

Ramifications of Phillips Petroleum Co. v. Shutts on Multistate Plaintiff Class Actions

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SUPREME COURT RAMIFICATIONS

RAMIFICATIONS OF *PHILLIPS PETROLEUM CO. v. SHUTTS* ON MULTISTATE PLAINTIFF CLASS ACTIONS

The class action originated with the English equitable bill of peace¹ and has evolved into a procedure used to adjudicate the rights of a group of similarly situated persons in one lawsuit.² The class action avoids multiplicity of suits thus reducing the burden on the judicial system and promoting judicial efficiency.³ It pro-

¹ See Z. CHAFEE, SOME PROBLEMS OF EQUITY 200-01 (1950). The bill of peace required the joinder of all interested persons in a single action. See, e.g., *Knight v. Knight*, 24 Eng. Rep. 1088 (Ch. 1734) (all parties must be joined); *How v. Tenants of Bromsgrove*, 23 Eng. Rep. 277 (Ch. 1681) (community interest requires joinder of action). Bills of peace determined questions of law or fact in a single proceeding, avoiding multiplicity of suits. See Chafee, *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297, 1297 (1932). See generally 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1751 (1972) (tracing history of class actions); Marcin, *Searching for the Origin of the Class Action*, 23 CATH. U.L. REV. 515, 517 (1974) (examining the origin of the class action); *Developments in the Law-Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 928 (1958) (development of bill of peace to decide common questions).

² See *Hansberry v. Lee*, 311 U.S. 32, 41 (1940); *Miner v. Gillette Co.*, 87 Ill. 2d 7, 428 N.E.2d 478, 484 (1981) ("[T]he object of the class action procedure is to adjudicate a large number of very small claims in one proceeding."), cert. granted, 456 U.S. 914, cert. dismissed, 459 U.S. 86 (1982). The class action is an important procedural device for resolving disputes among many people. See 7 C. WRIGHT & A. MILLER, supra note 1, at 510-11; see also Hazard, *The Effect of the Class Action Device Upon the Substantive Law*, 58 F.R.D. 307, 308-09 (1973) (describing societal changes that encouraged increase in class actions); Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 610 (1971) (class action suits promote justice and efficiency).

³ See *Weinberger v. Kendrick*, 698 F.2d 61, 72 (2d Cir. 1982) (Rule 23 authorizes the use of the class device to promote judicial efficiencies); *In re Asbestos School Litigation*, 104 F.R.D. 422, 433 (E.D. Pa. 1984) (judicial efficiency and economy is furthered by use of the class action); *In re Cadillac V8-6-4 Class Action*, 93 N.J. 412, 421, 461 A.2d 736, 745 (1983) (class actions are a means to promote judicial efficiency); 1 H. NEWBERG, CLASS ACTIONS § 5.13, at 447 (1985); Hutchinson, *Class Actions: Joinder or Representational Device?*,

vides a remedy when the overall harm may be great, but the individual effects too small to make individual suits feasible.⁴ A class suit may deter harmful activities in society⁵ and, at the same time, advance the judicial system's interest in the finality of judgments by binding all members of the class to a single judgment.⁶

Federal class action procedure is codified in Rule 23 of the Federal Rules of Civil Procedure.⁷ The courts have held that for state equivalents of Rule 23 to apply, the parties involved in a class action must meet certain jurisdictional due process requirements.⁸

1983 SUP. CT. REV. 459, 480; Weinstein, *Some Reflections on the "Abusiveness" of Class Actions*, 58 F.R.D. 299, 300 (1973).

⁴ The Supreme Court has stressed the importance of pooling resources through a class action in order to maintain suits that otherwise would not be feasible. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). The Court in *Eisen* observed:

A critical fact in this litigation is that petitioner's individual stake in the damage award he seeks is only \$70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all.

Id. at 161; *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972). "Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture." *Id.* at 266; *see also* Weinstein, *supra* note 3, at 300.

⁵ Hutchinson, *supra* note 3, at 480-81; *see also* Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 666 (1979).

⁶ FED. R. CIV. P. 23(c)(3). The judgment in a class action, "whether or not favorable to the class," includes all those "whom the court finds to be members of the class." *Id.*; *see, e.g., Hansberry v. Lee*, 311 U.S. 32, 39 (1940) (members of the class whose interests have been adequately represented are bound by the results in the case); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 363 (1921) (a judgment in a class suit binds all members of the class); *Smith v. Swormstedt*, 57 U.S. 307, 322 (1853) (where parties are so numerous and represented by only a portion thereof, a decree binds all of them the same as if all were before the court).

⁷ FED. R. CIV. P. 23. Rule 23 was enacted in 1938 to encourage the use of class actions. It divided all class actions into three categories: (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it; (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought. *Id.*

⁸ *See Phillips Petroleum Co. v. Shutts*, 105 S. Ct. 2965, 2975 (1985). Traditionally a court must have jurisdiction over the person before it can render judgment. *See Pennoyer v. Neff*, 95 U.S. 714, 720 (1878). *See also* R. CASAD, JURISDICTION IN CIVIL ACTIONS § 9.12, at 9.12(2)(b) (1983) (requirements for jurisdiction in class actions).

It is very difficult to bring class actions in federal court because each plaintiff must satisfy the \$10,000 jurisdictional amount requirement. *See Zahn v. International Paper Co.*, 414 U.S. 291, 300 (1973) (all plaintiffs in federal court class actions must each satisfy the federal jurisdictional amount); *Snyder v. Harris*, 394 U.S. 332, 338 (1969) (for class action claims based on diversity each plaintiff must have the \$10,000 jurisdictional amount). For this reason, most class actions are now brought under state statutes that are either identical

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The requirement that multistate plaintiffs have minimum contacts with the forum state has caused a split in the courts.⁹ However, in *Phillips Petroleum Co. v. Shutts*,¹⁰ the United States Supreme Court held that multistate plaintiffs in a class action need not have minimum contacts with the forum state.¹¹

This article will discuss the jurisdictional questions concerning multistate class action plaintiffs and how the *Phillips* decision has affected them. Part I will present the requirements for bringing and maintaining a class action. Part II will trace the evolution of jurisdictional due process requirements for a class action and the controversy which has resulted. Finally, part III will discuss *Phillips* and its ramifications on class actions.

I. CLASS ACTION REQUIREMENTS

To proceed as a class, a group must be certified.¹² Once certi-

or very similar to Federal Rule 23. *See, e.g.*, ALA. R. CIV. P. 23 (1972); ARIZ. REV. STAT. R. CIV. P. 23 (1966); HAWAII R. CIV. P. 23 (1970); KAN. CIV. PROC. CODE ANN. § 60-223 (Vernon Supp. 1984); 12 OKLA. STAT. ANN. tit. 12, § 2023 (West Supp. 1985).

⁹ Some courts have declined to entertain class actions because plaintiff class members lacked minimum contacts. *See* *Feldman v. Bates Mfg. Co.*, 143 N.J. Super. 84, 94, 362 A.2d 1177, 1182 (1976); *Thomas v. Times Mirror Magazines, Inc.*, 98 Cal. App. 3d 913, 159 Cal. Rptr. 711 (1979). *But see* *Miner v. Gillette Co.*, 87 Ill. 2d 7, 13, 428 N.E.2d 478, 481 (1981) ("class actions [are] an exception to the rule requiring *in personam* jurisdiction over a party before he will be bound by a judgment rendered"), *cert. granted*, 456 U.S. 914, *cert. dismissed*, 459 U.S. 86 (1982); *Schlosser v. Allis-Chambers Corp.*, 86 Wis. 2d 226, 241-42, 271 N.W.2d 879, 886-87 (1978) (minimum contacts are not necessary); *Katz v. NVF Co.*, 119 Misc. 2d 48, 50, 462 N.Y.S.2d 975, 977 (Sup. Ct. N.Y. County 1983) ("[I]n a 'class' . . . suit in personam jurisdiction [is] not required to bind non parties."), *rev'd on other grounds*, 100 App. Div. 2d 470, 473 N.Y.S.2d 786 (1st Dep't 1984); *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 542-43, 567 P.2d 1292, 1306 (1977) ("[A]lthough the general rule is that only persons subject to a court's jurisdiction are bound by its judgment, there is a recognized exception for suits of a representative character."), *cert. denied*, 434 U.S. 1068 (1978).

¹⁰ 105 S. Ct. 2965 (1985).

¹¹ *Id.* at 2975. In *Phillips*, the Court held that the only requirements needed for a plaintiff in a class action to satisfy due process are notice plus an opportunity to be heard. *Id.* The *Phillips* case, however, only involved a Rule 23(b)(3) class action and, in such actions, the right to opt-out is a due process procedural safeguard. *See id.* at 2976. It is submitted that since 23(b)(1) actions were not specifically mentioned in the decision, the question of a plaintiff's minimum contacts in a mandatory class action remains unresolved. *See infra* notes 60-62 and accompanying text.

¹² *See* FED. R. CIV. P. 23(a). Certification requires that the group constituting the class is so large that it would be impracticable to bring them all before the court; that there are questions of law or fact common to the class; that the claims or defenses of the representatives are typical of those of the class; and that the named representatives fairly and adequately represent the interests of the class. FED. R. CIV. P. 23(a)(1)-(4); *see also* General Tel.

fied, the class must qualify as a recognized class.¹³ Under Rule 23(b)(1), a class action may be brought if individual actions by or against members of the class would create the risk of unfair prejudice to either party.¹⁴ This may occur whenever multiple actions against a defendant may subject him to liability to one plaintiff and not to another with an identical claim.¹⁵ This rule also

Co. v. Falcon, 457 U.S. 147, 157 & n.13 (1982) (class must have common questions of law or fact so individual's claim typical of class); General Tel. Co. v. EEOC, 446 U.S. 318, 330 (1980) (individual litigant in Title VII class claim must meet prerequisites of Rule 23(a)); Milonas v. Williams, 691 F.2d 931, 938 (10th Cir. 1982) (common questions of fact or law demand sufficient commonality and typicality requirements), *cert. denied*, 460 U.S. 1069 (1983). There are two general prerequisites that have been implied by the courts: that there be an actual identifiable class and the representative of the class must be a member. See *Simer v. Rios*, 661 F.2d 655, 669 (7th Cir. 1981) ("It is axiomatic that for a class action to be certified a 'class' must exist"), *cert. denied*, 456 U.S. 917 (1982); *Rex v. Owens*, 585 F.2d 432, 436 (10th Cir. 1978) (must be established numbers constituting class); *Kaufman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 734 (3d Cir. 1970) (right to represent class is eligibility to sue on own), *cert. denied*, 401 U.S. 974 (1971). See generally Note, *Class Standing and the Class Representative*, 94 HARV. L. REV. 1637 (1981) (discussing class representatives under Rule 23).

¹³ See FED. R. CIV. P. 23(b)(1)-(3). A class action must satisfy the requirements of both 23(a) and (b). See *Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980) (class certification depends on requirements in Rule 23), *cert. denied*, 449 U.S. 1113 (1981); *West Virginia v. Charles Pfizer & Co.*, 440 F.2d 1079, 1089 (2d Cir.) (must satisfy both 23(a) and (b) for class action), *cert. denied*, 404 U.S. 871 (1971).

¹⁴ FED. R. CIV. P. 23(b)(1). Rule 23(b)(1) provides:

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

Id.

¹⁵ *Id.* See *In re Fed. Skywalk Cases*, 93 F.R.D. 415 (W.D. Mo.), *rev'd.*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982). In *Skywalk*, the court first noted that 150 actions had been filed and, without a class action, multistate actions would proceed. *Id.* at 423-24. Then, without explaining its reasoning, the court simply concluded that the "defendants risk being faced with incompatible standards of conduct if varying or inconsistent adjudications with respect to individual members of the class were obtained on the [issue] of liability for . . . damages," and thus certified a class pursuant to Rule 23(b)(1)(a). See *id.* at 424; see also 3B MOORE'S FEDERAL PRACTICE § 23.40 (1964) (possibility that defendant, if brought to trial repeatedly by individual plaintiffs, could be liable to some plaintiffs but not to others similarly situated is inappropriate basis for certification of 23(b)(1)(a) class); cf. *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1340 (9th Cir. 1976) (possibility of liability to some plaintiffs but not to others insufficient grounds for 23(b)(1)(a) certification); *McDonnell Douglas Corp. v. United States Dist. Ct., C.D. of Cal.*, 523 F.2d 1083, 1086 (9th Cir. 1975) (risk of inconsistent adjudications alone does not permit certification of a class under 23(b)(1)(a)), *cert. denied*, 425 U.S. 911 (1976); *Causey v. Pan World Airways*, 66 F.R.D. 392, 398 (E.D. Va. 1975) (possibility of compensating some plaintiffs but not others

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protects members of the class when individual litigation of some claims might substantially impair the ability of others to recover.¹⁶

Rule 23(b)(1) actions are termed "mandatory" because once the class is certified, members do not have the right to opt-out and they are bound by the eventual result, whether or not individual members of the class object to being included, and often, whether or not they are even aware of the proceedings.¹⁷ As a result, the court is required to insure that class members are adequately represented¹⁸ and that all plaintiffs are treated fairly in settlement negotiations.¹⁹

A class action may be brought under Rule 23(b)(3) when common questions of law or fact predominate over questions unique

does not create incompatible standards of conduct so no 23(b)(1) classes permitted on this ground alone).

¹⁶ The Advisory Committee note to the 1966 amendment of Rule 23(b)(1)(B) states:

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 law-suit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem.

FED. R. CIV. P. 23, advisory committee note to 1966 amendment. See *Coburn v. 4-R Corp.*, 77 F.R.D. 43, 45 (E.D. Ky. 1977) (bankruptcy need not be certain or even likely; rule satisfied if there is reasonable doubt as to whether defendant could satisfy all judgments). The fact that most courts are willing to allow consideration of prior punitive damage awards against a defendant to reduce further imposition of punitive damages indicates that there may be some implied in law limit on punitive damages. See RESTATEMENT (SECOND) OF TORTS § 908 comment e, at 467 (1977). The Court of Appeals for the Ninth Circuit has stated, however, that "no rule of law limits the amount of punitive damages a jury may award." *In re Northern Dist. of California "Dalkon Shield" IUD Prods. Liab. Litig.*, 693 F.2d 847, 852 (9th Cir. 1982), cert. denied, 459 U.S. 1171 (1983). It was responding to A.H. Robbin's claim that repetitive punitive damage awards are unconstitutional to the extent they result in excessive punishment. Brief for Appellee at 18-25, *Dalkon Shield*, 693 F.2d 847 (9th Cir. 1982), cert. denied, 459 U.S. 1171 (1983).

¹⁷ FED. R. CIV. P. 23(b)(1). Although Rule 23 only provides for notice in Rule 23(b)(3) class actions, some courts have required notice in 23(b)(1) mandatory actions as well. See *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 564-65 (2d Cir. 1968); *Richmond Black Police Officers Ass'n v. City of Richmond*, 386 F. Supp. 151, 158 (E.D. Va. 1974); *Bormann v. Long Island Press Publishing Co.*, 379 F. Supp. 951, 954 (E.D.N.Y. 1974); *Lopez v. Wyman*, 329 F. Supp. 483, 486 (W.D.N.Y. 1971), aff'd, 404 U.S. 1055 (1972); see also *infra* notes 69-71 and accompanying text.

¹⁸ FED. R. CIV. P. 23(a)(4).

¹⁹ FED. R. CIV. P. 23(c). A class action cannot be dismissed or compromised without court approval. See *Grumin v. International House of Pancakes*, 513 F.2d 114, 123 (8th Cir.) (court has discretion over settlements and must act as fiduciary for class), cert. denied, 423 U.S. 864 (1975).

to individual members to "achieve economies of time, effort and expense and promote uniformity of decision as to persons similarly situated."²⁰ The nexus between the class members may simply be that they claim to have been injured by the defendant in similar ways,²¹ but, under Rule 23(b)(3), class members may exclude themselves and bring an action on their own by opting-out.²²

II. DEVELOPMENT OF JURISDICTIONAL DUE PROCESS REQUIREMENTS FOR CLASS ACTION PLAINTIFFS

In order for a state court to render a binding judgment²³ which subsequently would be entitled to "full faith and credit" in other states,²⁴ the court must obtain personal jurisdiction over the parties involved.²⁵ Traditionally, physical presence in the forum state was the major prerequisite to obtaining jurisdiction.²⁶ The Su-

²⁰ FED. R. CIV. P. 23. Advisory Committee note to 1966 Amendments, subdivision (b)(3); see *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 550-51 (1974).

²¹ See A. MILLER, AN OVERVIEW OF FEDERAL CLASS ACTIONS: PAST, PRESENT AND FUTURE 40 (2d ed. 1977). A distinguishing characteristic of Rule 23(b)(3) class actions is that they are not mandatory. See FED. R. CIV. P. 23(b)(3). The drafters of the 1966 amendments concerned about binding absent class members, provided in Rule 23(c)(2) that the best practicable notice should be given to all Rule 23(b)(3) class members that would inform them of their right to opt-out of the class if they do not wish to be bound by the result. FED. R. CIV. P. 23(c)(2).

²² FED. R. CIV. P. 23(c)(2)(a). Rule 23(c)(2) provides in pertinent part:

In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the most notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date.

Id.

²³ A binding judgment is a decision that is given res judicata effect. See *Kulko v. Superior Court of California*, 436 U.S. 84, 91 (1978); *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 541, 567 P.2d 1292, 1304 (1977), cert. denied, 434 U.S. 1068 (1978); Note, *Consumer Class Actions With a Multistate Class: A Problem of Jurisdiction*, 25 HASTINGS L.J. 1411, 1423 (1974).

²⁴ U.S. CONST. art. IV, § 1. Article IV, section 1, of the U.S. Constitution provides in pertinent part: "Full faith and credit shall be given in each state to the . . . judicial proceedings of every other state." *Id.*; see *Pennoy v. Neff*, 95 U.S. 714, 729-33 (1878); see also 28 U.S.C. § 1738 (1976) (Congress' full faith and credit statute). See generally D. SIEGEL, NEW YORK PRACTICE § 471, at 631 (1978) (discussion of recognition of domestic judgments); 18 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4467, at 624 (1981) (res judicata between state courts).

²⁵ See *supra* note 9. In addition, due process requires notice and an opportunity to be heard. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

²⁶ See *Pennoy v. Neff*, 95 U.S. 714, 722 (1878); see also M. ROSENBERG, J. WEINSTEIN, H.

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preme Court, in *International Shoe Co. v. Washington*,²⁷ subsequently articulated an additional basis for *in personam* jurisdiction.²⁸ The Court reasoned that if the defendant had certain minimum contacts with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice,'" the defendant could be subjected to a judgment *in personam*.²⁹ In *World-Wide Volkswagen v. Woodson*,³⁰ the Supreme Court stated that the "minimum contacts" standard served the dual functions of protecting the defendant against the burdens of litigating in a distant or inconvenient forum and ensured that the states, through their courts, did not reach out beyond the limitations imposed on them by their status as coequal sovereigns in a federal system.³¹

The development of the minimum contacts standard has directly affected only defendants in determining whether it is fair to force them to litigate in a particular forum, since a plaintiff is gen-

SMIT & H. KORN, ELEMENTS OF CIVIL PROCEDURE 254 (3d ed. 1976). In *Pennoyer*, the Supreme Court held that a state was barred from exercising "direct jurisdiction and authority over persons or property without its territory." *Pennoyer*, 95 U.S. at 722. Therefore, absent consent, personal jurisdiction could be obtained only by serving process on nonresidents physically within the state's borders. *Id.*

²⁷ 326 U.S. 310 (1945).

²⁸ *Id.* at 316. The *International Shoe* Court presented the minimum contacts test as a continuation of the historical position that "the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person." *Id.* The Court cited *Pennoyer* in support of its statement that it would be inconsistent with due process for a judgment to be binding against an individual with whom the state has had no contacts. *Id.* at 319. Consistent with the limits of state sovereignty, yet another basis for *in personam* jurisdiction arises through the state's power to assert jurisdiction over nonresident parties. For example, a state has the power to exercise *in personam* jurisdiction over a person actually present within its territorial boundaries, even if that person is not a resident. *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878). The Supreme Court has also recognized that a state has the power to assert *in personam* jurisdiction over a nonresident corporation if it carries on "continuous and systematic corporate activities" within the state. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952); see also *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 413-14 (1984).

²⁹ *International Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

³⁰ 444 U.S. 286 (1980).

³¹ *Id.* at 292. In *World-Wide Volkswagen*, the Supreme Court resurrected state sovereignty as an important purpose for implementing limitations on state court jurisdiction. *Id.* See generally Note, *Personal Jurisdiction and Multistate Plaintiff Class Actions: The Impact of World-Wide Volkswagen Corp. v. Woodson*, 32 *DRAKE L. REV.* 441, 444-51 (1983) (state sovereignty from *Pennoyer* to *World-Wide Volkswagen*).

erally regarded as submitting to personal jurisdiction.³² Therefore, the question of whether the minimum contacts test also applies to plaintiffs, especially class action plaintiffs, has been the source of great controversy.³³ One view is that absent class action plaintiffs with no minimum contacts with the forum state can be bound by a judgment of the state courts.³⁴ This position has been justified by reliance on *Hansberry v. Lee*³⁵ where the Supreme Court stated that a "class" or "representative" suit is an exception to the traditional standards of personal jurisdiction.³⁶ It is sug-

³² *Adam v. Saenger*, 303 U.S. 59, 67-68 (1938) (by demanding justice, plaintiff submits himself to jurisdiction); D. SEGEL, *supra* note 24, § 58, at 59; Note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification*, 92 HARV. L. REV. 718, 726 (1979). It has been suggested that the due process requirements of the fourteenth amendment do not differentiate between persons who are plaintiffs and persons who are defendants. See Note, *supra* note 31, at 459; Comment, *State Court Jurisdiction Over Multistate Plaintiff Class Actions: Minimum Contacts and Miner v. Gillette*, 69 IOWA L. REV. 795, 806 (1984). But see Casenote, *Class Actions - Multistate Plaintiff Class Suits - Illinois Allows Multistate Plaintiff Class Action Suits to be Litigated in Illinois State Courts*, 1983 S. ILL. U.L.J. 379, 387 (Supreme Court cases recognize that minimum contacts test applies only to defendants).

³³ See *supra* note 10.

³⁴ See *Miner v. Gillette Co.*, 87 Ill. 2d 7, 13, 428 N.E.2d 478, 481 (1981), *cert. granted*, 456 U.S. 914, *cert. dismissed*, 459 U.S. 86 (1982); *Shutts v. Phillips Petroleum Co.*, 235 Kan. 195, 679 P.2d 1159, 1167-68 (*Shutts II*), *aff'd in part, rev'd in part*, 105 S. Ct. 2965 (1985); *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 543, 567 P.2d 1292, 1305 (1977), *cert. denied*, 434 U.S. 1068 (1978) (*Shutts I*); *Katz v. NVF Co.*, 119 Misc. 2d 48, 55, 462 N.Y.S.2d 975, 980 (Sup. Ct. N.Y. County 1982), *rev'd on other grounds*, 100 App. Div. 2d 470, 473 N.Y.S.2d 786 (1984). The courts in *Shutts I* and *Shutts II* upheld jurisdiction over nonresident absentee class members who had no connection with the forum state, asserting that the judgment would bind those unconnected members. See *Shutts II*, 235 Kan. at 201, 679 P.2d at 1167; *Shutts I*, 222 Kan. at 543-44, 567 P.2d at 1305-06. See generally Comment, *Civil Procedure: In Personam Jurisdiction Over Non Resident Plaintiffs in Multi-state Class Actions*, 17 WASHBURN L.J. 382 (1978). The above courts dealt with class actions in which the absent class action plaintiffs have a right to opt-out of the class, as permitted under FED. R. CIV. P. 23(b)(3) & (c)(2)(a).

³⁵ 311 U.S. 32 (1940).

³⁶ *Id.* at 41-42. The oft-cited passage which articulates the exception to the standard of personal jurisdiction for class or representative suit reads:

[T]here is a recognized exception [to ordinary jurisdictional rules] that . . . the judgment in a "class" or "representative" suit, to which some members of the class are parties, may bind members of the class to those represented who were not made parties to it. . . . Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all because some are not within the jurisdiction or because their whereabouts are unknown or where if all were made parties to the suit its continued abatement by death of some would prevent or unduly delay a decree. In such cases where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issue in which all have a common interest, the court will proceed to decree.

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gested that this exception appears to permit a judgment in a class action to bind all the class members regardless of whether the forum court had jurisdiction over them or not. The opposing view advocates the application of the minimum contacts standard to multistate class action plaintiffs as well.³⁷ Therefore, multistate plaintiffs with no minimum contacts with the forum state have been held not to be within the jurisdiction of the court.³⁸

III. *Phillips Petroleum Co. v. Shutts* AND ITS RAMIFICATIONS ON CLASS ACTIONS

The conflict concerning jurisdictional due process requirements for multistate class action plaintiffs was resolved by the Supreme Court in *Phillips Petroleum Co. v. Shutts*.³⁹

In *Phillips*, the defendant produced or purchased natural gas from leased land in eleven different states and sold it in interstate commerce.⁴⁰ The plaintiffs, 28,000 royalty owners possessing rights to the leases,⁴¹ brought a class action to recover interest on

Id. It has been suggested, however, that reliance on *Hansberry* is misplaced. See Comment, *supra* note 32, at 802-03.

³⁷ See, e.g., *Feldman v. Bates Mfg. Co.*, 143 N.J. Super. 84, 89, 362 A.2d 1177, 1180 (1976); *Klemow v. Time Inc.*, 466 Pa. 189, 197 n.15, 352 A.2d 12, 16 n.15, *cert. denied*, 429 U.S. 828 (1976). The *Feldman* court interpreted *Hansberry v. Lee*, 311 U.S. 32 (1940), as referring only to class members who have minimum contacts with the forum but who are physically outside the state where the action is commenced and not to all class members. *Feldman v. Bates Mfg. Co.*, 143 N.J. Super. 84, 93 n.1, 362 A.2d 1177, 1182 n.1 (1976). "*Hansberry* does not give a state court the ability to affect the legal relations of persons otherwise outside the scope of its judicial power." *Id.*; see also Comment, *supra* note 32, at 802-03.

³⁸ See *supra* note 37. It would be unfair to bind a nonresident plaintiff without minimum contacts because the possible adverse decision handed down by a foreign court has res judicata effect on him; he could be required to pay court costs and, if the defendant brings a counterclaim, he may be subject to liability, and if the forum court's choice of law rule requires the forum state to apply the substantive law of the plaintiff's home state and that law is misinterpreted by the forum court, the plaintiff would be bound by an erroneous decision. *Id.*

³⁹ 105 S. Ct. 2965 (1985).

⁴⁰ *Id.* at 2968. Each class member was then sent a notice of the action by mail stating that they could actively take part in the action or be represented by the named plaintiffs. The named plaintiffs were Irl Shutts, Robert Anderson and Betty Anderson. The class members were also given the opportunity to opt-out of the class by returning a "request for exclusion." Otherwise, they would be included in the class and be bound by the judgment. *Id.* at 2969.

⁴¹ *Shutts II*, 235 Kan. at 198, 679 P.2d at 1165. The class was reduced from a potential size of 33,000 after 3,400 class members elected to opt-out, and another 1,500 were excluded because actual notice could not be delivered. *Id.*

royalty payments which had been delayed by the defendant.⁴² The trial court granted the motion that the suit be certified as a class action notwithstanding the fact that over 99% of the gas leases and 97% of the plaintiffs had no connection with Kansas except for the lawsuit.⁴³ On appeal, the Supreme Court of Kansas affirmed the lower court's decision and held that the Kansas court could exercise jurisdiction over class plaintiffs who had no minimum contacts with the state and that notice and the opportunity to opt-out were sufficient to satisfy due process requirements.⁴⁴ The Supreme Court granted certiorari and upheld the judgment of the Supreme Court of Kansas insofar as it upheld the jurisdiction of the Kansas courts over the plaintiff class members.⁴⁵

Writing for the Court, Justice Rehnquist rejected the defendant's contention that the Kansas court could not exercise jurisdiction over the class action plaintiffs absent minimum contacts with the forum.⁴⁶ Justice Rehnquist reasoned that out-of-state plaintiffs are not saddled with the same burdens imposed on an absent defendant.⁴⁷ The Court recognized that while a defendant is compelled to travel to the forum to defend himself,⁴⁸ a class-action plaintiff may "sit-back" and allow the action to proceed knowing that there are safeguards in place to protect him.⁴⁹ The Court further rejected the defendant's contention that the opt-out procedure allowed by the Kansas statute⁵⁰ was inadequate and that an affirmative "opt-in" procedure was required in order to be bound

⁴² 105 S. Ct. at 2965. The plaintiffs reside in all fifty states, the District of Columbia, and several foreign countries. Irl Shutts, a resident of Kansas, filed the suit in Kansas state court and motioned that the suit be certified as a class action. *Id.* at 2965.

⁴³ 105 S. Ct. at 2967.

⁴⁴ 235 Kan. at 222, 679 P.2d at 1168, 1171.

⁴⁵ 105 S. Ct. at 2981. In *Phillips*, the Supreme Court reversed the judgment of the Supreme Court of Kansas insofar as it determined that Kansas law was applicable to all the transactions. *Id.*

⁴⁶ *Id.* at 2972-73. The defendant in *Phillips*, relying upon *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), which applied the minimum contacts test to out-of-state defendants, argued that the minimum contacts test should apply to absent class action plaintiffs. *Id.*; see *supra* notes 27-29 and accompanying text.

⁴⁷ *Phillips*, 105 S. Ct. at 2973.

⁴⁸ *Id.*

⁴⁹ *Id.* at 2974-75.

⁵⁰ KAN. STAT. ANN. § 60-223(b)(3)(c) (Supp. 1984). Section 60-223(b)(3)(c) of the Kansas statute is identical to Rules 23(b)(3)(B) and 23(c)(2)(A) of the Federal Rules of Civil Procedure. Compare KAN. STAT. ANN. § 60-223(b)(3)(c) with FED. R. CIV. P. 23(b)(3) & (c)(2)(a).

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by a state court judgment.⁵¹ Justice Rehnquist stated that the Kansas opt-out procedure satisfied the requirements of due process. Furthermore, the Court concluded that to require the plaintiff to affirmatively seek inclusion would be inefficient.⁵² The Court held that while it was not necessary for a plaintiff to possess minimum contacts with the forum, "minimal procedural due process protection" was required.⁵³

While *Phillips* resolved the jurisdictional due process problems of those class action plaintiffs who were given the opportunity to opt-out,⁵⁴ the *Phillips* Court stated that its holding was limited to class actions for money judgments and that it expressed no view towards other types of class actions.⁵⁵ Therefore, it is submitted that the applicability of this holding to mandatory class action plaintiffs is uncertain.⁵⁶

While courts have permitted certification⁵⁷ of multistate plaintiff class actions under Rule 23(b)(1),⁵⁸ which does not give plain-

⁵¹ *Phillips*, 105 S. Ct. at 2975. In *Phillips*, Justice Rehnquist reasoned: "The plaintiff's claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually, nor would he affirmatively request inclusion in the class if such a request were required." *Id.* at 2976.

⁵² *Id.* at 2976. The *Phillips* Court stated that the defendant's proposed opt-in requirement would invalidate many existing state statutes as well as the pertinent provision of the Federal Rules of Civil Procedure. *Id.* at 2976, & n.5. See FED. R. CIV. P. 23(c)(2)(A).

⁵³ *Phillips*, 105 S. Ct. at 2975. The *Phillips* Court explained that the "minimal due process protection" required for a class action includes "notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel; [and t]he notice should describe the action and the plaintiff's right in it." *Id.* at 2975. The *Phillips* Court held:

[D]ue process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt-out' or 'request for exclusion' form to the court. Finally the Due Process Clause requires that the named plaintiff at all times adequately represent the interests of the absent class members.

Id. (citation omitted).

⁵⁴ See *supra* note 51.

⁵⁵ 105 S. Ct. at 2975 n.3. The footnote reads:

Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately [sic] for money judgments. We intimate no view concerning other types of class action lawsuits, such as those seeking equitable relief. Nor, of course, does our discussion of personal jurisdiction address class actions where the jurisdiction is asserted against a defendant class.

Id.

⁵⁶ See *supra* note 18.

⁵⁷ See *supra* notes 13 and 15 and accompanying text.

⁵⁸ See, e.g., *In re Northern Dist. of California "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459

tiffs the right to exclude themselves from the litigation, the jurisdictional issue is not yet settled. Such certification has been justified by the notion that since individual plaintiff suits would be similar they would be inefficient, costly,⁵⁹ and possibly inconsistent.⁶⁰ It has also been argued that the sum of the many individual claims will exceed the resources of a defendant especially where there is a limited fund⁶¹ involved, thus allowing recovery for only

U.S. 1171 (1983); *In re Fed. Skywalk Cases*, 93 F.R.D. 415 (W.D. Mo.), *vacated*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982); *In re Benedictin Prods. Liab. Litig.*, 102 F.R.D. 239 (S.D. Ohio), *rev'd*, 749 F.2d 300 (6th Cir. 1984); *see also supra* note 15. *Dalkon Shield* was vacated because various class action prerequisites were not met. *See* 693 F.2d at 850. *Skywalk* was vacated on the ground that certification of the mandatory class violated the Anti-Injunction Act which prohibits federal courts from staying state court actions. *See* 680 F.2d at 1184. The *Dalkon Shield* court took the position that the minimum contacts test did not apply to unnamed members of a plaintiff class and that adequate representation was sufficient for jurisdiction. 526 F. Supp. at 906-07. This position is supported by Section 41(2) of the Restatement (Second) of Judgments: "A person represented by a party to an action is bound by the judgment even though the person himself does not have notice of the action, is not served with process, or is not subject to service or process." RESTATEMENT (SECOND) OF JUDGMENTS § 41(2) (1982). The court in *Feldman v. Bates*, 143 N.J. Super. 84, 362 A.2d 1177 (1976), argued that the corresponding section in the tentative draft, RESTATEMENT (SECOND) OF JUDGMENTS § 85(2) (Tent. Draft No. 2, 1975), misstated existing law, and that a reading of the 1975 proceedings of the American Law Institute suggested that the intent of the section was merely to permit courts to exercise jurisdiction over nonresidents when "affiliating circumstances, such as common trust funds," were present. Comment f to Section 41(2) adds that a representative is sufficient to satisfy the jurisdiction requirements: "participation through a representative implies that it is unnecessary for the represented person himself to be before the court." RESTATEMENT (SECOND) JUDGMENTS § 41(2) comment f (1982).

⁵⁹ *Dalkon Shield*, 526 F. Supp. at 894; *Skywalk*, 93 F.R.D. at 428; *see also* *Rosenfeld v. A.H. Robins*, 63 App. Div. 2d 11, 29, 407 N.Y.S.2d 196, 207 (2d Dep't) (Shapiro, J., dissenting) (complex litigation too expensive to bring individual actions), *appeal dismissed*, 46 N.Y.2d 731, 385 N.E.2d 1301, 413 N.Y.S.2d 374 (1978). Judicial economy is also a concern where many plaintiffs are involved and separate trials would require extraordinary amounts of time and duplication of effort. *In re Agent Orange Prod. Liab. Litig.*, 506 F. Supp. 762, 784 (E.D.N.Y. 1980).

⁶⁰ *Compare* *Evangelinos v. Trans World Airlines*, 396 F. Supp. 95 (W.D. Pa. 1975) (airline not liable under Warsaw Convention for passenger injuries caused by terrorists), *rev'd*, 550 F.2d 152 (3d Cir. 1977), *with* *Day v. Trans World Airlines*, 393 F. Supp. 217 (S.D.N.Y.) (airline liable under Warsaw Convention to passengers injured in same attack involved in *Evangelinos*), *aff'd*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 980 (1976).

⁶¹ *Payne v. Travenol Laboratories Inc.*, 673 F.2d 798, 834 (1982) (where there is a limited fund involved, the class action is necessary to permit all similarly injured plaintiffs to recover); *Dalkon Shield*, 526 F. Supp. at 897 (a limited fund may preclude recovery of punitive damages by later-prevailing class members). One form of "limited fund" may involve the defendant's total assets. In other contexts, a limited fund may be represented by a specific asset such as an insurance policy from which all claims must be recovered.

Insufficiency of funds is especially likely when punitive damages are sought, for they can be considerably larger than actual damages. *See Dalkon Shield*, 526 F. Supp. at 897-98; *cf.* *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (suit award-

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the "winner of the race to the courthouse."⁶² It is suggested that these are essentially policy arguments which, however valid, cannot stand because their implementation would result in the denial of due process to individuals.

The individual has an important liberty interest⁶³ which is protected when jurisdiction is authorized by him either through his contacts with a state or through his consent.⁶⁴ This interest is violated when a state attempts to exercise jurisdiction over the individual when he has not consented and has no connection whatsoever with that state. Such a violation took place in *In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation*⁶⁵ where every nationwide claim was ordered to be brought in California over the strong objections of the vast majority of the plaintiffs.⁶⁶ A defense to this position has been that although mandatory class action plaintiffs cannot exclude themselves from the action, they may actively participate in it, or have their interests represented.⁶⁷ This argument fails simply because in multistate plaintiff class actions, it would be extremely inconvenient for most plaintiffs to travel to a distant forum and there is no certainty that they will be adequately represented.⁶⁸

ing \$2.5 million in compensatory damages and punitive damages of \$125 million reduced to \$3.5 million).

⁶² *Skywalk*, 93 F.R.D. at 424. "Where a limited fund exists, individual members of the class face a very real risk that the winner of the race to the courthouse might be awarded all of the monies available." *Id.* Adjudication of mass tort claims in bankruptcy court is a possibility. Adjudication under the bankruptcy statute, see 28 U.S.C. § 1471(b) (Supp. III 1979), provides many of the advantages of mandatory class actions such as uniformity and comprehensive, albeit limited, compensation. One commentator, however, asserted that the threat of bankruptcy to mass tort defendants is "more theoretical than real," pointing to the MER/29 products liability litigation that ran its course leaving the defendant, Richardson-Merrill, intact. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1324-35 (1976).

⁶³ See *Burger King Corp. v. Rudzewicz*, 471 U.S. ____, ____, 105 S. Ct. 2174, 2181-82 (1985); *Insurance Corp. of Ireland Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

⁶⁴ See *supra* note 63.

⁶⁵ 526 F. Supp. 887 (N.D. Cal. 1981).

⁶⁶ The *Dalkon Shield* court violated the liberty interest by forcing the plaintiffs to bring their claims in a court that had no jurisdiction over them and then binding them to the judgment thus denying them due process. *Dalkon Shield*, 526 F. Supp. at 907. There was a "visceral reaction of many plaintiffs that the *Dalkon Shield* court's assertion of jurisdiction over cases filed outside California was an infringement of their rights." *Id.*

⁶⁷ *Dalkon Shield*, 526 F. Supp. at 905.

⁶⁸ Through mass representation there is the strong possibility of conflict of interest.

It is suggested that multistate mandatory class action plaintiffs are like defendants in that they are hailed into a particular court and compelled to litigate their rights at a time and place that is not necessarily of their choice. Also, like defendants, multistate mandatory class action plaintiffs are bound by the court's judgment through *res judicata* and are estopped from bringing their own individual action.⁶⁹ They may also be required to appear for depositions, answer interrogatories,⁷⁰ and be subjected to counterclaims under certain circumstances.⁷¹ Therefore, it is submitted that the minimum contacts test which is grounded in concepts of fairness should also apply to mandatory class action plaintiffs.

While the application of minimum contacts to mandatory class action plaintiffs could possibly increase the number of individual suits in different forums arising from the same facts, it is suggested that this would be a small price to pay in order to assure due process protection.

CONCLUSION

Phillips has resolved the jurisdictional due process controversy for Rule 23(b)(3) class actions in favor of not applying the minimum contacts test to class action plaintiffs as long as they are guaranteed notice and the right to opt-out of the class. Since Rule 23(b)(1) class action plaintiffs do not have this right, the forum

Therefore, the individual plaintiff is usually not willing to rely on a representative, and feels compelled to directly intervene in the forum state. *Skywalk*, 93 F.R.D. at 425.

⁶⁹ *Phillips*, 105 S. Ct. at 2969. Plaintiffs in the class action could be bound by *res judicata*. See Note, *Consumer Class Actions with a Multiple Class: A Problem of Jurisdiction*, 25 HASTINGS L.J. 1411, 1424 n.76 (1974); Note, *Toward a Policy-based Theory of State Court Jurisdiction Over Class Actions*, 56 TEX. L. REV. 1033, 1044 n.67 (1978).

⁷⁰ See, e.g., *Dellums v. Powell*, 566 F.2d 167, 187 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978); *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 340-41 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974); *Enterprise Wall Paper Mfg. Co. v. Bodman*, 85 F.R.D. 325, 327 (S.D.N.Y. 1980); *United States v. Trucking Employers, Inc.*, 72 F.R.D. 101, 104 (D.D.C. 1976); *Robertson v. National Basketball Ass'n*, 67 F.R.D. 460, 462-63 (D. Utah 1972) (*dictum*). But see *Wainright v. Kraftco*, 54 F.R.D. 532, 534 (N.D. Ga. 1972); *Fischer v. Wolfenbarger*, 55 F.R.D. 129, 132 (W.D. Ky. 1971).

⁷¹ See, e.g., *Herman v. Atlantic Richfield Co.*, 72 F.R.D. 182, 186 (W.D. Pa. 1976) (if class is compact and well defined and there was individual notice and right to opt-out); *Rollins v. Sears, Roebuck & Co.*, 71 F.R.D. 540, 543 (E.D. La. 1976) (if class members are identified by name); *Turoff v. Union Oil Co.*, 61 F.R.D. 51, 59 (N.D. Ohio 1973) (if amounts owing arise out of the transaction at issue); *Weit v. Continental Ill. Nat'l Bank & Trust Co.*, 60 F.R.D. 5, 8 (N.D. Ill. 1973) (if class members file claims).

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court must base its jurisdiction on the contacts the plaintiffs have had with the state. Therefore, it is suggested that the minimum contacts test must apply to mandatory class action plaintiffs. If this test is not satisfied the plaintiffs should not be bound by any judgment.

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