NOTES

CLAIMLESS CLAIMANTS AND THE PRECLUSION PREMIUM: TROUBLING TRENDS IN CLASS ACTION SETTLEMENTS

*Shai Berman**

In class action practice, settlements play a central role. As in all litigation, the parties on both sides see settlement as a way to make peace and avoid the risk associated with going to trial. Class settlements, however, offer defendants something that they cannot obtain by any other means—namely, the ability to cause individuals not in front of the court to release all claims that relate to the events at issue in the class action. Given the preclusive effects a class settlement carries with it, defendants are likely willing to pay some "preclusion premium" to procure a settlement that covers as many claimants and claims as possible. Though class counsel should theoretically accept this preclusion premium and agree to settle only when it represents the best outcome for all class members, present and absent, recent developments indicate that the theory does not match practice. This Note explores the emerging trend of class settlements that include "claimless claimants," individuals who clearly do not possess any viable claim in the settling court. This Note argues that by agreeing to include claimless claimants in settlement classes, class counsel increase their award while shortchanging individuals with viable claims and also sometimes unduly fleecing individuals with no viable U.S. claim out of a possibly more valuable foreign claim. In these class settlements, then, some absent class members likely do not receive the adequate representation mandated by due process and the class action rule. Furthermore, even if courts take steps to remedy this deficiency in representation, these settlements arguably face other, insurmountable legal hurdles. They may violate the Rules Enabling Act, run afoul of the presumption against the extraterritorial application of U.S. law, and fall outside the settling court's subject-matter and personal jurisdiction.

* J.D. Candidate 2020, Columbia Law School. The author would like to thank Professor Henry Paul Monaghan for his guidance and insight throughout the Note-writing process.

INTRODUCTION

In January 2018, the parties in a long-running U.S. securities fraud class suit surrounding the Brazilian company Petrobras and its alleged role in Brazilian government corruption decided to settle.[1] And what a settlement it was. Defendants agreed to pay $2.95 billion, making this the fifth-largest securities class settlement ever.[2] This $2.95 billion seems to have gone a long way. In contrast with any class that could have been certified for trial, the settlement class included not only individuals who purchased their Petrobras securities in the United States or on a U.S. exchange but also "all persons who purchased Petrobras Securities in" any transaction "that cleared or settled through" a certain system through which many other trades settle and clear.[3]

Given the record-setting award and the large number of people entitled to share in it, one might wonder if this outcome is too good to be true. It likely is—not because it's not true, but because it may not be all that "good." As this Note explains, the fact that class counsel expanded the settlement class to include claimants outside the bounds of any trial-certifiable class indicates that counsel may have bargained away the strong claims of some class members for below their fair value in order to allow the defendants to purchase increased preclusion.[4]

This Note explores the practice of modern courts to enter these kinds of "global" settlements in settlement-only class-certified actions.[5] Specifically, this Note examines and critiques the emerging trend of broadly defining

---

1. See Kevin LaCroix, Petrobras Settles U.S. Securities Suit Based on Corruption-Related Allegations for $2.95 Billion, D&O Diary (Jan. 3, 2018), https://www.dandodiary.com/2018/01/articles/securities-litigation/petrobras-settles-u-s-securities-suit-based-corruption-related-allegations-2-95-billion [https://perma.cc/YX8G-N2QS] [hereinafter LaCroix, Petrobras Settles].

2. Id.

3. See In re Petrobras Sec. Litig., 317 F. Supp. 3d 858, 865 (S.D.N.Y. 2018). This system is the Depository Trust Company's (DTC) book-entry system. See id. These DTC-only claimants could not have joined a litigation class since their securities fraud claims would have been barred by the Supreme Court's decision in Morrison v. National Australia Bank, 561 U.S. 247 (2010). See In re Petrobras Sec. Litig., 150 F. Supp. 3d 337, 341–43 (S.D.N.Y. 2015).

4. Any member of the settlement class, if the settlement is respected, will be barred from subsequently raising any claim that relates to the events that form the basis of the settlement, regardless of where or under what law those claims could be raised. See infra notes 163–168 and accompanying text. Unless otherwise indicated, in this Note the term "preclusion" refers to what is commonly called "claim preclusion"—that is, the inability of an individual to subsequently raise certain claims after the conclusion of a judicial proceeding. See David L. Shapiro, Civil Procedure: Preclusion in Civil Actions 32 (2001).

5. Except in the opening paragraph of section I.A or when otherwise specified, this Note uses the term "class" or "class action" to refer to groups of individuals and law suits contemplated by Rule 23(b)(3) of the Federal Rules of Civil Procedure—namely, a group of people seeking a common remedy to their individual claims for a money judgment. See Fed. R. Civ. P. 23(b)(3).

the settlement class to include individuals who do not have any colorable claim that they could litigate in front of the settling court, individuals this Note calls "claimless claimants." This practice, this Note argues, produces a two-pronged injury—one for class members with colorable claims in the settling court and another for class members who lack colorable claims in the settling court but have a valuable claim that they could raise in a different court.

Having entered into a class settlement, defendants get the significant benefit of ensuring that res judicata will prevent all class members from subsequently raising any claims released in the settlement in any forum.[6] In fact, defendants, ex ante, are likely willing to increase the potential settlement amount in order to procure the maximum preclusion possible, including preclusion of ostensibly claimless claimants.[7] Defendants' willingness to pay this "preclusion premium" likely incentivizes class counsel to settle a class action with the largest class possible and extract the maximum preclusion premium from defendants.[8] This incentive can lead class counsel to settle with a broad class even when they could have certified a more narrowly defined class for trial and thereby increased the value of that narrower class's members' claims.[9] In this scenario, class counsel increase the size of their loot while individuals who could have joined the narrower class find their claims settled prematurely and their individual awards diluted and shared with other, claimless claimants.[10]

Moreover, these "global" settlements threaten to unduly deprive some claimless claimants of lucrative claims they could raise in other courts,[11] especially since the opt-out right afforded to absent class members does not, in practice, protect them from becoming bound by a judgment that is not in their best interest.[12] These global settlements release all claims that any class member might have that relate to the subject matter of the settlement, regardless of whether or not those claims could have been raised in the settling court.[13] Therefore, individuals with valuable claims in other jurisdictions, but no colorable claim in the settling court, must content themselves with a settlement award based off different, perhaps less valuable, claims.[14] Also, these individuals may encounter more difficulty collecting the settlement payment than they would have if they litigated or settled a similar suit elsewhere.[15] All this suggests that class members in

6. See infra section I.D.3.
7. See infra section II.A.2; infra note 143 and accompanying text.
8. See infra section II.A.2.
9. See infra notes 142–146 and accompanying text.
10. See infra notes 142–146 and accompanying text.
11. See infra section II.B.2.
12. See infra note 100 and accompanying text.
13. See, e.g, infra notes 163–164, 180 and accompanying text.
14. See infra section II.B.2.
15. See infra notes 194–195 and accompanying text.

these global settlements do not receive the adequate representation required by due process[16] and the class action rule.[17]

To illustrate these problems, this Note closely analyzes two class action settlements that courts have approved in the last decade. Having demonstrated the extent of these issues, this Note suggests ways to reduce the pernicious effects of these settlements. Courts can better protect class members by fully allowing absent class members to collaterally attack the adequacy of representation in class settlements of this sort;[18] by demanding class members with claims of different values be separated into subclasses, each represented by separate counsel;[19] or by forcing class counsel to share the preclusion premium with class members with viable or stronger claims.[20] These measures, though, may fall short, as class settlements that include claimless claimants present other problems that perhaps no strategy can resolve.[21]

This Note proceeds as follows. Part I describes the legal background of the main legal concepts at play in this Note: preclusion, adequate representation, and personal jurisdiction in class actions. Part II details some issues that can arise in class settlements and then illustrates how recent developments have significantly exacerbated these issues. Part III suggests ways in which courts and parties can attempt to solve or avert the problems described in Part II. Finally, Part IV identifies additional concerns raised by the class settlements described in Part II and concludes that courts can only avoid these issues by refusing to approve these settlements.

I. THE MECHANICS OF CLASS ACTIONS AND CLASS SETTLEMENTS: THE PERFECT STORM

To understand how settlement class actions can impact class members' rights, one must understand the interplay between preclusion and the class action mechanism. This Part attempts to provide that understanding. Section A briefly describes the presumptive preclusive effect of class actions. Section B details the doctrine of the primary linchpin for preclusion in class actions: adequate representation. Section C explains how personal jurisdiction, another element required to confer preclusive effect on a class judgment, operates vis-à-vis absent class members. And, finally,

---

16. See Hansberry v. Lee, 311 U.S. 32, 40–46 (1940) (holding that due process requires that absent class members receive adequate representation).

17. See Fed. R. Civ. P. 23(a)(4) (listing as a prerequisite for class certification that "the representative parties will fairly and adequately protect the interests of the class"); Fed. R. Civ. P. 23(e)(2)(D) (directing courts to consider whether "the proposal treats class members equitably relative to each other" before approving a class settlement).

18. See infra section III.A.

19. See infra section III.B.

20. See infra section III.C.

21. See infra Part IV.

section D describes the legal basis and inner workings of class action settlements.

A. *The Presumptive Preclusive Effects of Class Actions*

Like with many legal devices, the modern class action did not emerge *ex nihilo*. English Chancery courts adjudicated lawsuits where present parties represented absent parties as early as the twelfth century.[22] Early U.S. courts, too, recognized forms of representative actions,[23] and the Supreme Court authorized similar procedures for federal equity courts in 1842.[24] And, by the mid-twentieth century, U.S. courts regularly held that some class judgments bound absent parties.[25]

In 1966, the advisory committee thoroughly revised Federal Rule of Civil Procedure 23, the class action rule. The revised rule set forth four "prerequisites to a class action": numerosity that makes joinder impracticable; commonality of questions of law or fact among the class; typicality between the claims of the representative parties and those of the class; and that "the representative parties will fairly and adequately protect" the class's interests.[26] Furthermore, in a "radical" development,[27] section (b)(3) of the revised rule allowed a class action to be maintained if a class merely met the four prerequisites and "questions of law or fact common to the members of the class predominate[d] over any questions affecting only individual members, and . . . a class action [would be] superior to other available methods for the fair and efficient adjudication of the controversy."[28] The advisory committee even intended and assumed that all Rule 23(b)(3) decrees would bind all class members, present or absent, even if they made

---

22. Georgene Vairo, What Goes Around, Comes Around: From the Rector of Barkway to *Knowles*, 32 Rev. Litig. 721, 725–26 (2013).

23. Geoffrey C. Hazard, Jr., John L. Gedid & Stephen Sowle, An Historical Analysis of the Binding Effect of Class Suits, 146 U. Pa. L. Rev. 1849, 1882–85 (1998).

24. Equity Rule 48 allowed courts to adjudicate suits in which a handful of plaintiffs or defendants would "represent" the "interests" of similarly situated "parties" when those parties were "very numerous" and could not all appear before the court "without manifest inconvenience and oppressive delays." Rules of Practice for the Courts of Equity of the United States, 42 U.S. (1 How.) xxxix, lvi (1843) (repealed 1938).

25. Vairo, supra note 22, at 739–40.

26. Amendments to Rules of Civil Procedure, 383 U.S. 1039, 1047 (1966).

27. John K. Rabiej, The Making of Class Action Rule 23—What Were We Thinking?, 24 Miss. C. L. Rev. 323, 325 n.10 (2005) (quoting Minutes, Advisory Committee on Civil Rules, April 28 and 29, 1994, *in* 1 Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23, at 181, 186 (1997), https://www.uscourts.gov/sites/default/files/workingpapers-vol1.pdf [https://perma.cc/4CP5-DW9Y]).

28. Amendments to Rules of Civil Procedure, 383 U.S. at 1048. This sanctioned using what was once only an equitable device to obtain a legal remedy. See Rabiej, supra note 27, at 324, 340.

no affirmative indication that they desired to join the class suit.[29] In fact, the rule acknowledged this, stating that in a (b)(3) class action "the judgment, whether favorable or not, will include all members who do not request exclusion."[30]

The revised Rule 23 has had lasting impact. Today's Rule 23 closely mirrors the rule adopted in the mid-1960s,[31] and many states adopted state law analogues to the federal rule.[32] And, indeed, the reality under Rule 23 is that absent class members in (b)(3) actions are presumptively bound unless they opt out.[33]

B. *Adequate Representation as a Key to Certification and Preclusion*

To trigger a preclusive effect, the class proceedings must afford all class members adequate representation. This requirement stems not only from Rule 23(a)(4)[34] but also from the Constitution's Due Process Clauses.[35] In the 1940 case of *Hansberry v. Lee*, the Supreme Court declared that due process prevents absent class members from being bound and precluded by a class suit if those absentees did not receive adequate representation in that suit.[36] The Court also held that absent class members do not receive adequate representation when the class representatives' "substantial interests are not necessarily or even probably the same as those" of the absentees.[37] *Hansberry* thus stands for the general principle that a class judgment cannot bind absent class members with "substantial interests" that diverged from those of class representatives.[38]

Hansberry did not, however, provide clear guidelines regarding how to ensure and assess adequacy of representation in class actions nor did it delineate the kinds of conflicts that would poison class representatives'

29. See Fed. R. Civ. P. 23(c)(3) advisory committee's note on 1966 Amendment; see also Rabiej, supra note 27, at pt. IV (describing the advisory committee's attitude toward the preclusive effects of judgments rendered in an action brought under the new Rule 23). The fact that the drafters included a notice requirement and an opt-out right for (b)(3) actions indicated their intention that the absent class members in (b)(3) actions would be presumptively bound by that suit. Vairo, supra note 22, at 743.

30. Amendments to Rules of Civil Procedure, 383 U.S. at 1048–49.

31. See Fed. R. Civ. P. 23.

32. Thomas D. Rowe, Jr., State and Foreign Class-Actions Rules and Statutes: Differences from—And Lessons for?—Federal Rule 23, 35 W. St. U. L. Rev. 147, 147–48 (2007).

33. See Charles Alan Wright & Mary Kay Kane, Law of Federal Courts 471 & n.609 (8th ed. 2017). In fact, the current rule demands that the notice sent to absent (b)(3) class members must inform them of "the binding effect of a class judgment on members." Fed. R. Civ. P. 23(c)(2)(B)(vii).

34. See Fed. R. Civ. P. 23(a).

35. See U.S. Const. amends. V, XIV § 1 (prohibiting the federal and state governments from "depriv[ing]" any person "of life, liberty, or property, without due process of law").

36. See 311 U.S. 32, 40–46 (1940).

37. Id. at 45.

38. See id.; Hazard et al., supra note 23, at 1925.

attempts to adequately represent absentees.[39] Though the class action rule adopted in 1966 listed adequate representation as a prerequisite for class certification, the rule did not discuss what courts should look at to determine adequacy.[40] This gave lower courts significant discretion in regulating adequate representation, and, over the next four decades, courts tended to employ a less-than-demanding test in ruling on adequacy.[41] These courts construed *Hansberry* as little more than a ruling that class members and representatives cannot have starkly divergent interests and that class counsel must possess a general competency.[42]

Partially in response to this trend,[43] the Supreme Court added some clarity to the adequacy requirement in the late 1990s with its decisions in *Amchem Products, Inc. v. Windsor*[44] and *Ortiz v. Fibreboard Corp.*[45] Disapproving of settlements lower courts approved in asbestos-related class actions, the Court broadened the scope of conflicts that could prove fatal to class representatives' and class counsel's attempts to provide adequate representation.[46] The Court ruled that conflicts between class members regarding not just the type but also the allocation of relief hinder adequacy.[47] Furthermore, the Court indicated that the same counsel could struggle to adequately represent class members who held claims of varying values.[48] To solve these issues, the Court suggested that differently situated class members should be divided into different subclasses, each represented by

---

39. Hazard et al., supra note 23, at 1945–46. In fact, the concept of adequate representation still lacks a hard and fast definition today. See Morris A. Ratner, Class Conflicts, 92 Wash. L. Rev. 785, 791–92 (2017).

40. See Fed R. Civ. P. 23(a)(4); Ratner, supra note 39, at 791–92.

41. See Ratner, supra note 39, at 794–95.

42. See id.

43. See id. at 796–97.

44. 521 U.S. 591 (1997).

45. 527 U.S. 815 (1999).

46. Ratner, supra note 39, at 797–98. Note that the Supreme Court's holdings in these cases most specifically reflect its interpretation of Rule 23's adequacy requirement, and one, therefore, need not conclude that due process absolutely requires the protections the Supreme Court outlined in these cases. See John C. Coffee, Jr., Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation, 100 Colum. L. Rev. 370, 373 (2000) [hereinafter, Coffee, Class Action Accountability] (commenting that the Court's decisions in *Amchem* and *Ortiz* "whisper 'Rule 23 does not authorize that,' rather than proclaim 'Due process forbids that'"). Nonetheless, class actions must satisfy the requirements in *Amchem* and *Ortiz* in order to be certified, whether due process demands so or not.

47. Ratner, supra note 39, at 797. Applying this standard to the actions in front of it, the Court viewed the interests of class members who were already experiencing asbestos-related injuries as necessarily at odds with class members who had been exposed to asbestos but had yet to exhibit any symptoms. Already-ailing class members likely desired immediate payout of the settlement proceeds while still-healthy members presumably prioritized ensuring that sufficient funding would remain to cover later-manifesting injuries. See *Ortiz*, 527 U.S. at 856; *Amchem*, 521 U.S. at 626–27.

48. See *Ortiz*, 527 U.S. at 857. In *Ortiz*, some class members' injuries were subject to indemnification and other class members' injures were not. See id.

different subclass counsel.[49] In *Amchem* and *Ortiz,* then, the Court ruled that class conflicts that did not amount to polar opposite objectives could poison adequate representation and, by extension, lead to an invalid, nonbinding class judgment.

Moreover, the Court's decisions in these cases recognized that adequate representation is as much, if not more, a function of class counsel as it is of the nominal class representatives. Class counsel can often be driven more by their desire for increased fees than by the interests of the class members; and since each class member usually has little legal background and a low value claim, they likely lack the willingness and ability to monitor class counsel.[50] Thus, to ensure adequate representation, class members and their counsel's interests should be as cohesive as possible.[51] The Supreme Court's demand in *Amchem* and *Ortiz,* therefore, that class members with divergent interests be divided into subclasses with different counsel exemplified an attempt to better monitor the adequacy of the representation class counsel provides to class members.[52]

Obviously, not every small difference in the interests and claims of class members requires subclassing and independent counsel to ensure adequate representation. The Court explicitly recognized this in *Ortiz.*[53] Significantly, though, the Court did not delineate when class conflicts do or do not rise to an adequacy-poisoning level. Instead, the Court in *Amchem* only concretized this issue in the context of the already-ailing versus still-healthy individuals exposed to asbestos in that case[54] and, in *Ortiz,* contented itself with the observation that the "two [specific] instances of conflict" there were "well within the requirement of structural protection recognized in *Amchem.*"[55] Furthermore, though the 2003 amendments to Rule 23 added a provision requiring courts to assess a proposed class counsel's ability to "adequately represent the interests of the class," the amended rule does not delineate the kinds of conflicts courts should look at when making this determination.[56] All this, then, has left lower courts to their

49. See id. at 856–57; *Amchem,* 521 U.S. at 627.

50. See Ratner, supra note 39, at 801.

51. Id.

52. Id. at 802.

53. *Ortiz,* 527 U.S. at 857 ("[A]t some point there must be an end to reclassification with separate counsel.").

54. See *Amchem,* 521 U.S. at 625–28; see also supra note 47.

55. *Ortiz,* 527 U.S. at 857.

56. See Fed. R. Civ. P. 23(g)(1)(B), (g)(4). The rule does not specifically address conflicts of interest. See Linda S. Mullenix, Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes, 57 Vand. L. Rev. 1687, 1736 (2004) (lamenting this fact).

own devices to determine what types of class conflicts they will or will not tolerate.[57]

C. *Obtaining (Assuming) Personal Jurisdiction in Class Actions*

A court cannot enter a binding class action judgment without personal jurisdiction any more than it can do so without adequate class representation.[58] In the class action context, a critical personal jurisdiction question arises with respect to plaintiff class members. When a class representative brings a suit, the court certainly possesses personal jurisdiction over that representative. By actively bringing the suit in that court, the representative consents to that court's jurisdiction.[59] But one cannot say the same thing with regard to "absent" class plaintiffs, since they have taken no affirmative action to manifest their consent to jurisdiction. Yes, absent class members may often have the constitutionally required "minimum contacts" with the forum the class representative chose, but they also may not.[60] Thus, without consent or minimum contacts, the recognized routes to personal jurisdiction,[61] a court would apparently lack the jurisdiction to issue a judgment in a class action that would bind those absent plaintiffs.

Ostensibly, this deficiency threatens to bring a class action to its knees. Absent personal jurisdiction over absent plaintiffs, the class representative and defendants will be bound by the action's result, but absent members will not be bound at all.[62] But worry not, the Supreme Court solved this issue when it ruled in *Phillips Petroleum v. Shutts* that a court can procure absent class members' consent to its jurisdiction without those absentees even lifting a finger.

In *Shutts*, the Kansas Supreme Court had affirmed a judgment entered against Phillips Petroleum in favor of a nationwide class, a class that included absent plaintiffs who had no contacts with Kansas.[63] In affirming the Kansas court's jurisdictional finding, the Court reasoned that the prospective burden facing an absent class plaintiff pales in comparison to that of a defendant, and, therefore, "the Due Process Clause need not and does not afford the former as much protection from . . . jurisdiction as it

---

57. See Ratner, supra note 39, at 803; Anthony J. Carucci, Note, A Functional Approach to Adequacy of Representation, 40 J. Legis. 164, 165–66 (2014).

58. In any lawsuit, a court cannot adjudicate claims or bind parties unless that court possesses personal jurisdiction over them. See Hanson v. Denckla, 357 U.S. 235, 250 (1958).

59. See, e.g., Adam v. Saenger, 303 U.S. 59, 67–68 (1938) ("The plaintiff . . . by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court . . . .").

60. See Shutts v. Phillips Petroleum Co. (*Shutts I*), 567 P.2d 1292, 1304–05 (Kan. 1977).

61. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 806, 812 (1985) (collecting cases).

62. Id. at 805. And absent members might be able to take advantage of a favorable decision even if they did not actively intervene in the action while it was ongoing and are not bound by its result. See id.

63. Id. at 802–03.

does the latter."[64] Therefore, to establish jurisdiction over absent claimants, the Supreme Court held, a court need only ensure three things: one, that the absentees "receive notice plus an opportunity to be heard"; two, that the absentees "be provided with an opportunity to . . . 'opt out'" from the class proceedings; and three, that class representatives "adequately represent the interests of the absent class members."[65]

In unpacking these *three* requirements, it is important to note the reasoning of the lower court in *Shutts*. The Kansas Supreme Court affirmed its state court's jurisdiction over absent plaintiffs on just *two* grounds. First, absent members received notice and the ability to appear in the lawsuit, and second, absent members received adequate representation.[66] In its decision, then, the Kansas court endorsed the contention that the Due Process Clause requires neither a preexisting connection between absent members and the forum court nor any kind of action to be taken by or imputed to the absentees in order for a court to have personal jurisdiction over them.[67] Instead, personal jurisdiction in class actions, the Kansas court declared, turned solely on satisfying the due process requirements of notice and adequate representation.[68]

But the Supreme Court did not take this route, at least not without adding to it. Yes, the Supreme Court adopted notice and opportunity to be heard and adequate representation as elements of the jurisdictional formula, but it also added another ingredient: the ability to opt out.[69] By requiring this opt-out right, the Court acknowledged that even with notice and adequate representation, due process requires a court to establish that absent class members who lack minimum contacts with the forum have consented to the court's jurisdiction.[70] Weighing absent plaintiffs' options, incentives, and burdens, however, the Court concluded that, so long as absentees receive adequate representation and a notice explaining both

---

64. Id. at 811.

65. Id. at 811–12.

66. See Shutts v. Phillips Petroleum Co. (*Shutts II*), 679 P.2d 1159, 1167, 1173 (Kan. 1984), aff'd in part, rev'd in part, 472 U.S. 797 (1985).

67. See id. at 1167–70.

68. See id. at 1167 ("What is important is that the nonresident plaintiffs *be given notice and an opportunity to be heard and that their rights be justly protected by adequate representation.* These are the essential requirements of due process . . . ." (quoting *Shutts I*, 567 P.2d 1292, 1305 (Kan. 1977))). The Kansas court based this conclusion in large part on dicta in *Hansberry* indicating that adequate representation was not merely necessary but also sufficient to enable a class judgment to bind absentees. See id. at 1167–71 (citing *Shutts I*, 567 P.2d at 1305–06).

69. See *Shutts*, 472 U.S. at 812.

70. "The essential question," said the Court, was "how stringent the requirement for a showing of consent [should] be." Id. Note that the Kansas Supreme Court's decision in *Shutts* did not mention consent at all. See *Shutts II*, 679 P.2d 1159.

the lawsuit and their right to opt out, a trial court can "presume[]" their "consent" through their failure to opt out.[71]

The Court in *Shutts* carefully explained that its decision spoke only to the specific type of lawsuit presented by the case, that is, "class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments."[72] Lower courts, though, have used *Shutts* to justify binding absent plaintiffs in cases that, while arguably fitting into the language quoted above, diverge significantly from the factual scenario presented in *Shutts*—a class action *litigation* of claims the lower court could aggregate for the purposes of a judgment after a *trial*.[73] To wit, courts have used *Shutts* to bind absent plaintiffs in class action *settlements*—settlements that release a broad swath of claims.[74]

D. *Class Action Settlements*

This section describes class actions that are certified for settlement purposes only and the application of Rule 23's requirements to those settlements. It then explains how defendants can use these class settlements to further their interests.

1. *Settlement-Only Class Actions.* — Given the many difficulties class counsel face in certifying a class for trial,[75] it is not surprising that more than half of class actions are certified for settlement purposes only.[76] In these cases, class counsel and defendants reach an agreement before a class is certified for trial, and the court certifies the class for purposes of settlement only and enters the settlement.[77]

Though both plaintiffs and defendants stand to gain from a settlement, defendants often have the upper hand in settlement-only class actions. Before certification, class counsel have little leverage, as defendants need worry only about satisfying the sometimes small claims of the few putative class representatives.[78] Defendants, however, may nonetheless seek a

71. See *Shutts*, 472 U.S. at 808–14. The Court did acknowledge that the class judgment would extinguish absentees' claims—claims that, like all "chose[s] in action," are "constitutionally recognized property interest[s] possessed by each [absentee]." Id. at 807. Nonetheless, the Court held that given their options an absent plaintiff would likely consent to jurisdiction. See id. at 808–14.

72. Id. at 811 n.3.

73. See id. at 799–802.

74. See, e.g., In re Prudential Ins. Co. of Am. Sales Practices Litig., 177 F.R.D. 216, 229, 233, 239–40, 242 (D.N.J. 1997).

75. See, e.g., Libby Jelinek, Comment, The Applicability of the Federal Rules of Evidence at Class Certification, 65 UCLA L. Rev. 280, 291–92 (2018) (commenting on the difficulty of certifying a class).

76. Howard M. Erichson, The Problem of Settlement Class Actions, 82 Geo. Wash. L. Rev. 951, 952 n.1 (2014).

77. Id. at 952 n.2.

78. See id. at 957–61.

class settlement in order to be released from all possible related claims against them.[79]

2. *Requirements for a Class Settlement.* — Of course, courts cannot simply certify a class just because both sides have agreed to settle.[80] When the trend of settlement-only classes began to pick up in the decades following the promulgation of the revised Rule 23 in 1966, courts began to demand that the settlement terms themselves be fair and reasonable.[81] Courts faced with settlement-only class actions, however, began neglecting Rule 23's specific prerequisites to class certification in favor of their own appraisals of the proposed settlement's fairness.[82] The Supreme Court responded to this emerging phenomenon by declaring that settlement-only classes must satisfy all the requirements in Rule 23(a) and the relevant subsection of 23(b).[83] In fact, the Court emphasized that these requirements, which are "designed to protect absentees by blocking unwarranted or overbroad class definitions[,] demand undiluted, even heightened, attention in the settlement context."[84]

Furthermore, a court's duties in approving a class settlement extend even further than determining if the proposed settlement class meets the standards in Rule 23(a) and (b). In December 2018, the advisory committee revised Rule 23, providing district courts with additional guidance for assessing whether a class settlement is "fair, reasonable, and adequate" and therefore merits approval.[85] Now, when a proposed settlement would bind absent class members, district courts must "consider[] whether (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate . . . [and] (D) the proposal treats class

---

79. See id. at 952–53; see also infra section I.D.3.

80. See Fed. R. Civ. P. 23(e) (listing requirements for court approval of class action settlements).

81. See Ratner, supra note 39, at 795. When making this kind of fairness determination, courts focus on the equitableness of the overall disposition, the method of the settlement's allocation, and the percentage of the award set aside for class counsel. Shapiro, supra note 4, at 88.

82. See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617–18, 622 (1997) (criticizing courts that "held that settlement obviates or reduces the need to measure a proposed class against the enumerated Rule 23 requirements" and hinted that "if a settlement is 'fair,' then certification is [necessarily] proper").

83. See id. at 619–20.

84. Id. at 620.

85. See Fed. R. Civ. P. 23(e)(2); Katherine S. Kayatta, Amendments to Rule 23 Now in Full Swing, Nat'l L. Rev. (Feb. 12, 2019), https://www.natlawreview.com/article/amendments-to-rule-23-now-full-swing [https://perma.cc/29CZ-W85U] ("On December 1, 2018, the amendments to Fed. R. Civ. P. 23 took effect, principally altering portions of the Rule governing class action notice, settlement, and appeals.").

members equitably relative to each other."[86] Settlement classes, then, must meet the same requirements as litigation classes and then some.

The Supreme Court, though, has acknowledged one exception to this general rule. Since a settlement class, if approved, will never proceed to trial, a proposed (b)(3) settlement class need not satisfy Rule 23(b)(3)(D)'s mandate that a court "inquire whether the case, if tried, would present intractable management problems."[87] The Court, thus, has carved out a theoretically narrow set of classes that could be certified for settlement but not for trial.

3. *The Advantages of Class Settlements.* — One of the main attractions of a class action settlement for defendants is its preclusive effect.[88] When defendants negotiate a class settlement with class counsel, they can, and do, insist that the settlement stipulate that all class members agree to release all claims that relate to the transactions or occurrences that underlie the class action.[89] Once approved by the court, these settlements presumptively bind all class members, qualify as a "judicial proceeding," and are presumptively entitled to full faith and credit (and therefore granted preclusive effect) in courts across the country.[90] That means that, unless the settling court neglects to make findings of jurisdiction[91] or adequate representation,[92]

---

86. Fed. R. Civ. P. 23(e)(2).

87. *Amchem*, 521 U.S. at 620 (citing Fed. R. Civ. P. 23(b)(3)(D)).

88. Cf. Erichson, supra note 76, at 958 n.28 ("[I]n a settlement class action, the plaintiffs' lawyer is offering the defendant something of real value—classwide res judicata.").

89. See, e.g, Stipulation of Settlement at 34–37, In re Prudential Ins. Co. of Am. Sales Practices Litig., 177 F.R.D. 216 (D.N.J. 1997) (No. 95-4704), 1995 WL 17807691.

90. See Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 373–74 (1996) (holding that a class action settlement qualifies as a "judicial proceeding" under the Full Faith and Credit Act). As a general principle, when a judicial proceeding from one forum (F-1) is challenged in a different jurisdiction in the United States (F-2), the F-2 court must accord that judgment at least the same preclusive effect that an F-1 court would afford it. This conclusion emanates from the Full Faith and Credit Clause (when F-1 is a state court), see Shapiro, supra note 4, at 121–23, 135–38, or from the interplay of federal common law and the Supremacy Clause (when F-1 is a federal court), see id. at 145. However, in the face of evidence that the F-1 court carried itself without jurisdiction or due process, the F-2 court may refuse to recognize the F-1 judgment and to grant it preclusive effect. See, e.g., World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980) (due process generally); Durfee v. Duke, 375 U.S. 106, 110 (1963) (subject-matter and personal jurisdiction); Hansberry v. Lee, 311 U.S. 32, 42–45 (1940) (adequate representation).

91. In the case of subject-matter and personal jurisdiction, established Supreme Court precedent dictates that if the record indicates that the parties fully and fairly litigated those issues in the F-1 court, the F-2 court cannot question the F-1 court's determination of its own jurisdiction. See *Durfee*, 375 U.S. at 111–12. This rule, though, does have some exceptions with ill-defined boundaries. See id. at 114–15.

92. Though some courts have embraced full collateral review on the issue of adequate representation, others have not. See Principles of the Law of Aggregate Litigation §§ 2.07 cmt. d & reporter's note, 3.14 cmt. a & reporter's note (Am. Law Inst. 2010). Those other courts hold that if the record reveals that the F-1 court instituted procedures to ensure

all class members, even absent ones, will encounter tremendous difficulty in subsequently raising any claims released in the settlement in any U.S. jurisdiction[93] and perhaps even in foreign jurisdictions.[94]

Moreover, a settlement is entitled to full faith and credit even when it releases (and therefore would preclude) claims that are admittedly outside the jurisdiction of the settling court. In *Matsushita v. Epstein*, the Supreme Court ruled that a federal court needed to give full faith and credit to a Delaware state court class settlement that released claims over which federal courts have exclusive jurisdiction.[95] The Court reasoned that since the complaint in that case stated only state law causes of action[96] and the state court thus "clearly possessed jurisdiction over the subject matter of the underlying suit and over the defendants," the settlement it entered was entitled to full faith and credit, notwithstanding the fact that it released claims subject exclusively to federal jurisdiction.[97] Therefore, so long as a court possesses jurisdiction "over the subject matter of the underlying suit and over the defendants"[98] there appears to be no jurisdictional limit to the claims a class action settlement can release. Indeed, class settlements today profess to release all claims that relate to certain transactions or occurrences, regardless of under what jurisdiction's law the claim arises and in what jurisdiction the claim could be adjudicated.[99]

In the end, as the next Part shows, the Supreme Court's permissive stance toward the claims a class settlement can release has allowed defendants and class counsel to pursue lucrative class settlements at the expense of class members.

II. AN INEQUITABLE PEACE? POTENTIAL ADVERSE IMPACTS OF CLASS SETTLEMENTS

This Part explains how certain settlement class action phenomena threaten to harm class members. Section II.A describes problems that recur in the context of settlement class actions, and section II.B illustrates

---

adequate representation and found that absent class members were indeed adequately represented, the F-2 court must accept that finding. See id.

93. See supra note 90.

94. This would occur if the foreign court also subsequently respects the class judgment. See, e.g., infra section II.B.2(b).

95. See *Matsushita*, 516 U.S. at 369, 386–87.

96. See id. at 370.

97. See id. at 386–87. Additionally, the Court held that since: (a) full faith and credit requires a federal court to accord a state court judgment the same preclusive effect that the issuing state would accord it; and (b) Delaware law would grant preclusive effect to a class action settlement that released claims outside its jurisdiction, a federal court could not decline to accord preclusive effect to the Delaware settlement on the ground that it released exclusively federal claims. See id. at 375–79.

98. Id. at 386.

99. For examples, see infra section II.B.2.

how a new development exacerbates these problems. Significant scholarship has shown that nearly all absent class members will not opt out of a class settlement even if it is in their interest to do so.[100] This Part, therefore, proceeds based on that assumption.

A. *Persistent Problems in Class Settlements*

This section details two kinds of issues that can hinder adequate representation in settlement-only class actions. First, as in class litigations, class members themselves may have divergent interests. Section II.A.1 discusses these "internal conflicts." Second, class counsel may face an incentive structure that causes their interests to differ from those of class members. These incentives can lead class counsel to settle too quickly and enter into suboptimal settlements from class members' perspectives. Section II.A.2 discusses these "counsel–claimant conflicts."

1. *Internal Conflicts.* — As explained above, class members may have different attitudes toward how they would want to pursue their claims.[101] In both *Amchem* and *Ortiz*, for example, some class members were already suffering from asbestos-related injuries while others had yet to exhibit any symptoms.[102] Already-ailing class members would have preferred immediate and complete payment of the award.[103] Still-healthy claimants, though, likely desired the defendants to make payments more slowly, thus ensuring that the defendants would have sufficient funds to pay the still-healthy claimants when they began to take ill.[104] Moreover, claimants with injuries were probably more interested in settling since they likely faced mounting medical expenses, while still-healthy class members might have preferred to try to take the case as far as it could go and thus perhaps increase the amount of the award.

---

100. See, e.g., John Bronsteen, Class Action Settlements: An Opt-In Proposal, 2005 U. Ill. L. Rev. 903, 906 (observing that absent class members "unwittingly become bound by an agreement they would not have chosen"). Individual absent members may not understand how to exercise their opt-out right or whether opting out would be best for them. Debra Lyn Bassett, Class Action Silence, 94 B.U. L. Rev. 1781, 1793–97 (2014). Moreover, absentees may not and need not practically ever have the opportunity to opt out before they become bound; class counsel must only ensure that the notice complies with certain procedural requirements when drafting and sending it. Id. at 1794. It should come as no surprise, then, that "fewer than one percent of class members . . . opt out." Id. at 1796. This narrative, though, changes when it comes to institutional plaintiffs. Institutional plaintiffs now regularly opt out and often procure a better outcome on their own. See John C. Coffee, Jr., Litigation Governance: Taking Accountability Seriously, 110 Colum. L. Rev. 288, 311–14 (2010) [hereinafter Coffee, Litigation Governance].

101. See supra notes 46–49 and accompanying text.

102. See Ortiz v. Fibreboard Corp., 527 U.S. 815, 856 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 626 (1997).

103. *Ortiz*, 527 U.S. at 856; *Amchem*, 521 U.S. at 626.

104. See *Ortiz*, 527 U.S. at 856; *Amchem*, 521 U.S. at 626.

Additionally, the *Ortiz* Court recognized another type of internal conflict: class members possessing claims of varying values.[105] In *Ortiz*, the variance occurred since some claims, but not others, arose from events covered by the defendant's liability insurance.[106] Claims can diverge in value in other ways as well. In some contexts, such as a tort class action, class members from different jurisdictions might have claims with varying standards of liability.[107] Some claimants, such as those with strict liability claims, would be able to collect an award merely by showing the defendant's conduct injured them, while others would need to prove that the defendant acted negligently or intentionally in injuring them.[108] The strict liability claimants thus have a greater chance of prevailing and therefore have a higher expected return from their claims—claims that have greater value than those of other class members. Alternatively, consider a securities fraud class action.[109] Suppose the defendant company made a series of misleading statements, partially revealed their missteps in one communication, and revealed the full extent of their misrepresentations one month later. Class members who purchased their shares before the first announcement would have stronger, and therefore more valuable, fraud claims than those who purchased shares between the two announcements.[110]

Though Congress and the Supreme Court both acted in the 1990s to remedy the harms caused by internal class conflicts, these measures did not fully solve these issues. In 1995, Congress passed the Private Securities Law Reform Act.[111] This legislation, in part, attempted to ensure that the lead plaintiff in a securities class action would be the party that could best represent all securities holders.[112] Though the new regime for selecting a lead securities plaintiff has likely had some positive effect, it appears that the new system does not offer much increased protection to absent claimants with conflicting interests.[113] Furthermore, though *Amchem* and *Ortiz* stressed that courts should not certify classes comprised of members with fundamental conflicts,[114] lower courts, in general, have limited the reach of those decisions

105. See *Ortiz*, 527 U.S. at 857.

106. See id.

107. See Coffee, Class Action Accountability, supra note 46, at 396.

108. See id.

109. This example is drawn from Coffee, Class Action Accountability, supra note 46, at 433–34.

110. This is because the defendant corporation could argue that, after the first announcement, its misdoings had been significantly incorporated into its share price. See id.

111. Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

112. See 15 U.S.C. § 78u–4(a)(3)(B) (2018).

113. See Coffee, Litigation Governance, supra note 100, at 322 (reporting that the PSLRA "does little for absent class members").

114. See Ortiz v. Fibreboard Corp., 527 U.S. 815, 856–58 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 626–28 (1997).

"to a crimped read of their facts" and only recognize a narrow set of conflicts as sufficiently fundamental to render a fatal blow to certification.[115]

2. *Counsel–Claimant Conflicts and the Preclusion Premium.* — Class counsel may often face a series of pressures that could lead them to settle more quickly than some class members would prefer. For example, a defendant may offer a relatively large settlement to class counsel on the condition that class counsel define the class more broadly than it had been originally.[116] The defendant would make this offer in order to deal with all the possible claims against it in one fell swoop. Remember, under *Shutts*, courts allow classes to encompass absent claimants who neither possess minimum contacts nor have affirmatively consented to the court's jurisdiction,[117] and, furthermore, class members who fail to opt out of an enlarged settlement class will likely be barred from subsequently raising any of the settled claims.[118]

Considering the far-reaching extent of the types of claims that a class settlement can release,[119] defendants are likely willing to pay a "preclusion premium" for the ability to settle all possible claims of any individuals against it at once.[120] In this scenario then, class counsel must choose between attempting to certify a smaller, more cohesive class with stronger claims for trial or accepting a settlement offer contingent on defining the class more broadly. Given the time and difficulty associated with certifying even a small class for trial[121] and the high costs of litigating a class action,[122] class counsel might find it difficult to reject the defendant's offer and associated preclusion premium. While class counsel's award under the settlement might equal or almost equal their expected award if they successfully certified a narrowly defined class for trial, the award that each potential member of the narrower class will receive under the settlement might well be significantly lower than the award they would have received if they had been certified for trial.[123] Thus, a defendant's offer to pay a preclusion

---

115. See Ratner, supra note 39, at 803–04.

116. See, e.g., Coffee, Class Action Accountability, supra note 46, at 388 (noting that "[i]n *Ortiz*, plaintiffs' counsel were offered a favorable settlement . . . but on the condition that these same attorneys agree to serve as class counsel in an action seeking to resolve the rights of future claimants").

117. See supra section I.C.

118. See supra notes 88–94 and accompanying text.

119. See supra notes 95–99 and accompanying text.

120. For another author's partial formulation of this idea, see Erichson, supra note 76, at 958 n.28.

121. See supra note 75.

122. See Class Actions, Justia, https://www.justia.com/trials-litigation/class-actions/ [https://perma.cc/APS2-XTB7] (last visited Oct. 10, 2019) ("[T]he complexity of class action cases makes them difficult and expensive to litigate, requiring greater time and resources of the attorneys . . . .").

123. Obtaining trial certification significantly increases the value of class members' claims since the defendant then faces the real specter of having to pay a very large award

premium can create a conflict between the interests of class counsel and the class members with the most similar and viable claims.[124]

B. *Claimless Claimants: A New Phenomenon Raising Heightened Concern*

A legal trend that emerged in the past decade threatens to further exacerbate the issues described in the previous section. At least two circuit courts have ruled that settlement classes may include "claimless claimants"—that is, absent plaintiffs who do not hold any colorable claim the settling court could adjudicate.[125] Section II.B.1 describes how this permissive stance increases the possibility of internal and counsel–claimant conflicts—conflicts that stand to harm and dilute the recovery of class members who have colorable claims. Section II.B.2 turns to a specific type of the settlements discussed in section II.B.1, namely U.S. securities fraud class settlements that include foreign absent plaintiffs who do not possess any colorable claim they could litigate in the United States.[126] These broad settlements injure not only claimants with colorable U.S. claims but also foreign claimants who cannot raise any colorable claim in a U.S. court but who have valuable claims they could pursue in their home countries.

1. *Enlarging (and Diluting) a Class:* Sullivan *and* AIG. — A 2011 Third Circuit decision explicitly opened settlement classes' doors to absent claimants who lack a single colorable claim before the settling court. In *Sullivan v. DB Investments, Inc.*, the Third Circuit, sitting en banc, upheld a settlement entered in a nationwide antitrust class action.[127] This nationwide class was comprised of two subclasses, one consisting of direct purchasers of the defendants' products and the other consisting of indirect purchasers.[128]

---

should they lose at trial. Cf. Erichson, supra note 76, at 953 ("[W]ithout plenary class certification, the lawyer negotiating a settlement class action lacks the authority to take the class claims to trial. Without this authority, she cannot make the threat that implicitly or explicitly drives every other litigation compromise.").

124. This counsel–claimant conflict only increases in severity once one takes account of the different risk preferences of class counsel and class members in certain class actions. In securities actions, for example, diversified investor claimants are likely risk neutral, while class counsel might be more risk averse and therefore more keen on accepting a certain settlement payment, even when class members would prefer to let things play out further. Coffee, Class Action Accountability, supra note 46, at 390–91.

125. Note that these claimants are not claimless in a strictly subject-matter jurisdictional sense; they could still plead a cause of action subject to the court's jurisdiction. Nonetheless, this Note refers to these claimants as "claimless" since they could not plead facts in good faith that give rise to a claim with any chance of surviving a motion to dismiss in the settling court.

126. These plaintiffs do not possess any colorable claim due to the Supreme Court's ruling in Morrison v. National Australia Bank, 561 U.S. 247 (2010). See infra notes 149–155 and accompanying text.

127. See Sullivan v. DB Invs., Inc., 667 F.3d 273, 285 (3d Cir. 2011) (en banc).

128. Indirect purchasers are individuals that purchased defendants' products not from defendants but from another party who themselves purchased directly from defendants. Id. at 287.

Objectors to the settlement protested that, due to variations in state law, many members of the indirect purchaser subclass did not have a single claim that would entitle them to damages for defendants' antitrust violations, while others did have viable claims.[129] Though the Third Circuit did not disagree with this legal assessment, it approved the settlement nonetheless.[130] It held that the settlement satisfied Rule 23(e)'s mandate that class settlements be "fair, reasonable, and adequate"[131] and that the settlement class did not run afoul of Rule 23(b)(3)'s predominance requirement.[132] In so ruling, the court explicitly rejected the contention that "every class member [must] ha[ve] 'some colorable legal claim' in order for a district court to certify a class."[133]

One year later, the Second Circuit issued a decision that, to an extent, adopted the Third Circuit's attitude toward the permissible expanse of settlement classes. In *In re American International Group, Inc. Securities Litigation* (*AIG*), a Second Circuit panel confronted a district court's decision to deny settlement-class certification and grant the defendant judgment on the pleadings in a securities fraud class action.[134] The district court found that the proposed class's members could not rely on the fraud-on-the-market presumption to demonstrate that they relied on the defendant's alleged misrepresentations when they purchased the securities at issue in the case.[135] Since reliance is a central component of a securities fraud claim, the district judge held that the absence of a common theory of reliance negated Rule 23(b)(3)'s predominance requirement and also entitled defendants to a judgment on the pleadings.[136]

The Second Circuit did not agree. It ruled that a "class's failure to satisfy the fraud-on-the-market presumption" does not poison predominance; rather, it merely poses manageability problems and, under *Amchem*, that failure does not preclude certification for the purposes of settlement only.[137] In so concluding, the court, citing *Sullivan*, also vacated the district court's order granting judgment on the pleadings to the defendant[138] even though the appeals court did not overturn the district court's ruling that class members could not plead claims that would entitle them to relief.[139]

---

129. Id. at 291. This reality existed since, under federal antitrust law, indirect purchasers do not have standing to sue for money damages, and some states have adopted this federal doctrine in interpreting their state antitrust laws while other states have not. Id. at 293.

130. See id. at 285, 304–05.

131. See id. at 319–20 (citing Fed. R. Civ. P. 23(e)).

132. See id. at 296–97.

133. Id. at 297 (quoting id. at 344 (Jordan, J., dissenting)).

134. 689 F.3d 229, 232 (2d Cir. 2012).

135. Id. at 236–37.

136. See id.

137. Id. at 241–43.

138. Id. at 243–44 (citing *Sullivan*, 667 F.3d at 310).

139. See id. at 241.

In so ruling, it stated that "[d]efendants . . . are entitled to settle claims pending against them on a class-wide basis even if a court believes that those claims may be meritless."[140]

Though stamped with approval by the Third and Second Circuits,[141] certifying settlement classes that include claimants who do not possess one colorable claim raises significant concerns relating to the adequacy of the representation that class members with colorable claims receive in the process that culminates with the binding settlement agreement that releases their claims. As noted above, a defendant, wishing to cover all their bases, may offer a sizeable preclusion premium to settle and release as many potential claims against it as possible.[142] Allowing a settlement class to include ostensibly claimless claimants increases the size of the buy available to defendants and the sell class counsel can offer. Though one might suspect that there would be little added value to including plaintiffs with no colorable claims in a settlement, *Sullivan* and *AIG* indicate otherwise. In both cases, defendants were apparently eager to settle claims of claimless claimants to protect against the chance that those claimants would unearth a nonfrivolous theory upon which they could sue the defendant.[143]

The court-sanctioned ability and defendants' desire to certify settlement classes that include even claimless individuals possibly affected by a defendant's relevant conduct creates a strong incentive for class counsel to settle class actions with settlement classes comprised of individuals with and without colorable claims. In doing so, class counsel can extract the maximum preclusion premium, a premium that might equal or exceed the value of successfully certifying a smaller class with only colorable claims. Even if the

---

140. Id. at 243. *AIG* does not necessarily go as far as *Sullivan*. In *Sullivan*, it was clear that some class members had colorable claims and some did not. See 667 F.3d at 293. In *AIG*, however, it seemed no class member could rely on the fraud-on-the-market presumption. See *AIG*, 689 F.3d at 236–37. Thus, though the Second Circuit cited *Sullivan*, one need not conclude that *AIG* sanctions certifying a settlement class with members that starkly display *Sullivan*-esque differences. In fact, the *AIG* panel noted that, upon remand, the district court should investigate "whether variations in state law might cause class members' interests to diverge" in a way that would preclude certification. Id. at 243.

141. The Second Circuit's endorsement, though, might not have gone as far as the Third's. See supra note 140.

142. See supra section II.A.2.

143. In *Sullivan*, though the appellate court found that some class members lacked a single colorable claim, see 667 F.3d at 285, 293, 308, 310, the district court believed that "all [class] members . . . ha[d] valid claims under state law." Sullivan v. DB Invs., Inc., No. 04-2819 (SRC), 2008 WL 8747721, at *13 (D.N.J. May 22, 2008). The defendant, thus, might have been concerned that the Supreme Court or state courts from states where some claimants lived would agree with the district court's determination. And in *AIG*, the settling defendant appealed the denial of settlement class certification even though the district court had granted it judgment on the pleadings. *AIG*, 689 F.3d at 232. Apparently, the defendant was concerned that a higher court would overturn the district court's ruling that the plaintiffs could not rely on the fraud-on-the-market presumption, which would have paved the way for the class to be certified for trial. See id. at 241 & n.9.

expected value of an award after successful certification for trial exceeds the preclusion premium, class counsel may find it difficult to reject a large, certain payment.[144] Thus, even in a case in which some claimants could be certified as a class for trial, and thereby increase the value of their individual claims,[145] class counsel may choose to accept defendants' offer to pay a preclusion premium, widen the class, and agree to a class-wide settlement that releases all related claims.

This type of resolution benefits three of the four groups involved: Defendants are happy since they obtain maximum preclusion; class counsel are happy since they get a large, certain payment; claimless claimants are also happy—they get some compensation even though their chances of obtaining an award on their own in any court range from slim to none. But class members with colorable claims might very well be unhappy. Instead of having their claims increased in value through obtaining certification for trial, they find their claims settled at a premature stage. Even worse, they must share whatever value their prematurely settled claims have with others who never held a colorable claim. In this scenario, then, defendants, class counsel, and claimless claimants profit at the expense of claimants who possess colorable claims. One might well conclude, therefore, that these claimants do not receive adequate representation in the negotiation and approval of these kinds of settlements.[146] And, furthermore, unless the allocations in these settlements sufficiently distinguish between claimless claimants and those with colorable claims, these settlements may run afoul of Rule 23(e)(2)(D)'s instruction that a class settlement "treat[] class members equitably relative to each other."[147]

2. *Claimless Claimants in Securities Fraud Settlements: A Post-*Morrison *Case Study*. — The issue of claimless claimants has begun to appear in securities fraud class action settlements. In these "global" settlements, class counsel and defendants include and release claims of foreign stockholders whose securities fraud claims, like the claims of some indirect purchasers in *Sullivan*, would never survive a motion to dismiss in the settling court. Not only does including foreign claimless claimants in these global settlements

---

144. See supra note 124 and accompanying text.

145. See supra note 123.

146. In fact, in his dissent in *Sullivan*, Judge Kent Jordan pointed out that—though the parties did not raise the issue of adequate representation on appeal—the *Sullivan* settlement might have indeed run afoul of Rule 23(a)(4)'s adequate representation requirement. *Sullivan*, 667 F.3d at 342 n.4 (Jordan, J., dissenting). He supported this contention by noting, inter alia, that including claimless claimants in the settlement "dilute[s] the recovery for those who actually have claims." Id.

For another author's brief formulation of this issue, in the specific context of the Petrobras settlement discussed infra section II.B.2(a), see John C. Coffee, Global Settlements: Promise and Peril 5–8, 18–20 (The Ctr. for Law & Econ. Studies, Columbia Univ. Sch. of Law, Working Paper No. 604, 2019), https://ssrn.com/abstract=3369199 (on file with the *Columbia Law Review*) [hereinafter, Coffee, Global Settlements].

147. Fed. R. Civ. P. 23(e)(2)(D).

likely harm claimants with viable U.S. claims,[148] it also stands to injure some foreign claimants since it can deprive them of valuable claims that they could pursue in their home countries.

This section discusses two examples of such class settlements—namely, those in securities fraud actions involving Petrobras and Verifone. To appreciate the expanse of the settlement classes in these cases, one must first take note of the Supreme Court's decision in *Morrison v. National Australia Bank*.[149] The *Morrison* Court addressed the proper scope of the Securities Exchange Act of 1934, which prohibits certain activities vis-à-vis securities, including fraud.[150] Stressing the importance of the "presumption against" applying a statute "extraterritorial[ly],"[151] the Court ruled that the prohibition the '34 Act created applied "only [to] transactions in securities listed on domestic exchanges, and domestic transactions in other securities."[152]

In the years after *Morrison*, the Second Circuit, the leading circuit in the securities law field,[153] issued at least two important interpretations of the Supreme Court's decision. First, the Second Circuit held that the mere fact that a corporation cross-lists its securities "on a domestic exchange" does not provide sufficient grounds to bring a suit under federal securities laws "if the relevant securities transaction did not *occur* on a domestic exchange."[154] Second, the Second Circuit ruled that "domestic transaction[s]," for the purposes of federal securities laws, occur only "when the parties incur irrevocable liability to carry out the transaction within the United States or when title is passed within the United States."[155]

a. *Petrobras*. — In order to satisfy *Morrison*'s domesticity requirement for some of its proposed class members, class counsel in the recent securities fraud suit against the Brazilian corporation Petrobras pleaded that many of the securities transactions at issue settled through the Depository Trust Company (DTC) in New York.[156] Both the district court and the

148. See supra notes 142–146 and accompanying text.

149. 561 U.S. 247 (2010).

150. See id. at 250–51, 262; see also 15 U.S.C. § 78j (2018); 17 C.F.R. § 240.10b–5 (2018).

151. *Morrison*, 561 U.S. at 255, 261.

152. Id. at 267.

153. See Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 32 (D.C. Cir. 1987) (recognizing "the Second Circuit's preeminence in the field of securities law"), abrogated by *Morrison*, 561 U.S. 247.

154. In re Petrobras Sec., 862 F.3d 250, 262 (2d Cir. 2017) (explaining its holding in City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG, 752 F.3d 173, 180–81 (2d Cir. 2014)).

155. Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60, 69 (2d Cir. 2012).

156. In re Petrobras Sec. Litig. (*Petrobras I*), 150 F. Supp. 3d 337, 341 (S.D.N.Y. 2015). As described by the district court, "the 'DTC . . . hold[s] securities for its participants and . . . facilitate[s] the clearance and settlement of securities transactions between participants through electronic book-entry changes to accounts of its participants.'" Id. at 342 (quoting Fourth Amended Complaint at ¶ 531, *Petrobras I*, 150 F. Supp. 3d 337 (No. 14–cv–9662 (JSR))).

Second Circuit, however, rejected this argument since "[t]he mechanics of DTC settlement . . . involve neither the substantive indicia of a contractual commitment . . . nor the formal weight . . . necessary to" establish domesticity under *Morrison*.[157] Thus, the mere fact that an individual's securities transaction cleared through the DTC would not suffice to allow that individual to join a U.S. securities fraud litigation class.[158] Furthermore, the district court noted that if, as the parties argued, "most securities transactions settle through the DTC or similar depository institutions, the entire thrust of *Morrison* and its progeny would be rendered nugatory if all DTC-settled transactions necessarily fell under the reach of the federal securities laws."[159]

With a Supreme Court decision on a cert petition on a different issue in the case looming, the parties agreed to settle for $2.95 billion.[160] In contrast with any class that could have been certified for trial, the settlement class included, inter alia, "all persons who purchased Petrobras Securities in . . . 'any transaction . . . that cleared or settled through the Depository Trust Company's book-entry system'"[161] who also failed to file a timely request for exclusion.[162] Furthermore, per the settlement, all class members agreed to "release":[163]

> all [c]laims, including . . . [u]nknown [c]laims . . . (a) alleged or which could have been alleged by Class Representatives or Settlement Class Members in the Action, or (b) that have been, could have been, or in the future can or might be asserted in any federal, state or foreign court, tribunal, forum or proceeding, in connection with any of the Petrobras Securities, whether arising from federal, state, foreign, or common law, against the [defendants], arising out of or relating in any manner to the Action or the allegations, claims, defenses, and counterclaims asserted in the Action, except for [c]laims to enforce the [s]ettlement . . . .[164]

"The DTC . . . holds legal title to the vast volume of securities, and [its nominee's] name is listed as the registered owner of these securities." Id. Class counsel argued that "when DTC adjusts its books to settle an investor's trade, it is the functional equivalent of transfer of title." Id.

157. Id.; see also *Petrobras*, 862 F.3d at 272 n.24.

158. See *Petrobras*, 862 F.3d at 272 n.24; *Petrobras I*, 150 F. Supp. 3d at 341–43.

159. *Petrobras I*, 150 F. Supp. 3d at 342.

160. LaCroix, Petrobras Settles, supra note 1; see also Petition for a Writ of Certiorari at i–ii, Petroleo Brasileiro S.A. v. Universities Superannuation, No. 17-664 (filed Nov. 1, 2017).

161. In re Petrobras Sec. Litig. (*Petrobras II*), 317 F. Supp. 3d 858, 865 (S.D.N.Y. 2018) (quoting Stipulation of Settlement & Release at 17, *Petrobras II*, 317 F. Supp. 3d 858 (No. 14-cv-9662) (on file with the *Columbia Law Review*) [hereinafter Petrobras Settlement]); see also Petrobras Settlement, supra, at 17, 25, 27.

162. See Petrobras Settlement, supra note 161, at 28, 50.

163. Id. at 32.

164. Id. at 26.

Assuming, as class counsel had originally argued, that "most securities transactions settle through the DTC or similar depository institutions,"[165] defendants appear to have secured a significant benefit in this settlement, a benefit likely procured by including a large "preclusion premium" in the settlement offer. This settlement, if respected by other domestic or foreign courts,[166] will have the effect of barring a significant number of people from subsequently raising any claims relating to the Petrobras securities at issue in the case. As evidenced by the previous rulings in this case, some of these precluded individuals would not have been able to join the litigation if it proceeded to trial[167] and therefore could not have been bound or precluded by a post-trial decision. Thus, this settlement goes a long way toward buying Petrobras a "global peace"[168] it could not have attained upon a favorable disposition at trial.

In including and releasing all related claims of *Morrison*-barred DTC claimants, this settlement, which gives DTC claimants the same award as other claimants,[169] ostensibly harms class members in two ways. First, like in *Sullivan*, class members whose claims are not barred by *Morrison* must share their award with individuals who could have never brought suit in the settling court. Second, unlike in *Sullivan*, this settlement also can impair the rights of the "claimless" DTC claimants. These *Morrison*-barred claimants are not necessarily entirely claimless. To the contrary, some of them may have valuable non-U.S. claims that they could bring in a foreign court.[170] If foreign courts choose to respect the U.S. settlement, then, the settlement will deprive these foreign claimants of their valuable foreign claims.[171] Given all this, one might wonder if class counsel here bargained

---

165. See *Petrobras I*, 150 F. Supp. 3d 337, 342 (S.D.N.Y. 2015).

166. This is a distinct, albeit not certain, possibility. See generally Antonio Gidi, The Recognition of U.S. Class Action Judgments Abroad: The Case of Latin America, 37 Brook. J. Int'l L. 893 (2012) (discussing, inter alia, the possibility of foreign recognition of U.S. class settlements); Rhonda Wasserman, Transnational Class Actions and Interjurisdictional Preclusion, 86 Notre Dame L. Rev. 313 (2011) (same). For an example of foreign recognition of a U.S. class settlement, see infra section II.B.2(b).

167. See supra notes 157–158 and accompanying text.

168. *Petrobras II*, 317 F. Supp. 3d 858, 866 (S.D.N.Y. 2018).

169. Id. at 868–69.

170. For an example in a different case, see infra section II.B.2(b). In fact, plaintiffs brought a class-type suit in the Netherlands that, in part, related to the same securities at issue in the U.S. *Petrobras* case. See Kevin LaCroix, Dutch Court OKs Petrobras Claim Jurisdiction Despite Brazilian Arbitration Clause, D&O Diary (Sept. 23, 2018), https://www.dandodiary.com/2018/09/articles/international-d-o/dutch-court-oks-petrobras-claim-jurisdiction-despite-brazilian-arbitration-clause [https://perma.cc/9GLP-CPNJ].

171. Indeed, some Dutch courts in the past have recognized U.S. class action judgments as binding upon non-U.S. class members who failed to opt out. See Tanya J. Monestier, Transnational Class Actions and the Illusory Search for Res Judicata, 86 Tul. L. Rev. 1, 52 n.178 (2011).

away adequate representation in exchange for a record high certain settlement payment that includes a significant preclusion premium.

These concerns notwithstanding, the district court approved the *Petrobras* settlement.[172] In dismissing objections to the inclusion of *Morrison*-barred claimants in the settlement class, the court, relying on *AIG*, ruled that parties are "entitled to settle even entirely non-meritorious claims."[173] The court then directly addressed the contention that including the DTC claimants "unfairly diluted" the award for other claimants and ruled that, given the specific facts of that case, this alleged conflict was not sufficiently "fundamental" to prevent the settlement's approval.[174]

b. *Verifone*. — A recently concluded series of litigations surrounding securities fraud allegedly committed by Verifone sheds light on just how seriously inclusion in a U.S. securities fraud settlement class can negatively affect *Morrison*-barred absent plaintiffs. On December 3, 2007, Verifone announced that some of its financial disclosures contained various inaccuracies.[175] That day, its stock price declined by forty-six percent.[176] In 2013, U.S. class counsel and Verifone agreed to a securities fraud class settlement.[177] Though none of the prior consolidated complaints made any reference to shareholders who purchased their shares outside the United States,[178] the

---

172. See *Petrobras II*, 317 F. Supp. 3d at 862.

173. Id. at 866 (citing In re Am. Int'l Grp., Inc. Secs. Litig (*AIG*), 689 F.3d 229, 243 (2d Cir. 2012)).

174. See id. at 867–70. Professor John Coffee agrees with this assessment. See Coffee, Global Settlements, supra note 146, at 7–8, 20. Because Rule 23 had not yet been amended to provide that a class settlement should "treat[] class members equitably relative to each other," Fed. R. Civ. P. 23(e)(2)(D); supra note 85, the court did not discuss that issue as an independent element of the settlement's approval.

On appeal, the Second Circuit affirmed this element of the district court's decision. See In re Petrobras Sec. Litig., No. 18-2270 (Con), 2019 WL 4127327, at *3 (2d Cir. Aug. 30, 2019). The court affirmed, however, in a nonprecedential summary order and on the ground that the objector-appellant waived the arguments he presented on appeal by failing to raise them in the district court. See id. at *1–3. The court also concluded that it saw "no manifest injustice or extraordinary need to exercise [its] discretion to nonetheless entertain the [appellant's] challenge." Id. at *3.

175. See Accounting Errors Cause Plunge in VeriFone Shares, N.Y. Times (Dec. 4, 2007), https://www.nytimes.com/2007/12/04/technology/04verifone.html (on file with the *Columbia Law Review*).

176. Id.

177. See Stipulation of Settlement at 1, In re VeriFone Holdings, Inc. Sec. Litig., No. C-07-6140 EMC, 2014 WL 12646027 (N.D. Cal. Feb. 18, 2014), 2013 WL 5212591 [hereinafter Verifone Settlement].

178. See First Amended Consolidated Complaint for Violations of the Federal Securities Laws, *Verifone*, 2014 WL 12646027 (No. C-07-6140 EMC), 2009 WL 5212065; Second Amended Consolidated Complaint for Violations of the Federal Securities Laws, *Verifone*, 2014 WL 12646027 (No. C-07-6140 EMC), 2010 WL 1231164; Revised Third Amended Consolidated Complaint for Violations of the Federal Securities Laws, *Verifone*, 2014 WL 12646027 (No. C-07-6140 EMC), 2010 WL 4620740.

settlement class was to include all purchasers of Verifone securities "on any . . . foreign exchange or otherwise."[179] And, as in *Petrobras*, the settlement released all class members' claims that related to the alleged fraud that formed the basis of the class action, regardless of whether those claims arose "under federal, state, local, statutory, common law, foreign law, or any other law, rule or regulation."[180]

After the parties motioned for settlement approval, the court received an objection from one David Stern, an Israeli investor who purchased his Verifone shares on the Tel Aviv Stock Exchange (TASE)[181] and who therefore would likely have been barred from litigating a securities fraud claim in the United States.[182] Stern alleged that the settlement treated him unfairly.[183] Moreover, the settlement's approval threatened to bring Stern closer to defeat in a legal battle that, likely unbeknownst to the American court, he had been waging in Israel for the past six years.

After Verifone's stock plummeted in 2007, Stern filed a class action against Verifone in an Israeli court on behalf of all Israeli purchasers of Verifone Securities.[184] Unlike the securities fraud claims in the U.S. action, which required the plaintiffs to prove that Verifone acted with scienter,[185] the claims Stern wanted to aggregate in the Israeli court might have entailed strict liability.[186] When the issue of the correct liability standard finally reached

---

179. Verifone Settlement, supra note 177, at 6.

180. Id. at 8–9.

181. See Objection of David Stern and the Putative Class of Tel Aviv Stock Exchange Purchasers to Proposed Class Action Settlement and Memorandum in Support Thereof at 1, *VeriFone*, 2014 WL 12646027 (No. C-07-6140 EMC), 2013 WL 8604543 [hereinafter Stern Objection].

182. See supra notes 153–154 and accompanying text.

183. See Stern Objection, supra note 181, at 4–5.

184. Bakasha Le'ishur Tovanah K'yitzugit [Application for Class Certification] at 1–2, File No. 3912-01-08 DC (CT), Stern v. Verifone Holding[s,] [Inc.] (Aug. 25, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.), https://docs.wixstatic.com/ugd/4bbb07_6dfa9e0c0a9b4bb3a37837e7ac9c3c24.pdf [https://perma.cc/5VVR-T3RX].

185. See 15 U.S.C. § 78u–4(b)(2) (2018).

186. In general, Israeli law applies strict liability in securities fraud actions. See Stern Objection, supra note 181, at 4, 17–18 (citing The Securities Law, 5728-1968, §§ 31, 33, 38B, 38C, 22 LSI 266 (1967–68) (as amended) (Isr.)). However, Israeli securities laws also allow corporations who, like Verifone, cross-list their shares on a U.S. stock exchange and TASE to file their U.S. disclosures with the Israeli authorities in lieu of the normally required Israeli disclosure. Dual Listing, Israeli Sec. Auth., http://www.isa.gov.il/sites/ISAEng/Supervised%20Departments/Public%20Companies/Dual_Listing/Pages/default.aspx (on file with the *Columbia Law Review*) (last visited Oct. 10, 2019). Though the Israeli statutes indicate that in an Israeli lawsuit relating to such disclosures, issues regarding *interpretation* of those disclosures would be made under U.S. law, cf. Nitzan Sandor & Sharon Rosen, Israel, *in* The Initial Public Offerings Law Review 74, 79 (David J Goldschmidt ed., 2d ed. 2018), https://thelawreviews.co.uk//digital_assets/3118818c-6c51-4988-8e4f-1e54d7d38833/full-book_initial.pdf (on file with the *Columbia Law Review*) ("[A] Dual Listing [issuer] . . . may prepare a prospectus . . . in accordance with the [foreign] securities laws applicable to

the Israeli Supreme Court, however, the court avoided addressing the issue. Instead, it indicated to Stern that he should withdraw his objection to the lower Israeli court's decision to stay his Israeli class action pending the resolution of the U.S. suit.[187]

When the parties in the U.S. litigation agreed to settle, Stern was likely unhappy to hear that news. For starters, the settlement gave him, a person who might have a valuable strict liability claim, the same award that it gave American investors, whose claims required proof of scienter.[188] Furthermore, it threatened to deprive him of his ability to pursue his claims in Israel. As mentioned above, the proposed settlement class included all holders of Verifone securities, without regard to where or on what exchange the shares were purchased, and all class members agreed to release all related claims against Verifone.[189] If approved by the U.S. court and subsequently recognized by an Israeli court, then, the settlement

---

it . . . ."), they do not clarify whether U.S. or Israeli *liability* standards would apply in those cases. Telephone Interview with Gil Ron, Partner, Gil Ron, Keinan & Co., Law Office (Oct. 18, 2018) (notes on file with the *Columbia Law Review*) [hereinafter Interview with Ron].

187. Interview with Ron, supra note 186; see also File No. 3973/10 CA, Stern v. Verifone Holdings, Inc., slip op. at ¶ 5 (Apr. 2, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.), https://docs.wixstatic.com/ugd/4bbb07_5e044a1bdc0a4903887becae7cdaeb06.pdf [https://perma.cc/Q3RT-W3HK], translated in Versa, The Israeli Supreme Court Project, Stern v. Verifone Holdings, Inc., Cardozo Law, https://versa.cardozo.yu.edu/opinions/stern-v-verifone-holdings-inc [https://perma.cc/HL4Z-JK4Q] [hereinafter, Stern, Israeli Supreme Court Project] (last visited Dec. 31, 2018) ("[T]he Petitioner gave notice (after hearing this Court's comments at the hearing that was held on January 9, 2013) that he agrees that in view of the existence of the Class Proceeding in the U.S., the hearing of the proceeding that he instituted in Israel be postponed . . . ."). Though one might wonder what relevance the ongoing U.S. Verifone case had to the question in front of the Israeli court, this decision makes sense in light of the facts that the Verifone disclosures at the heart of this suit were U.S. disclosures and that U.S. law would apply to the interpretation of these disclosures. See supra note 186. Thus, the Israeli court may have been waiting to see if the U.S. court would issue conclusions regarding the disclosure itself, conclusions that an Israeli court could apply in Stern's case.

188. See Stern Objection, supra note 181, at 4. Years later, in a different case, the Israeli Supreme Court stated, without explanation, that U.S. liability standards should apply in securities fraud suits brought vis-à-vis dual listed shares purchased on TASE. See Coffee, Global Settlements, supra note 146, at 15 & nn.37–39. Though this means that as of today, Stern's claim may not have more value than the domestic U.S. claims, this case and the discussion here nonetheless illustrate how a foreign claimless claimant could lose out on a valuable claim if included in a U.S. class settlement. When Stern and all other TASE purchases were included in and then held to be bound by the U.S. settlement, see infra notes 196–199 and accompanying text, the Israeli law was not yet clear on what liability standards would apply in their case. The Israeli Supreme Court could have later decided that under Israeli law, strict liability standards apply, but the recovery for the Verifone TASE shareholders would still not have changed at all even though they would have clearly had more valuable claims in retrospect. Additionally, even now that the Israeli Supreme Court has resolved the liability issue in favor of the U.S. securities law standard, the Israeli award collection mechanism still presents fewer hurdles than its U.S. analogue. See infra notes 194–195 and accompanying text.

189. See supra notes 177–180 and accompanying text.

would preclude Israeli investors from subsequently raising their Israeli securities fraud claims in Israel. Yes, Stern himself could opt out, but Stern's individual claim was too small to pursue on its own.[190] To make the claim worth all the effort necessary to litigate it, Stern was relying on being able to amass a class of Israeli investors.[191] These other investors, though, would likely not even know to opt out.[192]

And Stern would not be the only injured party here. Potential Israeli investor class members would also lose the chance to obtain a class judgment that would possibly result in an award greater than the one in the U.S. settlement due to the potential differences in liability standards.[193] Furthermore, even if the U.S. award were equal to whatever award investors could obtain through an Israeli litigation, Israeli investors could still be disadvantaged. In Israel, awards in securities fraud class actions are paid out to shareholders automatically, via their brokers on the Tel Aviv exchange.[194] Under the terms of the U.S. settlement, however, Israeli investors would receive nothing unless they actively filed a claim.[195]

In the end, the U.S. court overruled Stern's objections and approved the settlement.[196] With the U.S. settlement approved, Stern—and all other Israeli investors who did not opt out—lost their chance to pursue their claims in Israel. The Israeli courts chose to respect the U.S. settlement and

190. Interview with Ron, supra note 186.

191. Id.

192. See supra note 100 and accompanying text. In fact, the notice and opt-out procedure in this case was even more egregious than usual. As Stern pointed out to the U.S. court, neither he, nor any other Israeli investor apparently, received the original notice describing the settlement and potential ability to opt out. See Stern Objection, supra note 181, at 3. And even if an Israeli investor did receive this notice, the notice was written in English, contained many technical legal and financial terms, and gave monetary amounts in dollars. See id. at 4. This notice likely looked like gibberish to some investors in Israel, where the primary language is Hebrew and the currency is shekels. Id. Though the court ordered U.S. class counsel to remedy this issue by sending a new Hebrew notice to Israeli investors and extending the deadline to file a claim, the court did not demand Verifone likewise extend the deadline to opt out or object. See In re VeriFone Holdings, Inc. Sec. Litig., No. C-07-6140 EMC, 2014 WL 12646027, at *1 (N.D. Cal. Feb. 18, 2014). And Israeli investors, in fact, received the translated notice only after both those deadlines passed. See Bakasha Le'ishur Tovanah Yitzugit [Application for Class Certification] at 10, File No. 22300-05-15 DC (CT), Heit v. Verifone Sys., Inc. (May 14, 2018), Nevo Legal Database (by subscription, in Hebrew) (Isr.), https://docs.wixstatic.com/ugd/4bbb07_f14c4e92ed6642adb7d2a48cd3e8be1c.pdf [https://perma.cc/JG8T-EVA6].

193. See Stern Objection, supra note 181, at 4, 20 ("It is securities law 101 that . . . a 'strict liability' claim [] is of greater settlement value than a claim requiring proof of scienter.").

194. Interview with Ron, supra note 186. This settlement enforcement mechanism would apply even if the Israeli claims would be adjudicated entirely under U.S. law. Id.

195. See Verifone Settlement, supra note 177, at 16–17.

196. See *VeriFone*, 2014 WL 12646027, at *1–3.

grant it preclusive effect vis-à-vis both Stern[197] and any other Israeli investor who failed to timely opt out.[198] Therefore, since the settlement class included and released all related claims of anyone who purchased Verifone securities on foreign exchanges, neither Stern nor any Israeli who failed to opt out could subsequently bring a suit relating to those securities.[199]

C. *Summary*

This Part has demonstrated that, in the current legal environment, class settlements can give class members a bad deal in at least five different ways. First, the fact that courts allow the parties to include individuals with no colorable claims in a settlement class enables defendants to purchase maximum preclusion and class counsel to maximize the preclusion premium they can extract from defendants.[200] This gives class counsel the incentive to agree to a settlement with a wide class that includes claimless claimants, even when they could successfully certify a more narrowly defined class for trial and thereby increase the value of the narrower class's members' claims.[201] Second, not only do individuals with colorable claims potentially forgo trial certification when class counsel accept defendants' settlement offer in this scenario, they also find their individual awards under the settlement diluted and shared with claimless claimants.[202]

---

197. Stern bound himself to the settlement by appearing in the U.S. court. See File No. 3973/10 CA, Stern v. Verifone Holdings, Inc., slip op. at ¶¶ 34–41 (Apr. 2, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.), https://docs.wixstatic.com/ugd/4bbb07_5e044a1bdc0a4903887becae7cdaeb06.pdf [https://perma.cc/Q3RT-W3HK], translated in Stern, Israeli Supreme Court Project, supra note 187.

198. For the court's reasoning, see File No. 22300-05-15 DC (CT), Heit v. Verifone Sys., Inc., slip op. at 11–30 (May 14, 2018), Nevo Legal Database (by subscription, in Hebrew) (Isr.), https://docs.wixstatic.com/ugd/4bbb07_ebc7498fd9604963a154404cba581c8d.pdf [https://perma.cc/F5PP-ZVHM].

199. After the Israel Supreme Court dismissed Stern's suit, Stern's counsel brought another class action with a different representative. The district court, however, dismissed the suit, finding that it was precluded by the U.S. settlement. See id. at 29–30.

200. See supra notes 142–146 and accompanying text.

201. See supra notes 142–146 and accompanying text.

202. See supra notes 142–146 and accompanying text. Furthermore, recent Supreme Court personal jurisdiction jurisprudence has severely limited the fora in which plaintiffs can aggregate claims against a defendant in a mass action. See Andrew D. Bradt & D. Theodore Rave, Aggregation on Defendants' Terms: *Bristol-Myers Squibb* and the Federalization of Mass-Tort Litigation, 59 B.C. L. Rev. 1251, 1282–91 (2018). Since defendants can consent to jurisdiction in any forum, if these recent decisions apply to class actions as well, this new reality would enhance defendants' ability to run what Professor Coffee has termed a "reverse auction." Id. at 1289. In a reverse auction, defendants identify the class counsel willing to settle for the lowest award, negotiate and enter a settlement with that weak class counsel, and ensure that they will not have to worry about any subsequent claims regarding the activity that formed the basis of the settlement. See John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343, 1370–73 (1995).

Third, when a settlement class includes absent claimants who have no colorable claim in a U.S. court but have viable claims in a foreign country, those absent claimants may completely lose their ability to litigate their claims, even in their home countries.[203] Fourth, those absent members may hold foreign claims that are more valuable than the domestic claims that form the basis of the suit in front of the settling court.[204] These absentees may thus find that class counsel have traded their valuable claims for a price below their value.[205] Fifth, and finally, even if the award amount is otherwise fair, class members who could have joined a successful action in a different country may face greater hurdles in collecting their award than they otherwise would.[206]

Independently and combined, these issues raise serious concerns that class members in these settlements do not enjoy the adequate representation required by due process and the class action rule.[207] Furthermore, these settlements fly in the face of Rule 23(e)(2)(D)'s instruction that class settlements "treat[] class members equitably relative to each other."[208] Indeed, in adding this subsection, the advisory committee intended to "call attention to" the "concern" that "the apportionment of relief . . . take[] appropriate account of differences among [class members'] claims" and have courts consider if "the scope of [a] release may affect class members in different ways that bear on the apportionment of relief."[209] Finally, these issues also indicate that class settlements in these cases do not satisfy Rule 23(b)(3)'s requirement of being the superior method of adjudication.[210]

---

203. See supra notes 170–171, 187, 198–199 and accompanying text. As noted above, a foreign court might stay proceedings pending the outcome of a U.S. class action, even if it admits that the litigants could not litigate their claims in the United States. It would do this so certain factual and legal issues could be first determined by a court with superior competence and authority relating to those issues. See supra note 187. Furthermore, even if a foreign court allows the suit to proceed, the U.S. suit could settle before the foreign action finishes and foreign claimants could find themselves precluded.

204. See supra notes 105–110, 185–186 and accompanying text.

205. See supra notes 169–171, 188, 193 and accompanying text.

206. See supra notes 194–195 and accompanying text.

207. See supra section I.B.

208. Fed. R. Civ. P. 23(e)(2)(D).

209. Fed. R. Civ. P. 23(e)(2)(C)–(D) advisory committee's note on 2018 Amendment.

210. See Fed. R. Civ. P. 23(b)(3). Factors pertinent to superiority include, inter alia, "the class members' interests in individually controlling the prosecution or defense of separate actions," Fed. R. Civ. P. 23(b)(3)(A), and "the desirability or undesirability of concentrating the litigation of the claims in the particular forum," Fed. R. Civ. P. 23(b)(3)(C). Given the issues laid out in this section, one can well argue that many class members in these settlements would desire separate actions and that the proper forum for adjudicating some of these claims is elsewhere.

III. FACILITATING A FAIR GLOBAL PEACE

If courts recognize the issues laid out in Part II, they can take a number of actions to mitigate the deficiency in the representation and inequitable treatment provided and afforded to class members in class settlements that include claimless claimants. This Part lays out three such strategies judges can use to better police those broad (overinclusive) "global" class action settlements. These measures include: (a) allowing absent class members to collaterally attack these settlements, (b) requiring subclassing, and (c) demanding that the settlement's award allocation be tailored to a class member's specific claim (or lack thereof).

A. *Collateral Review*

If a court approves a settlement that includes claimless claimants, a court in a different jurisdiction can recognize the heightened risk of inadequate representation in such settlements and allow absent members to collaterally attack the constitutionally required adequate representation they were allegedly afforded in the original proceeding.[211] Note that while the *Matsushita* Court held that a class settlement that releases claims outside the settling court's subject-matter jurisdiction is still presumptively entitled to full faith and credit,[212] it did not rule on whether absent class members could collaterally attack the adequacy of the representation they received in the original proceeding.[213] In the wake of *Matsushita*, some courts have allowed such collateral attacks, while others have not.[214] Perhaps even courts that have refused to allow full collateral attacks on adequate representation might be willing to entertain them in the limited case of a settlement that includes claimless claimants. These courts can adopt a rule that in these cases, given the potential that class counsel has too easily bargained away class members' claims in exchange for a preclusion premium,[215] they will conduct a full review of the adequacy of the representation absent class members allegedly received. This possibility of collateral attack will make defendants and class

211. See supra notes 34–38 and accompanying text; supra note 90.

212. See supra notes 95–97 and accompanying text.

213. Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 398–99 (1996) (Ginsburg, J., concurring in part and dissenting in part) ("[P]laintiffs challenge the preclusive effect of the Delaware settlement, arguing that the Vice Chancellor never . . . made the constitutionally required determination of adequate representation . . . . [Defendant] counterargu[es] that the issue of adequate representation was resolved by full and fair litigation in the Delaware [c]ourt . . . . These arguments remain open . . . on remand.").

214. Compare, e.g., Stephenson v. Dow Chem. Co., 273 F.3d 249, 257–59 (2d Cir. 2001) (allowing full collateral attack on a class settlement based on "plaintiffs' inadequate representation allegations"), aff'd in part by an equally divided court, vacated in part, 539 U.S. 111 (2003) (per curiam), with In re Diet Drugs Prods. Liab. Litig., 431 F.3d 141, 146 (3d Cir. 2005) (denying absent class members the "right to collaterally attack the adequacy of representation determination of the class action court").

215. See supra section II.A.2; supra notes 142–143 and accompanying text.

counsel warier of entering into these global settlements and will also ensure that, if they do agree to such a settlement, they take the utmost care to provide fair compensation for each class member.

B. *Subclassing*

Requiring subclassing, perhaps the most familiar remedial measure in class actions,[216] can also help ensure that all class members in settlements that include claimless claimants receive adequate representation.[217] If courts insist that all class members be divided into separately represented subgroups that reflect the different kind of claims they hold (or lack thereof), each subclass counsel will have the incentive to advocate for the best result for their clients.[218] Those with a stronger hand (representatives of individuals with colorable U.S. claims or valuable foreign claims) will likely receive better outcomes than inferiorly positioned groups (those with only low-value foreign claims or no viable claim in any jurisdiction).[219] Thus, subclassing fosters adequate representation by closely aligning the interests of the subgroups and simultaneously helps ensure that class members are treated equitably relative to each other.

C. *Reallocation*

Courts that wish to directly combat the potential negative impacts of these global settlements can choose to approve such settlements but tinker with how the award is allocated. For example, courts can demand that global settlements provide different awards to claimless claimants and class members with colorable claims.[220] To free up some cash for this increased award for those with colorable claims, courts can reduce a class counsel's share of the award from a global settlement.[221] Taking this step would

---

216. See, e.g., Ortiz v. Fibreboard Corp., 527 U.S. 815, 856–57 (1999) ("[A] class divided between holders of present and future claims . . . requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel."); In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 827 F.3d 223, 231 (2d Cir. 2016) ("One common structural protection is division of the class into 'homogenous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel.'" (quoting *Ortiz*, 527 U.S. at 856)).

217. Professor Coffee has suggested this solution. See Coffee, Global Settlements, supra note 146, at 25.

218. See id.

219. See id.

220. Fed. R. Civ. P. 23(e)(2)(D) specifically directs courts not to approve a class action settlement without considering whether the settlement "treats class members equitably relative to each other."

221. Fed. R. Civ. P. 23(h) explicitly gives the settling court the power to apportion "reasonable" attorney's fees. Tailoring plaintiffs' attorneys' awards to provide optimal incentives is by no means novel. See, e.g., Goldberger v. Integrated Res., Inc., 209 F.3d 43, 50 (2d Cir. 2000) (listing criteria courts use to determine "reasonable" attorneys' fees in class actions, including "(1) the time and labor expended by counsel; (2) the magnitude and complexities of

reallocate more of the preclusion premium to the class members with colorable claims and also help ensure that the settlement "treats class members equitably relative to each other."[222]

This reallocation could benefit class members in two related ways. First, similar to the likely result with subclassing, class members with colorable claims who would otherwise not want to share an award with claimless claimants might be content with a global settlement if it means they receive a greater portion of the award than they otherwise would. Second, the specter of a categorically reduced award for class counsel will increase the "cost" of a settlement that includes claimless claimants. It will force class counsel to hesitate before agreeing to such a settlement and forgoing the greater award share they would receive if they settled or litigated with a class consisting only of individuals with colorable claims. And, since class counsel will receive a lower percentage of any award from these global settlements, they will likely demand a larger preclusion premium from defendants, and defendants will need to increase the total award in order to purchase the preclusion they crave.

IV. A PEACE POISED TO CRUMBLE

While the solutions suggested in Part III would help alleviate the class-action related concerns presented by global settlements like those described in Part II, these settlements can raise problems beyond the contours of Rule 23. These issues relate to the Rules Enabling Act, the presumption against applying U.S. laws extraterritorially, subject-matter jurisdiction, and personal jurisdiction. Sections IV.A through IV.D sketch these concerns in turn. Section IV.E concludes that none of the measures suggested in Part III provide a comprehensive solution to the problems described below and argues that, therefore, courts should consider pulling the plug on class settlements that include claimless claimants.

A. *The Rules Enabling Act*

Including claimless claimants in a settlement class may violate the Rules Enabling Act.[223] That act stipulates that rules created under its authority, such as the Federal Rules of Civil Procedure, "shall not abridge,

---

the litigation; (3) the risk of the litigation[;] [and] (4) the quality of representation" (quoting In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig., 724 F. Supp. 160, 163 (S.D.N.Y. 1989))); Ams. Mining Corp. v. Theriault, 51 A.3d 1213, 1259–60 (Del. 2012) (presenting similar criteria for derivative litigations and noting that "[w]hen a case settles early, the [court] tends to award 10–15% of the monetary benefit conferred," but if "a case settles after . . . meaningful litigation efforts . . . fee awards . . . range from 15–25% of the monetary benefits conferred").

222. Fed. R. Civ. P. 23(e)(2)(D).

223. The dissenting judges in *Sullivan* elaborated and advanced this argument. See Sullivan v. DB Invs., Inc., 667 F.3d 273, 352–55 (3d Cir. 2011) (en banc) (Jordan, J., dissenting).

enlarge or modify any substantive right."[224] By allowing claimless claimants to share in an enforceable class settlement based on claims they could have never litigated, a court arguably unduly uses Rule 23 to create substantive rights for these claimless claimants.[225]

B. *The Presumption Against Extraterritoriality*

In the securities fraud context, including *Morrison*-barred claimants in a settlement class undermines the presumption against giving extraterritorial effect to U.S. laws.[226] In *Morrison*, the Supreme Court emphasized "the perception that Congress ordinarily legislates with respect to domestic, not foreign, matters"[227] and that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[228] This presumption "protect[s] against unintended clashes between" U.S. and foreign laws "which could result in international discord."[229]

Applying this principle to U.S. securities laws, the Court held, meant limiting the scope of those laws to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities."[230] The Court reached this conclusion not only based on certain language in those statutes[231] but also since "[t]he probability of incompatibility" of U.S. securities laws "with the applicable [securities] laws of other countries is so obvious that if Congress intended . . . foreign application 'it would have addressed the subject of conflicts with foreign laws and procedures.'"[232] As evidence of this incompatibility, the Court pointed to amicus briefs filed by foreign countries and organizations that "complain[ed] of the interference with foreign securities regulation that application of [U.S. securities laws] abroad would produce."[233]

In sum, one might characterize the presumption against extraterritorial application of U.S. securities laws as an assumption that Congress did not intend to unilaterally make the United States the world's securities police. And by allowing class counsel and defendants to include *Morrison*-barred claimants in U.S. securities class action settlements that release all

224. 28 U.S.C. § 2072(b) (2018).

225. *Sullivan*, 667 F.3d at 352–53.

226. A similar argument to the one outlined in this section could apply in other types of global settlements if the basis for the underlying claims is a violation of U.S. statutes and the settlement class includes individuals with only foreign claims.

227. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010).

228. Id. (quoting EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991)).

229. *Aramco*, 499 U.S. at 248.

230. *Morrison*, 561 U.S. at 267.

231. See id. at 267–68.

232. Id. at 269 (quoting *Aramco*, 499 U.S. at 256).

233. Id.

related foreign claims,[234] courts do just that. They make U.S. securities laws the enforcement mechanism for foreign securities claims with little or no connection to the United States—claims that Congress presumptively did not wish to extend their power over when enacting those laws.[235]

C. *Subject-Matter Jurisdiction*

Additionally, in certain cases, federal courts may not even possess subject-matter jurisdiction over the noncolorable claims of claimless claimants. This could occur in at least two different scenarios. First, while some types of noncolorable claims of claimless claimants fail for lack of merit,[236] other types of noncolorable claims, such as foreign tort claims, present jurisdictional deficiencies.[237] Second, even if a noncolorable claim fails for a lack of merit, if that claim is so patently flawed, a federal court would lack subject-matter jurisdiction over it under *Bell v. Hood*'s substantiality doctrine.[238] Although the Supreme Court has limited this doctrine to claims that are "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit,"[239] a settlement that includes claimless claimants could well include individuals whose noncolorable claims would meet this standard. For example, a securities fraud class settlement might include individuals who purchased shares that do not trade on a U.S. exchange or who acquired notes in transactions that took place entirely outside the United States. The federal securities claims of these individuals would clearly be "foreclosed by prior decisions of th[e]

234. See supra notes 163–164, 172, 179–180, 196 and accompanying text.

235. Indeed, the same court that approved a class settlement that included *Morrison*-barred claimants in *Petrobras*, see *Petrobras II*, 317 F. Supp. 3d 858, 865–66, 879 (S.D.N.Y. 2018), earlier remarked that allowing those individuals to join a litigation class would render "the entire thrust of *Morrison* and its progeny . . . nugatory." *Petrobras I*, 150 F. Supp. 3d 337, 342 (S.D.N.Y. 2015).

236. See *Morrison*, 561 U.S. at 253–54 ("[W]e must correct a threshold error in the Second Circuit's analysis. It considered the extraterritorial reach of § 10(b) to raise a question of subject-matter jurisdiction . . . . But to ask what conduct § 10(b) reaches . . . is a merits question.").

237. See Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 116 (2013) ("The [Alien Tort Statute] . . . is 'strictly jurisdictional.'" (quoting Sosa v. Alvarez–Machain, 542 U.S. 692, 713 (2004))); id. at 124 ("[P]etitioners' case seeking relief for violations . . . occurring outside the United States is barred.").

238. See 327 U.S. 678, 682–83 (1946) ("[A] suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous."); see also Arbaugh v. Y & H Corp., 546 U.S. 500, 513 (2006) (citing *Bell*, 327 U.S. at 681–85) ("A plaintiff properly invokes § 1331 jurisdiction when she pleads a colorable claim 'arising under' the Constitution or laws of the United States." (quoting 28 U.S.C. § 1331 (2018))).

239. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666 (1974).

[Supreme] Court"[240] and therefore lack the substantiality to support federal subject-matter jurisdiction.

Thus, in some cases, such as a global tort or securities class actions where the relevant conduct took place outside the United States, a court might lack subject-matter jurisdiction to approve a class settlement that includes and binds claimless claimants. In fact, the Supreme Court recently re-emphasized that since a class settlement may only be entered with court approval, "[a] court is powerless to approve a proposed class settlement if it lacks jurisdiction over the dispute."[241]

Granted, the Supreme Court held in *Matsushita* that a court could release claims over which it did not possess subject-matter jurisdiction.[242] But the Court there noted that the class complaint itself only stated causes of action over which the settling court had subject-matter jurisdiction[243] and that the settling court "clearly possessed jurisdiction over the subject matter of the underlying suit."[244] Claimless claimants with exclusively jurisdictionally deficient claims, in contrast, could neither join any complaint that only stated causes of action within the court's jurisdiction nor present a court with any "underlying" suit over which the court would have jurisdiction. Thus, a court's ability to release claims that lie outside its jurisdiction that belong to individuals who have other claims that are subject to that court's jurisdiction does not also give that court the power to release claims of *claimants* who do not possess one claim within that court's jurisdiction.[245]

---

240. *Oneida*, 414 U.S. at 666; see also *Morrison*, 561 U.S. at 267 (ruling that section 10(b) of the Exchange Act applies only to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities").

241. Frank v. Gaos, 139 S. Ct. 1041, 1046 (2019) (per curiam).

242. Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 386–87 (1996).

243. See id. at 370.

244. Id. at 386.

245. But see Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986) (ruling that a valid *consent decree* must merely "spring from and serve to resolve a dispute within the court's subject-matter jurisdiction[,] . . . 'com[e] within the general scope of the case made by the pleadings,' . . . and . . . further the objectives of the law upon which the complaint was based" (alterations in original) (quoting Pac. R.R. v. Ketchum, 101 U.S. 289, 297 (1880))).

Additionally, one might argue that while, standing alone, the claims of claimless claimants in these cases lie outside a court's subject-matter jurisdiction, their factual relationship with the viable claims of other, domestic class members supports the exercise of supplemental jurisdiction under § 1367. See 28 U.S.C. § 1367(a) (2018) ("[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under . . . [the] Constitution."). While there may be merit to this argument, it cannot support unlimited jurisdiction over foreign claimants. For example, in a case where a small number of class members have claims subject to the court's jurisdiction while a majority do not, it would be odd to consider the claims of the majority "supplemental" to those of the minority.

D. *Personal Jurisdiction*

Finally, courts may lack personal jurisdiction over foreign claimless claimants. As described in section II.B.2, global settlements can harm claimless claimants as well, at least when those claimants have a valuable claim they could pursue in a different jurisdiction. For these individuals, which this section calls "displaced claimants," a global U.S. class settlement threatens to deprive them of their ability to mount or join a possibly more valuable class action or similar suit in their home countries.[246] *Shutts* notwithstanding, the settling court may lack personal jurisdiction over displaced claimants who neither have minimum contacts with the court's forum nor have affirmatively consented to the court's jurisdiction. And, therefore, a U.S. court would lack power to bind displaced claimants to a class action settlement and prevent them from litigating their foreign claims elsewhere.[247]

This section proceeds as follows. Section IV.D.1 explains how the rationale behind *Shutts*'s extension of personal jurisdiction over absent class members who lacked minimum contacts with the settling forum does not encompass displaced claimants. In fact, *Shutts* implies that, to the contrary, courts do not have personal jurisdiction over displaced claimants. Section IV.D.2 details how recent Supreme Court personal jurisdiction jurisprudence strengthens the argument against a U.S. court exercising personal jurisdiction over displaced claimants.

1. Shutts*'s Limited Reach.* — As noted in section I.C, *Shutts* revolved around a notion of assumed consent. The Supreme Court held that, as opposed to other litigants, absent plaintiff class members could be considered to have consented to a court's jurisdiction even if they took no affirmative action to manifest that consent. Rather, simply giving them notice of

---

Indeed, § 1367 allows a court to decline to exercise supplemental jurisdiction when "the claim substantially predominates over the claim or claims over which the district court has original jurisdiction." Id. § 1367(c)(2). For an elaboration and assessment of this argument (albeit in the context of a hypothesized separate lawsuit filed by claimless claimants under foreign law), see Coffee, Global Settlements, supra note 146, at 21–24.

246. See supra section II.B.2. The displaced claimants discussed in this section, then, are claimants who could aggregate claims in their home countries. While this places many foreign claimants outside the definition, it still includes a significant number of them, as an increasing number of countries have adopted class mechanisms. Lindsey Gomez-Gray, The Rise of Foreign Class Action Jurisprudence, Class Actions & Derivative Suits, Fall 2012, at 27, 27 ("[A]t least twenty-six countries have adopted class actions or class-action-like procedures . . . . In addition, several countries . . . are discussing the adoption of class action procedures.").

247. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 805 (1985) ("The only way a class action defendant . . . can assure itself [the] binding effect of the judgment is to ascertain that the forum court has jurisdiction over every plaintiff whose claim it seeks to adjudicate . . . ."); supra note 58 and accompanying text; cf. Frank v. Gaos, 139 S. Ct. 1041, 1046 (2019) (per curiam) ("A court is powerless to approve a proposed class settlement if it lacks jurisdiction over the dispute . . . .").

the action, a guarantee of adequate representation, and an ability to opt out allows a lower court to construe their silence as consent.[248]

The Court, however, only came to this conclusion after it analyzed and balanced the absentees' benefits and "burdens" of being joined to the class action. Unlike absent defendants, the Court observed, absent plaintiffs need not hire counsel, worry about suffering a default judgment requiring them to pay damages, or participate in discovery.[249] Yes, the Court noted, absent class members may find their claims "extinguish[ed]" by an adverse judgment due to principles of preclusion,[250] but that would be a small price to pay considering the relief absent members stood to gain from joining the class. If they were not joined, the Court stated, these absent members would likely be left with claims that "would be uneconomical to litigate individually," leaving them "no realistic day in court if" their consent could not be presumed.[251] Additionally, the Court was satisfied that the ability to opt out would sufficiently protect individuals who had valuable claims they could pursue separately from the class action.[252]

Notice, displaced claimants in global class action settlements are in a posture decidedly different from the absent class members described in *Shutts*. Yes, displaced claimants do not have any burdens associated with defending a lawsuit, but the specter of having their claims extinguished looms larger for them than other absent plaintiffs. Unlike the absent plaintiffs in *Shutts*, displaced claimants would not forgo their "day in court"[253] if they are not included in the U.S. settlement class.[254] They may very well be able to recover for their injuries nonetheless and, in fact, might face the prospect of an even higher and more easily collectible award in their home countries.[255] Furthermore, a simple opt-out right does not sufficiently protect a displaced claimant who desires to litigate their claim. Not only do most current day notice and opt-out procedures fail to afford absent class members significant protection,[256] displaced claimants might be at greater risk of not receiving or returning an opt-out form even

248. See supra notes 64–65, 71 and accompanying text.

249. See *Shutts*, 472 U.S. at 808–11.

250. See id. at 807, 810. Like all "chose[s] in action," these claims, the Court admitted, were "constitutionally recognized property interest[s] possessed by each [absentee]." Id. at 807.

251. Id. at 809.

252. See id. at 813. Indeed, in *Shutts*, the lower court excluded almost 5,000 individuals who either exercised their opt-out right or did not receive notice. This fact, the Supreme Court said, "show[ed] that the 'opt out' procedure provided [in *Shutts* was] by no means *pro forma* . . . ." Id.

253. See id. at 809.

254. This is especially true when a displaced claimant has already begun to mount a class suit in their home country. See supra section II.B.2(b).

255. See supra notes 107–109, 169–171, 185–188, 193–195 and accompanying text.

256. See supra note 100. This fact, alone, arguably invalidates *Shutts*'s application. See supra note 252 and accompanying text.

when it is in their best interests to do so.[257] And since all displaced claimants who fail to opt out may be prevented from ever raising their claims in the future,[258] presuming their consent does not prevent, but rather causes them to forgo their "day in court."[259] Moreover, even if they opt out, a displaced claimant will likely have difficulty finding counsel to represent them, since, unless other similarly situated claimants opt out, the displaced claimant may not be able to aggregate enough claims to build a sufficiently lucrative suit for an attorney to bring.[260] Accordingly, displaced claimants who fail to opt out do not represent some "*rara avis*"[261] underserving of the usual due process protections requiring either minimum contacts or affirmative consent as a prerequisite for personal jurisdiction;[262] a mere presumption from silence is not enough.

With *Shutts* unavailable, then, a court lacks personal jurisdiction over displaced claimants and, consequently, does not have the power to approve a settlement that purports to include them and prevent them from pursuing a more beneficial action in their home country.[263]

2. *The Resurging Limiting Principle of Sovereignty.* — After going two decades without deciding a personal jurisdiction case, the Supreme Court has issued six important decisions on that topic since 2011.[264] Through these cases, the Supreme Court has engaged in what some scholars have described as a "revolution" of personal jurisdiction doctrine,[265] narrowing courts' ability to obtain general and specific personal jurisdiction over parties.[266]

One aspect of the Court's "revolution" is its heightened emphasis on sovereignty concerns as a limit of a court's personal jurisdiction. The Court's plurality in *J. McIntyre Machinery, Ltd. v. Nicastro* believed that submission to a state's sovereignty, not notions of fairness or reasonable foreseeability, should form the basis of personal jurisdiction.[267] In *Bristol-Myers Squibb Co. v. Superior Court* (*BMS*), the Court, while not going as far as the *Nicastro* plurality, also stressed sovereignty's role in the personal

---

257. See supra note 192.

258. For an example, see notes 198–199 and accompanying text.

259. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985).

260. See supra notes 190–192 and accompanying text.

261. Id. at 813–14.

262. See supra note 61; see also supra note 64 and accompanying text.

263. This assumes, of course, that these displaced claimants do not have minimum contacts with the forum and did not affirmatively consent to jurisdiction.

264. Michael H. Hoffheimer, The Stealth Revolution in Personal Jurisdiction, 70 Fla. L. Rev. 499, 501 & n.4 (2018).

265. Id. at 503–05 & n.15.

266. Scott Dodson, Personal Jurisdiction and Aggregation, 113 Nw. U. L. Rev. 1, 23–28 (2018).

267. See 564 U.S. 873, 880–85 (2011) (plurality opinion) (Kennedy, J.); see also Dodson, supra note 266, at 25; Hoffheimer, supra note 264, at 538.

jurisdiction calculus.[268] The party objecting to personal jurisdiction in *BMS* did not contend that the forum in question was logistically unfair or burdensome.[269] Nonetheless, the Court made clear that reasonableness alone does not provide sufficient grounds for jurisdiction[270] and held that sometimes, as was the case in *BMS*, "'territorial limitations on the power of the respective States' . . . work independently . . . to restrict the adjudicatory authority of a state."[271]

This sovereignty concern suggests that U.S. courts lack personal jurisdiction over displaced claimants.[272] When a U.S. court issues a decree that purports to extinguish valuable non-U.S. causes of action held by displaced claimants who hold no colorable U.S. claim, have no significant contacts with the United States, and have not affirmatively consented to U.S. jurisdiction, that U.S. court likely unduly exceeds its sovereign power. There is simply not enough to establish that these displaced claimants have "submitt[ed] to the coercive power" of the United States.[273]

To concretize how this sovereignty-related limitation would serve to protect the individual liberty guaranteed by due process that restrictions

---

268. See 137 S. Ct. 1773, 1779–81 (2017).

269. Dodson, supra note 266, at 27–28.

270. Hoffheimer, supra note 264, at 538.

271. Dodson, supra note 266, at 27–28 (quoting *BMS*, 137 S. Ct. at 1780); see also *BMS*, 137 S. Ct. at 1780 ("[Personal jurisdiction] encompasses the more abstract matter of submitting to the coercive power of a State . . . . [R]estrictions on personal jurisdiction . . . 'are a consequence of territorial limitations on the power of the respective States.' . . . [A]t times, this federalism interest may be decisive." (quoting Hanson v. Denckla, 357 U.S. 235, 251 (1958))).

272. This argument must assume that the same sovereignty concern that, via the Fourteenth Amendment's Due Process Clause, indirectly limits state courts' exercise of personal jurisdiction over out-of-state claims, see *Nicastro*, 564 U.S. at 884; see also *BMS*, 137 S. Ct. at 1779–81, similarly limits federal and state courts' personal jurisdiction vis-à-vis foreign claims and claimants via the Fifth and Fourteenth Amendments' Due Process Clauses, respectively. This assumption holds water since the sovereignty concerns that animate the Fourteenth Amendment's Due Process Clause stem from the constitutionally recognized "sovereignty of each State," *BMS*, 137 S. Ct. at 1780 (internal quotation marks omitted) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980)). One can posit that the Constitution similarly acknowledges the sovereignty of foreign states as well. An additional necessary assumption would be that the principles the Supreme Court has established in regard to defendant personal jurisdiction have at least some application to personal jurisdiction over absent plaintiffs.

273. See *BMS*, 137 S. Ct. at 1780. Of course, displaced claimants will find themselves under the thumb of the U.S. court only if a court in their home country chooses to respect the U.S. settlement. The ability of a court in a party's home forum to reject a judgment from a different forum, however, cannot reasonably justify a U.S. court in exerting otherwise inappropriate jurisdiction. If this was not the case, U.S. courts would face no real limitation in exercising jurisdiction over absent parties—plaintiffs or defendants. They could always just hide behind the fact that a court in that party's home forum could refuse to enforce that judgment for a lack of personal jurisdiction.

on personal jurisdiction are designed to protect,[274] consider the following. Given general notions of sovereignty, individuals who engage in an activity in country A that may give rise to a valuable legal claim in country A, but no viable legal claim in country B, justifiably expect that—at least as a default—their legal rights relating to that activity will be vindicated in country A and country B will take no action to impair those legal rights. By approving a global settlement that extinguishes displaced claimants' foreign claims, a U.S. court jeopardizes those claimants' ability to bring those claims in their home country[275] and thus unduly infringes on those claimants' individual liberty. The U.S. court, therefore, lacks personal jurisdiction to include and bind displaced claimants to such a settlement, and even if a U.S. court attempts to do so, no other court should respect that judgment as it was necessarily entered without personal jurisdiction.[276]

E. *Summary*

While the solutions discussed in Part III would help alleviate the adequacy of representation and inequitable treatment concerns described in Part II, they would fail to tackle most, if not all, of the problems examined in this Part. Regardless of how many different courts review a settlement, how many subclasses are formed, and how many different tiers of allocation are created, class settlements that (a) include claimless claimants, (b) give them a right of recovery, and (c) extinguish any foreign claims they may have will still create substantive rights for individuals who previously had none,[277] might unduly commandeer U.S. laws to alleviate alleged wrongdoing that occurred abroad,[278] and may include claimants whose only claims lie outside a U.S. court's subject-matter jurisdiction.[279] As for personal jurisdiction, subclassing may provide displaced claimants with sufficient protection and compensation to allow a court to presume

274. See *Nicastro*, 564 U.S. at 884 (citing Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982)).

275. See supra notes 163–164, 170–172, 179–180, 196 and accompanying text.

276. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 805 (1985) ("The only way a class-action defendant . . . can assure itself of [the] binding effect of the judgment is to ascertain that the forum court has jurisdiction over every plaintiff whose claim it seeks to adjudicate . . . ."); supra note 58 and accompanying text; cf. Frank v. Gaos, 139 S. Ct. 1041, 1046 (2019) (per curiam) ("A court is powerless to approve a proposed class settlement if it lacks jurisdiction over the dispute . . . .").

This sovereignty concern might also allow domestic class members with colorable claims to argue that a court cannot include claimless claimants in a settlement class. The territorial power of a court, they could argue, should not extend to individuals who have no claim they could bring in that court, especially when doing so would harm people within the court's jurisdiction.

277. See supra section IV.A.

278. See supra section IV.B.

279. See supra section IV.C.

their consent under *Shutts*,[280] but this would arguably require even more exacting attention to the relative value of each class member's foreign claims as to surpass the realm of feasibility[281] and render the class action an inferior method for adjudicating these claims. In the end, then, perhaps the most comprehensive solution to the issues laid out in this Note is also the simplest: Cull claimless claimants from settlement classes, period.

CONCLUSION

When laypeople think of class actions, they likely picture a mechanism aggrieved individuals can use to collectively vindicate their interests against a transgressing defendant. Current class action practice, however, makes one question this image. In many cases, it seems, defendants use class settlements to efficiently absolve themselves of responsibility for their alleged wrongdoing. And class counsel, not inclined to look a gift horse in the mouth, are likely happy to play along. To the extent that this process unduly undercompensates individuals with viable claims, infringes on the abilities of individuals to bring claims against a defendant in a forum where those individuals' interests could best be vindicated, and exceeds the proper reach of U.S. laws and U.S. courts' power, this process must be reassessed. In fact, it may need to be abandoned completely.

280. See *Shutts*, 472 U.S. at 811–12.

281. See supra section IV.D. Though one could argue that any time adequate representation exists, a court could presume personal jurisdiction over displaced claimants, these two requirements do not necessarily converge. In *Shutts*, the court was careful to hold that to establish personal jurisdiction, a court must find not only that absent class members are adequately represented but also that the court can presume that absent claimants consent to its jurisdiction. See supra notes 69–71 and accompanying text. Thus, presuming consent appears to require more than basic adequate representation. Furthermore, the lax opt-out procedures and standards that prevail today, see supra note 100, might suffice for absent class members with negative-value claims, but displaced claimants, who have valuable foreign claims that a settlement could release, might require a more robust opt-out right or a heightened guarantee of fair compensation if a court is to presume they have "submitt[ed] to the coercive power" of the United States. Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1780 (2017); see also supra notes 253–255 and accompanying text.