MONETARY DAMAGES IN MANDATORY CLASSES: WHEN SHOULD OPT-OUT RIGHTS BE ALLOWED?

INTRODUCTION

For decades, controversy has surrounded the use of class actions,[1] ranging from distrust of the device as a whole, to disagreements over its scope.[2] Critics view class actions as little more than legalized blackmail,[3] while proponents emphasize that class actions offer a useful device for individuals

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1. FED. R. CIV. P. 23 governs class actions. To commence a class action, FED. R. CIV. P. 23(a)'s requirements must be fulfilled. Those requirements are:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so *numerous* that joinder of all members is impracticable, (2) there are questions of law or fact *common to the class*, (3) the claims or defenses of the representative parties are *typical* of the claims or defenses of the class, and (4) the *representative parties* will fairly and *adequately protect* the interests of the class.

FED. R. CIV. P. 23(a) (emphasis added).

If these requirements are met, the plaintiff must then decide which subsection of 23(b) applies. For certification to be appropriate under FED. R. CIV. P. 23(b)(1), it is necessary that

> the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests . . . .

Alternatively, a class may be certified as a 23(b)(2) class if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." FED. R. CIV. P. 23(b)(2). Classes certified under 23(b)(1) or (b)(2) are known as "mandatory" classes because absent class members have no inherent right to remove themselves. *See* FED. R. CIV. P. 23(c)(3) advisory committee's notes.

Certification is appropriate under 23(b)(3) if "the court finds that the questions of law or fact common to the members of the class *predominate* over any questions affecting only individual members, and that a class action is *superior* to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23(b)(3) (emphasis added). Under Rule 23(b)(3), absent class members have an automatic right to opt out (or remove themselves) from the class. *See* FED. R. CIV. P. 23(c)(2) advisory committee's notes.

Although the Federal Rules of Civil Procedure provide definitive parameters for bringing class actions within the various subsections of Rule 23(b), specifically defining what types of classes are encompassed by these rules often proves difficult. This topic is the subject of this Comment.

2. Class actions have provoked controversy in a multitude of contexts. *See, e.g.*, Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664 (1979) (defending Federal Rule of Civil Procedure 23 against those who would limit its scope and applicability and arguing that much of the hostility against this rule is based on misperceptions); Kevin R. Johnson, *International Human Rights Class Actions: New Frontiers for Group Litigation*, 2004 MICH. ST. L. REV. 643, 644 (2004) ("[T]he growing use of class actions for social reform in the United States . . . has provoked discussion and controversy for decades.").

3. Miller, *supra* note 2, at 665; *see also* William Simon, Class Actions—Useful Tool or Engine of Destruction, 55 F.R.D. 375, 375 (1973) (finding that terms such as "legalized blackmail" have a legitimate basis in areas such as class action damage suits under Federal antitrust and securities law).

who might otherwise be unable to pursue their claims.[4] Over the years, the United States Supreme Court has occasionally waded into the quagmire surrounding class actions to settle discrepancies among the various circuits with its guidance. The Court's precedents have been especially important in determining what individual rights are constitutionally protected within the scope of class actions—especially due process rights.[5] However, the constitutional rights of absent class members continue to create considerable controversy among the circuits, specifically in the area of opt-out rights concerning monetary damage claims.[6]

The United States Supreme Court has yet to decide definitively when absent class members have a constitutional right to opt out of class actions that assert monetary damages on their behalf. Twice in the past, the Supreme Court has granted certiorari on this issue, first in *Ticor Title Insurance Co. v. Brown*,[7] and later in *Adams v. Robertson*.[8] However, the Court did not reach a holding with regard to the issue of opt-out rights in either case, leaving this issue unresolved.[9]

When the Court dismissed *Ticor Title*, though, it noted a "substantial possibility" that "in actions seeking monetary damages, classes can be certified only under Rule 23(b)(3), which permits opt-out, and not under Rules 23(b)(1) and (b)(2), which do not."[10] Additionally, in *Adams*, the Court expressed a "continuing interest" in the issue of opt-out rights where monetary damages are asserted.[11] After dismissing these two cases, though, the Court has not heard arguments on the issue again.

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4. *See, e.g.*, Miller, *supra* note 2, at 665.

5. *See, e.g.*, Hansberry v. Lee, 311 U.S. 32, 42 (1940) (holding that there is a "failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it." (citing Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 235 (1897))); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 (1985) (holding that in claims for wholly or predominantly money judgments, due process requires that, at a minimum, absent class members be provided with an opportunity to "opt out").

6. Some circuits have found that class members who have substantial monetary claims cannot be bound to a class settlement without the right to opt out. *See, e.g.*, Molski v. Gleich, 318 F.3d 937, 948-49 (9th Cir. 2003); Brown v. Ticor Title Ins. Co., 982 F.2d 386, 392 (9th Cir. 1992), *cert. granted in part*, 510 U.S. 810 (1993), *cert. dismissed*, 511 U.S. 117 (1994). Other circuits favor a hybrid arrangement under Rule 23(b) in order to satisfy due process concerns. *See, e.g.*, Robinson v. Metro-N. Commuter R.R. Co., 267 F.3d 147, 164-67 (2d Cir. 2001); Eubanks v. Billington, 110 F.3d 87 (D.C. Cir. 1997); Holmes v. Cont'l Can Co., 706 F.2d 1144 (11th Cir. 1983). These circuits permit splitting actions into separate mandatory and opt out classes where both damages and injunctive or declaratory relief are sought. *Robinson*, 267 F.3d at 164-67; *Holmes*, 706 F.2d at 1151-60; *Eubanks*, 110 F.3d at 91-96. However, other circuits (e.g., the Third, Fourth, Fifth, Sixth, and Eighth) have taken a contrasting view. When presented with a scenario where both mandatory certification under Rule 23(b)(1) or (b)(2) would be appropriate, as well as where substantial damages claims might fall under the premises of Rule 23(b)(3), these circuits encourage mandatory certification even when damage claims are also present and opt out certification is a possibility. *See, e.g.*, DeBoer v. Mellon Mortgage Co., 64 F.3d 1171, 1175-76 (8th Cir. 1995); First Fed. of Mich. v. Barrow, 878 F.2d 912, 919-20 (6th Cir. 1989); Kyriazi v. W. Elec. Co., 647 F.2d 388, 392-95 (3d Cir. 1981).

7. 511 U.S. 117 (1994).

8. 520 U.S. 83 (1997).

9. In both instances, the Court dismissed the writ of certiorari as improvidently granted after briefing and oral arguments on the merits. *See Ticor Title*, 511 U.S. at 122; *Adams*, 520 U.S. at 85.

10. *Ticor Title*, 511 U.S. at 121.

11. *Adams*, 520 U.S. at 92 n.6.

Recently, *Smith v. Crystian*[12] raised concerns similar to those presented in *Ticor Title* and *Adams*. In *Smith*, the Fifth Circuit affirmed the district court's holding that mandatory class certification[13] was appropriate under the provisions of Federal Rule of Civil Procedure 23(b)(1)(A) or alternatively 23(b)(2),[14] irrespective of the fact that substantial damages appear to have been present.[15] When the Fifth Circuit's decision was appealed to the Supreme Court, the Court had the opportunity to determine the extent of opt-out rights in cases where monetary damages are asserted. Granting certiorari on this issue would have helped ensure that absent class members, such as those in *Crystian*, could not be improperly bound by a mandatory class where substantial damages are almost certainly present. Unfortunately, the Court denied the petition for certiorari,[16] leaving the issue unresolved and denying absent class members the right to enforce their due process rights.

Leaving the question of opt-out rights open to interpretation allows appellate courts to render inconsistent adjudications—often in violation of absent class members' due process rights. It is clear that where monetary damages are the *exclusive* or *predominate* form of relief sought, then certification under the mandatory provisions of Rule 23(b)(2) is inappropriate.[17] Therefore, courts that favor certification under the provisions of 23(b)(2) for claims that could alternatively be certified under 23(b)(3),[18] are violating absent class members' due process rights to opt out.

Additionally, in order to adequately address absent class members' constitutional right to opt out, the question of predominance under Rule 23(b)(2) must be explored. Although it is accepted that certification is improper under Rule 23(b)(2) where the relief sought is exclusively or *predominately* monetary damages,[19] there is much disagreement concerning the appropriate test for determining when monetary damages actually predominate over equitable relief. One approach is the *Allison v. Citgo Petroleum Co.*[20] "bright line" test, finds that in order for equitable relief to predominate over monetary damages, it must be determined that the monetary damages are "incidental" to the equitable relief sought.[21] In essence, this means that courts will concentrate their analysis on "the extent to which the various

12. Smith v. Crystian, 91 Fed. App'x 952 (5th Cir. 2004), *cert. denied*, Crystian v. Tower Loan of Miss. Inc., 125 S. Ct. 972 (2005).

13. "Mandatory" refers to a class in which there is no automatic right to notice or opt out for absent class members.

14. *Smith*, 91 Fed. App'x at 954-55.

15. *See* Petition for Writ of Certiorari at *4, *Crystian*, 125 S. Ct. 972 (2004) (No. 04-488), 2004 WL 2296302 ("[C]lass counsel has conceded that class members' circumstances vary widely and that between 1,000 and 1,500 class members could likely win substantial damages awards if permitted to pursue their own state-court actions.").

16. *Crystian*, 125 S. Ct. at 972.

17. *See* FED. R. CIV. P. 23(b)(2) advisory committee's notes.

18. *See infra* Part II.B.3.

19. *See* FED. R. CIV. P. 23(b)(2) advisory committee's notes.

20. 151 F.3d 402 (5th Cir. 1998).

21. *Id.* at 415.

forms of requested monetary relief would flow directly from a finding of liability on the plaintiffs' claims for injunctive and declaratory relief."[22]

The alternative approach employed by *Robinson v. Metro-North Commuter Railroad Co.*[23] and *Molski v. Gleich*[24] is an "ad hoc" balancing test, which requires that courts contemplate and examine the *individual features* of *each* case in order to determine predominance.[25] This Comment argues that the "ad hoc" approach is the appropriate standard because it allows courts to make informed, sound determinations of predominance through a contemplation of *all* factors involved in each specific case.

Unfortunately, until the United States Supreme Court definitively rules on the issue of opt-out rights where claims for monetary damages are asserted, some courts will continue to bind absent class members into classes without giving these individuals the right to opt out. Some courts have recognized the potential due process implications of failing to grant opt-out rights to class members with claims for monetary damages and have properly dealt with this problem through the use of hybrid classes.[26] In a hybrid class, where a mandatory class has been certified, claims for equitable relief continue to be bound by mandatory class provisions where there is no inherent right to opt out, but absent class members with monetary damages claims are allowed to opt out.[27]

It is possible that opt-out rights may be required in *all* cases where monetary damages are asserted,[28] but until the Supreme Court makes that determination, it is necessary—at a minimum—to allow opt-out rights where at least *substantial* monetary damages are present.[29] Therefore, the question of "predominance," will continue to present a problem, and as long as the question of "predominance" remains unresolved, it is impossible to definitively determine what constitutes *substantial* monetary damages.

In order to demonstrate that the question of opt-out rights where monetary damages are asserted is an issue that requires resolution by the Supreme

22. 2 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 4:14, at 79 (4th ed. 2002).

23. 267 F.3d 147 (2d Cir. 2001).

24. 318 F.3d 937 (9th Cir. 2003).

25. *See id.* at 950 & n.15; *Robinson*, 267 F.3d at 164. *Contra In re* Monumental Life Ins. Co., 365 F.3d 408, 415 (5th Cir. 2004) (employing the *Allison* bright-line test in its finding that "'determining whether one form of relief actually predominates in some quantifiable sense is a wasteful and impossible task that should be avoided.' In other words, certification does not hinge on the subjective intentions of the class representatives and their counsel in bringing suit") (citation omitted).

26. *See infra* Part II.B.2 (discussing hybrid classes as a mechanism by which courts can deal with equitable claims within the auspices of Rule 23(b)(2), which ordinarily does not grant opt-out rights, while allowing courts to separate claims for monetary damages into a separate class allowing automatic opt-out rights).

27. *See infra* Part II.B.2.

28. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) (finding that minimal due process requires that an absent class member be "provided with an opportunity to remove himself from the class by executing and returning an 'opt out' . . . form to the court," when monetary damages are involved). Therefore, it is possible that in classes where any monetary damages are asserted, certification may be proper only under Rule 23(b)(3).

29. *See supra* note 6 (discussing the various circuits' approaches to opt-out rights with regard to claims for "substantial" monetary damages).

Court, this Comment will explore several necessary elements. In Part I, Federal Rule of Civil Procedure 23 will be laid out and its various subparts examined. This examination will show the various policy rationales for the subparts of Rule 23(b) and the applicability of the various sections to particular types of class actions.[30] Additionally, *Crystian*[31] is used as a case study to demonstrate the problems with certifying a class as mandatory where substantial damages appear to be present. Part II examines the respective circuits' approaches in dealing with due process concerns surrounding opt-out rights where monetary damage claims are asserted. Part III addresses the issue that if indeed there is always a constitutional right to opt out where "substantial" monetary damages are asserted, the appropriate test for determining predominance is through the use of an "ad hoc" balancing test, not the *Allison* "bright line" test.[32] Finally, this Comment concludes that there is always a constitutional right to opt out of any class where substantial monetary damages are asserted and that the appropriate means of determining the presence of substantial damages is through the use of an "ad hoc" balancing test.

I. THE PROBLEMS EVIDENCED BY *CRYSTIAN*: A CLEAR DEMONSTRATION THAT OPT-OUT RIGHTS SHOULD AT TIMES BE REQUIRED—EVEN WITHIN THE PROVISIONS OF A MANDATORY CLASS

A. Federal Rule of Civil Procedure 23 and the Underlying Rationale for Its Various Subparts

Prior to determining which type of certification is appropriate for a particular class, it is necessary to conclude whether or not the class meets the prerequisites of Rule 23(a).[33] If the requirements of 23(a) are satisfied, then the relevant inquiry becomes under which subsection of 23(b) the class should be certified.[34] The two so-called mandatory classes are 23(b)(1)[35]

30. "Under Rule 23, the different categories of class actions, with their different requirements, represent a balance struck in each case between the need and efficiency of a class action and the interests of class members to pursue their claims separately or not at all." Allison v. Citgo Petroleum Co., 151 F.3d 402, 412 (5th Cir. 1998).

31. This examination will rely on the briefs submitted by both the Petitioner and the Respondent. *See also* Smith v. Crystian, 91 Fed. App'x 952, 955 (5th Cir. 2004) (upholding the district court's certification as a mandatory class irrespective of the fact that absent class members may have had claims for damages well in excess of the agreed upon settlement).

32. *See Allison*, 151 F.3d at 415.

33. *See* discussion of FED. R. CIV. P. 23(a) *supra* note 1 (explaining the prerequisites of class certification).

34. *See* FED. R. CIV. P. 23(b).

35. FED. R. CIV. P. 23(b)(1) states that a class may be certified under its provisions if

> the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests . . . .

and (b)(2),[36] while the only class where opt-out rights are automatic is 23(b)(3).[37]

Generally, the primary way in which a mandatory class is distinguished from an opt-out class is on the basis of class cohesiveness.[38] Rule 23(b)(2) classes are "homogeneous without any conflicting interests between the members of the class."[39] Opt-out rights are usually not applicable in the context of (b)(2) classes because these are almost exclusively group interest injuries, as opposed to those involving individual interests.[40] Likewise, under (b)(1), the "action encompasses cases in which the defendant is obliged to treat class members alike or where class members are making claims against a fund insufficient to satisfy all of the claims."[41] In the context of subsection (b)(1)(B), the members are bound together in a class because the prosecution of separate actions would create the risk of inconsistent adjudications and substantially impair the ability of members not party to the action to protect their interests.[42] Mandatory classes contrast sharply with (b)(3) classes.[43] In 23(b)(3) classes, individualized monetary damages are often asserted, which inherently gives rise to a conflict of interest within a class, thus destroying class homogeneity and requiring opt-out rights to protect absent class members' minimum due process rights.[44]

Members of a (b)(3) class are usually united only by a common trait that relates to the particular facts that gave rise to the litigation.[45] When a class is certified as a (b)(3) action it is "intended to dispose of all other cases in which a class action would be 'convenient and desirable,' including those involving large-scale, complex litigation for money damages."[46] The purpose of (b)(3) certification is to promote the efficiency of adjudication because a (b)(3) class will save time and money, and trying the proceedings as

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36. FED. R. CIV. P. 23(b)(2) states that certification is appropriate under these provisions when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

37. Class certification under 23(b)(3) is appropriate where

> the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

FED. R. CIV. P. 23(b)(3).

38. Holmes v. Cont'l Can Co., 706 F.2d 1144, 1155 n.8 (11th Cir. 1983).

39. *Id.* (quoting Wetzel v. Liberty Mut. Ins. Co, 508 F.2d 239, 256 (3d Cir. 1975)).

40. *Id.*

41. Allison v. Citgo Petroleum Co., 151 F.3d 402, 412 (5th Cir. 1998).

42. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 833 (1999).

43. *See supra* note 13.

44. Holmes v. Cont'l Can Co., 706 F.2d 1144, 1154-55 (11th Cir. 1983).

45. *Id.* at 1156.

46. *Allison*, 151 F.3d at 412.

a class will provide greater efficiency than individual adjudications.[47] In these proceedings, questions of law and fact must predominate and class proceedings must provide a superior device for adjudicating the proceeding over all other available methods.[48] However, because class members in a (b)(3) class are by definition a heterogeneous group and may have diverging monetary interests, 23(c)(2)[49] provides notice and opt-out rights which are typically unavailable to the members of a mandatory class.[50]

Opt-out rights in the (b)(2) context have traditionally been rare.[51] The general rule under 23(b)(2) is that absent individual class members do not have an automatic right to opt out of a certified class to bring their own claims, either in cases where a (b)(2) class is tried or settled.[52] There are three reasons for this rationale:

> First, under the certification procedure of Rule 23, the named parties must have been adjudged adequate representatives of the class. Secondly, . . . Rule 23(e) provided sufficient additional protections for class members when a class suit is settled. Thirdly, the court found that the important public interest in favor of settlement dictates that objectors to the settlement of a Rule 23(b)(2) class action need not be provided an opportunity to opt out of the settlement: "allowing objectors to opt out would discourage settlements because class action defendants would not be inclined to settle where the result would likely be a settlement applicable only to class members with questionable claims, with those having stronger claims opting out to pursue their individual claims separately."[53]

However, it is also recognized that even though there is no unqualified right to opt out under (b)(2), this right is available if specifically agreed upon by the parties or alternatively if the district court uses its discretionary power under Rule 23 to grant opt-out rights.[54]

The real rub comes where a claim for injunctive or declaratory relief is properly brought within the confines of a mandatory class, but along with

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47. *Holmes*, 706 F.2d at 1156.
48. FED. R. CIV. P. 23(b)(3).
49. FED. R. CIV. P. 23(c)(2)(B) provides:
> For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language: the nature of the action[;] the definition of the class certified[;] the class claims, issues, or defenses[;] that a class member may enter an appearance through counsel if the member so desires[;] that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded[;] and the binding effect of a class judgment on class members under Rule 23(c)(3).

50. *Id.*; *see also Holmes*, 706 F.2d at 1156.
51. *See Holmes*, 706 F.2d at 1156-57.
52. *Id.* at 1153.
53. *Id.* (citing Kincade v. Gen. Tire & Rubber Co., 635 F.2d 501, 507 (5th Cir. 1981)) (citations omitted).
54. *Id.* at 1154.

these equitable claims, monetary damages are also sought. This scenario raises several questions: first, whether there is an unconditional right to opt out in order to pursue those claims for damages; second, whether opt-out rights are essentially dependant on a determination of predominance; and third, whether the district court may use its discretion to certify a class as mandatory even though the class could also be properly certified under 23(b)(3).

B. Crystian v. Tower Loan of Mississippi*: A Case Raising the Previous Concerns of* Ticor Title Insurance Co. v. Brown *and* Adams v. Robertson *That Binding Absent Class Members Is Inappropriate Where Substantial Monetary Damages Are Present*

1. The Questions Regarding Constitutional Opt-Out Rights Presented by Ticor *and* Adams

In both *Ticor Title Ins. Co. v. Brown*[55] and *Adams v. Robertson*,[56] the United States Supreme Court granted certiorari on the question of whether "absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf."[57] In both cases, the writ was dismissed as improvidently granted after respective procedural violations came to the Court's attention.[58] However, the Court did express a "continuing interest" in the issue[59] and stated that there was a "substantial possibility"[60] that class actions seeking monetary damages may only be certified under Rule 23(b)(3).[61]

Ticor Title consolidated twelve different class actions originally brought in five federal district courts alleging price fixing by various title insurance companies.[62] This case reached a settlement, dropping all monetary claims against Ticor but granting injunctive relief.[63] Subsequently, the representatives of the Arizona and Wisconsin classes of title insurance consumers brought an action alleging that title insurers had conspired to fix rates for title searching services in Arizona and Wisconsin,[64] at which time Ticor moved for summary judgment.[65] The Ninth Circuit reversed the district court's grant of Ticor's motion for summary judgment on the basis that although the class was bound by the *injunctive* relief reached in the settlement

55. 511 U.S. 117 (1994).
56. 520 U.S. 83 (1997).
57. *Ticor Title*, 511 U.S. at 121.
58. *Id.* at 118; *Adams*, 520 U.S. at 85.
59. *Adams*, 520 U.S. at 92 n.6.
60. *Ticor Title*, 511 U.S. at 121.
61. *Id.* at 121-22.
62. *See* Brown v. Ticor Title Ins. Co., 982 F.2d 386, 388 (9th Cir. 1992), *cert. granted in part*, 510 U.S. 810 (1993), *cert. dismissed*, 511 U.S. 117 (1994).
63. *See id.* at 388-90.
64. *Ticor Title*, 511 U.S. at 121.
65. Ticor claimed that *res judicata* precluded the bringing of this class action because the *Brown* class was bound by the MDL 633 settlement. *See Brown*, 982 F.2d at 390.

of the original class, *monetary* claims against Ticor could not be barred by this settlement.[66] The Ninth Circuit found that binding absent class members in this manner would violate minimal due process under *Shutts*, which "requires that 'an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court,' if monetary claims are involved."[67] Unfortunately, on appeal, the United States Supreme Court did not determine whether the Ninth Circuit's holding was correct and left the issue of opt-out rights unresolved.[68]

The *Ticor* dissent criticized the majority for failing to answer this question based on the Court's perceived "speculation about a non-constitutional ground for decision that is neither presented on this record nor available to these parties."[69] Instead, the dissent stated that the question was properly presented[70] and that "[t]he resolution of a constitutional issue with such broad-ranging consequences is both necessary and appropriate."[71]

The Court received a second chance to decide the question of opt-out rights in *Adams v. Robertson*.[72] In that case, insureds brought suit against their health insurer to recover for an alleged fraud which compelled them to switch cancer insurance policies.[73] Although once again the plaintiffs raised the issue of whether the failure to allow opt-out rights violated due process rights,[74] the Supreme Court declined to decide the issue, concluding that certiorari was improvidently granted since the issue was never directly presented to the Alabama Supreme Court before appeal.[75] Therefore, even though the Court expressed a "continuing interest"[76] in the issue raised in *Ticor Title*, it refused to address the question because it was not properly presented in *Adams*.[77]

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66. *Id.* at 392.
67. *Id.* (quoting Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985)).
68. The Court found:

> It was conclusively determined in the MDL No. 633 litigation that respondents' class fit within Rules 23(b)(1)(A) and (b)(2); even though that determination may have been wrong, it is conclusive upon these parties, and the alternative of using the Federal Rules instead of the Constitution as the means of imposing an opt-out requirement for this settlement is no longer available.

Ticor Title, 511 U.S. at 121.
69. *Id.* at 123 (O'Connor, J., dissenting). The dissent noted that "the Court decline[d] to answer the constitutional question because the MDL No. 633 action might not have been properly certified—an issue that was litigated to a final determination in petitioners' favor more than five years ago, and on which [the Court] denied certiorari." *Id.* at 123-24.
70. *See id.* at 125.
71. *Id.*
72. 520 U.S. 83 (1997).
73. *Id.* at 83.
74. *Id.* at 85.
75. *Id.* at 86.
76. *Id.* at 92.
77. *See id.*

2. *The Problems Raised by* Crystian*: Substantial Damages Claims Within a Mandatory Class*

Crystian v. Tower Loan of Mississippi, Inc. again appealed the issue of opt-out rights to the United States Supreme Court.[78] *Crystian* presents an example of certification of claims including damages under the mandatory provisions of 23(b)(1) and (b)(2).[79] It involved the settlement of a class action brought on behalf of those individuals who had borrowed from Tower Loan of Mississippi between February 15, 1993 and September 1, 2001.[80] The class complaint alleged various predatory lending practices by Tower Loan of Mississippi, violating both Mississippi and Federal Law.[81] The plaintiffs claimed to be primarily seeking compensatory and punitive damages[82] and asserted that similar cases in the past had awarded damages far in excess of this class's contemplated settlement.[83] Even class counsel conceded that class members' claims were highly individualized, and that if members were permitted to pursue their own claims in state court, between 1,000 and 1,500 members could likely win substantial monetary damage awards.[84]

In spite of the existence of such substantial damages, the class was certified as a mandatory class action.[85] The court rationalized the certification on the basis that numerous claims for injunctive relief had already been filed or were expected to be filed against Tower Loan, which would require

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78. *See* Smith v. Crystian, 91 Fed. App'x 952 (5th Cir. 2004), *cert. denied*, Crystian v. Tower Loan of Miss., 125 S. Ct. 972 (2005).

79. The district court in *Crystian* should have either treated this as a hybrid class, or alternatively, certified the entire action under 23(b)(3). Instead, the district court certified a mandatory class under 23(b)(1)(A), or alternatively, under 23(b)(2). *See* Petition for Writ of Certiorari, *supra* note 15, at *5-*6; Brief in Opposition at *2, Crystian v. Tower Loan of Miss., Inc., 125 S. Ct. 972 (2004) (No. 04-488), 2004 WL 2912782.

80. *See* Petition for Writ of Certiorari, *supra* note 15, at *2.

81. The alleged predatory practices included the following: engaging in "insurance packing" where lenders induced borrowers to purchase insurance at unfavorable rates by employing fraudulent and misleading disclosures as well as coercive marketing practices; coercing plaintiffs to purchase unnecessary additional property insurance; charging for insurance without informing customers that the purchase of the insurance was optional; "flipping"—a practice where lenders persuade borrowers to refinance existing loans, thereby incurring additional interest payments and insurance premiums. *See id.* at *2-*3.

82. *Id.* at *3. *But see* Brief in Opposition, *supra* note 79 (stating that mandatory certification was appropriate for several reasons, including Respondent's contention that the litigation was a "negative value" suit in which class certification is appropriate since it would be uneconomical to litigate the claims individually; there was a substantial risk of inconsistent adjudications; numerous claims for injunctive relief had already been filed against Tower Loan; and injunctive relief predominated in the settlement).

83. *See* Petition for Writ of Certiorari, *supra* note 15, at *3-*4 (stating that several attorneys swore in uncontested affidavits that, in similar cases, substantial damages had been won at trial or through settlement, including one where the plaintiffs won individualized judgments ranging from $5,000 to $250,000 and another where the attorney stated that "all the individual settlements were far in excess of those contemplated by the Tower Class Settlement").

84. *Id.* at *4.

85. However, the class was only certified as mandatory on a second attempt. In February 1998, Judge Pickering rejected as improper the first attempt at mandatory class certification, specifically commenting that "class members must be provided the right to opt out." *See id.* at *5.

Tower Loan to modify its business practices.[86] The Fifth Circuit agreed, finding that certification under Rule 23(b)(1)(A) was proper because the facts of the case presented "an inherent risk that different courts could reach 'inconsistent or varying adjudications' which would 'establish incompatible standards of conduct' for Tower."[87]

Objecting class members disagreed with this mandatory certification since it provided no opt-out rights in spite of the fact that substantial damages were alleged.[88] Instead, all class members were locked into a settlement,[89] which not only prevented them from opting out of this particular suit but also prevented them from bringing any future claims against Tower, including damages claims that might have been raised in state court.[90] Therefore, the maximum relief available[91] to a class member under the settlement was $86.75.[92] Most borrowers received much less than this amount.[93]

The result of *Crystian* is troubling. Even if the class's claims for equitable relief were properly certified under a mandatory subdivision of Rule 23(b),[94] opt-out rights may still have been necessary for monetary damages claims.[95] Because the damages alleged in this case appear to have *predominated*[96] over injunctive relief, this case was an ideal vehicle for presenting the United States Supreme Court to deal with the issues previously raised by

86. Smith v. Crystian, 91 Fed. App'x 952 (5th Cir. 2004), *cert. denied*, Crystian v. Tower Loan of Miss., 125 S. Ct. 972 (2005).

87. *Id.* at 955.

88. *See* Petition for Writ of Certiorari, *supra* note 15, at *5 (stating that the first eighteen counts of the complaint focus exclusively on obtaining money damages through the use of actual and compensatory damages, "punitive damages in a fair and reasonable amount," and potential monetary relief under Mississippi Code Annotated § 63-19-55, while it is not until the nineteenth count of the complaint that a boilerplate request for injunctive relief is alleged).

89. Under amended FED. R. CIV. P. 23(b)(3), the court is given another opportunity to grant opt-out rights to absent class members at both the settlement stage and the certification stage (the only period allowed for opt-out rights under the prior rule). Therefore, if this district court had appropriately certified this class under 23(b)(3) and determined that the settlement did not adequately compensate absent class members for the substantial monetary damages alleged, they could have granted a right to opt out at the settlement stage. This is an important distinction from the mandatory classes where opt-out rights are granted only by the parties' specific agreement or under the district court's discretion—neither of which occurred in *Adams*.

90. *See* Petition for Writ of Certiorari, *supra* note 15, at *6-*7.

91. *See id.* at *6 (stating that in addition to damages provided by the settlement, Tower's lending practices will also be restricted for the next five years—"a benefit only to those plaintiffs who choose to borrow from Tower again in that period").

92. *Id.*

93. *See id.* ("Approximately 67,000 principal borrowers will receive $27.50 in compensatory damages and $41.25 in punitive damages, while 28,000 co-obligors will receive $13.75 and $20.62, respectively.").

94. *See* Petitioners' Reply at *3, Crystian v. Tower Loan of Miss., Inc., 125 S. Ct. 972 (2004) (No. 04-488), 2004 WL 3008657 (conceding that "[i]t is true that all courts permit certification of damages claims into nominally mandatory classes," although there is disagreement among the circuits about what those circumstances are).

95. *See id.* at *4 (stating that "[e]ven if every circuit would have certified the class . . . under a nominally mandatory subdivision of Rule 23(b), the Seventh and the Ninth Circuits, and perhaps others, would have provided opt-out rights with respect to the damages claims") (citation omitted).

96. *See id.* at *7 (finding that although respondents assert that injunctive relief predominates, "they do not contest . . . that many class members hold claims for substantial . . . damages").

Ticor and *Adams*—namely, under what circumstances, if any, do absent class members have a right to opt out of mandatory classes where monetary damages are asserted?

II. WHEN DOES DUE PROCESS REQUIRE THAT ABSENT CLASS MEMBERS SEEKING MONETARY DAMAGES BE GIVEN THE RIGHT TO OPT OUT?

Although the United States Supreme Court has been afforded several opportunities to determine whether opt-out rights are necessary to satisfy minimum due process where monetary damages are involved—first in the appeal of *Ticor Title*, then in *Adams,* and most recently in *Crystian*—the Court has yet to take a stand on the issue. Thus, the various circuits remain in turmoil over the appropriate means of addressing this question.

A. Underlying Due Process Concerns in Class Actions

Class actions present an exception to the general rule that "one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."[97] They are a unique device created to deal with situations where joinder of all interested parties is impracticable; where there are questions of fact and law in common for all interested parties; where the parties' claims and defenses are typical; and where the class representative provides adequate representation for absent class members.[98] Additionally, class actions are useful because of their ability to allow plaintiffs to pool claims that would otherwise be uneconomical to litigate individually.[99]

In the context of class actions, *Phillips Petroleum Co. v. Shutts*[100] substantially reconfigured the way in which courts view due process rights. In *Shutts*, the Court outlined the bases under which absent class members can be bound to a judgment in the forum state.[101] However, the Court also recognized that in cases where a state seeks to bind an absent class member "concerning a claim for money damages or similar relief at law, it must

97. Hansberry v. Lee, 311 U.S. 32, 40 (1940).

98. *See* FED. R. CIV. P. 23(a) (explaining the prerequisites that must be met before bringing a class action suit).

99. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) (stating the basis for what is known as a "negative value" suit).

100. 472 U.S. at 797.

101. In *Shutts*, the Court held:

> Because States place fewer burdens upon absent class plaintiffs than they do upon absent defendants in nonclass suits, the Due Process Clause need not and does not afford the former as much protection from state-court jurisdiction as it does the latter. The Fourteenth Amendment does protect "persons," not "defendants," however, 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. In this case we hold that 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.

Id. at 811-12.

provide minimal procedural due process protection."[102] This minimum procedural due process includes, among other things,[103] the opportunity to opt out.[104] In spite of setting forth these qualifications, though, the Court did not resolve the question of whether individuals should be given the opportunity to opt out when they have claims "'wholly or predominately for money judgments.'"[105]

Ortiz v. Fibreboard Corp.[106] expanded on the rationale set forth in *Shutts*, describing the necessity of opt-out rights for absent class members asserting substantial damages claims.[107] The *Ortiz* Court reversed certification of damages claims in a mandatory 23(b)(1)(B) class.[108] The Court rationalized its reversal by recognizing that the rights of mandatory class members may be compromised where damage claims are asserted on their behalf.[109] The Court found:

> Unlike Rule 23(b)(3) class members, objectors to the collectivism of a mandatory subdivision (b)(1)(B) action have no inherent right to abstain. The legal rights of absent class members (which in a class like this one would include claimants who by definition may be unidentifiable when the class is certified) are resolved regardless of either their consent, or, in a class with objectors, their express wish to the contrary.[110]

The Court emphasized that the situation in *Ortiz* mirrored *Shutts*, as *Ortiz* required that "before an absent class member's right of action was extinguishable due process required that . . . 'at a minimum . . . an absent plaintiff [must] be provided with an opportunity to remove himself from the class.'"[111]

However, even with *Ortiz*'s further expansion of what is necessary to fulfill minimal procedural due process requirements concerning opt-out rights, it is still unclear whether opt-out rights are required in *all* cases where monetary damages are involved or whether they are necessary *only* in cases where such damages "*predominate*."

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102. *Id.*
103. *See id.* at 812 (noting that other procedural due process protections exist, including notice and the requirement that the named plaintiff adequately represents the interests of absent class members).
104. *Id.*
105. *See* Stephen J. Safranek, *Do Class Action Plaintiffs Lose Their Constitutional Rights?*, 1996 WIS. L. REV. 263, 264 (1996) ("The [*Shutts*] Court did not explain why the Constitution required such an option solely in money damage cases. In addition, the Court did not decide when a case was 'wholly or predominately for money judgments.'").
106. 527 U.S. 815 (1999).
107. *Id.* at 846-48.
108. *Id.* at 864-65.
109. *See id.* at 846-47 ("The inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damages claims gathered in a mandatory class.").
110. *Id.* at 846-47.
111. *Id.* at 848 (quoting Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985)) (second ellipsis and brackets in original).

B. The Different Circuits' Approaches to Opt-Out Rights in Cases Where Monetary Damages Are Asserted

In class actions where monetary relief is the exclusive remedy sought, 23(b)(3) is the proper vehicle for obtaining certification.[112] However, where monetary damages are coupled with injunctive relief, it is less clear under which provision of Rule 23(b) the class should be certified. In general, several alternatives have been explored to decide whether opt-out rights are appropriate in cases where both monetary damages and injunctive relief are sought.[113] The circuits disagree over this issue and take different approaches: some circuits find opt-out rights permissible; others find opt-out rights necessary; still others favor mandatory certification where a class could alternatively be certified as both a 23(b)(3) and a mandatory class.

1. Circuits Holding That There Is an Absolute Right to Opt Out Where Damages Are Asserted

The Ninth Circuit, and perhaps the Seventh Circuit as well, has concluded that opt-out rights are required in any case where substantial monetary damages are asserted.[114] Under this rationale, it is necessary to look closely at what subsection of 23(b) is *most appropriate* for certification, rather than an arbitrary certification of the class under any subdivision of Rule 23(b), which *might* encompass the class.[115] Therefore, in cases where substantial damages are sought, courts find that "the most appropriate approach is that of Rule 23(b)(3), because it allows notice and an opportunity to opt out."[116]

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112. *See* FED. R. CIV. P. 23(b)(3). However, if the monetary relief is not unique to the parties and is equitable (such as backpay) the class may be appropriately certified as a mandatory class if it is determined that injunctive or declaratory relief predominates.

113. In Rule 23(b)(2) class actions that involve plaintiffs seeking injunctive relief and individual damage claims, courts have used four alternatives:

> First, . . . the court could limit the Rule 23(b)(2) certification to certain issues only. Second, the court could certify the injunction claims under Rule 23(b)(2) and the damages claims under Rule 23(b)(3). Third, the court could certify the entire class initially under Rule 23(b)(2), bifurcate the trial so that the defendant's liability potentially for both forms of relief is determined initially, and reconsider the class certification category if the plaintiffs and the class are successful at the liability stage. Finally, the court could certify special claims or issues under Rule 23(b)(2) and treat all the nondesignated claims or issues as individual or incidental ones to be determined separately after liability to the class has been adjudicated.

NEWBERG & CONTE, *supra* note 22, § 4.14, at 98 (citing Eubanks v. Billington, 110 F.3d 87, 95-96 (D.C. Cir. 1997)) (ellipsis in original).

114. *See, e.g.*, Jefferson v. Ingersoll Int'l Inc., 195 F.3d 894, 899 (7th Cir. 1999) ("[C]lass members' right to notice and an opportunity to opt out should be preserved whenever possible."); Brown v. Ticor Title Ins. Co., 982 F.2d 386, 392 (9th Cir. 1992) (stating that minimum due process requires the right to opt out), *cert. granted in part*, 510 U.S. 810 (1993), *cert. dismissed*, 511 U.S. 117 (1994).

115. *Jefferson*, 195 F.3d at 898 (finding that the language of Rule 23(b), which states than an action "may" be brought as a class action if the specifications of both 23(a) and one of the subparts of 23(b) are met, does not imply that the class must be certified under the first section of 23(b) that meets the requirements, but rather the class should be certified under the most appropriate subsection).

116. *Id.*

This line of cases construes *Shutts* as requiring that opt-out rights be provided to absent class members in any case where monetary damages are asserted.[117] By doing so, the *Ticor Title* line of cases expands the rationale of *Shutts*, which only applied to cases "wholly or predominately for money judgments,"[118] and asserts instead that due process rights can be protected only if opt-out rights are allowed in any case where monetary damages are sought.[119] This line of cases finds that, in light of *Ortiz*, there is an absolute due process right to opt out of *any* class where monetary damages of any proportion are involved.[120]

One basis for the Ninth Circuit's approach is a concern at the appellate level that if "the Due Process Clause allowed . . . opt out right[s] only when a case was predominately or wholly for money damages, lower courts could avoid review by the court of appeals by maintaining that the case was predominately for injunctive or equitable relief."[121] Although this thinking is soundly based, this rationale has not been met with enthusiasm throughout the circuits and has not been uniformly adopted even in the Ninth Circuit.

For example, in one Ninth Circuit case, *Molski v. Gleich*,[122] the court recognized the United States Supreme Court's "growing concern" that perhaps monetary damages should only be asserted in a mandatory class[123] but also found that due process rights are not necessarily implicated in all cases where monetary damage claims are asserted.[124] Rather, the court found that there are certain limitations on the procedural protections available to absent class members.[125] In fact, even the Ninth Circuit has recognized that monetary damages which are "merely incidental"[126] to injunctive relief are capable of being asserted under mandatory class certification.[127]

Today, all circuits permit the non-opt-out certification of damage claims as long as these claims do not predominate over equitable relief.[128] While some courts, such as the Ninth Circuit, contend that there is a constitutional right to opt out *even if* the class has been certified under the mandatory provisions of 23(b)(1) or (b)(2),[129] the real inquiry seems to be over the issue of whether monetary relief *predominates* over the equitable relief sought.[130] It

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117. *See Brown*, 982 F.2d at 386.
118. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 n.3 (1985).
119. *See* Safranek, *supra* note 105, at 284.
120. *See, e.g.*, Molski v. Gleich, 318 F.3d 937, 948 (9th Cir. 2003).
121. Safranek, *supra* note 105, at 284-85.
122. 318 F.3d 937 (9th Cir. 2003).
123. *See Molski*, 318 F.3d at 948-49.
124. *See id.* at 949 (noting that the due process concerns expressed in *Shutts* are an issue only where there were "out-of-state class members whose claims were 'wholly or predominately for money judgments'" (quoting Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 n.3 (1985))).
125. *See id.*
126. *Id.* (quoting Kanter v. Warner-Lambert Co., 265 F.3d 853, 860 (9th Cir. 2001)).
127. *Id.*
128. *See* Petitioners' Reply, *supra* note 94, at *3.
129. *See id.*
130. *See supra* text accompanying note 19. In cases where monetary damages are merely incidental to declaratory and injunctive relief, the apparent consensus among the circuits seems to be that the proper vehicle for asserting a claim is 23(b)(2), not (b)(3), making opt-out rights neither mandatory nor

seems unlikely that absent class members' due process concerns arise in the context of all damages claims, but rather the real issue asserted by *Ticor Title* and *Adams* centers on cases where "substantial" damages are asserted.[131] While *Ticor Title* asserted the possibility that monetary damages may only be brought under the provisions of Rule 23(b)(3),[132] there are alternatives that may prove more realistic in adequately addressing absent class members' due process rights under Rule 23(b) so that the purposes of the rule are not undermined.[133] One such alternative is a "hybrid" action where claims for equitable relief and monetary damages brought within the same mandatory class are split into separate classes such that the class members with claims for monetary damages are allowed to opt out of those claims, while equitable claims remain bound within the mandatory class.

2. *Hybrid Classes: A Compromise Envisioned to Adequately Address Both Due Process Concerns as Well as to Maintain the Integrity of Mandatory Classes*

The "hybrid" actions proposed by the Second, Seventh, Ninth, Eleventh and D.C. Circuits have created a clever means of dealing with the due process concerns presented by *Ticor Title*.[134] Under this line of reasoning, courts have allowed the certification of classes under the mandatory subparts of 23(b) and have granted opt-out rights to some members with claims for monetary damages at the courts' discretion.[135]

The Second Circuit in *Robinson v. Metro-North Commuter Railroad Co.*[136] supports this approach. While the court recognized that "where non-incidental monetary relief such as compensatory damages are involved, due process may require the enhanced procedural protections of notice and opt out for absent class members,"[137] the court also determined that it is not necessarily appropriate to allow opt out for *all* claims asserted even though certification under Rule 23(b)(2) poses a due process risk.[138] Instead the

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necessary.

131. *See* Petitioners' Reply, *supra* note 94, at *6-*7.

132. *See id.* at *3 (noting the *Ticor Title* court's suggestion that monetary damage claims might be properly certified only under 23(b)(3), which provides opt-out rights).

133. Namely, one should note the purposes of Rule 23(a) in remembering that class actions are devices intended to promote the efficient adjudication of claims where the class is so numerous that joinder is impracticable, the claims and defenses are typical of the class, and the named party provides adequate representation for the class. *See supra* text accompanying note 33. To allow opt-out rights in all instances where a class action arises would be inconsistent with the goals of the mandatory provisions of Rule 23.

134. *See* Petition for Writ of Certiorari, *supra* note 15, at *11-*12 (stating that these circuits have found that the appropriate means of addressing due process rights with regard to opt-out rights is to split actions into two separate classes, one mandatory and one opt out).

135. *See id.*

136. 267 F.3d 147 (2d Cir. 2001).

137. *Id.* at 165.

138. *See id.* at 166 (finding that certification of a claim under 23(b)(2) poses a risk that due process concerns may be violated as there is no inherent procedural protections under this provision to notice and opt out).

court found that the appropriate means of dealing with any potential due process concerns for non-incidental damages claims is, on the one hand, to afford notice and opt-out rights to absent class members on the basis of their damages claims.[139] Still, on the other hand, the court certifies equitable relief under 23(b)(2) where there are no automatic opt-out rights.[140] To split a class in such a manner is well within the district court's discretion.[141]

Similarly, in *Holmes v. Continental Can Co.*,[142] the Eleventh Circuit found that while claims for equitable relief were properly certified under 23(b)(2), the district court had acted inappropriately regarding claims for monetary damages. The Eleventh Circuit found that the district court should have used its discretionary power under Rule 23(d)(2) to allow opt-out rights for absent class members at the monetary relief stage of this Title VII case as the class was "functionally more similar to a (b)(3) class than to a (b)(2) class."[143] The Eleventh Circuit acknowledged that there is no automatic right to opt out of a (b)(2) class.[144] Still, it also noted that individualized monetary claims present sufficient due process concerns to confer opt-out rights and should be granted under the court's discretionary authority.[145]

Splitting claims has proven a useful device because it protects absent class members' due process rights where individualized damages are asserted, while also preserving the purposes of (b)(2) certification for seeking injunctive or declaratory relief.[146] But in spite of the positive aspects of using this hybrid approach to certification, critics remain concerned that splitting classes will compromise the underlying policies of 23(b)(3) since every class action for damages will be recast "as one for final declaratory relief of liability under (b)(2), followed by a class suit for damages under (b)(3)."[147] For this reason, some courts have been reluctant to allow hybrid actions where both equitable relief and monetary damages are sought.

3. *Given the Option Between (b)(2) and (b)(3) Certification, Some Courts Certify Only As (b)(2) Actions*

Still, some courts have rejected the notion that absent class members have the unequivocal right to opt out in at least some circumstances where monetary damages are asserted. Instead, these courts have found that where certification of a class is proper under both 23(b)(2) and 23(b)(3), the class

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139. *See id.*
140. *See id.*
141. FED. R. CIV. P. 23(d).
142. 706 F.2d 1144 (11th Cir. 1983).
143. *Id.* at 1154-55.
144. *See id.* at 1153.
145. *See id.* at 1155.
146. *See id.* at 1158 n.10 (demonstrating the usefulness of hybrid classes in certain cases because the fact that damages are sought "should not be fatal to a request for a (b)(2) suit, as long as the resulting hybrid case can be fairly and effectively managed." (quoting 3B JAMES W. MOORE, MOORE'S FEDERAL PRACTICE ¶ 23.40[4] (2d ed. 1981).
147. *Id.*

should be certified as a mandatory (b)(2) class. The Third, Fourth, Sixth, and Eighth Circuits support this view.[148] These circuits recognize the potential difficulties presented by hybrid classes and take a contrary approach to certification.[149] In cases where there is an option between certification as a 23(b)(2) claim and as a 23(b)(3) claim, these courts find that the class should be certified under the provisions of (b)(2).[150] Although these courts recognize the basis on which other circuits have provided opt-out rights with regard to monetary damages claims, they have declined to follow this rationale.[151] Instead, they have focused on the fact that settlement under a 23(b)(2) class will ensure a conclusive adjudication to the action.[152] By requiring that all class members be bound without the option to opt out, these courts eliminate the risk of inconsistent adjudications, possibly resulting from separate actions based on the same wrongful activity and otherwise leading to conflicting standards of conduct for the defendant.[153]

Although there is a clear policy rationale for eliminating inconsistent or varying adjudications, these courts have not considered the effects of this ruling on absent class members' due process rights. Instead of automatically electing to certify classes under either (b)(1) or (b)(2), when there is a choice between these provisions and (b)(3), the courts should instead use these mandatory provisions sparingly.[154] Courts have recognized the utility of Rule 23(b)(3) in accomplishing the general goals of class actions and its additional utility in ensuring that the due process rights of absent class members are not hampered, as the subsection "strikes a balance between the

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148. *See* Petition for Writ of Certiorari, *supra* note 15, at *12.

149. *See id.*

150. *See, e.g.*, DeBoer v. Mellon Mortgage Co., 64 F.3d 1171, 1175 (8th Cir. 1995) (stating that mandatory provisions should be chosen over Rule 23(b)(3) if a choice is available); First Fed. of Mich. v. Barrow, 878 F.2d 912, 919 (6th Cir. 1989) (finding that when a choice exists between (b)(1) or (b)(3), (b)(1) should be chosen because it prevents the risk of inconsistent adjudications); Kyriazi v. Western Elec. Co., 647 F.2d 388, 393 (3d Cir. 1981) ("[A]n action maintainable under both (b)(2) and (b)(3) should be treated under (b)(2) to enjoy its superior res judicata effect and to eliminate the procedural complications of (b)(3) which serve no useful purpose under (b)(2).").

151. *See* cases cited *supra* note 150.

152. These courts have favored certification under Rule 23(b)(2), without providing for opt-out rights, on the basis that

> [i]f the actions are classified under (b)(3), members of the class could elect to opt out and thereby not be bound by the judgment. This would permit the institution of separate litigation and would defeat the fundamental objective of (b)(2), to bind the members of the class with one conclusive adjudication. . . . [T]he procedural protections of (b)(3), opting out and notice, are necessary because of the heterogeneity of the (b)(3) class. They are unnecessary for the homogenous (b)(2) class.
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> . . . [Therefore] an action maintainable under both (b)(2) and (b)(3) should be treated under (b)(2) to enjoy its superior res judicata effect and to eliminate the procedural complications of (b)(3) which serve no useful purpose under (b)(2).

Kyriazi, 647 F.2d at 393 (citations omitted); *see also Barrow*, 878 F.2d at 919; *DeBoer*, 64 F.3d at 1175.

153. *See Barrow*, 878 F.2d at 919.

154. Courts have recognized the due process concerns are presented by class actions in general, mandatory or not, and that absent class members' rights are necessarily compromised by the basic structure of class actions. *See, e.g.*, *In re* Telectronics Pacing Sys., Inc., 221 F.3d 870, 881 (6th Cir. 2000). Because mandatory classes provide no inherent right to opt out or to receive notice, courts find that certification under these subsections "must be carefully scrutinized and sparingly utilized." *See id.*

value of aggregating similar claims and the right of an individual to have his or her day in court."[155] Therefore, certification under 23(b)(3) should actually *be favored* and not disfavored as it is by the Third, Fourth, Sixth, and Eighth Circuits.

The *Ortiz* Court would most likely have agreed to embrace certification under 23(b)(3). *Ortiz* found that the principles of sound judicial management and the constitutional concerns surrounding the rights of absent class members supported the conclusion that absent class members should be afforded the right to opt out where monetary damages are present.[156] Such entitlement to opt out "should be preserved whenever possible,"[157] and some courts, such as the Sixth Circuit, have gone so far as to say that when damages are present, the entitlement to opt out "can be overcome only when individual suits would confound the interests of other plaintiffs, such as with a limited fund that must be distributed ratably or an injunction that affects all plaintiffs similarly."[158] Therefore, it seems clear that the question is merely one of degree and not of the actual presence of monetary damages, as the Supreme Court has emphasized that opt-out rights should be available in cases where individualized monetary claims are present.[159]

However, even the conclusion that opt-out rights should be preserved where monetary damages are present, still does not reconcile the issue of predominance and whether such opt-out rights are really only intended when monetary damages *predominate* over injunctive or declaratory relief. If it is eventually determined that opt-out rights are *only appropriate* where monetary damages predominate, then it is also necessary to determine the appropriate test for predominance.

III. THE APPROPRIATE DETERMINATION OF PREDOMINANCE: A BRIGHT-LINE TEST OR AN "AD HOC" BALANCING APPROACH?

Although there is a general consensus that if class certification is sought under the provisions of 23(b)(2) and equitable relief is pursued in conjunction with monetary damages, then such equitable relief must predominate, substantial disagreement remains over the determination of such predominance. *Allison v. Citgo Petroleum Corp.*[160] represents one line of thinking in which the court drew a bright line, finding that "monetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief."[161] *Molski v. Gleich*[162] and *Robinson v. Metro-North*

155. *Id.*
156. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 843-48 (1999).
157. Jefferson v. Ingersoll Int'l Inc., 195 F.3d 894, 899 (7th Cir. 1999).
158. *In re Telectronics*, 221 F.3d at 881.
159. *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 & n.3 (1985); *Ortiz*, 527 U.S. at 843-48.
160. 151 F.3d 402 (5th Cir. 1998).
161. *Id.* at 415.
162. 318 F.3d 937 (9th Cir. 2003).

Commuter Railroad Co.[163] advocate a more subjective determination of predominance in which the district courts are given broad discretion to balance a number of factors in deciding the overall purpose of an action.[164]

Under the *Allison* rationale, injunctive or declaratory relief does not predominate over monetary damages unless it can be shown that such monetary relief is *incidental* to those equitable remedies.[165] Incidental damages are those damages "that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief."[166] The court in *Allison* clearly found that the recovery of incidental damages should be concomitant and not merely consequential to the declaratory relief sought, and that damages must be capable of objective computation.[167]

Allison's approach presents some clear benefits, since this rule's objective evaluation of predominance does not require the examination of individual claims, streamlining the proceedings. Other courts applying the *Allison* bright-line test have noted that "'determining whether one form of relief actually predominates in some quantifiable sense is a wasteful and impossible task that should be avoided.' In other words, certification does not hinge on the subjective intentions of the class representatives and their counsel in bringing suit."[168] Unfortunately, such an approach presents some serious problems as well.

Approaching the predominance issue through the *Allison* bright-line test overlooks the very essence of the predominance question. The *Allison* test relies on an examination of the proportion of the class members' claims which actually seek equitable relief—an important factor in determining predominance.[169] However, failing to acknowledge the respective monetary values of individual claims and the significant discrepancies between the amounts of damages sought by respective class members may lead to substantial due process violations as various class members' respective rights to opt out may be implicated.

The *Allison* approach to predominance hampers the district court's authority to make an informed, sound judicial decision with a full contemplation of all factors involved. In fact, it is hard to believe that the Advisory Committee intended a bright-line test to apply when it articulated the pre-

163. 267 F.3d 147 (2d Cir. 2001).
164. *See Molski*, 318 F.3d at 950; *Robinson*, 267 F.3d at 164-65.
165. *See Allison*, 151 F.3d at 415.
166. *Id.* at 415.
167. *See id.* (stating that computation of damages must be done objectively and must not depend on subjective differences among class members). The *Allison* court stated that the question should not depend on further hearings regarding the merits of each class members' claims and should not require the introduction of additional legal or factual issues. *Id.*
168. *In re* Monumental Life Ins. Co., 365 F.3d 408, 415 (5th Cir. 2004) (citation omitted).
169. *See id.* at 416 (explaining that "[a]lthough the exact number of class members . . . is unknown, the proportion is sufficient, absent contrary evidence from defendants, that the class as a whole is deemed properly to be seeking injunctive relief").

dominance requirement under Rule 23(b)(2).[170] Other courts have recognized the problems presented by the *Allison* bright-line test and have responded with the "ad hoc" approach advocated by *Molski* and *Robinson*.

Under the "ad hoc" approach, when presented with a motion for (b)(2) certification seeking both equitable relief and substantial monetary damages, the court "must 'consider[ ] the evidence presented at a class certification hearing and the arguments of counsel,' and then assess whether (b)(2) certification is appropriate in light 'of the relative importance of the remedies sought, given all of the facts and circumstances of the case.'"[171] Such an approach allows the district court to certify a (b)(2) action if it finds that two conditions are met: 1) the positive weight of the equitable relief sought by the plaintiff predominates in spite of the fact that compensatory or punitive damages are also sought; and 2) the class would be efficient and manageable, thus promoting judicial economy.[172]

Molski further expanded on this rationale by concluding that it is necessary to examine the specific facts and circumstances of each case in order to determine whether the pursuit of monetary damages is the "essential goal" in the suit.[173] This court pointed to other negative implications of the *Allison* bright-line test, such as the assertion that the *Allison* test not only nullifies the district courts' vested discretion under Rule 23 but also holds troubling implications for future civil rights actions.[174] Allowing district courts to maintain discretion in certification proceedings is important, as deliberation on the facts of a case has traditionally been within the district court's rights when determining if the certification prerequisites have been met.[175]

Additionally, the "ad hoc" approach allows a court to assess cases individually in determining the issue of predominance. This is important because the "ad hoc" approach does not require the court to consider the facts of a case under the *Allison* bright-line standard. The *Allison* test does not allow for the examination of individual damage claims of each particular case, which may be crucial in determining predominance.[176] The "ad hoc" approach also helps to prevent due process concerns from arising, since the court is able to use more creative alternatives,[177] such as hybrid actions,[178] in

170. *See Allison*, 151 F.3d at 429 (Dennis, J., dissenting) (stating that the Fifth Circuit suggested the possibility that the Advisory Committee may have intended for the court to compare both the respective quantity and quality of injunctive and monetary remedies in a particular case in order to determine which predominates).

171. Robinson v. Metro-N. Commuter R.R. Co., 267 F.3d 147, 164 (2d Cir. 2001) (alteration in original).

172. *See id.*

173. *See* Molski v. Gleich, 318 F.3d 937, 950 (9th Cir. 2003).

174. *See id.* at 949-50.

175. *Robinson*, 267 F.3d at 164-65.

176. *See id.* at 165 ("[P]ermitting district courts to assess issues of judicial economy and class manageability on a case-by-case basis is superior to the one-size-fits-all approach of the incidental damages standard.").

177. *See id.* ("[O]ptions other than the adoption of the incidental damages approach exist to eradicate the due process risks posed by (b)(2) class certification of claims for damages.").

178. *See supra* Part II.B.2.

order to safeguard due process rights—providing the right to opt out and notice where there is a question that the damages asserted would provide such a right. Therefore, the "ad hoc" approach, although admittedly more time-consuming, appears to present the surest method of guaranteeing that absent class members' due process rights are protected.

CONCLUSION

Crystian v. Tower Loan of Mississippi highlighted the issue of due process concerns in the context of mandatory classes where monetary damages are asserted. This issue has been brewing since *Ticor Title* was appealed to the Supreme Court. Although the Court chose not to address the concerns raised in *Crystian*, the case illustrates the problems raised by certifying monetary claims in classes where there are no automatic rights to opt out. The Court itself acknowledged that there is a "substantial possibility" that actions seeking monetary damages may only be certified under the provisions of Rule 23(b)(3).[179] However, until it is determined whether classes asserting monetary damages can only be certified within the parameter of 23(b)(3), it is *certain* that there is a due process right to opt out of any class where monetary damages predominate over injunctive or declaratory relief.

In order to best safeguard the due process rights of absent class members, the hybrid classes proposed by the Second, Seventh, Ninth, Eleventh, and D.C. Circuits present the best alternative. Such classifications permit the courts to maintain classes seeking equitable relief under the provisions of the mandatory classes contemplated to deal with such actions, while at the same time severing monetary damages claims that present meritorious due process questions. In order to decide whether a class presents monetary damages claims that predominate over the equitable relief sought, the "ad hoc" balancing test presents the best route for making a fair and adequate determination.

However, this proposal only offers a temporary solution to the unresolved issue of opt-out rights. It ultimately will be necessary for the Supreme Court to decide whether there is an unconditional right to opt out in *all* circumstances where monetary damages are sought and not simply in cases where such claims *predominate*. Therefore, when the Court is presented with another opportunity such as that raised in *Crystian*, the Court should seize the chance to put an end to this unresolved question.

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179. *See* Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 121 (1994).