INTRODUCTION

The due process clause, "one of the murkiest constitutional mandates," tempts legal practitioners, judges, and scholars to grasp for words to give content to this constitutional enigma. The further temptation is to equate such secondary language—whether in the form of an explanatory phrase, formula, or many-pronged test—with due process itself and to apply it in new contexts without focusing on its original content. It is easy to lose sight of the fact that "due process is flexible and calls for such procedural protections as the particular situation demands."2

The contours of due process are particularly murky in the class action area. Here, the conflict between plaintiff classes and individual defendants reflects an underlying clash of philosophies "between the traditional individualism theory of litigation, which requires individual initiative to authorize passive judicial remedies, and a new, active protection theory," which "allows a stranger, a lawyer, and a court to initiate [an] action" on behalf of a passive class of plaintiffs. To complicate matters further, the class action mechanism may serve one or more functions: to deter unfair or illegal conduct on the part of businesses and government agencies, to disgorge unjustly realized profits, or to compensate victims. Additionally, both the size of the class and scope of relief may vary considerably. Contrast, for example, the antitrust class action, implicating perhaps millions of consumers, each with a claim of only a few dollars, with the employment discrimination suit brought on behalf of fewer than a hundred employees, each of whom has a claim for substantial backpay in addition to an equitable demand for changes in hiring and promotion practices.

3 There also exists the possibility of a dispute between individual or class plaintiffs and a class of defendants. Consideration of the due process concerns of defendant class members, however, is beyond the scope of this Comment. But see generally Wolfson, Defendant Class Actions, 38 Ohio St. L.J. 459 (1977); Note, Defendant Class Actions, 91 Harv. L. Rev. 630 (1978); Note, Personal Jurisdiction and Rule 23 Defendant Class Actions; 53 Ind. L.J. 841 (1978).
5 Id. at 26.
In light of the complexity and far-reaching impact of class actions, it is not surprising that the due process interests of class members have preoccupied jurists and commentators. Most acknowledge differences between individual and class litigation and note the variety of forms a class action may take depending on the size of the class and the nature of the relief sought. Nonetheless, there is a tendency to import into class litigation the due process requirements developed in the individual litigation context and to apply these touchstones uniformly to plaintiff members of class actions, regardless of the different due process considerations different types of class actions may involve. Thus, such due process concepts as minimum contacts\(^6\) and notice and opportunity to be heard\(^7\) often appear in class action opinions\(^8\) and journal articles\(^9\)

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\(^6\) See infra text accompanying notes 30-36.
\(^7\) See infra text accompanying notes 37-41.


but seldom are accompanied by an examination of how well the functions of such traditional due process concepts match the due process interests of plaintiff class members. This Comment undertakes such an examination.

The class action label applies to a wide variety of cases, ranging from mass tort actions involving individual claims of millions of dollars to small-claim consumer actions in which the individual stakes are negligible. This Comment argues that the constitutional interests of plaintiff class members bringing damage actions vary according to the size of their individual claims and that, therefore, the constitutional protection afforded plaintiff class members should vary to reflect those different interests. Thus, the larger the individual claims of plaintiff class members, the greater the interest each member will have in the suit, and the more demanding should be the requirements of due process. Conversely, the smaller the individual claims of plaintiff class members, the less the interest each member will have, and the less stringent should be the requirements of due process.

To set the stage, the first section of part I discusses the personal jurisdiction and notice requirements that have been imposed upon or recommended for class actions. Then, shifting to the context of single-party litigation, the next section outlines the specific requirements that have been articulated in the name of the traditional concepts of personal jurisdiction and prejudgment notice. The Comment then examines the constitutional interests that these requirements are intended to serve.

Having identified the interests that enlighten the due process requirements of personal jurisdiction and notice, the Comment considers in part II the import of these interests for class actions. Specifically, the part asks whether these interests support transplanting into the class action context the standards used in the traditional single-party context. The first section considers the appropriateness of personal jurisdiction requirements over absent class plaintiffs for differing types of class actions. It concludes that the traditional notions of personal jurisdiction are not suitable for many types of class actions. The second section

looks to the appropriateness of prejudgment notice to class plaintiffs and concludes that traditional prejudgment notice is not necessary for all class actions. Finally, the last section points to protections available to plaintiff class members in those cases where the Comment has concluded that the traditional safeguards are unjustified.

I. PERSONAL JURISDICTION AND NOTICE: TOUCHSTONES OF DUE PROCESS?

A. Due Process Rights in Class Actions

In the conventional class action—a suit brought against individual defendants on behalf of a large number of plaintiffs—the extent to which the constitutional procedural due process requirements of personal jurisdiction and prejudgment notice apply to absent class plaintiffs is unsettled. The Supreme Court has denied\(^\text{10}\) or dismissed\(^\text{11}\) certiorari on the issue of personal jurisdiction, and it has not decided whether prejudgment notice to absent class members is constitutionally required.\(^\text{12}\)

Opinions vary on the constitutional necessity of personal jurisdiction over absent members of a plaintiff class. While some courts and commentators have assumed that the same minimum contacts that are required between a defendant and the forum in a traditional non-class suit\(^\text{13}\) must exist between the absent class member and the forum,\(^\text{14}\)


\(^{12}\) Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), held that individual prejudgment notice to members of a federal Rule 23(b)(3) class was required under subsection (c)(2) of the Rule, not that it was constitutionally required. Id. at 173-75. The Court has never held that notice to members of Rule 23(b)(1) or (b)(2) classes is required, even by the Rule itself.

\(^{13}\) See infra text accompanying notes 24-36.

others would require only some relationship between the forum and the subject of the class litigation,¹⁵ and a third group would not impose either a minimum contacts or a forum interest limitation.¹⁶ Rejecting the jurisdictional requirements traditionally imposed on individual parties, this third group argues that in a class action the due process interests of absent plaintiff class members are adequately protected by the class representative and the court.¹⁷

Similarly, views on the constitutional necessity of notice to absent class members vary from those that would, like traditional approaches to non-class suits,¹⁸ require prejudgment notice in all cases¹⁹ to those

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¹⁸ See infra notes 37-41 and accompanying text.

that would require it only in some cases or not at all. Like those who would reject traditional jurisdictional requirements for absent plaintiff class members, those who would dispense with the requirement of prejudgment notice to absent class members assume that the due process interests of the class would be adequately protected by the class representative and the court.

A third approach, advocated by Professor John Kennedy, would merge jurisdiction and notice requirements. Kennedy argues that, at least in cases where class members have the right to opt out of the class, notice can constitute a waiver of jurisdictional objections from those absent class members who do not respond, thereby conferring jurisdiction on the court by default. This approach rejects the traditional view that neither jurisdiction nor notice can substitute for the other.

Thus, theories of procedural due process in the class action context can range far from those approaches developed in the context of single-party litigation. While recognizing the merit of each of these theories for certain types of class actions, this Comment argues that none is sufficient for all types of class actions.

Courts developed the procedural due process safeguards of personal jurisdiction and notice for the protection of individual defendants.

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21 Dam, Class Action Notice: Who Needs It?, 1974 Sup. Ct. Rev. 97, 121-26 (proposing a return to one-way intervention, as well as elimination of the notice requirement); cf. Berry, Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action, 80 Colum. L. Rev. 299, 326-27 & n.188 (1980) (advocating provision of Senate bill for reform of federal class damage action, which would require no notice in "deterrence-oriented public actions" involving 200 or more class members and individual claims of $300 or less).

22 See cases and authorities cited supra note 20.
To the extent that the interests of members of plaintiff classes resemble those of individual defendants, it makes sense to transplant defendant safeguards into the class action context. However, the less the similarity between class members' interests and individual defendant interests, the less the justification for imposing upon class action plaintiffs restrictions designed to serve the interests of individual defendants. This Comment advocates an approach that would pierce the class characterization and would allow the requirements of due process to vary according to the similarity of interests of plaintiff class members to those of individual defendants.

The next section of the Comment examines the specific requirements arising from the procedural due process concepts of personal jurisdiction and prejudgment notice as those requirements have developed in the context of traditional single-party litigation. The constitutional interests supporting these requirements are then considered; these interests will be the basis for the analysis in part II, which considers, in light of these interests, the procedural due process requirements appropriate for class actions.

**B. Due Process in Single-Party Litigation**

The limits on the powers of states to assert jurisdiction over individual defendants have expanded beyond the rigid bounds of territoriality and residence to the flexible requirement of "minimum contacts." In 1878 the Supreme Court held in *Pennoyer v. Neff* that a state's sovereign power was confined by the physical boundaries of the state—only residents, or persons who were found within the state or who submitted themselves voluntarily to the state's jurisdiction by appearing in court, could be bound by a judgment. But with the expansion of multistate commerce and the general increase in mobility, territorial restraints on jurisdiction became inadequate. Domicile, implied consent, and

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24 95 U.S. 714 (1878).
25 *Id.* at 720.
27 *See*, e.g., Milliken v. Meyer, 311 U.S. 457, 462 (1940) ("Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service.").
28 *See*, e.g., Adam v. Saenger, 303 U.S. 59 (1938) (upholding a state rule of procedure by which a personal judgment could be rendered in a cross-action against a plaintiff in the state's courts); Hess v. Pawloski, 274 U.S. 352 (1927) (upholding a Massachusetts statute under which the operation by a nonresident of a motor vehicle on a public way of the commonwealth was equivalent to an appointment by the nonresident of the commonwealth's registrar of motor vehicles as his agent for service of process in
constructive presence\textsuperscript{29} were accepted as bases for jurisdiction. Finally, in \textit{International Shoe Co. v. Washington},\textsuperscript{30} handed down in 1945, the Court declared that a state court could assert jurisdiction over persons who had "certain minimum contacts" with the territory of the forum.\textsuperscript{31} Subsequent cases have affirmed the \textit{International Shoe} minimum contacts test for personal jurisdiction.\textsuperscript{32}

The requirement that a party sought to be joined in an action have minimum contacts with the forum has evolved to a standard that requires the party to have either "continuous and substantial"\textsuperscript{33} ties with the forum—so that she would not be burdened greatly by also appearing in litigation there—or isolated contacts with the forum that gave rise to the litigation itself.\textsuperscript{34} Under the Court's analysis in \textit{World-Wide Volkswagen v. Woodson},\textsuperscript{35} however, not just any litigation-related contacts will do. The contacts must have been initiated by the person sought to be joined and must be of such a quality that she could not only have reasonably foreseen their giving rise to litigation in the forum, but could also have anticipated such.\textsuperscript{36} Implicit in either a finding of substantial and continuous or specific, litigation-related contacts with the forum is a judgment that the party thereby joined had control over the conduct that created the contacts and, therefore, could have avoided the litigation by ordering her affairs differently.

In addition to the due process requirement of nexus between the forum and defendant, procedural due process also requires that a defendant be given adequate notice and an opportunity to be heard.\textsuperscript{37} Individual notice through service of process is ordinarily required. If such notice is impossible or impracticable, notice may be given in some manner "reasonably calculated, under all the circumstances," to convey the required information.\textsuperscript{38} In such cases, the form of notice chosen must be one "not substantially less likely to bring home notice than other of the

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\textsuperscript{30} 326 U.S. 310 (1945).
\textsuperscript{31} Id. at 316.
\textsuperscript{33} International Shoe Co. v. Washington, 326 U.S. 310, 318 (1945).
\textsuperscript{34} See McGee v. International Life Ins. Co., 355 U.S. 220 (1957); see also J. MOORE, J. LUCAS, H. FINK & C. THOMPSON, 2 MOORE'S FEDERAL PRACTICE ¶ 4.41-1[3] [hereinafter cited as 2 MOORE].
\textsuperscript{35} 444 U.S. 286 (1980).
\textsuperscript{36} Id. at 297.
\textsuperscript{38} Id. at 314.
feasible and customary substitutes." In *Mullane v. Central Hanover Bank & Trust Co.*, for example, the Supreme Court required individual mailed notice, rather than notice by publication, to beneficiaries of a common trust where the trustee knew the names and addresses of the beneficiaries.

Due process requirements of personal jurisdiction over and notice to defendants and other interested parties are meshed in state long-arm statutes. A long-arm statute may be viewed primarily as authorization to a forum court to serve notice on defendants or other interested parties who are not residents of the forum state. But, because it is subject to the limitations of the due process clause, the long-arm statute may also be viewed as defining the constitutional limits of the forum court's jurisdiction over nonresident defendants and interested parties. Despite the merging of personal jurisdiction and notice requirements in

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59 *Id.* at 315.
61 *Id.* at 318-20.
62 As used in this Comment, "interested parties" refers to individuals who could be joined in a traditional lawsuit under a forum's mandatory or permissive joinder rules. See, e.g., FED. R. CIV. P. 19 (mandatory joinder of necessary parties); FED. R. CIV. P. 20 (permissive joinder of parties whose claims or potential liabilities arise "out of the same transaction, occurrence, or series of transactions or occurrences" and present a "question of law or fact common to all [plaintiffs or defendants] . . . in the action").
63 See, e.g., CAL. CIV. PROC. CODE § 410.10 (West 1973); N.Y. CIV. PRAC. LAW § 302 (McKinney 1972); VT. STAT. ANN. tit. 12, § 855 (1973); see also 2 MOORE, supra note 34, ¶¶ 4.41-1[1] & 4.41-1[3].

Some states have explicitly incorporated due process into their long-arm statutes. See, e.g., 42 PA. CONS. STAT. ANN. §§ 5308, 5322 (Purdon 1981). Writing due process into a long-arm statute can serve two functions. It can provide a constitutional self-check by stipulating that all other provisions of the statute must comport with due process, or it can act as a constitutional extender by providing that in addition to the specific long-arm provisions of the statute, a forum court's jurisdiction also reaches to the fullest extent of due process. The Pennsylvania long-arm statute does both. Section 5308 permits Pennsylvania courts to exercise jurisdiction "only where the contact with [the] Commonwealth is sufficient under the Constitution of the United States." Section 5322, the long-arm statute itself, provides that in addition to its specific provisions, Pennsylvania courts may assert jurisdiction over nonresidents "to the fullest extent allowed under the Constitution of the United States . . . based on the most minimum contact . . . allowed under the Constitution." California's long-arm statute simply provides, "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." CAL. CIV. PROC. CODE § 410.10 (West 1973).
the fabric of a long-arm statute, the two are not interchangeable. Neither jurisdiction nor notice can substitute for the other, nor does the existence of one automatically create the other.45

1. Functions of Personal Jurisdiction

In World-Wide Volkswagen, the Supreme Court outlined the two principal rationales for the minimum contacts requirement:

[A] state court may exercise personal jurisdiction over a non-resident defendant only so long as there exist “minimum contacts” between the defendant and the forum State. The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.46

The first function protects the individual liberty interests of those over whom a court is seeking to assert jurisdiction.47 As the Supreme Court wrote in International Shoe, “Due process requires that in order to subject a defendant to judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”48 The importance of fairness was reemphasized in Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxite de Guinee,49 the Court’s most recent pronouncement on personal jurisdiction. Thus, a court’s ability to assert personal jurisdiction over a party or parties is a matter of fairness—the fairness of requiring a party to participate in a suit in a particular forum or, alternatively, the fairness of binding that party to the outcome of the suit.50

45 See 2 Moore, supra note 34, at ¶ 4.34[2].
48 See International Shoe, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
49 456 U.S. 694, 702 (1982); see infra text accompanying note 53.
50 This assumes that the judgment would be given full faith and credit if raised or attacked in a subsequent proceeding in another state or federal court. See U.S. Const. art. IV, § 1; 28 U.S.C. § 1738 (1982). Lack of jurisdiction over a party whose rights were adjudicated in the original proceeding would be a ground for attacking the judgment in a later proceeding. See J. Moore, J. Lucas & T. Currier, 1B Moore’s Federal Practice ¶ 4.05 [4-1] n. 24 and accompanying text (2d ed. 1948) [hereinafter...
The role of the second function discussed in *World-Wide Volkswagen*—preservation of state sovereignty—is unclear. The Court’s preoccupation with federalism in *World-Wide Volkswagen* provoked critical commentary\(^5\) and the *Insurance Corp.* opinion calls into question whether this consideration retains any validity. Writing for the Court, Justice White stated, "The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."\(^5\) In a lengthy footnote, Justice White further explained,

> [O]ur holding today does not alter the requirement that there be "minimum contacts" between the nonresident defendant and the forum State. . . . The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirements and the Clause itself makes no mention of federalism concerns. . . .\(^5\)

This language makes clear that federalism no longer represents an independent restraint upon courts' efforts to assert jurisdiction. Rather, if federalism remains a factor to be considered at all, considerations of it have been subsumed into considerations for individual liberty interests. Thus, one can conclude that the primary rationale for the personal jurisdiction requirement is the protection of the liberty interests of defendants or other parties.

2. Functions of Prejudgment Notice

Notice protects the due process interests of the notified party, who is thereby informed that an adjudication of her rights is imminent and who, through notice, is given an opportunity to appear in the proceeding before the court renders judgment.\(^5\) In the words of the Supreme Court, "[t]he fundamental requisite of due process of law is the oppor-

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\(^{52}\) *Insurance Corp.*, 456 U.S. at 702.

\(^{53}\) Id. at 703 n.10.

\(^{54}\) See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("[T]he right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."); 2 MOORE, *supra* note 34, at ¶ 4.02[3]; text accompanying n.22.
tunity to be heard.' 55

Because due process presumes that interested parties will want to exercise their opportunity for a hearing,56 actual, timely notice becomes the constitutional goal. Thus, personal notice early in the litigation is always adequate;57 and most jurisdictions require personal or mailed service of process within days or weeks of filing suit.58 Any less effective means of notification, for example, by posting or publication, must meet the standard articulated in Mullane that "within limits of practicability notice must be such as is reasonably calculated to reach interested parties."59

Mullane makes clear, however, that the question of whether individual notice is constitutionally required is resolved by balancing the individual interest sought to be protected by the due process clause against the interest of the state in adjudicating the suit. Although acknowledging that notice by publication was essentially the equivalent of no notice,60 the Court in Mullane approved such notice for certain absent parties whose "interests in the common fund [were] so remote as to be ephemeral."61 The Court recognized the "practical difficulties and costs that would be attendant" upon notification of persons whose whereabouts were unknown.62

Thus, the constitutional requirements of notice depend upon the specifics of the case. The notice required varies with the magnitude of the interests of the parties to be notified and with the magnitude of the barrier to the proceedings posed by the notice requirement.

55 Mullane, 339 U.S. at 314 (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)).
56 Id.
57 See id. at 313.
58 See, e.g., PA. R. Civ. P. 233 (general rule governing manner of process); PA. R. Civ. P. 1009 (thirty-day time limit for service of process in assumpsit action); PA. R. Civ. P. 2079 (ninety-day limit for service on nonresident defendants); cf. FED. R. Civ. P. 4(a) ("Upon the filing of the complaint the clerk shall forthwith issue a summons . . ."); FED. R. Civ. P. 4(e) (service of process rule or statute of state in which district court sits may be applied in lieu of federal rule).
59 Id. at 318. In Greene v. Lindsey, 456 U.S. 444 (1982), for example, the Supreme Court invalidated a Kentucky statute that permitted service of process in forcible entry and detainer actions by posting a summons in a conspicuous place on the premises if the defendant or an adult member of the defendant's family could not be found on the premises. The Court observed that many tenants never received actual notice by this manner because the posted notices were removed by children or other tenants, id. at 453-54 & n.7, and concluded that notice by mail would have been far more effective, id. at 455.
60 Mullane, 339 U.S. at 315.
61 Id. at 317.
62 Id.
II. PERSONAL JURISDICTION AND NOTICE IN CLASS ACTIONS

Having identified the interests that animate the procedural due process requirements in traditional single-party suits, the question arises whether those interests favor similar requirements in the class action context. This part of the Comment considers the applicability of traditional notions of personal jurisdiction and notice to absent plaintiffs involved in class actions.

A. Minimum Contacts: Ever Appropriate in Class Actions?

Some courts\textsuperscript{63} and commentators\textsuperscript{64} argue that the same minimum contacts requirement that limits court jurisdiction in traditional single-party suits should also delimit jurisdiction in class actions. Such a requirement would be appropriate for those types of class actions for which the requirement would serve the interest that it serves in single-party suits: protection of the liberty interests of the party over whom the court seeks to assert jurisdiction. In other words, reliance upon minimum contacts would be justified for those types of class actions in which it would be fair for a forum to force a plaintiff to participate in an action in that forum's courts or, alternatively, to enter a judgment in her absence.\textsuperscript{65} But, for those types of class actions in which it would be fair to assert jurisdiction even in the absence of minimum contacts, the minimum contacts requirement loses its justification and should not control.

In what types of class actions, then, does constitutional fairness require that a plaintiff meet the minimum contacts standard? First, in those class actions where the plaintiff members must opt into the class\textsuperscript{66} or where they can opt out of the class\textsuperscript{67} and have the opportunity to do so, it would be fair to recognize jurisdiction even if the minimum contacts standard were not satisfied. In such cases, all those in the class

\textsuperscript{63} See cases cited supra note 14.
\textsuperscript{64} See authorities cited supra note 14.
\textsuperscript{65} See supra text accompanying notes 47-50.
\textsuperscript{66} Opt-in requirements have been frowned upon under the federal class action rule, see MANUAL FOR COMPLEX LITIGATION 18-21 (1973), and were abolished by the 1966 amendments to the federal rules. Opting in is not expressly provided for under most state rules. But see Pa. R. Civ. P. 1711(b) (court may under "special circumstances" require class members to include themselves in the action).
\textsuperscript{67} The federal class action rule and most state rules permit class members to exclude themselves or opt out of certain class proceedings by notifying the court in accordance with its instructions. See Fed. R. Civ. P. 23(c)(2); Pa. R. Civ. P. 1711(a); cf. N.M. R. Civ. P. 23 (class members not permitted to opt out because class action rule does not permit court to entertain the "common question" class actions in which other jurisdictions permit class members to opt out).
would have submitted to the jurisdiction of the court.

It would also be fair to recognize jurisdiction in the absence of minimum contacts in a second group of class actions—actions in which individual claims were so small that no one would pursue them individually. *Miner v. Gillette Co.* is an example of this type of class action.

The class claims in *Miner* arose from a promotion run by the Gillette Company, in which the company had offered to supply a "free Accent Table Lighter" valued at $7.95 in return for proof of purchase of two "Cricket" lighters and fifty cents for postage and handling. Because of an unexpectedly large response, Gillette ran out of table lighters, leaving 180,000 orders unfilled. Gillette sent letters of apology to the 180,000 "unsatisfied" customers, along with fifty cents and a free "Cricket" lighter. Steven Miner, one of the 180,000, filed suit on behalf of the class, alleging breach of contract and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act.

On the issue of personal jurisdiction, the Illinois Supreme Court recognized an "exception" for class actions, holding that the trial court could assert jurisdiction over absent plaintiffs even though the minimum contracts standard was not satisfied. The court explained, "This exception is justified when one examines the nature of a class action suit. Its very purpose is to allow a representative party to pursue the claims of a large number of persons with like claims. It consequently does not contemplate or necessitate the appearance of absent parties."

This Comment agrees with the conclusion reached in *Miner*, although it argues for a different rationale. Rather than waiving the minimum contacts requirement because of the generic aspects of class actions, for example, the purpose of allowing the pursuit of a large number of like claims, a court should determine whether such waiver would be constitutionally fair to the affected plaintiffs by looking at the size of individual claims in the particular case. In a case like *Miner*, where individual claims amount to only a few dollars, a minimum contacts requirement is not justified because the interests the requirement is intended to protect—the liberty interests of prospective class members—are not threatened.

There remains a final type of class action—that in which plaintiff class members have substantial individual claims and no right to opt

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69 87 Ill. 2d at 10, 428 N.E.2d at 480. Under the state's consumer fraud statute, plaintiffs may recover their "actual damages and any other relief which the court deems proper." ILL. ANN. STAT. ch. 121 1/2, ¶ 270A, § 10a (Smith-Hurd Supp. 1981).

70 *Miner*, 87 Ill. 2d at 12-14, 428 N.E.2d at 481-82.

71 Id. at 14, 428 N.E.2d at 482.
out. Arguably, the same contacts that suffice to create jurisdiction over individual defendants—continuous and substantial contacts with the forum or specific litigation related contacts—would suffice to establish jurisdiction over absent class members in these mandatory large-claim class actions.

To the extent a class member has substantial general contacts with the forum—for example, by regularly vacationing or doing business there—it would be no great hardship to participate in a class proceeding there, either by corresponding informally with class counsel and the court or by entering an appearance through personal counsel. Alternatively, to the extent a class member had initiated particular contacts with the forum that bore significant relation to the subject of the class litigation, it would be fair to include the class member in the suit because she should have anticipated the lawsuit and altered her conduct to avoid inclusion.

While continuous and substantial ties with the forum may be adequate for jurisdiction in all mandatory large-claim class actions, the suggestion that jurisdiction can be premised upon specific litigation-related ties with the forum falters in at least two respects when applied to plaintiff class members involved in these cases. First, few of the isolated contacts an individual initiates with a forum, which in hindsight can be viewed as giving rise to some cause of action against another party, are such that at the time they were initiated the individual should have anticipated being joined in a class action as a result. Individual plaintiffs generally litigate the results of unforeseen rather than anticipated events—harm caused by a defective product, injury from an auto accident, monetary losses due to fraud or breach of contract—and plaintiff class members should be presumed to do the same.

It was just such potential class plaintiffs who opposed national class certification in the recent IUD products liability litigation (Abed v. A.H. Robbins Co., 526 F. Supp. 887 (N.D. Cal. 1981), vacated and remanded, 693 F.2d 847 (9th Cir. 1982), cert. denied, 103 S. Ct. 817 (1983)) and in the Hyatt Regency skywalk litigation (In re Federal Skywalk Cases, 680 F.2d 1175 (8th Cir.), cert. denied, 103 S. Ct. 342 (1982)). For further discussion of these cases, see infra note 118.


Cf. World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297 (1980) (Jurisdiction over nonresident defendant would be fair if defendant "should reasonably anticipate being haled into court [in the forum].")

See Note, Multistate Plaintiff Class Actions: Jurisdiction and Certification, 92 Harv. L. Rev. 718, 732 (1979) ("[P]laintiffs are typically passive with respect to the
Basing jurisdiction on contacts that the party did not anticipate would violate a principle enunciated in *World-Wide Volkswagen Corp. v. Woodson*: "The foreseeability that is critical to due process analysis...is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." For class members whose interests are such as to require that the court have personal jurisdiction, any less stringent minimum contacts test than that adopted for defendants seems inappropriate.

Second, even if a potential class action plaintiff could anticipate that a cause of action might arise from her contacts with a particular forum, the plaintiff would not necessarily be in an economic position to avoid the contacts. Consider, for example, a Pennsylvania resident who purchases through a telephone order a defective product that is manufactured by a company in Texas. Although the purchaser might have anticipated that the product would prove defective, she may have no alternative but to place the order because the product was a necessity not available elsewhere. Consider, on the other hand, the defendant-manufacturer's position. When the subject of the litigation is a defective product, the manufacturer could have altered its behavior and avoided the lawsuit by making a better product. Alternatively, the defendant-manufacturer could have avoided the litigation in the particular forum by not initiating contacts with the forum.

Thus, the concept of minimum contacts, integral to procedural due process in the individual party setting, is of limited usefulness in the class action context. For many types of class actions, a court could as-
sert personal jurisdiction over absent plaintiff class members, even though the minimum contacts standard were not met, without violating the due process rights of those plaintiffs.

Finally, it should be noted that even in those cases where a court determines that the minimum contacts requirement is appropriate—that is, in the rare cases of mandatory class actions involving substantial individual damage claims—the court should be wary of adopting too liberal a contact-counting approach.

A recent national shareholder class action brought in New York provides an example of a case in which a court used a liberal minimum contacts standard and disregarded the magnitude of the claims of individual plaintiffs. In *Katz v. NVF Co.* the court concluded that "the minimum contacts test governs all assertions of State jurisdiction," but suggested that "in the class action context a court can make a determination on whether a nonresident has minimum contacts with the forum by utilizing a liberal approach." The court was not really concerned with the individual liberty interests of the members of the proposed class. The opinion does not even mention the size of class members' individual claims.

Although the flexible minimum contacts test adopted by the court in *Katz* purportedly involved consideration of "the parties, the relief requested and the unavailability of a more suitable forum for adjudication of the controversy," the contacts that satisfied the court were the defendant corporation's extensive activities in New York and New York's interest in entertaining the action. Such ties, though surely rel-

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80 Cases like *Abed v. A.H. Robbins Co.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983), and *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982) (for discussion, see infra note 118), that involve substantial individual damage claims and no opportunity for class members to exclude themselves should be rare because most damage class actions would be brought under federal Rule 23(b)(3)—or an analogous state rule—that permits class members to opt out.

If the *Abed* and *Skywalk Cases* are any indication, the class settings in which a minimum contacts analysis might prove appropriate would be those involving a limited fund available for awarding damages to a sizeable number of plaintiffs. There, a court might be prompted to consider certifying a mandatory class under federal Rule 23(b)(1) or a state analogue to assure some measure of compensation to all plaintiffs.

81 119 Misc. 2d 48, 462 N.Y.S.2d 975 (Sup. Ct. 1983).
82 *Id.* at 54, 462 N.Y.S.2d at 979.
83 *Id.* at 62, 462 N.Y.S.2d at 984. The court did say that class members could opt out.
84 *Id.* at 54, 462 N.Y.S.2d at 979.
85 *Id.* at 55, 462 N.Y.S.2d at 980. The factors considered by the *Katz* court bring to mind the jurisdictional analysis proposed by Justice Brennan in his opinions in *Shaffer v. Heitner*, 433 U.S. 186, 219 (1977) (Brennan, J., concurring in part and dissenting in part) and *World-Wide Volkswagen*, 444 U.S. at 299 (Brennan, J., dissenting). Brennan suggested consideration of "the extent of contacts between the controversy, the
relevant, do not constitute minimum contacts as such have been inter-
preted by the Supreme Court, for they are not the ties between the
parties sought to be joined and the forum state.

Under the analysis proposed by this Comment, the court need not
have demanded a showing of minimum contacts if the individual liberty
interests implicated, as suggested by the size of the individual plaintiff
claims, were not great. However, were the court to determine that min-
imum contacts were necessary for assertion of jurisdiction, the test
should not be as loose at that adopted in *Katz*; fairness requires closer
ties between plaintiffs and the forum than those required by the court in
*Katz*.

B. Notice to Class Members: What Form, When, and Who Pays?

As explained above, the chief function of notice in traditional
single-party litigation is to assure the notified party the opportunity to
be heard. In class litigation, notice similarly gives class members the
opportunity for a hearing in cases in which notice informs them that
they have a right to intervene, opt out, or opt in, which they may exer-
cise by responding to the notice.
Notwithstanding the similar functions notice serves in the single-party and class action contexts, the notice requirement has very different ramifications for class actions. While a notice requirement in single-party litigation may require notifying a handful of people, a similar requirement in a class action may entail notification of thousands, possibly millions, of potential plaintiffs. The difficulty and expense of such a requirement could threaten the viability of large class actions involving small individual claims. This threat leads one to question whether notice is constitutionally required in all class actions.

Where class members' individual claims are so small that individual plaintiffs are likely to have little or no interest in litigating them individually, the constitutional justification for prejudgment notice

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and Shining Knights: Myth, Reality, and the "Class Action Problem," 92 HARV. L. REV. 664, 682 (1979) (Comment) (positive effect of Eisen and other restrictive Supreme Court decisions in federal class actions area is to "encourage[] many plaintiffs' lawyers to be much more precise and careful" and to "act[] more responsibly than before").

Regardless of the functions theoretically served by notice to absent class members, it has been argued that the only real function of notice is that it binds class members to a judgment. See Dam, supra note 21, at 123; see also Kennedy, supra note 4, at 16-17 (notice requirement for (b)(3) class actions added by 1966 amendment to federal rule is essentially an opt-out provision conceived at a time when mutuality of estoppel principle still controlled in federal procedure). Under this analysis, the primary beneficiaries of the notice requirement are the representative plaintiffs, their counsel, and the defendant, who is betting on a binding judgment against the class.

In fact, class members supposedly protected by prejudgment notice are worse off than they would be under a system of post-judgment intervention similar to that which prevailed for "spurious" class actions under the old federal class action rule. Class actions denominated as "spurious" under the 1938 version of Rule 23 were those involving common questions and common relief, but not common "rights" or interests in the same property. The latter characteristics applied to "true" and "hybrid" class actions, respectively. See FED. R. CIV. P. 23 advisory committee note, 39 F.R.D. 69, 98 (1966) [hereinafter cited as Advisory Note]. A member of a spurious class could opt into the class action after a judgment favorable to the class but was not bound by an adverse judgment and was free to relitigate the class claim against the same defendant in a subsequent proceeding. See id. at 99, 105.

A member of a (b)(3) class under the present federal rule is bound by the outcome of the class suit, favorable or unfavorable, unless the individual opts out beforehand. Id. at 105-06. In that case, the self-excluded class member may not later opt in when a favorable judgment is rendered but must institute a new suit against the defendant in order to recover and will only be able to raise the prior class judgment as preclusive in a jurisdiction that permits offensive use of collateral estoppel.

See Kennedy, supra note 4, at 56. Another commentator has observed that "death" was in fact the probable result of the Supreme Court's imposition of an individual notice requirement on the named plaintiff in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). Although the Court there left open the possibility that a more narrowly drawn class might be certified on remand, Eisen apparently decided it was economically worthwhile neither to notify the 2,250,000 "easily ascertainable" members of the original class, see 417 U.S. at 175, nor to litigate on behalf of a substantially smaller class with substantially smaller aggregate damage claims. See Rutherglen, Notice, Scope, and Preclusion in Title VII Class Actions, 69 VA. L. REV. 11, 28 & n.74 (1983).
seems to vanish.\(^9\) Due process requires that notice of a pending court

\(^9\) Indeed, the prevailing view is that due process does not require prejudgment notice to members of every plaintiff class. See supra notes 20-21 and accompanying text. However, commentators differ as to what factors should mitigate the traditional notice requirement in class actions.

Factors frequently cited as relevant in determining whether notice to class members is constitutionally necessary—and if so, in what form—include the nature and scope of class relief sought; the cohesiveness of the class; the ability, motivation, and resources of the class representative and class counsel; the pendency of other individual or class suits on similar or identical claims; the state policies implicated in the litigation; and the costs of communicating with the class.

Some courts and commentators stress one or two of these factors. See, e.g., Johnson v. General Motors Corp., 598 F.2d 432, 437 (5th Cir. 1979) (where previous class action under 23(b)(2) procured only injunctive relief, “due process requires that [notice] be provided before individual monetary claims may be barred”); Larionoff v. United States, 533 F.2d 1167, 1186 n.44 (D.C. Cir. 1976) (notice not constitutionally required in federal (b)(1) and (b)(2) class actions because “the class generally will be more cohesive” and “it is less likely that there will be special defenses or issues relating to individual members of [the class]”), aff’d, 431 U.S. 864 (1977); Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 256 (3d Cir.) (notice to adequately represented (b)(2) class not constitutionally necessary because “[t]he very nature of a (b)(2) class is that it is homogeneous without any conflicting interests between members of the class”), cert. denied, 421 U.S. 1011 (1975); Frank v. Teachers Ins. & Annuity Ass’n of America, 71 Ill. 2d 583, 593, 376 N.E.2d 1377, 1381 (1978) (“[t]he degree there is cohesiveness within the class, the need for notice to absent members will tend toward a minimum,” although notice may be required if there exist questions as to the adequacy of the representation); Advisory Note, supra note 89, at 106 (need for discretionary notice minimal where class is cohesive and class representation is adequate); Fisch, supra note 15, at 197 (notice that ensures adequate representation of class as whole is sufficient); Rutherglen, supra note 90, at 26 (implying that relevant factor in determining appropriate notice is degree of commonality of issues and claims of class members).

Others consider an array of factors. See, e.g., Watson v. Branch County Bank, 380 F. Supp. 945, 958-59 (W.D. Mich. 1974) (notice not required in (b)(2) class actions in light of cohesiveness of class, substantial cost notice would impose on named plaintiffs, and administrative burden it would impose on court), rev’d on other grounds, 516 F.2d 902 (6th Cir. 1975); Kamp, Adjudicating the Rights of the Plaintiff Class: Current Procedural Problems, 26 ST. LOUIS U.L.J. 364, 399 (1982) (suggesting revision of federal class action rule, substituting flexible notice requirement based on considerations of cost, the interest at stake, and the benefits of intervention); Kirkpatrick, Consumer Class Litigation, 50 OR. L. REV. 21, 39 (1970) (“[T]ype of notice to be given should vary with the amount sought in the case, the nature of the claim, the likelihood of absent class members objecting to the suit or the representation, and the likelihood of collusion between the defendant and the party plaintiffs.”); Developments in the Law-Multiparty Litigation in the Federal Courts, 71 HARV. L. REV. 874, 936, (1958) (“nature of the class, procedural safeguards, and judicial administration in granting relief”).

Still others suggest balancing the benefits of notice—solicitations of useful information, intervention by class members—against the costs to the class representative, the class as a whole, and society in general. See Cartt v. Superior Court, 50 Cal. App. 3d 960, 973, 124 Cal. Rptr. 376, 385 (1975) (individual notice inappropriate where “[t]he class is huge, the damages per member trifling and the financial burden of the notice ordered by the . . . court entirely out of proportion to its beneficial results when these are compared to the purely theoretical risks of a less expensive method of notifying the class.”); Comment, Notice in Rule 23(b)(2) Class Actions for Monetary Relief: Johnson v. General Motors Corp., 128 U. PA. L. REV. 1236, 1257-58 (1980) (discussing factors to be taken into account in ordering discretionary notice under 23(d)(2)); cf. McCall,
action be given to individuals who are likely to have a genuine interest in participating in the proceeding. One would think, then, that the factor most relevant to determining the necessity, form, and timing of notice to plaintiff class members would be the probability that they would respond, either by exercising a right to opt in or out, or by requesting to intervene in the proceeding. Common experience suggests that the higher the individual stakes the more likely that class members would respond to notice and take advantage of any procedural rights it offers them.

This Comment argues that imposition of a prejudgment notice requirement should depend upon the size of the individual claims of plaintiff class members. Consequently, a constitutionally valid class action procedure could provide for no prejudgment notice to plaintiff class members in class actions where individual damage claims did not exceed a fixed monetary ceiling—perhaps one hundred or two hundred dollars. Above that ceiling, or where purely equitable relief was sought, a court could have discretion to require some form of prejudgment notice.

Before requiring that personal or individual notice be sent to class

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*Due Process and Consumer Protection: Concepts and Realities in Procedure and Substance—Class Action Issues*, 25 Hastings L.J. 1351, 1409 (1974) (in consumer class actions, interest of absent class members in receiving notice “is clearly overbalanced” by class’s interest in access to courts and society’s interest in “the therapeutic benefits from class litigation”).

92 Class members’ stakes in the litigation need not be monetary. Although difficult to quantify, the interest of an individual in equitable relief from inferior public education or substandard institutional care is significant. For a thorough discussion of the problems of class representation in actions for reform of public and private institutions, see Rhode, *Class Conflicts in Class Actions*, 34 Stan. L. Rev. 1183 (1982).

In class actions in which equitable relief is sought, the size of the individual stakes may depend upon whether individual class members expect individual relief. See Rutherglen, *supra* note 90, at 26-27 (“The appropriate distinction is not between damages . . . and injunctions . . . but between classwide injunctive relief that restructures employment practices and any form of individual compensatory relief, whether legal or equitable.”).

93 Cf. *Unif. Class Actions Act* § 7(d) (1976) (personal or mailed notice to individual class members required only where individual claims exceed $100); Berry, *Ending Substance’s Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action*, 80 Colum. L. Rev. 299, 326 n.184 (1980) (under Department of Justice proposal for legislative overhaul of federal class action rule, H.R. 5103, 96th Cong., 1st Sess. (1979), there would be no notice requirement in “public actions” brought on behalf of 200 or more persons with individual damage claims of $300 or less); *see also* 15 U.S.C. § 15c(b)(1) (1982) (under Hart-Scott-Rodino Antitrust Improvements Act, the only notice required to individuals represented by state attorney general in *parens patriae* antitrust damage action is by publication, unless court finds special circumstances warrant additional notification).

94 This could be by publication, by mail to a sample of the class, or, in class actions brought against regular suppliers of goods or services, by inserts in the defendant’s regular mailings to customers.
members, however, the court should make a finding, supported by evidence, that the individual claims of class members were substantial, that individual prejudgment notice was the only effective means of informing class members of the pending action, and that the names and whereabouts of the class members sought to be notified were already known to the court or could readily be made available. Under such circumstances, individual notice would be required. In the absence of such a finding, however, the court could order individual notice at the request of either party only if that party agreed to finance the costs of identifying class members and printing and delivering the notice. The expense of notice found by the court to be constitutionally necessary would be borne by the class representative or, if necessary to prevent prejudice, by the defendant or the court.

Cf. Fed. R. Civ. P. 23(c)(2) (individual notice required sent to "all members of (b)(3) classes] who can be identified through reasonable effort"); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 317 (1950) (notice by publication sufficient as to trust beneficiaries "whose interests or whereabouts could not with due diligence be ascertained").

As the Supreme Court's treatment in Eisen v. Carlisle & Jacqueline, 417 U.S. 156 (1974), makes clear, such standards of reasonableness may be abused. There, the Court found the names and addresses of 2,250,000 class members "easily ascertainable," 417 U.S. at 175, and held that individual notice had to be mailed to each, notwithstanding that the resulting expense to the class representative might well "place impossible or impractical obstacles in the way" of the class action, see id. at 314. See also Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978) (holding class representative responsible for payment of $16,000 to generate names and addresses of class members for purpose of sending them (b)(3) notices).

Such taxing of costs seem fair in light of the parties' likely motivations for requesting a form of class notice beyond the constitutional minimum. The class representative would wish to define the class as broadly as possible and would be more likely to persuade a court that the scope of the class was legitimate if class members had been notified and invited to exclude themselves if their status did not match the class definition. The optimistic defendant, on the other hand, would wish to bind as many class members as possible to what the defendant anticipated would be a dismissal of the class's claims, by sending opt-out notices to a broadly defined class and hoping few exercised their option. In either case, individual notice would serve the strategic interest of one side or the other, and it would be reasonable to charge for the additional benefit.

The rule articulated here is one of simplicity and economy. A pretrial hearing on the merits to allocate notice costs between class representative and defendant, such as that conducted by the district court and rejected by both the Second Circuit and the Supreme Court in Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 168-69, 177-78 (1974), would prolong the preliminaries of a class action and increase overall class litigation costs. Because in many cases a fairly limited form of notice would be constitutionally sufficient, the initial monetary burden on the class representative would not be overwhelming. Furthermore, the class actions in which individual notice would be constitutionally required would be those in which class members' damage claims were substantial, and the class representative presumably would be willing to cover initial expenses in anticipation of full compensation from a sizeable class judgment.

In any event, this rule would permit courts to shoulder notice costs or transfer them to the defendant in circumstances in which taxing the class representative would be unfair. Certainly where, as in the IUD litigation, discussed supra note 72, it was
Of course, prejudgment notice requirements could be eliminated altogether if courts permitted class members to opt in after judgment. Such one-way intervention, permitted for "spurious" class actions under the original federal class action rule enacted in 1938, was viewed as unfair to defendants, who, unlike plaintiff class members, would be bound by a judgment against them. For this reason, among others, post-judgment intervention was eliminated under the 1966 amendments to the rule; Rule 23(c)(3), which has replaced the spurious class action, combines mandatory notice with a prejudgment opt-out provision. Commentators have suggested, however, that a post-judgment intervention procedure would no longer be unfair to defendants in jurisdictions with liberal collateral estoppel rules. They argue that if a plaintiff who opted out would be allowed through collateral estoppel to raise offensively a prior judgment against the same defendant on a similar claim, it would be no less fair to the defendant if that plaintiff were permitted to intervene after judgment in the original proceeding.

However, in light of the intent of the revisers of federal Rule 23 to do away with one-way intervention and the adoption by most states of a class action rule modeled on the federal one, it appears unlikely that the option will find renewed approval in the courts unless legislators and rulemakers amend their class action statutes and rules to provide the option expressly. Thus, abandonment of the requirement of

the defendant who moved for class certification, rather than a member of the plaintiff class, see Abed v. A.H. Robbins Co., 693 F.2d 847, 849 n.2. (9th Cir. 1982), cert. denied, 103 S. Ct. 817 (1983), it would seem unjust to appoint a class representative and order her to finance notice to the remainder of the class.

98 See Advisory Note, supra note 89, at 99, 105. For a discussion of spurious class actions, see supra note 89.

99 See Advisory Note, supra note 89, at 105-06.

100 See Dam, supra note 21, at 124; Note, supra note 76, at 734-37.

101 This assumes that, in the absence of a post-judgment intervention procedure, individuals not included in the class action but having similar claims against the same defendant would bring separate actions after judgment for the class and could raise the prior judgment as preclusive. However, relitigation of most consumer class action claims would be highly unlikely because the costs of bringing suit would far outweigh the possible recovery for an individual plaintiff. Cf. Dam, supra note 21, at 120 (when defendant wins, other class members usually will not try to relitigate).

102 See supra note 99 and accompanying text.

103 Roughly two-thirds of the states have modeled their class action rules on the 1966 amendment to federal Rule 23. See H. Newberg, supra note 16, § 1210a (Supp. 1983). The remaining states have patterned their rules either on the 1938 version of the federal rule or on the 1849 Field Code, see id., or on the Uniform Class Actions Rule introduced in 1976, see, e.g., Iowa R. Civ. P. 42; N.D. R. Civ. P. 23. Two states, Mississippi and New Hampshire, have no formal class action rule but rely on common law. See H. Newberg, supra note 16, § 1220.

104 In fact, most courts supervising class actions in which class members are per-
prejudgment notice in small-claim class actions, coupled with adoption of a presumption that notice need not be given to members of a plaintiff class, is a more realistic proposal.

Nonetheless, substantial revision would be necessary to bring federal and state class notice rules into conformity with the approach suggested by this Comment. Under federal Rule 23 and the state rules patterned after it, the appropriateness of notice—as well as its form and timing—is determined not by the magnitude of the class members' individual claims but by the nature of the class action itself. No prejudgment notice is required for members of classes certified under subsection (b)(1) and (b)(2) of the rule, but "the best notice practicable under the circumstances" must issue to all (b)(3) classes.

"Best notice practicable," according to the Supreme Court in Eisen v. Carlisle & Jacquelin, means individual notice to "each class member who can be identified through reasonable effort." Ironically, small-claim class actions are most appropriately brought under state rules patterned after federal Rule 23(b)(3).

105 See supra notes 93-97 and accompanying text.
106 See supra note 103.
107 See Fed. R. Civ. P. 23(c)(2) (prescribing notice only for Rule 23(b)(3) actions). Class actions maintainable under Rule 23(b)(1) are those that, in addition to fulfilling the general prerequisites of numerosity, commonality, typicality, and adequacy of representation contained in section (a) of the Rule, would present risks of inconsistent adjudications or adjudications that would be dispositive of other plaintiffs' claims or would impair their ability to protect their interests. Such class actions might typically involve litigation over rights in real property or a limited fund from which to award damages to several plaintiffs. See Fed. R. Civ. P. 23(b)(1); Advisory Note, supra note 89, at 100-02.
108 See Fed. R. Civ. P. 23(c)(2) (prescribing notice only for Rule 23(b)(3) actions). Class actions certified under Rule 23(b)(2) typically involve claims for injunctive or declaratory relief made on behalf of a group of persons. See Fed. R. Civ. P. 23(b)(2); Advisory Note, supra note 89, at 102.
109 Fed. R. Civ. P. 23(c)(2). A class action may be certified under Rule 23(b)(3) if, in addition to the general prerequisites contained in section (a), "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).
111 Id. at 176.
In contrast to the federal rule, class action rules in four states leave notice to the complete discretion of the trial judge. However, the vast majority take an approach similar to that of the federal rule, and four require notice in all categories of class actions.

Recent cases dramatically illustrate the anomalous results that present class notice requirements can produce. *Abed v. A.H. Robbins Co.* and *In re Federal Skywalk Cases* each involved plaintiffs with substantial individual claims. In each, certification of a national plaintiff class was proposed under subsection (b)(1)(B) of the federal rule. Therefore, had the classes been certified, no notice to class members would have been required, although the court might have ordered some form of discretionary notice "for the protection of the . . . class or otherwise for the fair conduct of the action." On the other hand, in *Miner v. Gillette Co.*, in which individual class members had eight-dollar claims, the Illinois Supreme Court intimated that individual no-

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113 See supra note 103.
114 See N.D.R. Civ. P. 23(g) (personal notice required only for those class whose claims or liability exceed $100; other forms of notice, such as publication, sufficient for members with lesser stakes); Pa. R. Civ. P. 1712 (notice mandatory, but type of notice discretionary); Tex. R. Civ. P. 42(c)(2) ("best notice practicable" in all cases).
116 680 F.2d 1175 (8th Cir.), cert. denied, 103 S. Ct. 342 (1982).
117 693 F.2d at 849; 680 F.2d at 1178. Subsection (b)(1)(B) of Rule 23 applies in cases in which separate adjudications of class members' claims would be dispositive of the interests of other class members or would "substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1)(B). As discussed in the Advisory Committee Note to Rule 23, Advisory Note, supra note 89, at 101-02, such a situation exists when there are insufficient funds available to satisfy the claims of all potential plaintiffs.

In both *Abed* and *Skywalk*, the district courts conditionally certified class actions under 23(b)(1)(B) because of concern that the defendants lacked sufficient funds to pay both compensatory and punitive damages to all plaintiffs. See *Abed*, 693 F.2d at 849; *Skywalk*, 680 F.2d at 1178.

118 The Ninth Circuit in *Abed* vacated the district court's conditional certification of a national (b)(1)(B) class both because it found the basic prerequisites of 23(a)—commonality, typicality, and adequacy of representation—lacking and because it found the district court had not established that the defendant A.H. Robins's funds were in fact "limited." See 693 F.2d at 850-52.

The Eighth Circuit vacated the district court's conditional (b)(1)(B) certification of a class in the *Skywalk* litigation because it found the certification order effectively enjoined pending state proceedings on the same cause of action but did not fall under one of the exceptions to the federal Anti-Injunction Act and thus would be in violation of it. See 680 F.2d at 1180-83.

120 For a review of this case, see supra text accompanying notes 69-71.
tice, while not required under the Illinois class action rule, would be constitutionally necessary. And in *Katz v. NVF Co.*, after thoroughly discussing class certification requirements under the New York rule, finding them satisfied, and certifying the national plaintiff class, the New York trial court summarily ordered that individual notice be sent to class members without discussion of the size of the individual claims, even though the New York class action rule did not require notice.

It is ironic that under prevailing class action procedure, no notice need be sent to class members whose individual tort claims could easily run into several figures, as was the case in *Abed* and *Skywalk*, but that individual notice would automatically issue to class members with individual claims of only eight dollars, as was the case in *Miner*. Even though the *Abed* and *Skywalk* plaintiffs would not have been able to opt out of the proposed (b)(1) class actions had the classes successfully been certified, they certainly would have responded to notice and taken advantage of the opportunity to be heard because of the size of their individual claims. In both cases, in fact, numerous plaintiffs had already filed individual suits against the defendants, and many participated actively in opposing class certification.

Conversely, the small size of the individual claims in *Miner* and *Katz* brings into question the assumption by the courts in those cases that notice was required in (b)(3)-type actions brought in state courts. A notice requirement was surely unnecessary in *Miner*, where the likelihood that individual class members would have any interest in safeguarding their eight-dollar claims was remote.

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121 See 119 Misc. 2d at 62, 462 N.Y.S.2d at 984.
122 See N.Y. CIV. PRAC. LAW § 904(b) (McKinney 1976) (In class actions for other than injunctive or declaratory relief, "reasonable notice of the commencement of a class action shall be given to the class in such manner as the court directs."); see also id. § 904(c) ("In determining the method by which notice is to be given, the court shall consider . . . cost . . . , the resources of the parties and . . . the stake of each represented member of the class . . . .")
123 See supra note 72.
C. Special Protections for Plaintiff Class Members

As a final matter, it should be noted that while this Comment has concluded that the traditional safeguards of procedural due process—personal jurisdiction and prejudgment notice—are not appropriate in many types of class actions, plaintiff members of these actions would not be stripped of all protections. For unlike parties in single-party suits, class members do not face the dilemma of appearing and litigating their case or not appearing and suffering a default judgment. Rather, the interests of absent class members are represented by the class representative, and, if this representation is not adequate, the absent members can attack the judgment collaterally.\(^{128}\)

There is another aspect of class actions that mitigates any unfairness that might result from relaxation of personal jurisdiction or notice requirements. A class member who fails to opt into a class proceeding in which such was required\(^{129}\) and that resulted in a judgment for the class would not be permitted immediately to share in the class recovery. But, she may be able to raise the judgment offensively in a subsequent action against the defendant in a jurisdiction with liberal collateral estoppel rules,\(^{130}\) thereby taking advantage of the favorable judgment.

**CONCLUSION**

Members of a plaintiff class, depending on their individual stakes in the class litigation, will be more or less interested in the outcome and in the proceedings that lead up to it. Because the essential purpose of the due process clause is to safeguard an individual’s interest in a lawsuit, the due process concerns of class members will vary with their degree of interest in the case, and due process protections should vary accordingly.

This Comment has argued that such traditional due process safeguards as a minimum contacts requirement and individual prejudgment notice are neither completely applicable nor completely inapplicable in

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\(^{128}\) See, e.g., Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973) (holding class members not bound by prior class suit involving same class because inadequate representation in the prior action denied the class members due process). For a summary of cases in which the adequacy of class representation has been successfully attacked collaterally, see Schroder, supra note 79, at 952 n.139; see also Note, Collateral Attack on the Binding Effect of Class Action Judgments, 87 Harv. L. Rev. 589 (1974).

\(^{129}\) See supra note 66.

\(^{130}\) See, e.g., Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979) (offensive use of collateral estoppel permissible in federal courts where plaintiff could not easily have joined earlier action and use is not otherwise unfair to defendant). See generally 1B Moore, supra note 50, at ¶ 0.405[3].
the class action setting. Rather, they may be useful in protecting the interests of class members whose stakes in the class litigation are high and who therefore would be likely to exclude themselves and pursue their claims independently if given the opportunity.

Most class actions, however, do not involve such substantial individual claims. In the great number of class actions involving relatively small individual claims, traditional due process restraints such as minimum contacts or individual notice are unnecessary, and, to the extent they raise artificial obstacles to the bringing of class suits, they run contrary to the public policies of vindicating consumers' rights and deterring unfair or illegal practices by large institutions.

Finally, in those class actions in which traditional jurisdiction and notice requirements are unnecessary, plaintiffs who are included in the certified class are not without protection. A class action is representative, and those individuals certified within a class can rely on the good faith and competence of the named plaintiff and class counsel, as well as on the diligence of the court, to safeguard their interests.