument that an injunction is necessary in aid of the court's jurisdiction. Third, they (and the attorneys representing the parties in federal class actions) should seek to ensure that settlement agreements and notices sent to absent class members are more explicit about the risks faced by those who preserve limited opportunities to opt out after the initial (full) opt-out period expires. In particular, if some claims are preserved but other factually related claims are released, the settlement agreement should explicitly delineate the extent to which the opportunity to prove the preserved claim may be hampered by the preclusive effect of the release.

injunction in such a case operates directly in aid of the federal court's exercise of protective jurisdiction.").

321. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 3(a), 119 Stat. 4, 5-9 (codified in scattered sections of 28 U.S.C.).

C. *Younger Abstention*

In *Younger v. Harris*,³²² the Supreme Court held that a federal district court erred when it enjoined a criminal prosecution pending in state court. Recognizing that federal courts owe state courts and their functions “proper respect,”³²³ the Court articulated the belief that “the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.”³²⁴ Comity and federalism concerns thus require the federal government to strive to protect federal rights without “unduly interfer[ing] with the legitimate activities of the States.”³²⁵ A federal court ordinarily should abstain from enjoining a state criminal prosecution filed in good faith³²⁶ when the defendant can challenge the constitutionality of the statute she is charged with violating in the context of the state court action.³²⁷ In later cases, the Court held that the *Younger* abstention doctrine not only barred federal injunctions against state criminal prosecutions, but also barred federal intervention to suppress the use in state court of evidence that allegedly had been seized through unlawful means.³²⁸

322. 401 U.S. 37 (1971); see generally Ann Althouse, *The Misguided Search for State Interest in Abstention Cases: Observations on the Occasion of Pennzoil v. Texaco*, 63 N.Y.U. L. REV. 1051, 1086-87, 1090 (1988) (arguing that the focus in *Younger* abstention should be on the federal interest in “maximizing federal law enforcement through the effective and efficient use of our parallel judicial systems,” rather than on state interests); Martin H. Redish, *The Doctrine of Younger v. Harris: Deference in Search of a Rationale*, 63 CORNELL L. REV. 463, 465-66, 477, 482 (1978) (delineating four theoretical rationales for *Younger* abstention and concluding that none of them justifies the *Younger* doctrine’s “sweeping limitation on federal judicial authority”); Wood, *supra* note 259, at 293-94. For a review of the different types of abstention and a more thorough discussion of *Younger* abstention, see 17A WRIGHT ET AL., *supra* note 249, § 4241; 17B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 4251-4255 (3d ed. 2007).

323. *Younger*, 401 U.S. at 44.

324. *Id.*

325. *Id.*

326. The *Younger* doctrine allows federal intervention when “the state proceeding is motivated by a desire to harass or is conducted in bad faith,” *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975), or in other extraordinary circumstances. *Moore v. Sims*, 442 U.S. 415, 432-33 (1979); see also *Younger*, 401 U.S. at 47-49, 53; *Dombrowski v. Pfister*, 380 U.S. 479, 483-85 (1965); 17B WRIGHT ET AL., *supra* note 322, § 4251, at 12, § 4255.

327. *Younger*, 401 U.S. at 46; accord *Kowalski v. Tesmer*, 543 U.S. 125, 133 (2004).

328. See, e.g., *Kugler v. Helfant*, 421 U.S. 117, 129-31 (1975); *Perez v. Ledesma*, 401 U.S. 82, 84 (1971); see also *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951); 17B WRIGHT ET AL., *supra* note 322, § 4252, at 18.

Even beyond the criminal context, the Supreme Court has held that the *Younger* abstention doctrine applies to civil state court proceedings as long as important state interests are at stake and the state proceeding affords an adequate legal remedy.³²⁹ In determining whether the state has a substantial interest, the Court does “not look narrowly to its interest in the *outcome* of the particular case—which could arguably be offset by a substantial federal interest in the opposite outcome. Rather, what [the Court] look[s] to is the importance of the generic proceedings to the State.”³³⁰

Even where the state is not a party to the state court proceeding (as it is in criminal cases), it may have an important enough interest in administering its judicial system to support *Younger* abstention.³³¹ For example, in *Juidice v. Vail*,³³² a state court rendered a default judgment against Harry Vail, who had defaulted on a credit arrangement with a private lender. When Vail failed to satisfy the judgment and ignored a subpoena ordering him to attend a post-judgment deposition, the state court judge ordered him to

329. See, e.g., *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 (1987) (stating that *Younger* abstention is mandated “not only when the pending state proceedings are criminal, but also when certain civil proceedings are pending, if the State’s interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government”); *Ohio Civil Rights Comm’n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 627 (1986) (observing that *Younger* abstention “applied ... to state administrative proceedings in which important state interests are vindicated”); *Middlesex County Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 425, 437 (1982) (holding that “a federal court should abstain from considering a challenge to the constitutionality of disciplinary rules that are the subject of pending state disciplinary proceedings”); *Moore*, 442 U.S. at 423 (applying *Younger* abstention where the state was a party to the state proceedings and “the temporary removal of a child in a child-abuse context is ... ‘in aid of and closely related to criminal statutes’”) (citation omitted); *Trainor v. Hernandez*, 431 U.S. 434, 444 (1977) (applying *Younger* abstention to civil litigation commenced by the state in its sovereign capacity to recover welfare payments); *Juidice v. Vail*, 430 U.S. 327, 334, 337 (1977) (applying *Younger* abstention to state contempt proceedings); *Huffman*, 420 U.S. at 594, 604-05, 607 (applying *Younger* abstention to a state nuisance action commenced by the state “in aid of and closely related to criminal statutes” barring the dissemination of obscene materials); see also 17B WRIGHT ET AL., *supra* note 322, § 4254; cf. *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 370, 373 (1989) (declining to apply *Younger* abstention to “a state court challenge to completed legislative action” because *Younger* applies only to proceedings that are “judicial in nature”).

330. *New Orleans Pub. Serv.*, 491 U.S. at 365.

331. See, e.g., *Pennzoil*, 481 U.S. at 12-14 (concluding that the state had an important interest in the enforcement of its money judgments).

332. 430 U.S. 327 (1977); see also 17B WRIGHT ET AL., *supra* note 322, § 4254, at 74-76.

show cause why he should not be punished for contempt.³³³ When Vail did not attend the hearing, the judge held him in contempt and ordered him to pay a fine.³³⁴ When Vail failed to pay the fine, the judge had him arrested.³³⁵ After his release from jail, Vail commenced a federal lawsuit on behalf of himself and a class of judgment debtors, challenging the constitutionality of the state's statutory contempt procedures.³³⁶ Noting that Vail's constitutional challenge "could have been raised ... in the state courts, as a defense to the ongoing proceedings,"³³⁷ the Supreme Court held that the federal court should have abstained out of respect for the "State's interest in the contempt process, through which it vindicates the regular operation of its judicial system."³³⁸ Although recognizing that the state's interest in its contempt process is "[p]erhaps ... not quite as important as ... the State's interest in the enforcement of its criminal laws, or even its interest in the maintenance of a quasi-criminal proceeding such as was involved in *Huffman*,"³³⁹ the Court nevertheless concluded that "it is of sufficiently great import to require application of the principles of those cases. The contempt power lies at the core of the administration of a State's judicial system."³⁴⁰

In *Pennzoil Co. v. Texaco*,³⁴¹ the Supreme Court held, in the context of a contract dispute between two private corporations, that a federal court should not have enjoined Pennzoil from seeking to enforce its state court judgment against Texaco. The Court reached its conclusion because a decision by the state court on the validity of its judgment enforcement procedures might have been resolved on state statutory or state constitutional grounds without the need to reach the federal constitutional issues that Texaco raised in federal court³⁴² and out of respect for the state's interest in the

333. *Juidice*, 430 U.S. at 329.

334. *Id.*

335. *Id.* at 329-30.

336. *Id.* at 330.

337. *Id.*

338. *Id.* at 335.

339. *Id.* (citations omitted).

340. *Id.*

341. 481 U.S. 1 (1987); see also *Althouse*, *supra* note 322, at 1054-82; 17B WRIGHT ET AL., *supra* note 322, § 4254, at 82-91.

342. *Pennzoil*, 481 U.S. at 11-12. Such concerns may support *Pullman* abstention. See *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 500-01 (1941); 17A WRIGHT ET AL., *supra* note 249, §

enforcement of its judgments.³⁴³ Comparing the case to *Juidice*, the Court stated:

There is little difference between the State's interest in forcing persons to transfer property in response to a court's judgment and in forcing persons to respond to the court's process on pain of contempt. Both *Juidice* and this case involve challenges to the processes by which the State compels compliance with the judgments of its courts.³⁴⁴

Case law therefore suggests that in deciding whether to abstain from enjoining a state court action filed by an absent class member exercising a limited back-end opt-out right that arguably seeks relief barred by a judicially-approved settlement agreement, a federal court must consider three issues: “*first*, do[es] [the state court action] constitute an ongoing state judicial proceeding; *second*, do the [state] proceedings implicate important state interests; and *third*, is there an adequate opportunity in the state proceedings to raise constitutional challenges.”³⁴⁵

The first and third conditions are obviously met. The action filed by the opt-out plaintiff in state court is clearly an “ongoing state judicial proceeding.” Moreover, the defendant who asks the federal court to enjoin the state court action to prevent violations of the settlement agreement approved by the federal court has the opportunity to ask the state court to recognize the federal judgment and to enforce the limits inherent in the back-end opt-out right.³⁴⁶ Thus, the appropriateness of *Younger* abstention in these circum-

4242, at 320-21 (stating that “a federal court may, and ordinarily should, refrain from deciding a case in which state action is challenged in federal court as contrary to the federal constitution if there are unsettled questions of state law that may be dispositive of the case and avoid the need for deciding the constitutional question”). The *Pennzoil* Court declined to consider *Pullman* abstention because *Pennzoil* had not argued it to the Court, but noted “that considerations similar to those that mandate *Pullman* abstention are relevant to a court's decision whether to abstain under *Younger*.” *Pennzoil*, 481 U.S. at 11 n.9.

343. *Pennzoil*, 481 U.S. at 10-11.

344. *Id.* at 13-14; *cf.* Althouse, *supra* note 322, at 1080-82 (suggesting that the state in *Juidice* had a strong interest in its contempt power whereas the state in *Pennzoil* had a more neutral and muted interest in providing a judicial forum for private litigants).

345. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1992).

346. It is possible that the *Younger* doctrine supports abstention only where the federal court is called upon to review the *constitutionality* of state action. *See infra* notes 348-51 and accompanying text.

stances turns on the remaining condition—the existence of an important state interest in administering its own judicial processes without federal court interference.

The Third Circuit in the fen-phen case summarily concluded that this condition was not met:

We discern nothing about the state civil proceedings at issue here—personal injury suits sounding largely in state tort law—that can fairly be thought to implicate “important state interests.” The instances where the Supreme Court ... ha[s] applied *Younger* to state civil proceedings—such as state contempt proceedings [and] judicial proceedings enforcing state court orders ... —involved proceedings qualitatively different from those at issue here.³⁴⁷

The Third Circuit might have bolstered its conclusion that *Younger* abstention was not mandated by adding that federal restraint typically is required only in deciding federal *constitutional* challenges to state action.³⁴⁸ As the Supreme Court noted in *Pennzoil*, in cases challenging state law or practice on federal constitutional grounds, abstention affords the state court an opportunity to resolve unsettled state law questions that may render resolution of the federal constitutional issue unnecessary.³⁴⁹ These “considerations [are] similar to those that mandate *Pullman* abstention,”³⁵⁰ which applies only when resolution of an unsettled state law question might avoid the need to decide a federal constitutional issue, not a federal statutory issue.³⁵¹ In a case like

347. *Diet Drugs II*, 369 F.3d 293, 307 n.6 (3d Cir. 2004) (citations omitted).

348. *Pennzoil*, 481 U.S. at 11-12; *Shepherd Intelligence Sys., Inc. v. Def. Techs., Inc.*, 702 F. Supp. 365, 367 n.3 (D. Mass. 1988) (declining to abstain in the absence of a federal constitutional issue); 17B WRIGHT ET AL., *supra* note 322, § 4251, at 1; *cf.* *Hoai v. Sun Ref. & Mktg. Co.*, 866 F.2d 1515 (D.C. Cir. 1989) (concluding that abstention was inappropriate in a federal case that failed to raise a federal constitutional issue, but not raising that point in support of the holding); *Redish*, *supra* note 322, at 481 n.94 (suggesting, before *Pennzoil*, that “[i]f *Younger* were extended to civil cases involving private parties, it is not clear whether the doctrine would still be limited to § 1983 suits or would apply to any asserted basis for federal injunctive relief”).

349. *See supra* note 342 and accompanying text.

350. *Pennzoil*, 481 U.S. at 11 n.9.

351. 17A WRIGHT ET AL., *supra* note 249, § 4242, at 325-26; *cf.* *Druker v. Sullivan*, 458 F.2d 1272, 1274 (1st Cir. 1972) (stating that “[w]hile ordinarily the federal claims in abstention cases have been purely constitutional ones, the same policies are applicable where ... the

fen-phen, which raised no federal constitutional challenge to a state law or practice and interpreted no federal statute, abstention would not avoid the potentially unnecessary resolution of federal constitutional, or even statutory, issues.

On a related note, as Professor Ann Althouse has argued, it may be that *Younger* abstention should be invoked to maximize the enforcement of federal law by permitting state courts to develop familiarity and expertise in federal law, rather than to serve state interests.³⁵² If *Younger* is so understood, the case for abstention may be weak in the back-end opt-out context irrespective of the state interest. Permitting a state court to interpret a settlement agreement approved by a federal court and to determine whether evidence that a plaintiff seeks to introduce will flout the restrictions built into a limited back-end opt-out right likely will not serve “[l]ong-term federal interests in promoting a strong and capable parallel system of courts”³⁵³ to enforce federal constitutional (or even statutory) law. Put differently, permitting a state court to interpret one federally-approved settlement agreement will not help it develop familiarity or expertise in federal law or even help it interpret another settlement agreement approved by a different federal court in another class action.³⁵⁴ Viewed through this lens, the case for federal abstention is weak.

Although these arguments bolster the Third Circuit’s conclusion that *Younger* abstention is not mandated when a federal court is asked to enjoin a state court proceeding to ensure that a judicially-approved settlement agreement is properly interpreted and applied, the question is more complicated than the Third Circuit suggested. First, given the Supreme Court’s decisions in *Pennzoil* and *Juidice*, the fact that the fen-phen case was a civil action between private

federal claim is in part statutory”).

352. Althouse, *supra* note 322, at 1053, 1084-90.

353. *Id.* at 1088.

354. This is especially true if state law governs the interpretation of the settlement agreement, as it likely will if the agreement settles state law claims. Michael E. Solimine, *Enforcement and Interpretation of Settlements of Federal Civil Rights Actions*, 19 RUTGERS L.J. 295, 318 (1988). If, on the other hand, the agreement settles federal claims, federal common law may govern the interpretive questions, Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 526-30 (2006); Solimine, *supra* at 319, and at least there would be an argument that state courts should be afforded the opportunity to develop an expertise in this body of federal common law.

litigants clearly is not dispositive. Even in civil litigation between private parties, states may have important interests in enforcing their judgments that may support federal abstention.

Second, although the actions initiated by the opt-out plaintiffs in state court had not yet gone to judgment and therefore the states involved could not claim an interest in the *enforcement* of their judgments, states may have important interests in judicial independence and the integrity of their judicial processes even before judgment is rendered. After all, *Younger* itself involved federal interference with a pending state criminal prosecution that had not yet gone to judgment.³⁵⁵ In other cases, too, the Court has barred federal intervention in pre-judgment state criminal prosecutions.³⁵⁶ In *O'Shea v. Littleton*,³⁵⁷ for example, the federal plaintiffs sought to enjoin a county court magistrate and judge from engaging in racial discrimination in connection with the setting of bonds and sentencing in prospective prosecutions. The Court noted that "the [federal] order would contemplate interruption of state proceedings to adjudicate assertions of noncompliance by [the county magistrate and judge]. This seems to us nothing less than an ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that [*Younger*] ... sought to prevent."³⁵⁸

As the Third Circuit's opinion in *Diet Drugs II* suggests, it may be that although a state's substantive interest in its criminal laws is sufficient to support *Younger* abstention even *before* a state prosecution has gone to judgment, its interest in civil litigation between private parties is not sufficiently important for *Younger* purposes until its courts invest the time and resources necessary to produce a judgment.³⁵⁹ In an earlier suit, the Third Circuit suggested as much:

355. *Younger v. Harris*, 401 U.S. 37, 39-41 (1971).

356. *See, e.g.*, *Kugler v. Helfant*, 421 U.S. 117, 129-31 (1975); *O'Shea v. Littleton*, 414 U.S. 488, 499-500 (1974); *Perez v. Ledesma*, 401 U.S. 82, 84-85 (1971); *see also* *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951).

357. 414 U.S. 488 (1974).

358. *Id.* at 500 (citation omitted); *see also* *Cinema Blue of Charlotte, Inc. v. Gilchrist*, 887 F.2d 49, 53 (4th Cir. 1989).

359. *Cf.* *Redish*, *supra* note 322, at 477-80 (rejecting a state's substantive legislative goals as an appropriate consideration in *Younger* abstention).

[T]he ... principle that the state's interest in litigation initiated by private persons is less weighty than other state interests protected by *Younger* may still have some room to operate, as it suggests that the federal courts may, in an appropriate case, interfere with an ongoing privately initiated state proceeding in which the state court has not yet rendered judgment even if *Younger* would preclude such interference in a case in which the state had already entered a judgment.³⁶⁰

But this conclusion is neither obvious nor necessarily correct. State courts may have a powerful interest in overseeing and administering civil litigation without federal interference. Although this interest does not derive from a substantive interest in state criminal laws or an interest in having state civil judgments recognized and enforced, it nevertheless may be sufficiently important to support *Younger* abstention. For example, in *Owens-Corning Fiberglas Corp. v. Moran*,³⁶¹ the plaintiffs filed a civil action in an Illinois state court and, consistent with an Illinois state rule, provided notice that they expected four of the corporate defendant's nonresident employees to appear at trial. The trial judge denied the defendant's motion to quash the notice for lack of personal jurisdiction.³⁶² The defendant then filed suit against the state trial judge in federal court.³⁶³ On appeal from a dismissal of the federal action, the Seventh Circuit relied upon *Younger* abstention to uphold the dismissal even though the state court had not yet rendered a judgment.³⁶⁴ Noting that the state-court defendant "wants the federal court to consider a rule affecting the production of evidence in court, the implementation (or disregard) of which affects the outcome of the merits,"³⁶⁵ the Seventh Circuit concluded that "[i]t would be absurd, an inversion of appropriate principles of federalism, for this court to tell a state trial court in mid-trial what evidence and sanctions are appropriate."³⁶⁶ Other courts of appeals

360. *Schall v. Joyce*, 885 F.2d 101, 109 (3d Cir. 1989) (relying in part on *Williams v. Red Bank Bd. of Educ.*, 662 F.2d 1008, 1019 (3d Cir. 1981)).

361. 959 F.2d 634 (7th Cir. 1992).

362. *Id.* at 634.

363. *Id.* at 634-35.

364. *Id.* at 636-37.

365. *Id.* at 636.

366. *Id.*

have expressed similar concern over the disruption that would be caused if a federal court had to “monitor and enforce the state courts’ compliance with a federal order.”³⁶⁷ The second condition for *Younger* abstention thus may be satisfied in cases like fen-phen, in which a party asks a federal court to enforce the limits on a back-end opt-out right by monitoring the allegations that may be made and the evidence that may be admitted in a pending state court action.

Finally, even if the requisite state interest exists to support *Younger* abstention, it may be appropriate for a federal court to intervene to protect or effectuate its judgment (when the state court has not yet entered a judgment). In other words, although the *Younger* doctrine requires federal courts to abstain in certain cases out of respect for the integrity of the state’s judicial processes (or to maximize the enforcement of federal law), perhaps the *Younger* doctrine should acknowledge a countervailing interest in the enforcement of federal judgments, an interest already codified in the third exception to the Anti-Injunction Act.³⁶⁸ Professor Martin Redish has suggested that courts considering whether to abstain under *Younger* “should balance, on a case-by-case basis, the danger of disruption of state proceedings against the strength of the individual’s need for immediate review by a federal tribunal.”³⁶⁹ In the Anti-Injunction Act context, too, Professor Redish has advocated an approach that would “balance evenly the interest of the state courts in remaining free from collateral federal interference against the importance of preserving the authority and integrity of the federal court’s jurisdiction.”³⁷⁰ When a federal court is called upon to enjoin the violation of a judicially-approved settlement agreement by litigants in a pending state court proceeding, it may also be appropriate to balance the state court’s interest in autonomy

367. *Anthony v. Council*, 316 F.3d 412, 421 (3d Cir. 2003); *see also Parker v. Turner*, 626 F.2d 1, 8 (6th Cir. 1980) (upholding *Younger* abstention where the “relief which the plaintiffs seek ... would necessarily require monitoring of the manner in which the state juvenile judges conducted contempt hearings in non-support cases”).

368. 28 U.S.C. § 2283 (2000); *see also supra* Part IV.B.2.

369. Redish, *supra* note 322, at 486; *see also id.* at 486 n.115 (suggesting that the recommended analysis should “be applied exclusively to civil rights suits under § 1983”).

370. Martin H. Redish, *The Anti-Injunction Statute Reconsidered*, 44 U. CHI. L. REV. 717, 755 (1977); *cf.* Redish, *supra* note 260, at 1371-72 (seeking to reconcile his advocacy of a balancing approach with his later support for a “zero tolerance” model).

against the need to preserve the integrity of the federal judgment and the settlement agreement that it approved.

V. EQUITABLE AND PRACTICAL COMPLICATIONS

As the Supreme Court has noted, “the fact that an injunction *may* issue under the Anti-Injunction Act does not mean that it *must* issue.”³⁷¹ Thus, even if an exception to the Anti-Injunction Act is available and even if the *Younger* doctrine does not mandate abstention, the federal district court should consider “the principles of equity [and] comity ... that must restrain a federal court when asked to enjoin a state court proceeding.”³⁷² Specifically, it should not enjoin pending state proceedings unless the standard requirements for injunctive relief—a showing of irreparable harm and the absence of an adequate remedy at law—are met.³⁷³ Practical concerns may also counsel in favor of restraint. It is to these complications that Part V now turns.

A. Equity

Equitable relief may be no broader than necessary to remedy the legal transgression established.³⁷⁴ When a federal court is asked to enjoin a state court litigant from proceeding with her action or from offering certain evidence in support of her claim, the court must carefully tailor any injunction it issues and ensure that it is “commensurate with the wrong it is crafted to remedy.”³⁷⁵

In deciding whether or not to uphold the injunction issued in the fen-phen litigation to enjoin absent class members who exercised

371. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 151 (1988).

372. *Mitchum v. Foster*, 407 U.S. 225, 243 (1972); *see also Diet Drugs II*, 369 F.3d 293, 306-07 (3d Cir. 2004); 17A WRIGHT ET AL., *supra* note 249, § 4226, at 127-29.

373. *See, e.g., Younger v. Harris*, 401 U.S. 37, 43-44 (1971); *see also Diet Drugs II*, 369 F.3d at 307; Wood, *supra* note 259, at 292 (stating that “equitable principles have a strong restraining force on anti-suit injunctions”).

374. *Temple Univ. v. White*, 941 F.2d 201, 215 (3d Cir. 1991). Some scholars have questioned the courts’ reliance in a merged system on certain equitable principles, which were developed when equity and law were separate legal systems. *See, e.g., Owen M. Fiss, Dombrowski*, 86 YALE L.J. 1103, 1107 (1977); Redish, *supra* note 322, at 463-64 n.6; Ralph U. Whitten, *Federal Declaratory and Injunctive Interference with State Court Proceedings: The Supreme Court and the Limits on Judicial Discretion*, 53 N.C.L. REV. 591, 611-13 (1975).

375. *Diet Drugs II*, 369 F.3d at 307.

limited back-end opt-out rights from offering certain evidence in state court, the Third Circuit had to determine whether the injunctions were necessary to enforce the terms of the Settlement Agreement. “An over-inclusive injunction would run afoul of well-established principles of equity and federalism.”³⁷⁶

The court focused on the terms of the class action notice sent to absent class members and the Settlement Agreement, concluding that “to avoid due process concerns,” the preclusion language had to “be strictly construed against those who [sought] to restrict class members from pursuing individual claims.”³⁷⁷ The court concluded that three relevant restrictions emerged from a close reading. First, those exercising intermediate opt-out rights would not be permitted to sue for consumer fraud or business loss, but otherwise, they could “pursue all ... Settled Claims’ for timely diagnosed VHD [valvular heart disease].”³⁷⁸ Second, class members who exercised intermediate opt-out rights could not seek “punitive, exemplary, or any multiple damages.”³⁷⁹ Third, they could not introduce into evidence any verdicts or judgments against Wyeth or any evidence regarding the Settlement Agreement.³⁸⁰

Notably, although the opt-out plaintiffs were precluded from offering certain kinds of evidence, such as evidence of judgments against the company, they were not specifically precluded from using evidence that supported a proper claim “simply because it would [also] be relevant in supporting punitive damages.”³⁸¹ In other words, the Settlement Agreement did not specifically bar the absent class members from offering evidence of intentional or reckless behavior, which would have supported their claims for negligence or defective design. “One deduces from the absence of such an evidentiary restriction that the agreement meant only to block the specified type of damages award and not types of evidence that are relevant to permissible awards but might also be relevant to punitive damages.”³⁸² Even though evidence of intentional or

376. *Id.* at 308.

377. *Id.*

378. *Id.* at 309.

379. *Id.* at 310.

380. *Id.*

381. *Id.*

382. *Id.*

reckless behavior also would have supported punitive damages, which the plaintiffs were precluded from seeking, the Third Circuit declined to construe the Settlement Agreement as requiring that very strong evidence of fault be “diluted so that it would not arouse the jury to award punitive damages.”³⁸³

The court recognized that in its own decision in *Prudential I*, it upheld an injunction that prevented absent class members who opted out regarding some insurance policies but not others “from using evidence common to the purchase and sale of their Class Policies and their Excluded Policies in their state action on their Excluded Policies.”³⁸⁴ In seeking to distinguish *Prudential I*, the *fenphen* court noted that the release in *Prudential I* was broad, releasing the defendants “from any and all causes of action ... of any kind or nature whatsoever ... that have been, or could have been, may be or could be alleged or asserted now or in the future ... on the basis of ... the Released Transactions [i.e., settled policies under the settlement agreement].”³⁸⁵ Given the breadth of the release, which precluded claims that were related in any way to a settled policy, the Third Circuit in *Prudential I* upheld an injunction that barred opt-out plaintiffs from using common evidence in support of their preserved claims.³⁸⁶

Unlike the broad general release in *Prudential I*, which “prevent[ed] new causes of action from overlapping with settled causes of action with a ‘common nucleus of operative facts,’”³⁸⁷ the *Diet Drugs* release was “a bar only to the magnitude and type of relief.... VHD-based claims for compensation, including pain, anguish, and loss of consortium, are not precluded or limited in any way.... What is limited is the type and extent of *damages* for such VHD-claims.”³⁸⁸ Given the equitable requirement that injunctive relief be carefully tailored to remedy the violation found, the Third Circuit declined to “read this punitive damages limitation as if it

383. *Id.* at 311-12.

384. *Prudential I*, 261 F.3d 355, 368 (3d Cir. 2001); *see also supra* notes 277-91 and accompanying text.

385. *Diet Drugs II*, 369 F.3d at 311 (quoting *Prudential I*, 261 F.3d at 367) (internal quotation marks omitted).

386. *Prudential I*, 261 F.3d at 365.

387. *Diet Drugs II*, 369 F.3d at 311 (quoting *Prudential I*, 261 F.3d at 367).

388. *Id.*

were a limit on the manner in which opt-out plaintiffs can pursue their claims for compensation.”³⁸⁹

The lesson from equity for attorneys and trial courts involved in class action settlements that afford limited back-end opt-out rights is similar to one of the lessons gleaned from the analysis of the Anti-Injunction Act: settlement agreements and notices sent to absent class members must be clear and explicit about (a) both the claims released and those retained by class members preserving limited opportunities to opt out after the initial, full opt-out period expires; (b) the restrictions, if any, on the types of damages that those with back-end opt-out rights may seek; and (c) the extent to which evidence that supports preserved claims but also would support precluded claims or precluded types of damages may be offered.

B. Practical Concerns

Even apart from the jurisdictional, federalism, and equitable complications that may bedevil efforts by federal courts to enforce the terms of judicially-approved settlement agreements against state court litigants who exercise limited back-end opt-out rights, practical and prudential considerations also exist.

First, while it likely would be better situated to interpret the settlement agreement it approved and to ascertain the intent of the parties in limiting back-end opt-out rights,³⁹⁰ the federal court that oversaw the class action might not be well situated to make many of the evidentiary decisions that would become necessary if the back-end opt-out plaintiff sought to introduce evidence that the defendant claimed was barred by the settlement agreement. For example, if the settlement agreement precluded back-end opt-out plaintiffs from seeking punitive damages, as it did in the fen-phen case, the defendant would want to ensure that opt-out plaintiffs did not circumvent this restriction by offering proof of the defendant’s willful and wanton conduct or other evidence that would support a

389. *Id.*

390. *Stephenson v. Dow Chem. Co.*, 273 F.3d 248, 257 (2d Cir. 2001); *In re “Agent Orange” Prod. Liab. Litig.*, 996 F.2d 1425, 1431 (2d Cir. 1993) (concluding that the court “best situated” to determine “the scope of the ... class action and settlement ... is the court that approved the settlement and entered the judgment enforcing it”).

claim for punitive damages (even if the plaintiff's complaint did not seek punitive damages). Yet, if the evidence would support not only a precluded claim for punitive damages but also a preserved claim for compensatory damages, a court would have to determine whether the evidence should be admitted.

In making this determination, the court would have to balance the probative value of the evidence against the risk that it might be "so inculpatory that it might inflame the jury to award damages that would punish [the defendant] instead of simply compensating the plaintiffs."³⁹¹ In the words of the Third Circuit in *Diet Drugs II*, this balancing process is "nuanced and contextual"³⁹² and needs to be performed as the plaintiff's narrative unfolds at trial with the benefit of a "full record,"³⁹³ and not "prematurely"³⁹⁴ and "[p]recipitous[ly]"³⁹⁵ in an "arid"³⁹⁶ pretrial hearing before a federal judge who will not try the case.³⁹⁷ Thus, the federal judge's physical and temporal remove from the trial creates serious practical complications.

Second, evidence properly excluded from the plaintiff's case in chief might nevertheless be admissible for purposes of rebuttal or impeachment if the defendant were to "open the door" at trial. But if a federal judge were to decide in a pretrial hearing that certain exhibits or portions of testimony were "excluded definitively," the state trial court's discretion to permit the previously excluded evidence for rebuttal or impeachment purposes would be bounded by the federal court's order. The plaintiff would have to seek a modification of the federal order, which necessarily would interrupt the flow of the state court trial.³⁹⁸ Even if the plaintiff could seek such a modification by telephone, the very need to call the federal judge would be "awkward, ... highly intrusive and unworkable."³⁹⁹

391. *Diet Drugs II*, 369 F.3d at 314.

392. *Id.*

393. *Id.* (quoting *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 859 (3d Cir. 1990)).

394. *Id.*

395. *Id.*

396. *Id.*

397. *See id.*

398. *Id.* at 316.

399. *Id.*; *see also* Althouse, *supra* note 322, at 1053, 1062 (describing the benefit of having the state court that is "already engaged in processing a case" decide the federal issues raised therein).

Such interruptions would be far more disruptive if the federal judge were not immediately available and the state trial had to recess until she could be reached. Not only would the jurors, the parties, their attorneys, and the state court judge waste valuable time, and not only would the flow of the trial be interrupted, but presumably the jury would question the authority of the state court judge to oversee litigation pending in her own courtroom.

Third, a federal injunction might be so sweeping in scope or so vague in its language that a state trial court would be unsure what authority it retained to proceed. For example, in the *Prudential Insurance* litigation, the federal court that approved the settlement of a nationwide class action issued an injunction that enjoined class members who opted out regarding some but not all of their insurance policies “from engaging in motion practice, pursuing discovery, presenting evidence or undertaking any other action in furtherance [of their state court action] that is based on, relates to or involves facts and circumstances underlying the Released Transactions in the Class Action.”⁴⁰⁰ Following issuance of the federal injunction, the state court judge overseeing the opt-out plaintiff’s claim issued an order staying the action “until clarification is achieved ... as to the scope, effect and ramifications [of the district court order] so that the parties and this Court may understand the practical impact this injunction will have on these proceedings.”⁴⁰¹ The Third Circuit in *Diet Drugs II* also expressed concern that the federal district court’s order lacked clarity regarding the decisions the state trial court retained authority to make and those that were foreclosed.⁴⁰²

Finally, a vague order might not only create uncertainty for the state trial court judge, but it might also unduly inhibit the opt-out plaintiff’s attorney from seeking to offer evidence at trial. In the absence of a federal order making evidentiary determinations, the attorney representing the opt-out plaintiff might seek to offer at trial evidence that would support both plaintiff’s negligence or defective design claims, and also a claim for punitive damages. If the plaintiff’s attorney “pushed the envelope,” the defendant’s

400. *Prudential I*, 261 F.3d 355, 363 (3d Cir. 2001) (quoting the district court order).

401. *Id.* at 363 n.7 (quoting the state court order).

402. *See Diet Drugs II*, 369 F.3d at 317.

attorney likely would object to the introduction of the evidence, and the state trial court could sustain the objection or even grant a mistrial. But the plaintiff's attorney would not run the risk of a punitive sanction.⁴⁰³ On the other hand, if the federal court were to grant a pretrial order proscribing the introduction of vague categories of evidence, "[t]here [would] be strong pressure on [plaintiff's] counsel to steer well clear of the line and possibly forego offering admissible evidence that [plaintiff] would normally expect to get before the jury."⁴⁰⁴ This pressure could drive a wedge between plaintiff's counsel, who might curb her zealotry to avoid being held in contempt, and her client, whose interests might be served by more aggressive efforts to offer the evidence at trial.

Recognizing the federal court's "unquestioned right to effectuate the restraints of the settlement through an order limiting opt-out plaintiffs' conduct in ancillary state proceedings,"⁴⁰⁵ the Third Circuit nevertheless concluded:

[T]he power must be exercised in a manner that minimizes entanglement in the state judge's ability to supervise judicial proceedings in his own courtroom. Similarly, the order should be fashioned in a manner that presumes that the state judge is capable and willing to enforce that settlement without close and intrusive supervision by the District Court.⁴⁰⁶

CONCLUSION

Back-end opt-out rights afford absent class members a delayed opportunity to remove themselves from a class action lawsuit when they know the terms of the settlement, when they know how much they will receive under it, or when they learn that they have been injured or the extent of their injuries. In some instances, class members are afforded *limited* back-end opt-out rights: they are permitted to exclude themselves from the class action at a later time, but in exchange for the prolonged flexibility, they give up something of value, such as the right to sue for punitive damages

403. *See id.* at 316.

404. *Id.*

405. *Id.* at 317.

406. *Id.*

or the right to bring certain claims. These structural innovations render the right to opt out more meaningful by permitting its exercise when class members have enough information to make an informed decision.

This Article has identified several curious complications that may arise if absent class members exercise limited back-end opt-rights and choose to bring their claims in state court and the defendant then asks the federal court that approved the class action settlement to enforce the limits inherent in the opt-out right through issuance of an injunction. The Article has raised questions regarding the federal court's power—whether it would have subject matter jurisdiction to proceed or personal jurisdiction over the absent class members; federalism—whether the risk of friction that a federal injunction against a pending state judicial proceeding likely would cause counsels against issuance of the injunction; and the federal court's good judgment—whether equitable and practical concerns militate against federal intervention to enforce the limits inherent in back-end opt-out rights.

By identifying these various complications, this Article does not mean to discourage the use of back-end opt-out rights. To the contrary, this Article attempts to facilitate the use of these back-end opt-out rights by suggesting ways to improve the quality of information afforded to absent class members and to ensure that both state and federal courts have effective tools to enforce the limits inherent in some back-end opt-out rights.

Four general conclusions emerge. First, counsel and courts overseeing class action litigation should seek to ensure that settlement agreements and notices sent to absent class members are more explicit about the risks faced by those who preserve limited opportunities to opt out after the initial, full opt-out period expires. In particular, settlement agreements and notices should be clear and explicit about (a) both the claims released and those retained by class members after the initial, full opt-out period expires; (b) the restrictions, if any, on the types of damages that those exercising back-end opt-out rights may seek; and (c) the extent to which the opportunity to offer evidence that supports preserved claims but also would support precluded claims or types of damages may be hampered by the preclusive effect of the release. Such specific guidance will help absent class members make better

informed decisions. And such guidance will help whichever court, federal or state, that may later be called upon to enforce the limits imposed by the settlement agreement and the back-end opt-out right.

Second, to ensure that they will have the authority to enforce the limitations imposed on class members exercising back-end opt-out rights (should they choose to exercise it), federal district courts approving class action settlements should (a) expressly retain jurisdiction to enforce the terms of the settlement agreement or incorporate the terms of the agreement into their orders of dismissal; (b) issue injunctions against the filing of state suits that present claims covered by the settlement agreement or seek damages barred by the settlement agreement *before* any such state suits are filed; and (c) consider urging the parties, when crafting the settlement agreement and back-end opt-out form, to include a waiver of potential objections to the court's jurisdiction in any ancillary proceeding brought to enforce the limits built into the back-end opt-out right.

Third, federal and state courts should cooperate in the enforcement of back-end opt-out rights. Open communication between the two courts may alleviate the federal court's concerns that the state court may not understand the nature of the limits imposed by the settlement agreement or the critical role that such limits play in the overall settlement.⁴⁰⁷ Once such information is communicated—in a conference call arranged upon notice to, and with participation of, counsel for all relevant parties—the federal court's and the litigants' concerns may be allayed and the federal court may feel sufficiently comfortable to leave it for the state court to decide the evidentiary issues that may arise during the state court trial. The Manual for Complex Litigation contemplates other means of

407. MANUAL FOR COMPLEX LITIGATION, *supra* note 307, § 20.312, at 233 (“Federal judges should communicate personally with state court judges ... to discuss mutual concerns and suggestions These communications ... help avoid potential conflicts.”); *id.* § 21.15 (urging interjurisdictional “cooperation and coordination”); *id.* § 21.42 (discussing means of informal communication between state and federal courts); *see also* JAMES G. APPLE ET AL., MANUAL FOR COOPERATION BETWEEN FEDERAL AND STATE COURTS (1997); Francis E. McGovern, *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867, 1896 (2000) (urging “[a] strategy of cooperation at the institutional level”); Wasserman, *supra* note 319, at 524-28 (advocating the creation of a registry of all class actions to foster communication among courts entertaining dueling class actions).

coordination between state and federal judges, including “joint pretrial conferences and hearings at which all involved judges preside, and parallel orders.”⁴⁰⁸ Such partnering between the state and federal courts in the enforcement of settlement agreements would reduce friction, bolster respect and comity, and minimize the practical problems that would arise if the federal court were unduly intrusive.

Finally, in deciding whether to issue an injunction against a back-end opt-out plaintiff or to enforce an injunction issued before the filing of the state court action, the federal court should examine the contacts the back-end opt-out plaintiff has with the state in which the federal court sits. If the contacts are minimal, the federal court should consider whether it would be fair to subject a plaintiff who lacks minimum contacts to coercive or punitive sanctions if she were to violate the injunction and whether it would be fair to deprive her of the opportunity to challenge the adequacy of representation in a convenient forum.

408. MANUAL FOR COMPLEX LITIGATION, *supra* note 307, § 10.123; *see also id.* § 20.313 (discussing joint “hearings on pretrial motions, based on a joint motions schedule” with “coordinated briefs”); *id.* § 21.15 (discussing “jointly [held] hearings”); APPLE ET AL., *supra* note 407, at 22-25 (discussing joint proceedings).