# Class Actions for Monetary Relief Under Rule 23(b)(1)(A) and (b)(1)(B): Does Due Process Require Notice and Opt-Out Rights?

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ABSTRACT

*The courts are in disarray regarding the due process rights of absent class members in mandatory Rule 23(b)(1)(A) and (b)(1)(B) class actions involving money damages. That confusion is the result of a series of Supreme Court decisions, culminating in* Wal-Mart Stores, Inc. v. Dukes *in 2011, in which the Court suggested in dictum that the Due Process Clause requires that absent class members be given notice and the right to opt out of class suits involving money damages.*

*After examining the history and purpose of Rule 23(b)(1)(A) and (b)(1)(B), and after considering the due process issues raised by such classes, this Article concludes that due process requires reasonable notice in (b)(1) suits involving money damages. Notice enables class members to monitor the litigation and, if necessary, intervene. By contrast, due process does not require opt-out rights. Indeed, were opt-out rights required, the entire purpose of a (b)(1) class—to protect the rights of the defendant or absent class members—would be thwarted.*

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## INTRODUCTION

Federal Rule of Civil Procedure 23(b) sets forth four types of class actions, and a plaintiff seeking class certification must fit within at least one of those types.[1] Three of the four—Rule 23(b)(1)(A), (b)(1)(B), and (b)(2)—are so-called mandatory class actions, meaning that the Rule does not entitle class members to notice of class certification or the right to opt out of the class.[2] The fourth type—(b)(3)—is an opt-out class, and notice of certification is required.[3]

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1 A plaintiff must also satisfy three threshold requirements: a proper class definition, and a representative who is both a member of the class and has a live claim. ROBERT H. KLONOFF, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION IN A NUTSHELL 30–31, 38 (4th ed. 2012) [hereinafter NUTSHELL]. In addition, a plaintiff must satisfy the four explicit requirements of Rule 23(a)(1)–(4): numerosity, commonality, typicality, and adequacy of representation. *Id.* at 38–73; Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1437 (2010).

2 NUTSHELL, *supra* note 1, at 75; *see also* FED. R. CIV. P. 23(c)(2)(A) (making notice discretionary in (b)(1) and (b)(2) class actions and containing no reference to opt outs); Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2558 (2011) (stating that Rule 23 "provides no opportunity for (b)(1) or (b)(2) class members to opt out").

3 FED. R. CIV. P. 23(c)(2)(B) (requiring, in (b)(3) suits, "the best notice that is practicable under the circumstances," which must state, inter alia, "that the court will exclude from the class any member who requests exclusion"); *Dukes*, 131 S. Ct. at 2558 ("[U]nlike (b)(1) and (b)(2) classes, the (b)(3) class is not mandatory; class members are entitled to receive 'the best notice that is practicable under the circumstances' and to withdraw from the class at their option." (quoting FED. R. CIV. P. 23(c)(2)(B))).

Classes under (b)(1) are permitted when bringing together all similarly situated claimants in one proceeding is necessary to protect the defendant from inconsistent adjudications,[4] or to protect the rights of absent class members.[5] Classes under (b)(2) and (b)(3) are broader: (b)(2) authorizes class actions for declaratory or injunctive relief applicable to the class as a whole,[6] and (b)(3) permits opt-out class actions when common issues "predominate" and the class action is the "superior" device for resolving the controversy.[7]

In *Phillips Petroleum Co. v. Shutts*,[8] the Supreme Court stated that in a class action "wholly or predominately for money judgments," a court must afford class members notice and an opportunity to opt out.[9] In both *Ortiz v. Fibreboard Corp.*[10] and *Wal-Mart Stores, Inc. v. Dukes*,[11] the Court reaffirmed the *Shutts* language.[12] While the language in those cases can be characterized as dictum, these decisions raise difficult issues about whether (b)(1) actions require notice and opt-out rights as a matter of due process when significant monetary relief is sought.

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4 FED. R. CIV. P. 23(b)(1)(A) (stating that a "class action may be maintained if . . . prosecuting separate actions by or against individual class members would create a risk of . . . inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class").

5 FED. R. CIV. P. 23(b)(1)(B) (stating that a "class action may be maintained if . . . adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests"); *see also* 2 NEWBERG ON CLASS ACTIONS § 4:2 (William B. Rubenstein ed., 5th ed. 2012) [hereinafter NEWBERG] ("The two parts of 23(b)(1) consider similar situations from opposite perspectives.").

6 FED. R. CIV. P. 23(b)(2) (stating that a "class action may be maintained if . . . the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole").

7 FED. R. CIV. P. 23(b)(3) (stating that a "class action may be maintained if . . . the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy"); Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1430 (2013) (discussing predominance requirement); Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1191 (2013) (same).

8 Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

9 *Id.* at 811–12 & n.3.

10 Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).

11 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

12 *Dukes*, 131 S. Ct. at 2559 (noting the holding in *Shutts* that "[i]n the context of a class action predominantly for money damages . . . absence of notice and opt-out violates due process"); *Ortiz*, 527 U.S. at 848 n.24 ("In *Shutts*, as an important caveat to our holding, we made clear that we were only examining the procedural protections attendant on binding out-of-state class members whose claims were 'wholly or predominately for money judgments.'" (quoting *Shutts*, 472 U.S. at 811 n.3)).

Not surprisingly, given *Shutts*, *Ortiz*, and *Dukes*, courts are in disarray over what due process requires in suits for money judgments under (b)(1)(A) and (b)(1)(B).[13] Some hold that, notwithstanding the language of the Rule (which makes clear that (b)(1) suits are mandatory), due process requires notice and opt-out rights.[14] Others hold, notwithstanding *Shutts* and its progeny, that notice and opt-out rights are not required, even for suits primarily about money.[15] Still others hold that notice and opt-out rights are required only if the suit is primarily about money and are not required if the request for money is only incidental.[16] Furthermore, some courts construe (b)(1)(A)—without even reaching due process—as applying only to suits for declaratory and injunctive relief and not to suits for money judgments.[17]

The question whether due process requires notice and opt-out rights in (b)(1) actions involving money is critical. As discussed *infra*, both (b)(1)(A) and (b)(1)(B) contemplate some kinds of cases seeking money judgments.[18] For example, under (b)(1)(A), many courts have certified class actions in cases brought under the Employee Retirement Income Security Act ("ERISA"),[19] where each class member's right to pension benefits depends on the same provision of the pension plan. Those courts have done so notwithstanding the fact that the benefits sought would consist of money, reasoning that "monetary relief in the form of contractual benefits under the terms of the Plan would be dependent upon and ancillary to a declaration by the court regarding the proper interpretation of" the plan at issue.[20] Similarly, the classic "limited fund" situation contemplated by the drafters of Rule 23(b)(1)(B) involves a dispute over a sum of money.[21]

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13 *See infra* Part II.

14 *See infra* Part II.

15 *See infra* Part II.

16 *See infra* Part II.

17 *See infra* Part II.

18 *See infra* Part II.

19 Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001–1461 (2012).

20 Adams v. Anheuser-Busch Cos., No. 2:10-cv-826, 2012 WL 1058961, at *11 (S.D. Ohio Mar. 28, 2012); *see also infra* note 90 (citing similar cases).

21 *See* FED. R. CIV. P. 23(b)(1)(B) advisory committee's notes to 1966 amendment (describing (b)(1)(B) as contemplating "various situations [in which] an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members," and stating "[t]his is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims").

In the (b)(2) context, actions for money have been sharply curtailed as a result of *Dukes*, which held that individualized claims for money are rarely, if ever, appropriate in mandatory classes under (b)(2).[22] To even arguably qualify under (b)(2), individualized monetary claims must be "incidental" to the declaratory or injunctive claims, and even then due process may require notice of class certification and the right to opt out of the monetary portion of the suit.[23] Actions for money under (b)(3) have also been sharply curtailed.[24] To hold that (b)(1) actions for money judgments cannot proceed without opt-out rights would render (b)(1) essentially meaningless in such cases, given that (b)(1) actions only achieve their purpose when opt outs cannot occur.[25] On the other hand, if due process can be satisfied solely through notice (or even without notice), so that opt-out rights are not required, then (b)(1) can serve an important—albeit narrow—purpose in cases that meet the strict requirements of (b)(1)(A) or (b)(1)(B).

This Article analyzes the due process issues raised in (b)(1)(A) and (b)(1)(B) suits involving money. Part I surveys the pertinent Supreme Court jurisprudence on due process rights in class actions, beginning with *Shutts* and culminating in *Dukes*. It concludes that the issue of whether class members are entitled to notice and opt-out rights in (b)(1)(A) and (b)(1)(B) actions for money remains unresolved after *Dukes*. Part II examines the history, purposes, and case

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22 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2558–59 (2011). While the *Dukes* Court did not specifically explain what it meant by "individualized," the opinion stated that under Title VII's "detailed remedial scheme," Wal-Mart was "entitled to individualized determinations of each employee's eligibility for backpay," and thus the class could not "be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." *Id.* at 2560–61.

23 *See id.* at 2559 (noting the "serious possibility" that absence of notice and opt-out rights violates due process even "where the monetary claims do not predominate").

24 For instance, numerous courts have made clear that mass tort cases are rarely appropriate under (b)(3). *See, e.g.*, *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 721–22 (E.D.N.Y. 1983) (noting "a number of recent cases that have denied (b)(3) certification in mass tort cases"), *aff'd*, 818 F.2d 145 (2d Cir. 1987); *see also* NUTSHELL, *supra* note 1, at 123, 335–38; Laura J. Hines, *The Dangerous Allure of the Issue Class Action*, 79 IND. L.J. 567, 577 (2004) (noting that (b)(3)'s predominance and superiority requirements "have proven problematic for the certification of mass tort class actions"). Moreover, cases involving fraud or reliance issues or the laws of multiple states have frequently been rejected as (b)(3) classes. Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 793, 796–97 (2013) (stating that "[m]any courts have adopted essentially a *per se* view that fraud suits involving questions of individual reliance are not suitable for class certification" under (b)(3) and that "[n]umerous courts hold that when the laws of multiple states are involved and are not uniform, class certification is essentially *per se* inappropriate").

25 *See infra* note 134.

law under (b)(1)(A) and (b)(1)(B). It surveys the conflicting approaches that courts have taken in deciding (1) whether to allow monetary claims at all, and (2) if so, whether such suits can proceed without notice or opt-out rights. Cases under (b)(1)(A), in particular, are sharply divided over whether monetary claims are even permissible under that subdivision.[26] Part III assesses the conflicting law and offers a proposed solution. It concludes, initially, that both (b)(1)(A) and (b)(1)(B) contemplate suits for money, even when money is the exclusive or predominant relief sought. It further concludes that reasonable notice of class certification is required as a matter of due process for all (b)(1)(A) and (b)(1)(B) actions seeking money. Notice enables class members to monitor the lawsuit and thereby helps to ensure adequate representation. The notice can be tailored to the circumstances, however, and individual notice is not necessarily required. Other forms of notice, such as e-mail, web sites, and publication, may suffice. Finally, Part III concludes that opt-out rights are *not* required by due process. Reasonable notice sufficiently protects the class members' due process rights, and allowing opt outs would defeat the very purpose of a (b)(1) class and impede the rights of the defendant and unnamed class members.[27]

## I. SUPREME COURT PRONOUNCEMENTS ON DUE PROCESS RIGHTS OF CLASS MEMBERS SEEKING MONETARY RELIEF

The landmark case on due process rights of class members seeking monetary relief is *Phillips Petroleum Co. v. Shutts*.[28] *Shutts* was a

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26 *See infra* Part II.A.2.

27 This Article only addresses (b)(1) suits for money damages. Due process, of course, applies to all suits, but this Article tracks the focus of *Shutts*, *Ortiz*, and *Dukes*, all of which address the procedural protections in suits involving money. *See supra* notes 9, 12, and accompanying text. In addition, this Article addresses only plaintiff classes under (b)(1)(A) and (b)(1)(B). Both subdivisions also permit actions against a class of *defendants*. NUTSHELL, *supra* note 1, at 379–80. But defendant class actions raise very different issues, since an adverse ruling would require class members to affirmatively satisfy a judgment and pay out money. *Id.* at 374–76; *see also* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 n.3 (1985) ("[O]ur discussion of personal jurisdiction [does not] address class actions where the jurisdiction is asserted against a *defendant* class.").

28 *Shutts*, 472 U.S. 797. *Shutts* has generated considerable commentary. *See, e.g.*, Elizabeth Barker Brandt, *Fairness to the Absent Members of a Defendant Class: A Proposed Revision of Rule 23*, 1990 BYU L. REV. 909; Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 ARIZ. L. REV. 461, 465–68 (1997); Hines, *supra* note 24, at 589–94; Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649 (2008); Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CALIF. L. REV. 1573 (2007); Bruce H. Nielson, Note, *Was the 1966 Advisory Committee Right?: Suggested Revisions of Rule 23 to Allow More Frequent Use*

Kansas state court class action brought under the Kansas equivalent of Federal Rule 23(b)(3).[29] The suit was filed on behalf of thousands of royalty owners throughout the United States (and several foreign countries) who alleged that they were entitled to interest on delayed royalty payments for natural gas produced by Phillips Petroleum.[30] Only a small fraction of class members had any connection with Kansas.[31] The trial court certified an opt-out class, ordered notice to the class, and later found Phillips Petroleum liable.[32] One issue that the Court addressed was whether those class members with no connection to Kansas lacked "minimum contacts"—a concept normally applied to a defendant—and thus could not be part of the lawsuit without waiving personal jurisdiction.[33]

The Supreme Court held that the Due Process Clause did not require that absent class members receive the same due process protections that were afforded out-of-state defendants.[34] It recognized:

> [A]bsent plaintiff class members are not subject to [the] burdens imposed upon defendants. They need not hire counsel or appear. They 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.
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> Unlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything. He may

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*of Class Actions in Mass Tort Litigation*, 25 HARV. J. ON LEGIS. 461 (1988); Rory Ryan, Comment, *Uncertifiable?: The Current Status of Nationwide State-Law Class Actions*, 54 BAYLOR L. REV. 467, 482–85 (2002). Indeed, the case was the topic of an entire symposium in 2005—the twentieth anniversary of the decision—and the papers were subsequently published. *See Class Action Symposium: The Twentieth Anniversary of* Phillips Petroleum Co. v. Shutts, 74 UMKC L. REV. 487–798 (2006). Only a few commentators, however, have focused in detail on Rule 23(b)(1). *See, e.g.*, Brian Wolfman & Alan B. Morrison, *What the* Shutts *Opt-Out Right Is and What It Ought to Be*, 74 UMKC L. REV. 729, 747 (2006) (proposing a complete redrafting of Rule 23(b)); Rima N. Daniels, Comment, *Monetary Damages in Mandatory Classes: When Should Opt-Out Rights Be Allowed?*, 57 ALA. L. REV. 499, 510–11, 520 (2005) (stating that *Shutts* "substantially reconfigured the way in which courts view due process rights" in the class action context and that "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").

29 *Shutts*, 472 U.S. at 799–801.

30 *Id.* at 799.

31 *See id.* at 801.

32 *Id.*

33 *Id.* at 806.

34 *Id.* at 814.

> sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection.[35]

Nonetheless, the Court noted that to "bind an absent plaintiff" with respect to claims involving "money damages or similar relief at law,"[36] the forum state had to offer absent class members certain protections:

> The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or though counsel. . . . Additionally . . . due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.[37]

In an important footnote, the Court stated, "Our holding today is limited to those class actions which seek to bind known plaintiffs concerning *claims wholly or predominately for money judgments.* We intimate no view concerning other types of class actions, such as those seeking equitable relief."[38] Because *Shutts* involved the Kansas equivalent of Rule 23(b)(3), the Court was not casting doubt on the constitutionality of the rule at issue.[39] Both the Kansas Rule and Federal Rule 23(b)(3) require notice and opt-out rights.[40] The implications for (b)(1) and (b)(2), however, were left unclear. Certainly, one can read the *Shutts* language broadly as mandating notice and opt-out rights in *any* type of class action "wholly or predominately for money judgments."[41] On the other hand, each of the four types of class actions contains unique and particularized requirements; it is not necessarily true that due process requires the same protections for all four types.[42]

The Supreme Court has had several subsequent opportunities to clarify the reach of *Shutts* in (b)(1) and (b)(2) actions involving money, but it has stopped short of doing so. In *Brown v. Ticor Title*

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35 *Id.* at 810 (footnote omitted).

36 *Id.* at 811.

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

38 *Id.* at 811–12 & n.3 (emphasis added).

39 *See supra* note 29 and accompanying text.

40 *See Shutts*, 472 U.S. at 814 & n.5; *see also* FED. R. CIV. P. 23(c)(2)(B).

41 *See Shutts*, 472 U.S. at 811 n.3.

42 *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 334 (1976) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands." (internal quotation marks omitted)).

*Insurance Co.*,[43] the Ninth Circuit relied on *Shutts* in holding that class members in an antitrust suit under (b)(1)(A), (b)(1)(B), and (b)(2) were not bound by a settlement when they later sued for damages. This was so, according to the Ninth Circuit, because class members had not been given the right to opt out of the earlier action, which had involved both injunctive relief and damages.[44] The Supreme Court granted certiorari in part to decide what opt-out rights were required by due process in (b)(1) and (b)(2) actions involving monetary claims,[45] but subsequently dismissed the writ as improvidently granted.[46] The same outcome occurred in a second case, *Adams v. Robertson*,[47] a mandatory class action by life insurance policy holders certified under the Alabama equivalents of (b)(1)(A), (b)(1)(B), and (b)(2).[48] In *Adams*, the Court dismissed the writ as improvidently granted but noted its "continuing interest" in the *Shutts* question.[49]

In 1998, the Supreme Court granted certiorari in *Ortiz v. Fibreboard Corp.*, a mass tort asbestos settlement class action brought under Rule 23(b)(1)(B).[50] The Fifth Circuit had upheld a monetary settlement under (b)(1)(B) under a limited fund theory even though the class members had not been given the right to opt out.[51] In their appeal to the Supreme Court, objectors to the settlement argued, among other things, that the settlement was invalid on due process

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43 Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992), *cert. granted*, 510 U.S. 810 (1993), *cert. dismissed as improvidently granted*, 511 U.S. 117 (1994) (per curiam).

44 *Id.* at 392.

45 *See* Petition for Writ of Certiorari at i, Ticor Title Ins. Co. v. Brown, 511 U.S. 117 (1994) (No. 92-1988), 1993 WL 13673963, at *i (presenting question "[w]hether a federal court may refuse to enforce a prior federal class action judgment, properly certified under Rule 23, on grounds that absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf").

46 Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 117 (1994) (per curiam); *see also id.* at 124–25 (O'Connor, J., dissenting) ("Unless and until a contrary rule is adopted, courts will continue to certify classes under Rules 23(b)(1) and (b)(2) notwithstanding the presence of damages claims; the constitutional opt-out right announced by the court below will be implicated in every such action, at least in the Ninth Circuit.").

47 Adams v. Robertson, 520 U.S. 83 (1997) (per curiam) (dismissing writ as improvidently granted).

48 *See* Petition for Writ of Certiorari at i, Adams v. Robertson, 520 U.S. 83 (1997) (No. 95-1873), 1996 WL 33413779, at *i (presenting question of "[w]hether the certification and settlement of this nationwide class action pursuant to Rules 23(b)(2), 23(b)(1)(A) and 23(b)(1)(B) of the *Alabama Rules of Civil Procedure*, with no right to opt out, violate the Due Process Clause of the Fourteenth Amendment when all class members suffered individual monetary damages but the vast majority of class members receive no monetary compensation for the release of their claims for compensatory and punitive damages").

49 *See Adams*, 520 U.S. at 92 n.6.

50 Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).

51 *Id.* at 828–29.

grounds because class members had not been afforded opt-out rights.[52] The Court decided the case on other grounds—namely, that the class did not satisfy the strict criteria of a limited fund under (b)(1)(B)[53]—and did not decide the due process issue. The Court did, however, reiterate the concerns it had raised in *Shutts*:

> 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. 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. . . .
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> In related circumstances, we raised the flag on this issue of due process more than a decade ago in *Phillips Petroleum Co. v. Shutts*. . . . After losing at trial, the defendant, Phillips Petroleum, argued that the state court had no jurisdiction over claims of out-of-state plaintiffs without their affirmative consent. We said no and held that out-of-state plaintiffs could not invoke the same due process limits on personal jurisdiction that out-of-state defendants had [invoked]. . . . But we also saw that before an absent class member's right of action was extinguishable due process required that the member "receive notice plus an opportunity to be heard and participate in the litigation," and we said that "at a minimum . . . an absent plaintiff [must] be provided with an opportunity to remove himself from the class."[54]

In an accompanying footnote, the *Ortiz* Court reiterated the focus in *Shutts* on monetary claims: "In *Shutts*, as an important caveat to our holding, we made clear that we were only examining the procedural protections attendant on binding out-of-state class members whose claims were 'wholly or predominately for money judgments.'"[55]

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52 *See* Brief for Petitioners at 39, Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) (No. 97-1704), 1998 WL 464933, at *39 (arguing that "[t]he Fifth Circuit's judgment binding absent class members violated due process" because, inter alia, "it purported to release individual monetary claims for particularized tort damages without granting the plaintiffs a meaningful chance to opt out").

53 *See infra* Part II.B.1 (discussing the *Ortiz* Court's reasoning under (b)(1)(B)).

54 *Ortiz*, 527 U.S. at 846–48 (second alteration in original) (footnote omitted) (citations omitted) (quoting Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985)).

55 *Id.* at 848 n.24 (quoting *Shutts*, 472 U.S. at 811 n.3).

The Court noted that mandatory classes also raised Seventh Amendment concerns,[56] and that use of (b)(1)(B) "to aggregate individual [mass] tort claims on a limited fund rationale" was especially troublesome.[57] Those concerns, the Court said, "counsel[ed] against adventurous application of Rule 23(b)(1)(B)."[58] Thus, the Court flagged but did not decide various due process and Seventh Amendment issues, and it certainly did not hold that due process required notice and opt-out rights in limited fund class actions.[59] To the contrary, implicit in the Court's analysis was that a (b)(1)(B) mandatory class might well be constitutional if the strict requirements of (b)(1)(B) were met.

In 2011, the Supreme Court addressed *Shutts* in the context of Rule 23(b)(2). In *Wal-Mart Stores, Inc. v. Dukes*, an employment discrimination class action, plaintiffs attempted to use (b)(2) as the vehicle to aggregate the claimants even though the class sought, in addition to declaratory and injunctive relief, the remedy of backpay.[60] The Court did not definitively decide the due process question even for (b)(2), let alone for (b)(1). Instead, it reversed the certification order on the ground that Rule 23(b)(2) itself does not allow individualized claims for money (except, possibly, when the claim is "incidental" to the claim for declaratory or injunctive relief).[61] The Court held that backpay was individualized and thus could not be deemed "incidental."[62] Nor did it matter, according to the Court, whether backpay could be characterized as "equitable" relief as opposed to a remedy at law, because Rule 23 does not draw such a distinction.[63] Despite its holding, however, the Court did address the due process issues in de-

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56 *Id.* at 845–46 (stating that "the certification of a mandatory class followed by settlement of its action for money damages obviously implicates the Seventh Amendment jury trial rights of absent class members").

57 *Id.* at 845.

58 *Id.*

59 Notice was not an issue because *Ortiz* involved a settlement class—one presented to the Court simultaneously for class certification and settlement approval. Under Rule 23(e)(1), notice of a settlement is required for (b)(1) and (b)(2) classes, as well as (b)(3) classes, and the *Ortiz* class did in fact receive notice (the adequacy of which was not at issue in the case). *Id.* at 841 n.19.

60 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2548–49 (2011).

61 *Id.* at 2557 (explaining that the Court did not reach the broader question of whether Rule 23(b)(2) "applies *only* to requests for . . . injunctive or declaratory relief and does not authorize the class certification of monetary claims at all" because "at a minimum, claims for *individualized* relief (like the backpay at issue here) do not satisfy the Rule").

62 *See id.* at 2560 (noting that respondents did not even attempt to argue that backpay was incidental "and in any event they cannot").

63 *Id.*

tail, because the concerns raised in *Shutts* provided a strong reason for reading (b)(2) narrowly:

> Permitting the combination of individualized and class-wide relief in a (b)(2) class is also inconsistent with the structure of Rule 23(b). . . . The Rule provides no opportunity for (b)(1) or (b)(2) class members to opt out, and does not even oblige the District Court to afford them notice of the action. Rule 23(b)(3), by contrast . . . . entitle[s] [class members] to receive "the best notice that is practicable under the circumstances" and to withdraw from the class at their option.
>
> Given that structure, we think it clear that individualized monetary claims belong in Rule 23(b)(3). . . . [Unlike Rule 23(b)(3), Rule 23(b)(2)] does not require that class members be given notice and opt-out rights, presumably because it is thought (rightly or wrongly) that notice has no purpose when the class is mandatory, and that depriving people of their right to sue in this manner complies with the Due Process Clause. *In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process. While we have never held that to be so where the monetary claims do not predominate, the serious possibility that it may be so provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here.*[64]

Thus, the Court in *Dukes* strongly suggested that, when monetary claims are more than incidental to claims for declaratory and injunctive relief, due process requires notice and opt-out rights. Indeed, the Court hinted that notice and opt-out rights may be required in (b)(2) actions even where the monetary claims in the case do not predominate.[65] Under this rationale, and given the fact that the Court addressed (b)(1) and (b)(2) as a package in contrasting mandatory classes and opt-out classes,[66] *Dukes* could be read to support the argument that when a (b)(1)(A) or (b)(1)(B) action is exclusively or primarily about money, due process requires notice and opt-out rights. Nonetheless, as noted, *Dukes* did not definitively decide the due process issues under (b)(2), let alone (b)(1).[67] The issue of whether notice and opt-out rights are required under (b)(1) when monetary claims

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64 *Id.* at 2558–59 (emphasis added) (citations omitted) (quoting FED. R. CIV. P. 23(c)(2)(B)).

65 *See id.* at 2559.

66 *See* 2 NEWBERG, *supra* note 5, § 4:24 (stating that "the *Wal-Mart* court in its reasoning lumped Rule 23(b)(1) and 23(b)(2) together").

67 *See supra* notes 60–61 and accompanying text.

are involved can only be resolved after considering the history and purposes of (b)(1)(A) and (b)(1)(B).

## II. HISTORY, PURPOSES, AND CONFLICTING CASE LAW UNDER (b)(1)(A) AND (b)(1)(B)

Rule 23(b) identifies four types of class actions but has only three subdivisions. There is an obvious reason for that structure: "Both Rules 23(b)(1)(A) and (b)(1)(B) are designed to prevent prejudice to the parties resulting from multiple suits involving the same subject matter by certifying a mandatory class."[68] Rule 23(b)(1)(A) protects the defendant; Rule 23(b)(1)(B) protects the class members.[69] This Part addresses the history and purposes of (b)(1)(A) and (b)(1)(B), the cases applying those provisions, and the cases addressing whether notice and opt-out rights are required in such lawsuits.

### *A. Rule 23(b)(1)(A)*

#### *1. History and Purposes*

Rule 23(b)(1)(A) was implemented as part of the 1966 revision to Rule 23, and it has remained unchanged since that time, apart from stylistic changes.[70] The Advisory Committee Notes summarize the purpose of (b)(1)(A):

> One person may have rights against, or be under duties toward, numerous persons constituting a class, and be so positioned that conflicting or varying adjudications in lawsuits with individual members of the class might establish incompatible standards to govern his conduct. The class action device can be used effectively to obviate the actual or virtual dilemma which would thus confront the party opposing the class.[71]

In its basic purpose, (b)(1)(A) shares similarities with compulsory joinder under Rule 19, interpleader under Rule 22, and intervention

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68 Harris v. Koenig, 271 F.R.D. 383, 392 (D.D.C. 2010).

69 *See* FED. R. CIV. P. 23 advisory committee's note to 1966 amendment.

70 *Compare* FED. R. CIV. P. 23(b)(1)(A), 28 U.S.C. app. at 558 (1982) (stating that rule applies where separate actions would create a risk of "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" (emphasis added)), *with* FED. R. CIV. P. 23(b)(1)(A) (stating that rule applies where separate actions would create risk of "inconsistent or varying adjudications with respect to individual *class members that* would establish incompatible standards of conduct for the party opposing the class" (emphasis added)).

71 FED. R. CIV. P. 23 advisory committee's notes to 1966 amendment.

under Rule 24.[72] The Notes suggest that the drafters of Rule 23 envisioned that the Rule would encompass claims for money damages. The Notes give several examples of disputes that are suitable for (b)(1)(A) certification:

> Separate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment, might create a risk of inconsistent or varying determinations. In the same way, individual litigations of the rights and duties of riparian owners, or of landowners' rights and duties respecting a claimed nuisance, could create a possibility of incompatible adjudications. Actions by or against a class provide a ready and fair means of achieving unitary adjudication.[73]

Immediately following the above-quoted passage, the Notes cite four cases. Three of the four cases involved declaratory relief, injunctive relief, or both.[74] One case, however, involved a suit for money damages: *Maricopa County Municipal Water Conservation District No. One v. Looney*.[75] *Looney* was a suit by bondholders to recover interest allegedly owed by a water district.[76] The district court resolved the matter by examining the bond instruments.[77] The Ninth Circuit upheld the district court's ruling, including its finding that the case was suitable for class certification.[78] The Advisory Committee's explicit reference to *Looney* arguably suggests that the drafters of the Rule intended it to encompass claims for money.[79]

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72 *See* 2 NEWBERG, *supra* note 5, § 4:3 (discussing relationship between Rule 23(b)(1)(A), Rule 19 (compulsory joinder), Rule 22 (interpleader), and Rule 24 (intervention)); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 389 (1967) (noting that the criteria of Rule 23(b)(1)(A) "resemble those used in new rule 19" and that "the resemblances are not accidental but logical").

73 FED. R. CIV. P. 23 advisory committee's notes to 1966 amendment.

74 *See* Gart v. Cole, 263 F.2d 244 (2d Cir. 1959) (seeking to enjoin an urban redevelopment project); Martinez v. Maverick Cnty. Water Control & Improvement Dist. No. 1, 219 F.2d 666 (5th Cir. 1955) (involving a dispute over water from the Rio Grande River); Rank v. Krug, 142 F. Supp. 1 (S.D. Cal. 1956) (involving a dispute over water from the San Joaquin River), *aff'd in part, rev'd in part sub nom.* California v. Rank, 293 F.2d 340 (9th Cir. 1961), *on reh'g*, 307 F.2d 96 (9th Cir. 1962), *aff'd in part, rev'd in part sub nom.* Dugan v. Rank, 372 U.S. 609 (1963), *aff'd in part sub nom.* City of Fresno v. California, 372 U.S. 627 (1963).

75 Maricopa Cnty. Mun. Water Conservation Dist. No. One v. Looney, 219 F.2d 529 (9th Cir. 1955).

76 *Id.* at 529.

77 *Id.* at 531.

78 *Id.*

79 *See supra* notes 73–74.

### 2. *Case Law Under Rule 23(b)(1)(A)*

As noted, the case law under Rule 23(b)(1)(A) is in disarray.[80] This section discusses the conflicting case law on (1) whether (b)(1)(A) itself encompasses suits for money damages, and (2) if so, whether due process requires notice and opt-out rights.

#### a. *Whether (b)(1)(A) Is Limited to Declaratory and Injunctive Relief*

Numerous courts have held, as a matter of rule interpretation, that Rule 23(b)(1)(A) does not apply to suits for money damages. The leading case for this proposition is *In re Dennis Greenman Securities Litigation*.[81] In *Dennis Greenman*—a securities fraud case stemming from an alleged "Ponzi" scheme—objectors challenged the district court's decision to certify a class under (b)(1) for purposes of settlement.[82] In holding that (b)(1)(A) could not be invoked, the Eleventh Circuit reasoned:

> Many courts confronting the issue have held that Rule 23(b)(1)(A) does not apply to actions seeking compensatory damages. These courts reason that inconsistent standards for future conduct are not created because a defendant might be found liable to some plaintiffs and not to others. Implicit in these decisions is the view that only actions seeking declaratory or injunctive relief can be certified under this section.

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80 One conflicting body of case law not addressed in the text is whether a defendant can veto a plaintiff's attempt to certify a (b)(1)(A) class. Several cases have held that, because (b)(1)(A) is designed to protect the defendant, such a class cannot be certified if the defendant objects. *See, e.g.*, Pettco Enters., Inc. v. White, 162 F.R.D. 151, 155 (M.D. Ala. 1995) ("[I]t is inappropriate to certify a Rule 23(b)(1)(A) class over objection of the party opposing the class."); Kenney v. Landis Fin. Grp., Inc., 349 F. Supp. 939, 951 (N.D. Iowa 1972) (finding certification unwarranted where "[d]efendant who opposes class determination apparently is willing to accept th[e] hazard" of "varying or inconsistent adjudications"); *accord* Michael M. Gallagher, *Vetoing Class Actions*, 24 REV. LITIG. 527, 530 (2005) (supporting defendant's right to veto (b)(1)(A) class). The better view, however, is that (b)(1)(A) does not give defendants such a veto power. *See, e.g.*, Casa Orlando Apartments, Ltd. v. Fed. Nat'l Mortg. Ass'n, 624 F.3d 185, 197 (5th Cir. 2010) ("We find nothing in the plain text of Rule 23 that permits a defendant's veto over (b)(1)(A) certification."); Tex. Med. Providers Performing Abortion Servs. v. Lakey, 806 F. Supp. 2d 942, 954 (W.D. Tex. 2011) (same), *vacated in part on other grounds*, 667 F.3d 570 (5th Cir. 2012); Humphrey v. United Way of Tex. Gulf Coast, No. H-05-0758, 2007 WL 2330933, at *11 (S.D. Tex. Aug. 14, 2007) (stating that (b)(1)(A) "does not exist only to benefit the non-class party: clearly all litigants as well as the courts benefit from consistency in the adjudication of claims of individual class members" (internal quotation marks omitted)); *accord* 2 NEWBERG, *supra* note 5, § 4:8 (stating that that neither the text nor history of (b)(1)(A) supports giving defendant a veto power).

81 *In re* Dennis Greenman Sec. Litig., 829 F.2d 1539 (11th Cir. 1987).

82 *Id.* at 1542.

> Underlying is the concern that if compensatory damage actions can be certified under Rule 23(b)(1)(A), then all actions could be certified under the section, thereby making the other sub-sections of Rule 23 meaningless, particularly Rule 23(b)(3).
>
> Albeit reluctantly, we must agree.[83]

Other courts disagree. While recognizing that not all damages suits should be certified under (b)(1)(A), those courts conclude that certain damages actions—those that truly create incompatible standards of conduct for the defendant—should be permitted as (b)(1)(A) class actions. Courts taking that approach reason that limiting (b)(1)(A) to declaratory and injunctive relief gives the Rule no role not already encompassed by Rule 23(b)(2).[84] As the Delaware Chancery Court recognized in discussing the Delaware counterpart to (b)(1)(A):

> That [some damages actions] can be certified under Rule 23(b)(1)(A) hardly makes all claims for damages certifiable under that subsection. Rather, there remains an abundance of damage claims involving common *and* uncommon issues of law or fact that can be asserted on a class basis only by meeting the criteria under the more flexible Rule 23(b)(3). In this respect, it is in reality the *Greenman* court's reading that is more likely to render a subsection of Rule 23(b) meaningless. By holding that a Rule 23(b)(1)(A) class can be certified only for claims for injunctive and declaratory relief, the *Greenman* court renders Rule 23(b)(1)[(A)] largely redundant of Rule 23(b)(2), which expressly addresses injunctive and declaratory relief.[85]

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83 *Id.* at 1545 (citations omitted); *accord, e.g.*, Babineau v. Fed. Express Corp., 576 F.3d 1183, 1195 (11th Cir. 2009) ("Because the risk that judicial action will create incompatible standards of conduct is low when a party seeks compensatory damages, only actions seeking declaratory or injunctive relief can be certified under Rule 23(b)(1)(A)."); Cohen v. Office Depot, Inc., 204 F.3d 1069, 1078 n.7 (11th Cir. 2000) ("Because [plaintiff's] class seeks compensatory damages, it cannot be certified as a (b)(1)(A) class."); La Mar v. H & B Novelty & Loan Co., 489 F.2d 461, 466 (9th Cir. 1973) ("Infrequently, if ever, will [the defendant be required to follow inconsistent courses of continuing conduct] when the action is for money damages.").

84 *See infra* note 85.

85 Turner v. Bernstein, 768 A.2d 24, 33–34 (Del. Ch. 2000) (discussing DEL. CH. CT. R. 23); *accord, e.g.*, Hans v. Tharaldson, No. 3:05-cv-115, 2010 WL 1856267, at *10 (D.N.D. May 7, 2010) (finding certification of suit to recover losses from breach of fiduciary duty under (b)(1)(A) appropriate due to the "real possibility of inconsistent results" if claims were not aggregated); Stanford v. Foamex L.P., 263 F.R.D. 156, 173 (E.D. Pa. 2009) ("The issue is not whether plaintiff seeks primarily monetary damages; rather, the focus of a Rule 23(b)(1)(A) analysis is on whether separate actions could lead to adjudications that establish incompatible standards of conduct for the party opposing the class." (internal quotation marks omitted)); Jones v. NovaS-

The most common type of (b)(1)(A) action for money is a suit under ERISA. For instance, in *Harris v. Koenig*,[86] the court upheld (b)(1)(A) certification in an ERISA action brought against the fiduciaries of an employee retirement and savings plan where the relief sought was "primarily monetary."[87] In that case, plaintiffs alleged ten violations of ERISA for breach of fiduciary duty in the management of a profit sharing and savings plan.[88] They sought an order directing defendants to pay any losses to the plan that resulted from that breach.[89] In finding the case suitable for certification under (b)(1)(A), the court reasoned as follows:

> [Cases disapproving (b)(1)(A) certification for money damages] involved . . . claims in which each class member had individual claims against the defendants, and therefore class certification would pose individual liability issues. Here, in contrast, the claims are brought on behalf of the entire Plan, of which the putative class members are participants, and rulings on liability will apply to all members of the class.[90]

On the other hand, as one treatise has noted, not all ERISA suits fit within (b)(1)(A); in particular, ERISA cases requiring individualized

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tar Fin., Inc., 257 F.R.D. 181, 193–94 (W.D. Mo. 2009) ("If one court ordered full restitution to the Plan and removal of the fiduciaries, but another ordered differently, those orders would establish incompatible standards of conduct for Defendants."); *Humphrey*, 2007 WL 2330933, at *10 (noting that limiting (b)(1)(A) to cases predominantly for declaratory and injunctive relief would render that Rule "superfluous or redundant" and stating that the "more consistent interpretation of (b)(1)(A) . . . is that it permits certification when monetary damages are sought"); *In re* Celera Corp. S'holder Litig., No. 6304-VCP, 2012 WL 1020471, at *18 (Del. Ch. Mar. 23, 2012) (finding that class suit for money damages stemming from breach of fiduciary duty fit under (b)(1) because the relief "is the remedy for violation of an equitable right owed simultaneously and equally to all class members"), *aff'd in part and rev'd in part*, 59 A.3d 418 (Del. 2012); Critchfield Physical Therapy v. Taranto Grp., Inc., 263 P.3d 767, 782–83 (Kan. 2011) (discussing *Turner* with approval).

86 Harris v. Koenig, 271 F.R.D. 383 (D.D.C. 2010).

87 *Id.* at 393.

88 *Id.* at 385–86.

89 *Id.* at 386.

90 *Id.* at 393; *see also, e.g.*, Kanawi v. Bechtel Corp., 254 F.R.D. 102, 111 (N.D. Cal. 2008) (stating that "[m]ost ERISA class action cases are certified under Rule 23(b)(1)" and certifying a class under (b)(1)(A)); Rogers v. Baxter Int'l Inc., No. 04 C 6476, 2006 WL 794734, at *10 (N.D. Ill. Mar. 22, 2006) ("The propriety of Rule 23(b)(1) certification is confirmed by the vast number of cases in which courts have certified ERISA classes pursuant either to Rule 23(b)(1)(A) or Rule 23(b)(1)(B), or both."); Kolar v. Rite Aid Corp., No. CIV.A. 01-1229, 2003 WL 1257272, at *3 (E.D. Pa. Mar. 11, 2003) ("It would seem that ERISA litigation of this nature presents a paradigmatic example of a(b)(1) [sic] class" because of the risk of, inter alia, "inconsistent or varying adjudications").

determinations are not suitable candidates for (b)(1)(A) certification.[91]

Finally, some courts have held that a (b)(1)(A) class can be certified for damages as long as claims for declaratory or injunctive relief predominate. In *White v. National Football League*,[92] for example, a suit brought under (b)(1)(A) on behalf of a class of past, present, and future professional football players, the court concluded that "even where a class action involves claims for money damages, mandatory non-opt-out class certification remains proper as long as the class claims for equitable or injunctive relief predominate over the claims for damages."[93] By parity of reasoning, in *Caruso v. Allstate Insurance Co.*,[94] a suit by homeowners who were victims of Hurricane Katrina, the court *rejected* certification under (b)(1)(A) because "[p]laintiffs predominantly [sought] monetary relief," that is, damages for breach of contract and penalties and attorneys' fees under state law.[95]

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91 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 5:5 (9th ed. 2012) ("Misrepresentation-based claims under [42 U.S.C.] § 502(a)(2) are ill-suited for (b)(1)(A) certification because the issues of materiality and individual reliance on defendants' alleged misrepresentations will vary among plan participants and therefore permit varying adjudications that will not establish inconsistent standards for the defendants.").

92 White v. Nat'l Football League, 822 F. Supp. 1389 (D. Minn. 1993).

93 *Id.* at 1410; *accord, e.g.*, Adams v. Anheuser-Busch Cos., No. 2:10-cv-826, 2012 WL 1058961, at *9–11 (S.D. Ohio Mar. 28, 2012) (certifying (b)(1)(A) ERISA class because "[a]ny monetary relief in the form of contractual benefits under the terms of the Plan would be dependent upon and ancillary to a declaration by the court regarding the proper interpretation of the Plan"); Tibble v. Edison Int'l, No. CV 07-5359 SVW (AGRx), 2009 WL 6764541, at *8 (C.D. Cal. June 30, 2009) (permitting (b)(1)(A) certification because "in addition to damages, Plaintiffs seek substantial equitable relief"); Thomas v. SmithKline Beecham Corp., 201 F.R.D. 386, 397 (E.D. Pa. 2001) (concluding "that plaintiffs' claims are appropriate for certification under Rule 23(b)(1)(A)" where plaintiffs sought both equitable and legal relief because "the plaintiffs seek broad declaratory and injunctive relief"); 2 NEWBERG, *supra* note 5, § 4:15 ("[B]oth the structure of [Rule 23(b)(1)(A)] and the Constitution's Due Process Clause could limit monetary relief to that which is incidental to injunctive relief.").

94 Caruso v. Allstate Ins. Co., No. 06-2613, 2007 WL 2265100 (E.D. La. Aug. 3, 2007).

95 *Id.* at *4; *accord, e.g.*, Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1194 (9th Cir. 2001) (finding certification under (b)(1)(A) inappropriate where plaintiff "primarily seeks money damages"), *amended by* 273 F.3d 1266 (9th Cir. 2001); Altier v. Worley Catastrophe Response, LLC, Nos. 11-241, 11-242, 2011 WL 3205229, at *14 (E.D. La. July 26, 2011) (declining to certify (b)(1)(A) class "[b]ecause monetary relief predominates in plaintiffs' complaint"); *In re* First Am. Corp. ERISA Litig., 258 F.R.D. 610, 621 (C.D. Cal. 2009) (finding that "controlling Ninth Circuit authority precludes class certification under Rule 23(b)(1)(A) to the extent that [plaintiffs] primarily seek monetary relief"); *In re* Syncor ERISA Litig., 227 F.R.D. 338, 346 (C.D. Cal. 2005) (denying certification under (b)(1)(A) because "there is little dispute that the Plaintiffs primarily seek monetary damages" (internal quotation marks omitted)).

### b. *Whether Due Process Requires Notice and Opt-Out Rights in (b)(1)(A) Suits Seeking Money*

When addressing (b)(1)(A) suits involving money, courts have taken conflicting approaches on the issue of notice. Several courts have ordered notice of certification in (b)(1)(A) actions as a matter of discretion,[96] an approach permitted by Rule 23(c)(2)(A).[97] In addition, although Rule 23(b)(1) says nothing about discretion to order opt outs,[98] the Second Circuit has held that the Rule permits notice *and* opt-out rights as a matter of discretion.[99] Several courts have taken a similar approach in dictum, reasoning that "the language of Rule 23 is sufficiently flexible to afford district courts discretion to grant opt-out rights in (b)(1) and (b)(2) class actions."[100]

Other courts have not required notice and opt-out rights under (b)(1)(A), even when money is the exclusive or primary remedy sought. For example, in *Harris v. Koenig*, discussed above,[101] the court concluded that certification under (b)(1)(A)—without notice and opt-out rights—was appropriate in a suit primarily for money

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96 *See, e.g.*, Taylor v. ANB Bancshares, Inc., No. 08-5170, 2010 WL 4627841, at *13 (W.D. Ark. Oct. 18, 2010) (report and recommendation) ("Although Rule 23(b)(1) does not require notice to class members . . . the Court finds it appropriate to notify class members that their interests are being represented with regard to the claims in this case."), *report and recommendation adopted*, No. 08-CV-5170, 2010 WL 4627672 (W.D. Ark. Nov. 4, 2010); Jones v. NovaStar Fin., Inc., 257 F.R.D. 181, 194 (W.D. Mo. 2009) (finding it appropriate to order notice in (b)(1) ERISA suit "in light of the current economic climate, in which many are worried about the state of their retirement accounts"); Thomas v. SmithKline Beecham Corp., 201 F.R.D. 386, 397–98 (E.D. Pa. 2001) (refusing to allow opt outs after certifying (b)(1)(A) class in suit primarily for declaratory and injunctive relief but ordering notice).

97 *See* FED. R. CIV. P. 23(c)(2)(A) (stating that, "[f]or any class certified under Rule 23(b)(1) or (b)(2), the court *may* direct appropriate notice to the class" (emphasis added)).

98 McReynolds v. Richards-Cantave, 588 F.3d 790, 800 (2d Cir. 2009) (noting that the "right of a class member to opt-out in Rule 23(b)(1) . . . actions is not obvious on the face of the rule").

99 Cnty. of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1303–05 (2d Cir. 1990) (affirming district court's ruling allowing opt outs in a (b)(1)(B) case).

100 Eubanks v. Billington, 110 F.3d 87, 94 (D.C. Cir. 1997); *accord, e.g.*, Scholtisek v. Eldre Corp., 229 F.R.D. 381, 393 n.10 (W.D.N.Y. 2005) (stating, in the context of (b)(3) action, that a "district court has discretion to permit opt-outs in a(b)(1) [sic] or (b)(2) action"); Coleman v. Pension Benefit Guar. Corp., 196 F.R.D. 193, 200 n.6 (D.D.C. 2000) (stating in the context of a (b)(2) suit that "in certain circumstances where the plaintiffs request monetary as well as injunctive relief, a district court may, in its discretion, provide class members with the right to opt out of a class action certified under (b)(1) or (b)(2)"); Hastings-Murtagh v. Tex. Air Corp., 119 F.R.D. 450, 456 n.4 (S.D. Fla. 1988) (stating in a (b)(3) suit that "[i]f a class action is sustained under subsection (b)(1) . . . [a] court may exercise its discretion and order that notice plus an opt-out provision be sent to the class").

101 *See supra* notes 86–90 and accompanying text.

damages.[102] The court did not discuss due process.[103] Other courts similarly do not address due process but merely analyze whether (b)(1)(A) itself is satisfied and assume with no analysis that due process does not require notice and opt-out rights when the requirements of (b)(1)(A) are met.[104]

Other courts have squarely addressed the due process concerns of certifying mandatory classes in suits involving monetary damages. For instance, in *Donovan v. St. Joseph County Sheriff*,[105] the court denied class certification under (b)(1)(A) in a suit seeking damages for alleged Fourth Amendment violations.[106] In its decision, the court cited the language in *Ortiz* noting possible due process and Seventh Amendment concerns when a mandatory class seeks damages.[107] The court found that "[t]he inclusion of money damages presents [constitutional] problems that make this case inappropriate for (b)(1)(A) certification."[108] Similarly, in *Beer v. XTO Energy, Inc.*,[109] the court denied certification under (b)(1)(A) because, "given that plaintiffs seek significant monetary damages, due process requires class members be given the option to opt out of this action."[110] Other courts,

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102 Harris v. Koenig, 271 F.R.D. 383, 394 (D.D.C. 2010).

103 *See id.* at 392–94 (pertinent discussion of (b)(1)(A) with no reference to due process).

104 *See, e.g.*, Tibble v. Edison Int'l, No. CV 07-5359 SVW (AGRx), 2009 WL 6764541, at *8–9 (C.D. Cal. June 30, 2009) (finding (b)(1)(A) satisfied without discussing due process where plaintiffs sought both damages and equitable relief, and noting that "[g]iven that Plaintiffs seek disgorgement or a constructive trust, the possibility exists that Defendants could be subjected to inconsistent standards of conduct"); Alvidres v. Countrywide Fin. Corp., No. CV 07-5810-RGK (CTx), 2008 WL 1766927, at *3 (C.D. Cal. Apr. 16, 2008) (finding (b)(1)(A)'s incompatibility standard satisfied without discussing due process because "there are over 40,000 potential Plaintiffs who could individually file suit for damages arising from the same conduct"); Clauser v. Newell Rubbermaid, Inc., No. CIV. A. 99-5753, 2000 WL 1053395, at *6 (E.D. Pa. July 31, 2000) (finding (b)(1)(A) satisfied without discussing due process where, in addition to request for declaratory and injunctive relief, the suit also sought damages, which could result in conflicting rulings that "could make compliance impossible for defendants").

105 Donovan v. St. Joseph Cnty. Sheriff, No. 3:11-CV-133-TLS, 2012 WL 1601314 (N.D. Ind. May 3, 2012).

106 *Id.* at *7.

107 *Id.* at *6 (citing Ortiz v. Fibreboard Corp., 527 U.S. 815, 845–46 (1999)).

108 *Id.*

109 Beer v. XTO Energy, Inc., No. CIV-07-798-L, 2009 WL 764500 (W.D. Okla. Mar. 20, 2009).

110 *Id.* at *6; *see also* Langbecker v. Elec. Data Sys. Corp., 476 F.3d 299, 318 (5th Cir. 2007) (directing district court to "consider the extent to which . . . due process . . . appl[ies] to a (b)(1)(A) class and whether a (b)(1)(A) class can be maintained if damages are the primary remedy sought"); Brown v. Ticor Title Ins. Co., 982 F.2d 386, 392 (9th Cir. 1992) (reversing the trial court in action under (b)(1)(A), (b)(1)(B), and (b)(2) because due process would be denied if damage claims were barred by res judicata), *cert. granted*, 510 U.S. 810 (1993), *cert. dismissed as improvidently granted*, 511 U.S. 117 (1994); *In re* Paxil Litig., 212 F.R.D. 539, 545 (C.D. Cal.

however, have taken the opposite view. As one court concluded, "no due process right to opt out arises in a properly certified Rule 23(b)(1)" class.[111] According to that court, the "[c]onstitutional guarantees for absent members of a mandatory class are preserved through fulfillment of the adequacy of representation requirement of Rule 23(a) and the homogeneity requirements of Rule 23(b)(1)(A) and Rule 23(b)(2)."[112]

In sum, courts are divided over whether due process requires notice and opt-out rights in (b)(1)(A) cases. As discussed below in Part II.B, a similar multiplicity of approaches exists under (b)(1)(B).

### *B. Rule 23(b)(1)(B)*

#### *1. Requirements for a Limited Fund Class*

Rule 23(b)(1)(B) is designed to protect absent class members. As the Advisory Committee Notes explain: "In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit."[113] The Notes provide numerous examples, with the classic case being one "when claims are made by numerous persons against a fund insufficient to satisfy all claims."[114] In those circumstances, "[t]he vice of an individual action would lie in the fact that the other members of the class, thus practically concluded, would have had no representation in the lawsuit."[115] In other words, the limited fund would be consumed by the first-to-judgment litigants, leaving no money to pay additional claimants.[116] By contrast, a limited fund action would encompass all

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2003) (denying certification under any subdivision of Rule 23(b), partially because of notice and due process concerns).

111 Smith v. Tower Loan of Miss., Inc., 216 F.R.D. 338, 379 (S.D. Miss. 2003) (citing Allison v. Citgo Petroleum Corp., 151 F.3d 402, 412–13 & n.7 (5th Cir. 1998)), *aff'd sub nom.* Smith v. Crystian, 91 F. App'x 952, 954 (5th Cir. 2004) (per curiam). The court in *Tower Loan*, however, did order the parties to issue notice of settlement by mail and publication. *Tower Loan*, 216 F.R.D. at 348.

112 *Tower Loan*, 216 F.R.D. at 379.

113 FED. R. CIV. P. 23 advisory committee's notes to 1966 amendment.

114 *Id.* The Committee added that "[t]he same reasoning applies to an action by a creditor to set aside a fraudulent conveyance by the debtor and to appropriate the property to his claim, when the debtor's assets are insufficient to pay all creditors' claims." *Id.*; *see also* Tardiff v. Knox Cnty., 365 F.3d 1, 4 (1st Cir. 2004) (stating that "disputes about a common fund [are] covered by subsection (b)(1)(B)"); 2 NEWBERG, *supra* note 5, § 4:17 (referring to the "limited fund class action" as the "paradigm case" under (b)(1)(B)).

115 FED. R. CIV. P. 23 advisory committee's notes to 1966 amendment.

116 *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.07 cmt. i (2010) [hereinafter PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION] ("The

claimants, whose recoveries would be reduced pro rata because of the limited fund.[117]

Unlike (b)(1)(A), which has divided courts over whether money is even recoverable as part of the lawsuit,[118] there is no dispute among courts that (b)(1)(B) *can* apply to claims that are predominantly—or even entirely—about money. Indeed, a limited fund suit (without an attendant request for declaratory or injunctive relief) is *exclusively* about money.[119] But as noted below,[120] despite the agreement that (b)(1)(B) authorizes suits for money, the due process issues under (b)(1)(B) remain unsettled.

In *Ortiz*, the Court addressed at length the requirements for a limited fund class action.[121] The case involved the propriety of certification under (b)(1)(B) of a sprawling asbestos class where the settlement fund of $1.525 billion would be paid primarily by insurance companies, not by Fibreboard, the asbestos manufacturer.[122] As noted, the Supreme Court raised due process and Seventh Amendment concerns about certification of a mandatory class seeking damages.[123] It ultimately did not reach the constitutional issues, however, finding that the class failed to meet the essential prerequisites for a limited fund class.[124] The Court identified three "presumptively necessary"[125] characteristics of a limited fund:

> [(1)] The totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximums, demonstrate the inadequacy of the fund to pay all the claims. . . .

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point of mandatory aggregation in the limited-fund scenario is to avoid a disorderly rush of individual claimants upon the fund.").

117 *See In re* Joint E. & S. Dist. Asbestos Litig., 982 F.2d 721, 736 (2d Cir. 1992) (noting that "a 'limited fund' class action may be used for its traditional purpose of effecting a pro rata reduction of all claims"), *opinion modified on reh'g on other grounds sub nom. In re* Findley, 993 F.2d 7 (2d Cir. 1993). Other examples of (b)(1)(B) given in the Notes include: "an action by policy holders against a fraternal benefit association attacking a financial reorganization of the society"; "actions by shareholders to compel the declaration of a dividend"; and "an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries." FED. R. CIV. P. 23 advisory committee's notes to 1966 amendment.

118 *See supra* Part II.A.2.a.

119 *See supra* notes 114–16.

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

121 *See generally* Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).

122 *Id.* at 824–28.

123 *See supra* notes 50–59 and accompanying text.

124 *See id.*

125 *Ortiz*, 527 U.S. at 842.

> [(2)] [T]he whole of the inadequate fund [is] to be devoted to the overwhelming claims. . . . [and]
> [(3)] [T]he claimants identified by a common theory of recovery [are] treated equitably among themselves.[126]

Without ruling on the second requirement, the Court held that the settlement class at issue violated requirements one and three, finding that there was (1) "no adequate demonstration of . . . the upper limit of the fund itself," and that (2) the certification settlement "fell short" with respect to the "inclusiveness of the class and the fairness of distributions to those within it."[127]

Following *Ortiz*, several courts have decertified (or refused to certify) Rule 23(b)(1)(B) classes under the Court's three-part analysis.[128] Appellate courts that have rejected (b)(1)(B) certification because of the failure to satisfy the three *Ortiz* requirements have generally avoided the due process issues of notice and opt-out rights.[129] At least one court, however, has noted that, because of lurking due process issues, "[c]ertification under subsection (b)(1)(B), which does not include [notice and opt-out] protections, must be carefully scrutinized and sparingly utilized."[130] Other courts have upheld certification of a mandatory class under the three-part *Ortiz* framework—again, without discussing due process. For example, in one

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126 *Id.* at 838–39.

127 *Id.* at 850, 854. While the Court did not decide whether the second requirement was met, it did state that a "contested feature of this settlement certification that departs markedly from the limited fund antecedents is the ultimate provision for a fund smaller than the assets understood by the Court of Appeals to be available for payment of the mandatory class members' claims; most notably, Fibreboard was allowed to retain virtually its entire net worth." *Id.* at 859.

128 *See, e.g.*, *In re* Katrina Canal Breaches Litig., 628 F.3d 185, 189–92 (5th Cir. 2010) (holding that *Ortiz* "requires decertification of the mandatory class because the settlement fails to provide a procedure for distribution of the settlement fund that treats class claimants equitably amongst themselves"); *In re* Telectronics Pacing Sys., Inc., 221 F.3d 870, 874 (6th Cir. 2000) (rejecting certification where, as "in *Ortiz*, the funds available are limited only by agreement of the parties, not because the funds do not exist as a factual matter"); Doe v. Karadzic, 192 F.R.D. 133, 139, 144 (S.D.N.Y. 2000) (concluding that "mandatory class treatment under a limited fund rationale must be confined to a narrow category of cases" and decertifying a (b)(1)(B) class because individual defendant's assets could not be considered a "limited fund").

129 *See, e.g.*, *In re* Simon II Litig., 407 F.3d 125, 136–38 (2d Cir. 2005) (reversing district court's certification of (b)(1)(B) class, without mentioning due process, "because there was no evidence on which the district court [could] ascertain the limit and the insufficiency of the fund" (internal quotation marks omitted)); Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1196–97 (9th Cir. 2001) (holding, without mentioning due process, that district court did not abuse its discretion in denying certification under (b)(1)(B)); *see also Karadzic*, 192 F.R.D. at 139–44 (denying certification under (b)(1)(B) on grounds that plaintiffs had not provided evidence of the existence of a limited fund under *Ortiz*, without mentioning due process).

130 *Telectronics Pacing*, 221 F.3d at 881.

post-*Ortiz* case, the Fifth Circuit affirmed a district court's certification of a mandatory punitive damages settlement class under (b)(1)(B) without addressing due process issues of notice and opt-out rights.[131]

### 2. *Notice and Opt-Out Rights Under Rule 23(b)(1)(B)*

"[T]he applicability of *Shutts* to Rule 23(b)(1)(B) class actions is far from settled,"[132] and the courts that have addressed due process issues have taken a variety of approaches. This should not be surprising. On the one hand, a limited fund action clearly involves money—not incidentally or indirectly but at its core.[133] On the other hand, permitting or requiring opt outs would undermine the very purpose of a (b)(1)(B) class: to bring all affected class members into a single action.[134]

The Fifth Circuit has taken the view that *Shutts* does not apply in limited fund cases and that opt-out rights are not required.[135] In *Ortiz*,

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131 Baker v. Wash. Mut. Fin. Grp., LLC, 193 F. App'x 294, 297 (5th Cir. 2006) (per curiam) (discussing due process only to address argument that "substantive due process prohibits excessive punitive damages"); *accord, e.g.*, *In re* Black Farmers Discrimination Litig., 856 F. Supp. 2d 1, 15–20 (D.D.C. 2011) (certifying (b)(1)(B) class in limited fund monetary settlement without discussing due process); Williams v. Nat'l Sec. Ins. Co., 237 F.R.D. 685, 691–93 (M.D. Ala. 2006) (concluding, after considering *Ortiz* but without discussing due process, that certification under (b)(1)(B) was warranted because "the protection afforded by 23(b)(1)(B) is necessary to protect absent class members"; mentioning due process solely in discussion of the sufficiency of notice under Rule 23(e)).

132 *In re* Silicone Gel Breast Implant Prods. Liab. Litig., No. 2:97-CV-11441-RDP, 2010 U.S. Dist. LEXIS 145069, at *138 (N.D. Ala. May 19, 2010), *aff'd sub nom.* Juris v. Inamed Corp., 685 F.3d 1294 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 940 (2013).

133 *But see* 2 NEWBERG, *supra* note 5, § 4:24 (arguing that the distribution of funds to class members "follow[s] incidentally" from the decision about whether the class has a right to the fund).

134 *See Juris*, 685 F.3d at 1332 n.37 (discussing the necessity of binding absent parties to judgment in a limited fund case under (b)(1)(B)); *id.* § 4:2 (noting that in a dispute over a limited fund, "a class action is not only necessary but it must also be mandatory: if a class member could opt out of a limited fund class action, pursue her claim, and collect her purse, the entire point of the aggregate proceeding would be undermined"); *see also* 2 NEWBERG, *supra* note 5, § 4:4 ("If an individual litigant could opt out of an individual fund case, that would destroy the entire purpose of aggregation."); George Rutherglen, *Better Late Than Never: Notice and Opt Out at the Settlement Stage of Class Actions*, 71 N.Y.U. L. REV. 258, 272 (1996) ("Allowing class members to opt out of (b)(1) actions would defeat the purpose of certifying them in the first place."); Wolfman & Morrison, *supra* note 28, at 747 (noting that "the purpose of adjudicating [a limited fund] dispute as a class action would be undermined if exclusion were permitted").

135 *In re* Asbestos Litig., 90 F.3d 963, 986–87 (5th Cir. 1996), *vacated sub nom.* Flanagan v. Ahearn and Ortiz v. Fibreboard Corp., 521 U.S. 1114 (1997). The district court in *Asbestos Litigation* ordered notice in that case because it was a class settlement. *Asbestos Litig.*, 90 F.3d at 973; *see also* FED. R. CIV. P. 23(e)(1) (requiring notice of settlement for all class actions).

the Supreme Court reversed the Fifth Circuit,[136] although not on due process grounds.[137] Some circuits take the position that because of due process, "class members' right to notice and an opportunity to opt out should be preserved whenever possible."[138]

In one recent case, the Eleventh Circuit held that *Shutts*, a personal jurisdiction case, was inapplicable in the (b)(1)(B) context.[139] The court reasoned that, "[i]n a limited fund class action, presence within the jurisdiction of a res or fund that is the subject of the litigation resolves the personal jurisdiction objection of absent claimants."[140] The district court in that case had likewise found that *Shutts* did not pose a due process problem, but did so on the rationale that a limited fund suit was "not an action for money damages but is rather an action in equity" because the court was exercising its equitable powers to apportion money among a group of claimants.[141]

In short, courts have taken various approaches on the issue of whether notice and opt-out rights are required in a limited fund class under Rule 23(b)(1)(B).

## III. Analysis of Case Law and Proposed Solution

This Part evaluates the case law discussed above. It concludes that reasonable notice should be required in all (b)(1)(A) and (b)(1)(B) suits seeking money, but that opt-out rights are not required by due process—and indeed, would defeat the purpose of (b)(1) suits.[142] As a preliminary matter, this Part addresses a threshold issue of whether (b)(1) even applies to claims for money. It concludes that both (b)(1)(A) and (b)(1)(B) were intended to encompass at least some claims involving money.

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136 Ortiz v. Fibreboard Corp., 527 U.S. 815, 830 (1999).

137 *See supra* notes 53–58 and accompanying text.

138 Jefferson v. Ingersoll Int'l Inc., 195 F.3d 894, 899 (7th Cir. 1999) ((b)(2) case citing *Ortiz* for this proposition).

139 Juris. v. Inamed Corp., 685 F.3d 1294 (11th Cir. 2012).

140 *Id.* at 1331.

141 *In re* Silicone Gel Breast Implant Prods. Liab. Litig., No. 2:97-CV-11441-RDP, 2010 U.S. Dist. LEXIS 145069, at *140–41 (quoting *In re* Joint. E. & S. Dist. Asbestos Litig., 78 F.3d 764, 777–78 (2d Cir. 1996)), *aff'd sub nom.* Juris v. Inamed Corp., 685 F.3d 1294 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 940 (2013).

142 As noted above, this Article does not address due process requirements in cases seeking solely declaratory or injunctive relief. *See supra* note 27.

### A. *Both Rule 23(b)(1)(A) and Rule 23(b)(1)(B) Are Designed to Cover Suits Involving Money*

A threshold issue is whether (b)(1)(A) and (b)(1)(B) even apply to suits for money. As noted above,[143] there is no dispute among courts and commentators that (b)(1)(B) applies to claims for money (the classic (b)(1)(B) case being a limited fund suit), but the law with respect to (b)(1)(A) is complicated.[144] Several cases, including *Dennis Greenman*, hold that (b)(1)(A) applies only to suits for declaratory or injunctive relief.[145] Powerful arguments, however, suggest that this line of cases is incorrect. Nothing in the text or history of Rule 23(b)(1)(A) supports such a limitation.[146] To the contrary, as discussed above,[147] the Advisory Committee Notes cite a case involving interest on bonds—clearly an action for money—as an example of a case suitable for certification under Rule 23(b)(1)(A).[148] ERISA cases involving money are frequently certified under (b)(1)(A), and those cases would seem to fall within the purpose of that subsection: to avoid imposing inconsistent obligations on the defendant.[149] Adopting the *Dennis Greenman* approach[150] would render (b)(1)(A) meaningless by making its only role one that is already encompassed by (b)(2), which covers actions for declaratory and injunctive relief.[151] Nor is there merit to the reasoning in cases limiting (b)(1)(A) or (b)(1)(B) to situations in which the monetary claims are "incidental" to injunctive or declaratory claims.[152] The "incidental" damages rule arose under (b)(2), which, as the Advisory Committee Notes state, applies to claims wholly or predominantly about declaratory or injunc-

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143 *See supra* Part II.B.1.

144 *See* La Mar v. H & B Novelty & Loan Co., 489 F.2d 461, 466 n.10 (9th Cir. 1973) ("Whether an action for money damages can ever fall within Rule 23(b)(1)(A) has been the subject of much comment.").

145 *See supra* Part II.A.2.a; *see also, e.g.*, *In re* Dennis Greenman Sec. Litig., 829 F.2d 1539, 1545 (11th Cir. 1987).

146 *See supra* Part II.A.1.

147 *See supra* notes 75–78 and accompanying text.

148 FED. R. CIV. P. 23 advisory committee's notes to 1966 amendment (citing Maricopa Cnty. Mun. Water Conservation Dist. No. One v. Looney, 219 F.2d 529 (9th Cir. 1955)); *see also* 7AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1773 (3d ed. 2005) [hereinafter WRIGHT & MILLER] (noting that a suit for "different damage awards might be sufficient to qualify under [(b)(1)(A)] . . . if all of the class claimants were seeking payment from a single fund").

149 *See supra* note 90 (collecting cases).

150 *Dennis Greenman*, 829 F.2d at 1545 (limiting the applicability of (b)(1)(A) to suits for declaratory or injunctive relief).

151 *See* FED. R. CIV. P. 23(b)(2).

152 *See supra* note 95 (collecting cases).

tive relief.[153] There is no similar language in the text of (or Notes to) (b)(1)(A).[154] In any event, the Notes to (b)(2) were unpersuasive to the Supreme Court in *Dukes* even in construing (b)(2).[155]

To be sure, (b)(1)(A) should not be read to cover all cases involving money, but only a subset. Courts are correct that *merely* having to pay money to one plaintiff but not another because of different facts does not establish incompatibility.[156] Most cases involving money turn on individual facts and thus do not put defendants in an impossible situation.[157] The notion that any case in which a defendant is ordered

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153 *See* FED. R. CIV. P. 23 advisory committee's notes to 1966 amendment ("The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages."); Allison v. Citgo Petroleum Corp., 151 F.3d 402, 411 (5th Cir. 1998) ("We, like nearly every other circuit, have adopted the position taken by the advisory committee that monetary relief may be obtained in a (b)(2) class action so long as the predominant relief sought is injunctive or declaratory."); NUTSHELL, *supra* note 1, at 104–07.

154 *See* FED. R. CIV. P. 23(b)(1)(A).

155 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2559 (2011) (rejecting argument that the "negative implication" of the "Advisory Committee's statement that Rule 23(b)(2) 'does not extend to cases in which the appropriate final relief relates *exclusively or predominantly* to money damages'" is that "it *does* extend to cases in which the appropriate final relief relates only partially and nonpredominantly to money damages," and stating that "it is the Rule itself, not the Advisory Committee's description of it, that governs" (quoting FED. R. CIV. P. 23 advisory committee's notes to 1966 amendment)).

156 *See, e.g.*, Zimmerman v. Bell, 800 F.2d 386, 389 (4th Cir. 1986) ("The danger of imposing incompatible standards of conduct on the party opposing the class is . . . not normally posed by a request for money damages." (internal quotation marks omitted)); McDonnell Douglas Corp. v. U.S. Dist. Ct. for Cent. Dist. of Cal., 523 F.2d 1083, 1086 (9th Cir. 1975) (stating that "a judgment that defendants were liable to one plaintiff would not require action inconsistent with a judgment that they were not liable to another plaintiff"); Rowe v. E.I. DuPont de Nemours & Co., Nos. 06-1810 (RMB), 06-3080 (RMB), 2008 WL 5412912, at *10 (D.N.J. Dec. 23, 2008) ("The 'incompatible standards of conduct' language of (b)(1)(A) requires more than a risk that separate judgments would oblige the opposing party to pay damages to some class members but not to others or to pay them different amounts." (internal quotation marks omitted)); Williams v. Balcor Pension Investors, No. 90 C 0726, 1991 WL 117893, at *3 (N.D. Ill. June 25, 1991) ("[T]he mere possibility that plaintiffs might recover damages in some suits and not others is not sufficient to justify certification under subsection (b)(1)(A)."); *In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762, 789 (E.D.N.Y. 1980) ("Rule 23(b)(1)(A) is *not* meant to apply . . . where the risk of inconsistent results in individual actions is merely the possibility that the defendants will prevail in some cases and not in others, thereby paying damages to some claimants and not others."); Fifth Moorings Condo., Inc. v. Shere, 81 F.R.D. 712, 718 (S.D. Fla. 1979) ("Potential inconsistency in monetary recovery alone is insufficient under [(b)(1)(A)'s] standard."); *see also* 7AA WRIGHT & MILLER, *supra* note 148, § 1773 (stating that certification under (b)(1)(A) "requires more than a risk that separate judgments would oblige the opposing party to pay damages to some class members but not to others or to pay them different amounts").

157 *See, e.g.*, Simer v. Rios, 661 F.2d 655, 668–69 n.24 (7th Cir. 1981) ("[T]he presence of individual issues in the lawsuit—that is, each putative class member's state of mind—renders the case unsuitable for (b)(1)(A) classification because the need to litigate individual issues prevents the possibility of varying adjudications which might establish incompatible standards of conduct."); Horowitz v. Pownall, 105 F.R.D. 615, 618 (D. Md. 1985) (stating that "the presence of

to pay money to some plaintiffs and not others could be certified under (b)(1)(A) would render (b)(3) virtually meaningless because class counsel would almost always choose a mandatory class over an opt-out class. Moreover, because (b)(1)(A), unlike (b)(3), does not require predominance or superiority, the drafters' intent to impose those requirements for most damages actions would be thwarted.[158] Clearly, the drafters of (b)(1)(A) did not intend for that subdivision to deprive (b)(3) of all meaning. At the same time, cases (such as *Dennis Greenman*) holding that suits for money can *never* be brought under (b)(1)(A) are flawed. Some cases that involve primarily or exclusively money, such as certain ERISA cases, fit comfortably within (b)(1)(A). In those cases, the concern is that the defendant is obligated by law to treat everyone the same, and the outcome does not turn on facts specific to each class member.[159]

Rule 23(b)(1)(B) presents an even clearer situation for permitting suits involving money. The very point of a limited fund suit is to divide up a pot of money.[160] As one court has stated, the "paradigm

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individual issues would preclude the possibility of varying adjudications in different lawsuits, with individual members of the class establishing incompatible standards to govern the defendants' conduct"), *aff'd sub nom.* Zimmerman v. Bell, 800 F.2d 386 (4th Cir. 1986).

158 *See, e.g.*, Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013) (distinguishing between (b)(3) opt-out classes and mandatory classes under (b)(1) and (b)(2)); *McDonnell Douglas*, 523 F.2d at 1086 (stating that "(b)(1)(A) was not intended to permit class actions simply when separate actions would raise the same question of law," and that "[t]o hold otherwise would be to render superfluous the detailed provisions of subdivision (b)(3)").

159 *See, e.g.*, Adams v. Anheuser-Busch Cos., No. 2:10-cv-826, 2012 WL 1058961, at *9–11 (S.D. Ohio Mar. 28, 2012) (noting that courts do not normally certify cases for compensatory damages under (b)(1)(A), but certifying in this ERISA case because "[a]ny monetary relief in the form of contractual benefits under the terms of the Plan would be dependent upon and ancillary to a declaration by the court regarding the proper interpretation of the Plan"); Shirk v. Fifth Third Bancorp, No. 05-cv-049, 2008 WL 4425535, at *4 (S.D. Ohio Sept. 30, 2008) ("An ERISA action to enforce fiduciary duties is brought in a representative capacity on behalf of the Plan as a whole. Any relief granted by a court to remedy a breach of fiduciary duty inures to the benefit of the Plan as a whole, rather than to individual plaintiffs."); *In re* Citigroup Pension Plan ERISA Litig., 241 F.R.D. 172, 179 (S.D.N.Y. 2006) ("The language of subdivision (b)(1)(A), addressing the risk of inconsistent adjudications, speaks directly to ERISA suits, because the defendants have a statutory obligation, as well as a fiduciary responsibility, to treat the members of the class alike." (internal quotation marks omitted)); *In re* Enron Corp. Secs., No. MDL 1446, Civ.A. H-01-3913, 2006 WL 1662596, at *19 n.26 (S.D. Tex. June 7, 2006) (finding certification of ERISA suit appropriate under Rule 23(b)(1)(A) because "the nature of Plaintiffs' breach of fiduciary duty claims relate to a common course of conduct by each of the Defendants that applies to the class as a whole, across the board"); Baker v. Comprehensive Emp. Solutions, 227 F.R.D. 354, 360 (D. Utah 2005) (stating that "[t]he fiduciary duty at issue is owed to the entire class and separate actions would create the risk of establishing inconsistent standards under ERISA").

160 *See supra* Part II.B.1.

Rule 23(b)(1)(B) case is one in which there are multiple claimants to a limited fund . . . and there is a risk that if litigants are allowed to proceed on an individual basis those who sue first will deplete the fund and leave nothing for latecomers."[161] If suits for money were not allowed under (b)(1)(B), then no suits involving limited funds could be brought under that subdivision.

### *B. Due Process Rights in (b)(1)(A) and (b)(1)(B) Suits Involving Money*

This section examines whether class actions for money under (b)(1) require notice and opt-out rights as a matter of due process. Due process, of course, is a flexible concept that "calls for such procedural protections as the particular situation demands"[162] and requires, at a minimum, notice and an opportunity to be heard.[163]

As an initial matter, courts cannot validly escape the due process issues raised by a suit for money by finding jurisdiction over the res, as the appellate court attempted to do in *Juris*.[164] Such an approach arguably addresses personal jurisdiction, but not the broader due process concerns. The concern expressed in *Shutts* goes beyond mere minimum contacts of unnamed class members. At bottom, the concern in *Shutts* is about depriving absent class members of property without due process.[165] That concern is not limited to absent class members who lack minimum contacts with the forum, but applies equally to all absent class members. As Professors Wolfman and Morrison have noted:

> [T]he teaching of *Shutts*, if not its actual holding, is that, although minimum contacts are not necessary to bind absent

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161 *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 725 (E.D.N.Y. 1983) (quoting ARTHUR R. MILLER, FED. JUDICIAL CTR., AN OVERVIEW OF FEDERAL CLASS ACTIONS: PAST, PRESENT, AND FUTURE 45 (1977)), *aff'd*, 818 F.2d 145 (2d Cir. 1987); *accord, e.g.*, Specialty Cabinets & Fixtures, Inc. v. Am. Equitable Life Ins. Co., 140 F.R.D. 474, 477 (S.D. Ga. 1991) ("The most common use of subsection (b)(1)(B) class actions is in limited fund cases."); 2 NEWBERG, *supra* note 5, § 4:24 ("[T]here is nothing in the language or history of Rule 23(b)(1)(B) that prohibits money damages . . . . On the contrary, (b)(1)(B)'s paradigmatic case, the limited fund class action, is explicitly about money damages.").

162 Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (internal quotation marks omitted); Hansberry v. Lee, 311 U.S. 32, 42–43 (1940) (adequate representation is touchstone of due process); *see also* Van Harken v. City of Chi., 103 F.3d 1346, 1351 (7th Cir. 1997) (Posner, J.) (stating that due process analysis "requires a comparison of the costs and benefits of whatever procedure the plaintiff contends is required").

163 Propert v. District of Columbia, 948 F.2d 1327, 1331 (D.C. Cir. 1991).

164 Juris v. Inamed Corp., 685 F.3d 1294, 1330–32 (11th Cir. 2012); *see also supra* text accompanying note 140.

165 *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812–14 (1985).

> class members, minimal due process—notice, adequate representation, and an opportunity to opt out—must be accorded *all* class members who were not named as plaintiffs, not just those lacking jurisdictional contacts, before those class members can be bound. The property interests of those class members arise not from the [Supreme] Court's personal jurisdiction cases, but from two other related strains of the Court's due process jurisprudence[:] . . . . that a cause of action is a form of property protected by the Due Process Clause, and . . . that individuals retain considerable control over the disposition of their property interests when those interests are threatened by administrative or judicial processes.[166]

Likewise, the due process concerns about cases involving money are not eliminated merely by labeling the suit as "equitable," as the district court did in the *In re Silicone Gel Breast Implant* case.[167] The Supreme Court in *Dukes* rejected a similar argument. There, in response to plaintiff's contention that backpay could be pursued in a (b)(2) class action because it is an equitable remedy, the Court stated: "The Rule does not speak of 'equitable' remedies generally but of injunctions and declaratory judgments. As Title VII itself makes pellucidly clear, backpay is neither."[168] The critical point, regardless of label, is that a limited fund suit adjudicates class members' entitlement to money.

In short, given the language in *Shutts*, *Ortiz*, and *Dukes*, the due process issues must be confronted directly and cannot be evaded by use of labels or technical personal jurisdiction arguments.

### *1. Notice*

By its terms, Rule 23(c)(2)(A) makes notice of class certification discretionary in mandatory classes: "For any class certified under Rule 23(b)(1) or (b)(2), the court *may* direct appropriate notice to the class."[169] According to the Advisory Committee Notes, "[t]he court may decide not to direct notice after balancing the risk that notice costs may deter the pursuit of class relief against the benefits of no-

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166 Wolfman & Morrison, *supra* note 28, at 733 (footnotes omitted).

167 *In re* Silicone Gel Breast Implant Prods. Liab. Litig., No 2:97-CV-11441-RDP, 2010 U.S. Dist. LEXIS 145069, at *138–39 (N.D. Ala. May 19, 2010), *aff'd sub nom.* Juris v. Inamed Corp., 685 F.3d 1294 (11th Cir. 2012); *see also supra* text accompanying note 141.

168 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2560 (2011) (citing 42 U.S.C. § 2000e–5(g)(2)(B)(i), (ii) (2006)).

169 FED. R. CIV. P. 23(c)(2)(A) (emphasis added).

tice."[170] By contrast, when a class is certified under (b)(3), Rule 23 directs the court to provide "the best notice that is practicable under the circumstances."[171]

Somewhat inconsistently, Rule 23(e)(1) draws no distinction, for purposes of settlement, between mandatory classes ((b)(1) and (b)(2)) and opt-out classes ((b)(3)), and provides generally that in all cases "[t]he court *must* direct notice in a reasonable manner to all class members who would be bound by the proposal."[172] Rule 23 also requires notice of motions for attorneys' fees in all kinds of class actions. It provides that "[n]otice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner."[173] Thus, if a case is settled, members of (b)(1)(A) and (b)(1)(B) classes (and also (b)(2) and (b)(3) classes) are entitled to reasonable notice,[174] and class members in all four types of class actions are entitled to notice of motions for attorneys' fees.[175] If a (b)(1) or (b)(2) class is certified for trial, however, notice of certification is not required under the current Rule 23.[176] Such notice is only required by rule in (b)(3) actions.[177]

In 2001, the Civil Rules Advisory Committee issued a proposal that would have *required* notice for certification of all (b)(1) and (b)(2) classes; it suggested that "[m]embers of classes certified under Rules 23(b)(1) or (b)(2) have interests that may deserve protection by notice."[178] The proposal, however, was never adopted. Specifically, the Advisory Committee recommended for publication a proposed Rule 23(c)(2) that would have "adopt[ed] an express notice requirement for (b)(1) and (b)(2) classes."[179] The amended Rule "would, for the first time, require that notice be given to members of a (b)(1) or

170 FED. R. CIV. P. 23 advisory committee's notes to 2003 amendment.

171 FED. R. CIV. P. 23(c)(2)(B).

172 FED. R. CIV. P. 23(e)(1) (emphasis added).

173 FED. R. CIV. P. 23(h)(1); *see also* NEWBERG, *supra* note 5, § 4:4 (stating that Rule 23(h) "*requires* that (b)(1) class members receive notice of *any* claim for attorney's fees award").

174 FED. R. CIV. P. 23(e).

175 FED. R. CIV. P. 23(h)(1).

176 FED. R. CIV. P. 23(c)(2)(A).

177 FED. R. CIV. P. 23(c)(2)(B).

178 FED. R. CIV. P. 23 advisory committee's notes to 2003 amendment.

179 Civil Rules Advisory Comm., Minutes 21 (Apr. 23–24, 2001) [hereinafter April 2001 Minutes], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CRAC401.pdf.

(b)(2) class."[180] The Committee explained the purpose of the required notice as follows:

> The purpose of notice is not to protect the right to request exclusion, because class members cannot request exclusion from such classes. The purpose instead is to establish an opportunity for class members to challenge the certification or the class definition, and to superintend the adequacy of representation by class representatives and class counsel.[181]

Public interest and civil rights lawyers opposed the proposed amendment, arguing that the cost of notice would deter filing of civil rights claims under (b)(1) or (b)(2).[182] Nonetheless, "[o]thers argued that notice is desirable as a matter of principle."[183] Eventually, the Committee opted for discretionary notice in (b)(1) and (b)(2) classes,[184] an approach that was "meant to strike a fair balance between the competing concerns."[185]

The mandatory (b)(1) and (b)(2) notice proposal that the Committee eventually withdrew did not require "the comprehensive individual-member notice required in (b)(3) class actions."[186] Rather, it only required "notice by means calculated to reach a reasonable number of class members."[187] Subsequently, in opting for discretionary notice, the Committee reaffirmed that the cost of any notice plan should be balanced against its likely effectiveness.[188]

The Advisory Committee's proposal to make notice of some kind mandatory for (b)(1) and (b)(2) actions had much to recommend it.

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180 Civil Rules Advisory Comm., Minutes 4 (Mar. 12, 2001), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CRACMM01.pdf.

181 *Id.* The Advisory Committee has stated elsewhere that "[n]otice facilitates the opportunity to participate." FED. R. CIV. P. 23 advisory committee's notes to 2003 amendment.

182 Civil Rules Advisory Comm., Minutes 15 (Jan. 22–23, 2002), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CRAC0102.pdf; *see also* Civil Rules Advisory Comm., Minutes 15 (May 6–7, 2002) [hereinafter May 2002 Minutes], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CRAC0502.pdf ("Civil rights plaintiffs protested that notice costs would cripple worthwhile class actions, to the point of deterring filing.").

183 May 2002 Minutes, *supra* note 182, at 15.

184 *See* FED. R. CIV. P. 23(c)(2)(A) ("For any class certified under Rule 23(b)(1) or (b)(2), the court *may* direct appropriate notice to the class." (emphasis added)).

185 May 2002 Minutes, *supra* note 182, at 15.

186 April 2001 Minutes, *supra* note 179, at 21.

187 *Id.*

188 *See* FED. R. CIV. P. 23 advisory committee's notes to 2003 amendment ("Informal methods may prove effective. A simple posting in a place visited by many class members, directing attention to a source of more detailed information, may suffice. The court should consider the costs of notice in relation to the probable reach of inexpensive methods.").

As the Committee itself pointed out, notice allows absent class members to monitor the litigation and ensure adequate representation.[189] As noted, the Rule *requires* notice for settlement and for a motion for attorneys' fees, but not for certification.[190] While settlement raises special issues of possible collusion,[191] the need for close monitoring of class representatives and class counsel does not disappear when a case involving money goes to trial and does not reach a settlement. Even in a mandatory class action, it is important to afford class members the opportunity to monitor the suit and to intervene should they choose to do so, a point made by the Advisory Committee in its 2001 proposal.[192] Indeed, Rule 23 itself currently recognizes that discretionary notice may provide class members the "opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action."[193]

One might contend that notice of certification is not feasible or economically sensible in (b)(1) suits. Yet the fact that some form of notice is *required* for (b)(1) settlements undercuts any argument that notice is not feasible or prudent at the certification stage.[194]

Because (b)(1)(A) and (b)(1)(B) suits involving money directly implicate the property interests of class members—and thus trigger the critical language in *Shutts*, *Ortiz*, and *Dukes*[195]—due process requires reasonable notice. This is true even if the monetary claim is of lesser importance than a declaratory or injunctive claim in the same case. It makes little sense to apply a notice requirement only to cases in which monetary claims predominate.[196]

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189 *See supra* note 181 and accompanying text; *see also* Debra J. Gross, Comment, *Mandatory Notice and Defendant Class Actions: Resolving the Paradox of Identity Between Plaintiffs and Defendants*, 40 EMORY L.J. 611, 650 (1991) (noting importance of notice in "affording absentees the opportunity to object to (or affirm) the appointment of a class representative before class issues are judicially determined").

190 *See supra* text accompanying notes 172 and 178.

191 *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, *supra* note 116, § 3.02 cmt. a (discussing potential for collusion between class counsel and defendants at the expense of absent class members).

192 *See supra* note 181 and accompanying text.

193 FED. R. CIV. P. 23(d)(1)(B)(iii).

194 *See supra* note 172 and accompanying text.

195 *See supra* notes 8–12 and accompanying text.

196 Indeed, notice may also be appropriate in suits not involving money, and may even be constitutionally required in some circumstances. *See, e.g.*, Neloms v. Sw. Elec. Power Co., 72 F.R.D. 128, 130–31 (W.D. La. 1976) (stating in dictum that due process requires notice in (b)(2) cases that do not involve money if "the rights of th[e] absent parties probably would be prejudiced as a practical matter by the eventual class judgment").

The notice required under (b)(1) need not comport with *Eisen v. Carlisle & Jacquelin*,[197] a (b)(3) case in which the Supreme Court held that Rule 23 "requires that individual notice be sent to all class members who can be identified with reasonable effort."[198] The *Eisen* Court based its decision not on due process but on the language of the Rule,[199] which requires (for (b)(3) classes) "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[200] Due process, by contrast, is flexible and requires only that notice be "reasonably certain to inform those affected."[201] In the class action context, where the claimants can number in the millions and span the United States and abroad, the need to balance the benefits of notice against the cost of providing it becomes especially apparent.[202] This flexible approach is embodied in the notice provision governing settlement, which requires "notice in a reasonable manner to all class members who would be bound by the proposal."[203] Because the primary purpose of notice—ensuring adequacy of representation—is achieved if a sufficient portion of the class receives actual notice, individual notice may not be necessary.[204] Thus, courts should consider notice programs that do not necessarily require individual notice, especially where individual claims are small and where any monetary recovery would be the same across the class and not dependent on individual circumstances.[205] Notice by e-mail, through websites, and in the press

197 Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

198 *Id.* at 177.

199 *See id.* at 175–77.

200 FED. R. CIV. P. 23(c)(2)(B).

201 Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950); *see also* Mathews v. Eldridge, 424 U.S. 319, 334 (1976) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands." (internal quotation marks omitted)).

202 *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, *supra* note 116, at § 3.04 cmt. a ("Under the Due Process Clause . . . it is important to balance the benefit of notice against the cost of providing notice.").

203 FED. R. CIV. P. 23(e)(1). For a discussion of the flexible approaches to notice embodied in state procedural rules, including examples, see PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, *supra* note 116, § 2.07 cmt. f.

204 *See, e.g.*, Nunez v. City of New York, No. 11 Civ. 5845(LTS)(JCF), 2013 WL 765132, at *1 (S.D.N.Y. Feb. 28, 2013) (holding that notice by publication satisfied due process in 23(b)(1) and (b)(2) case, and that "providing individual notice . . . would be onerous and unnecessary"); FED. R. CIV. P. 23 advisory committee's notes to 2003 amendment ("Notice calculated to reach a significant number of class members often will protect the interests of all.").

205 *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, *supra* note 116, § 2.07 cmt. f ("The value of notice is likely to be low . . . when claimants have small stakes and when they have little information of value to contribute to the aggregate proceeding.").

may be suitable and highly effective without individual notice.[206] The goal should be to alert class members as efficiently as possible about the pendency of the suit, consistent with keeping administrative costs reasonable.[207] Because the form of notice would be subject to the court's discretion, subsequent challenges by class members who did not personally receive notice should rarely be successful.

### 2. *Opt-Out Rights*

If reasonable notice is provided in a properly certified (b)(1) action seeking money, due process should not require opt-out rights. Indeed, opt outs would nullify the very purpose of (b)(1)(A) and (b)(1)(B): to avoid the "difficulties which would be likely to arise if resort were had to separate actions by or against the individual members of the class."[208] The very reason to bring all impacted parties together is to protect the defendant (in (b)(1)(A) suits) or absent class members (in (b)(1)(B) suits). Opt outs would destroy this purpose.[209] Under a due process balancing of costs and benefits, individual class

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206 *See generally, e.g.*, Robert H. Klonoff, Mark Herrmann & Bradley W. Harrison, *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. PITT. L. REV. 727 (2008) (discussing the ability of the internet to foster participation by absent class members, and noting ways that notice may be provided over the internet). Internet notice is considerably more cost-effective than notice by mail. *See id.* at 750 ("The internet decreases the cost of giving . . . notices and increases the likelihood that absent class members will receive them. Courts should therefore increasingly rely on the internet to deliver these, and other, notices."); *id.* at 733–34 ("[C]ourts have come to accept both email and internet notice campaigns as acceptable means of giving notice in class actions. Indeed, courts are beginning to embrace the belief that internet notice may be preferable to traditional methods of publication notice." (footnote omitted)); *see also* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, *supra* note 116, § 2.07 cmt. f ("As the methods for diffusion of information become more advanced with the development of Internet-based and other avenues for communication . . . individualized notice as conventionally understood may not necessarily be the best notice that is practicable in all situations.").

207 *See* Jones v. Flowers, 547 U.S. 220, 229 (2006) (noting that due process requires "balancing the interest of the State against the individual interest sought to be protected by the Fourteenth Amendment" (internal quotation marks omitted)); Van Harken v. City of Chi., 103 F.3d 1346, 1351 (7th Cir. 1997) (Posner, J.) (stating that due process analysis "requires a comparison of the costs and benefits of whatever procedure the plaintiff contends is required"); PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, *supra* note 116, § 3.04 cmt. a ("Under the Due Process Clause . . . it is important to balance the benefit of notice against the cost of providing notice."); Kenneth W. Dam, *Class Action Notice: Who Needs It?*, 1974 SUP. CT. REV. 97, 109 (concluding that the required notice should be decided on a case-by-case basis).

208 FED. R. CIV. P. 23 advisory committee's notes to 1966 amendment.

209 *See* Waldron v. Raymark Indus., Inc., 124 F.R.D. 235, 238 n.1 (N.D. Ga. 1989) ("The idea of a mandatory class with opt out rights, besides being oxymoronic, is contrary to the very purpose for which a Rule 23(b)(1)(B) class action is meant to serve."); Rutherglen, *supra* note 134, at 272 ("Allowing class members to opt out of (b)(1) actions would defeat the purpose of certifying them in the first place."); *see also supra* note 134; *cf.* Piazza v. EBSCO Indus., Inc., 273 F.3d 1341, 1352 (11th Cir. 2001) (finding that it was an abuse of discretion to certify an ERISA

members should not be entitled to opt out. Their interests are protected through reasonable notice. Allowing opt outs would render (b)(1) ineffective to achieve its purpose, and thereby adversely impact the defendant and other class members. The requirements under (b)(1)(A) and (b)(1)(B) are rigorous, and few monetary suits will qualify. But for those that do, due process concerns are satisfied by reasonable notice, which (as noted) enables class members to have input to ensure adequacy of representation.[210]

## CONCLUSION

In (b)(1) actions seeking money, due process requires reasonable notice. Notice enables class members to monitor the litigation and, if necessary, to intervene in the action. At the same time, due process does not require an opportunity to opt out. A requirement of reasonable notice fully protects class members' due process rights. Indeed, requiring opt outs would defeat the very purpose of a (b)(1) class—to protect the rights of the defendant or absent class members.

class under (b)(3) since opt outs could expose the defendants to inconsistent or varying adjudications).

210 *See supra* text accompanying notes 191–93.