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Collateral Attacks Upon Class Action Judgments: Ending the Scope of Review Debate by Addressing the Underlying Notice Problems

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Notes & Comments

Collateral Attacks Upon Class Action Judgments: Ending the Scope of Review Debate By Addressing the Underlying Notice Problems.

INTRODUCTION

In deciding *Lamarque v. Fairbanks* in July 2007 the Rhode Island Supreme Court faced two troublesome issues in class action civil procedure.[1] The first issue was what scope of review a court should apply when an absentee class member collaterally attacks a class action judgment entered by a foreign court in order to escape its binding effect. In other words, if an absentee class member contends that he or she should not be bound by the first judgment for lack of due process, should a court examine the merits of that claim, as it would if a plaintiff in an individual suit collaterally attacked on personal jurisdiction grounds the judgment of another court? Or should the court give full faith and credit to the foreign court's judgment and limit review to a determination of whether there were adequate safeguards in place to ensure procedural due process? The second and underlying issue, which the court avoided confronting as a result of its ruling on the first, is what the standards are in a class action suit certified under Rule 23(b)(3)[2] for determining whether the notice to absentee class members satisfies Federal Rule of Civil

1. Lamarque v. Fairbanks, Capital Corp., 927 A.2d 753 (R.I. 2007).

2. FED. R. CIV. P. 23(b)(3) applies to class action suits seeking solely or predominantly money damages. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 n.3 (1985).

Procedure 23(c)(2)(B)[3] and due process requirements laid down by the Supreme Court.

On the first issue in *Lamarque* the Rhode Island Supreme court joined the ranks of courts favoring the more narrow scope of review that looks only to the procedures of the foreign court and not to the merits of the absentee class member's grievance.[4] The court thus barred the plaintiff's[5] illegal foreclosure, breach of implied contract not to foreclose, and deceptive trade practices claims.[6]

The plaintiff had sued loan servicer Fairbanks when Fairbanks foreclosed on her property in 2001 after allegedly refusing her tenders of payment, continually changing the amount due, failing to explain charges, and advising her that foreclosure would not be initiated until January 2002.[7] Subsequent to her filing suit, a class action in Massachusetts was initiated that made "almost identical" allegations as those made by the *Lamarque* plaintiff.[8] However, although the *Lamarque* plaintiff fit within the criteria for identifying those to whom individual notice would be sent, she was never sent notice of the class action suit or the settlement.[9]

Moreover, months before the requests for exclusion from the class action were due from the class members who were mailed notice, the class action court ordered a preliminary injunction that prohibited class members from commencing any suit against

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3. FED. R. CIV. P. 23(c)(2)(B) states in part that "[f]or any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."

4. *Lamarque*, 927 A.2d at 753.

5. Initially, the suit was filed by both Kathy Lamarque and her ex-husband Andre Lamarque, who jointly owned the property. The relationship with Fairbanks stemmed from the Lamarques' refinancing of the property to help fund their son's college education. *Id.* at 755. Although Kathy had moved to Texas at the time of the refinance, Andre continued to live at the jointly owned property. *Id.* at 755 nn.2-3. However, because Andre did not appeal the grant of summary judgment and thus was not a party to the case decided by the Rhode Island Supreme Court, I will refer to Kathy alone as the "*Lamarque* plaintiff." *Id.* at 756.

6. *Id.* at 754-55.

7. *Id.* at 755-56, 757 n.12.

8. *Id.*

9. *Id.* at 755, 760 n.16.

Fairbanks.[10] Fairbanks could have moved to dismiss the *Lamarque* plaintiff's suit immediately after the granting of the preliminary injunction, which would have given her actual notice of the class action and the right to opt out and pursue her claim independently.[11] However, it "instead waited until . . . long after the opt-out deadline . . . to move for summary judgment based on *res judicata*."[12] Her notice of the class action suit thus came four months after a settlement agreement was reached and judgment entered by the United States District Court in Massachusetts, when Fairbanks moved for summary judgment in her suit.[13]

The *Lamarque* plaintiff appealed the granting of the summary judgment motion on the grounds that she had been deprived adequate notice and thus due process of law. The Rhode Island Supreme Court expressed its "very grave concerns about why Kathy Lamarque was not sent individual notice" and felt "compelled to question the way that defendant and defendant's counsel . . . handled plaintiff's conundrum regarding the preclusive effect of the [class action] suit."[14] With regard to the time sequence of the preliminary injunction enjoining the commencement of any suits by class members, the court termed Fairbanks's and defense counsel's actions "questionable if not odious."[15] It further noted that such timing "may well be a strange coincidence, but if it [was] the product of strategy, th[at] series of events is indicative of sharp and unseemly practice and falls woefully short of what this court expects of attorneys who practice in this jurisdiction."[16]

Nonetheless, the Rhode Island Supreme Court found that its scope of review was restricted to a determination of whether there were sufficient procedural safeguards in place in the class action suit to protect the due process rights of absentee class members rather than a reexamination of the United States District Court's decision that the notice was adequate.[17] Because the court found

10. *Id.* at 767 n.27.
11. *Id.*
12. *Lamarque*, 927 A.2d at 767 n.27.
13. *Id.* at 756.
14. *Id.* at 766-67, nn.26-27.
15. *Id.* at 767 n.27.
16. *Id.*
17. *Lamarque*, 927 A.2d at 765.

that the procedural safeguards in the class action suit were adequate, the District Court's approval of the notice to class members was determinative.[18] Lamarque's due process for lack of adequate notice challenge thus failed and her suit to recover for wrongful foreclosure on her property was barred.

The factual circumstances of *Lamarque*, about which the court itself expressed its discomfort, exemplify a broader problem of inadequate protection of absentee class members' due process right to notice. The system for approving notice procedures is no longer adversarial because neither class counsel nor defendants have incentive to enforce stringent notice requirements. [19] In addition, especially when the suit is on the track to settlement, the presiding court has little incentive to overturn notice procedures agreed to by opposing parties.[20] Thus, the debate surrounding the proper scope of review of a collateral attack arises because, with no one enforcing stringent notice requirements, courts must make an uncomfortable choice: when an absentee class member who was never notified of the class action suit turns up, courts must either second guess the certifying court's adequacy of notice determination or bar the claims of plaintiffs despite the fact that the approved notice method did not achieve its objective of notifying the absentee class member.

Part II of this Comment will discuss the collateral attack debate and conclude that inadequate and unclear standards for determining what constitutes adequate notice in the first place is the impetus for the debate. Part III will discuss the notice standards prescribed by the United States Supreme Court and Rule 23(c)(2)(B), the questions left open by the broad language of the standard, and the resulting lenient interpretations that

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18. *Id.* at 765-66.

19. *See* Darren Carter, Note, *Notice and the Protection of Class Members' Interests*, 69 S. CAL. L. REV. 1121, 1126-27 (1996) (suggesting that "[t]he plaintiffs' attorney, who brought suit and asserted class standing in the first place, obviously has no incentive to derail the settlement process... Likewise, the defense attorney, with whom the enforcement responsibility for most of Rule 23's provisions principally lies, has no incentive to object since certification and maintenance are needed to obtain res judicata on the class as a whole").

20. *See id.* at 1127 (suggesting that the "policy of federal courts to encourage settlement precludes any true inquiry into the certification and maintenance requirements if a voluntary, negotiated settlement has already been reached").

provide inadequate protection to class members' right to receive notice of the adjudication of their rights. Part IV will discuss the systemic problems resulting from the lenient notice standards, and Part V will recommend measures to remedy these problems, to afford greater protection to class members' right to notice, and to make unnecessary the debate regarding the proper scope of review when a class action judgment is collaterally attacked on inadequate notice grounds.

II. THE PRECLUSIVE EFFECT OF A FOREIGN COURT'S JUDGMENT ON AN ABSENTEE CLASS MEMBER AND THE PROPER SCOPE OF REVIEW OF A COURT REVIEWING A COLLATERAL ATTACK.

The history of the debate surrounding the proper scope of review of a collateral attack on a class action judgment begins with two United States Supreme Court decisions: one related to the issue of collateral attack, and the other to the issue of absentee class members' due process rights.

In *Hansberry v. Lee*, the Supreme Court entertained defendants' collateral attack on lack of due process grounds upon an earlier class action judgment, and held that absentee class members "may be bound by the judgment where they are in fact adequately represented by parties who are present."[21] Based on its finding that the defendants in the case before it were not adequately represented, because their interests in resisting enforcement of the racially restrictive land use agreement were in conflict with the class representative in the prior suit who sought enforcement of the same agreement, the Court found that "the procedure and course of litigation" in the class action suit did not satisfy the due process requirement of adequate representation.[22]

Subsequently, in *Phillips Petroleum Co. v. Shutts*, the Court expanded the due process requirements beyond adequate representation for class actions certified under 23(b)(3), which "concern[] claims wholly or predominately for money judgments."[23] The Court found that the "minimal procedural due

21. 311 U.S. 32, 42-43 (1940).

22. *Id.* at 44-46.

23. 472 U.S. 797, 811 n.3 (1985). For an explanation of the development and rationale behind the distinctions between 23(b)(1), (2), and (3) classes, *see* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356,

process protection" required that an absentee class member plaintiff "receive notice plus an opportunity to be heard and participate in the litigation" and "an opportunity to remove himself from the class by executing and returning an opt out request for exclusion form to the court," and that "the named plaintiff at all times adequately represent the interests of the absent class members."[24] Thus after *Shutts* a collateral attack based on lack of due process, which was authorized by *Hansberry*, can have grounds other than inadequate representation.

The landscape at which the Rhode Island Supreme Court was looking when it decided *Lamarque* included, on the one hand, courts that had ruled that *Hansberry* stands for a limited scope of review when a class action suit is collaterally attacked and that *Shutts* did not expand the scope. For instance, in *Epstein v. MCA, Inc.*, relied on by the Rhode Island Supreme Court in *Lamarque*, when class members argued to the Ninth Circuit that lack of due process as a result of inadequate representation precluded a Delaware Supreme Court's entry of judgment in a concurrent class action from binding them, the court found that *Shutts* "d[id] not support the broad collateral review" required for it to examine the merits of that argument.[25] Noting that the *Hansberry* Court only examined whether the procedures adopted were adequate, the court held that due process required only that "an absent class member's right to adequate representation be protected by the adoption of the appropriate procedures by the certifying court and by the courts that review its determinations; due process [did] not require collateral second-guessing of those determinations and that review."[26] Thus, the court seemed to suggest that the "appropriate procedures" are only a finding by the class certifying court that the Rule 23 criteria were satisfied.[27] Because the Delaware court "made the requisite findings" that "the settlement

386-94 (1967).

24. *Hansberry*, 472 U.S. at 812. In addition, the Court adopted the notice standard requiring that notice must be "'the best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Id.* (*quoting* Mullane v. Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950)).

25. Epstein v. MCA, Inc., 179 F.3d 641, 644, 648 (9th Cir. 1999).

26. *Id.* at 648.

27. *Id.* at 647 n.6.

was 'fair, reasonable, adequate and in the best interests of the . . . Settlement class,'" that "notice to the class was 'in full compliance with . . . the requirements of the process'" and that the plaintiffs "fairly and adequately protected the interests of the Settlement Class," the judgment was therefore "protected from a collateral attack."[28] Although the *Epstein* decision was appealed, the United States Supreme Court declined review.[29]

The South Carolina Supreme Court agreed with the Ninth Circuit, and in *Hospitality Management Associates v. Shell Oil Co.*, which the *Lamarque* court also relied on, it held that "the proper scope of collateral review of a rendering court's rulings on the due process requirements for binding absent class members is one limited to a consideration of whether the procedures in the prior litigation allowed a full and fair opportunity to litigate the due process issues."[30] In arriving at its decision, the court examined "important policy considerations favoring both limited and broad collateral review," and concluded that "the significant interests in efficiency and finality," as well as the "spirit of full faith and credit" outweighed the possibility of enforcing "class action settlement against parties over whom the rendering court did not have personal jurisdiction."[31] The court therefore limited its review to a determination of "whether there were safeguards in place to guarantee sufficient notice and adequate representation" and "whether such safeguards were, in fact, applied."[32] The United States Supreme Court again declined to grant certiorari to address the proper scope of review.[33]

On the other hand, the landscape of precedent from other jurisdictions for the *Lamarque* court to reference also included decisions from courts that held that *Hansberry* does not require such a limited scope of review. In *Stephenson v. Dow Chemical Co.*, the only case the *Lamarque* court's decision referred to that adopted the broad scope of review, the Second Circuit declined to

28. *Id.*

29. Epstein v. Matsushita Elec. Indus. Co., 528 U.S. 1004 (1999).

30. Hospitality Mgmt. Assocs., Inc. v. Shell Oil Co., 591 S.E.2d 611, 623 (S.C. 2004). The Rhode Island Supreme Court relied on both *Epstein* and *Hospitality Management* in *Lamarque*. *Lamarque*, 927 A.2d at 765.

31. *Hospitality Mgmt.*, 591 S.E.2d at 659-60.

32. *Id.* at 619.

33. Hospitality Mgmt. Assocs., Inc. v. Shell Oil Co., 543 U.S. 916 (2004).

adopt Epstein's limited scope of review and examined the merits of the plaintiffs' inadequate representation argument.[34] The plaintiffs in *Stephenson* were Vietnam veterans who sued for compensation for injuries resulting from exposure to Agent Orange which did not manifest themselves until 1996 and 1998, when each was diagnosed with cancer.[35] The defendant claimed the actions were barred by a 1984 class action settlement that included in the class veterans whose injuries had not yet manifested and also provided that the funds from the settlement award would not be paid out for death or disability occurring after 1994.[36] The plaintiffs contended that their interests were inadequately represented in the class action and that binding them would therefore violate their due process rights.[37]

The court declined to follow the *Epstein* decision but found that the plaintiffs' collateral attack was allowed under its standard because no court had "addressed specifically the adequacy of representation for those members of the class whose injuries manifested after depletion of the settlement funds" and thus, there had been "no prior determination of the absent class members rights."[38] The court further found that the propriety of a collateral attack on a class action judgment was supported by *Hansberry*, *Shutts* and other circuit court decisions and that "such collateral review would not . . . violate defendants' due process rights by exposing them to double liability [because e]xposure to liability . . . is not duplicative if plaintiffs were never proper parties to the prior judgment in the first place."[39] Although the United States Supreme Court granted certiorari, in a per curiam opinion it simply vacated and remanded the Second Circuit's judgment with respect to some plaintiffs and affirmed Second Circuit's judgment with respect to others.[40]

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34. 273 F.3d 249, 258 (2d Cir. 2001). The court noted, however that "plaintiffs' collateral attack is proper even under [*Epstein*'s] standard." *Id.* The Rhode Island Supreme Court consulted *Stephenson* in *Lamarque* but found *Epstein* and *Hospitality Management* more persuasive. *Lamarque*, 927 A.2d at 763-65.

35. *Stephenson*, 273 F.3d at 255.

36. *Id.* at 253-54.

37. *Id.* at 257.

38. *Id.* at 257-58.

39. *Id.* at 258-59.

40. Dow Chemical Co. v. Stephenson, 539 U.S. 111 (2003).

In *Vermont v. Homeside Lending Inc.*, another case adopting the broad scope of review but not referenced by the *Lamarque* court, the Vermont Supreme Court was "inclined to follow the . . . decision of the Second Circuit Court of Appeals in *Stephenson*" when it determined the question of the proper scope of review of a collateral attack upon a class action judgment entered by a foreign court.[41] The first class action, which was claimed to bar the *Homeside Lending* suit, arose when Bank of Boston forced mortgagees to keep more money in their escrow accounts than was required by their contracts and did not pay them interest on these amounts.[42] Bank of Boston was thus "getting the use of the mortgagees' money for free."[43]

Because it felt the attorneys' fees proposed by the bank were too low, class counsel rejected the bank's initial offer to release the excess money and separately pay attorney fees.[44] Instead, class counsel negotiated a settlement that included much larger attorney fees, but provided that these fees would be paid not by the bank, but from the escrow accounts the bank would release.[45] The result was that class members had to pay attorney fees out of escrow money that was never lost to them, nor "recovered" by class counsel.[46] It had always been held by the bank in the customers' own names; the dispute was over the interest owed.[47] "What this meant for some absent class members was that some piddling figure, representing back interest, was deposited in their escrow accounts and a much greater figure was deducted to pay attorneys' fees. All those absent class members ended up poorer for having settled their claims against the bank." [48]

The Vermont Attorney General sued BancBoston and

41. Vermont v. Homeside Lending, Inc., 826 A.2d 997, 1017 (Vt. 2003).

42. *See* Susan P. Koniak, *How Like a Winter? The Plight of Absent Class Members Denied Adequate Representation*, 79 NOTRE DAME L. REV. 1787, 1809 (2004).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 1809-10.

47. *Id.*

48. *See* Koniak, *supra* note 42, at 1810-11. In addition, even customers who had not had excess escrow money held were charged attorneys' fees, and thus, some class members "got $0 in recovery and paid sometimes over $100 in attorneys' fees." *Id.*

Homeside Lending, Inc., the successor to the bank's mortgage business, who in turn claimed that the action was barred because all the absent class members were bound by the earlier settlement.[49] The court entertained the collateral attack and found that the both the notice sent to the absent class members and the representation afforded them by class counsel was inadequate. [50] The notice did not "comport with due process" because it failed to include "the one essential fact" that "some, many, or all of the absent class members were actually in a defendant class because their attorney's fee exposure, under the fee requested by class counsel, exceeded their economic benefit."[51] The court further found that the class representatives had not adequately represented the absent class members because their economic interest in an additional payment they would receive under the settlement terms "required them to support the settlement irrespective of how it treated any [absent] class member."[52] In addition, the court held that class counsel's representation was inadequate because its fees "took away most or all of the economic benefit of the litigation for class members."[53]

The court went on to say, however, that even if it were to subscribe to the view that the test is limited to a determination whether the adequacy of notice and representation was fully litigated in the foreign court, that would not preclude collateral attack in the instant case where hearings were "not adversarial."[54] The court noted that "[t]here was no contest over the class notice, and the [first class action] court simply accepted it as proposed jointly by class counsel and defendants without analysis."[55] The first class action judge's decision had simply reiterated "[w]ithout any analysis or specificity" that "the notice complied with all requirements of due process" and did not directly address the adequacy of representation issue.[56] Thus, the court approved the collateral attack on the alternate ground of lack of adverseness in the prior proceedings.

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49. *Id.* at 1814.
50. *Homeside Lending,* 826 A.2d at 1018.
51. *Id.* at 1011.
52. *Id.* at 1013.
53. *Id.* at 1016.
54. *Id.* at 1018.
55. *Id.* at 1018-19.
56. *Homeside Lending,* 826 A.2d at 1018.

Thus was the landscape when *Lamarque* came before the Rhode Island Supreme Court. *Lamarque* involved a plaintiff that filed suit in Rhode Island state court in January 2002 alleging illegal foreclosure, breach of an implied contract not to foreclose, and use of deceptive trade practices.[57] In early 2003, unbeknownst to the *Lamarque* plaintiff, *Curry v. Fairbanks Capital Corp.*, a class action making substantially the same allegations against the same defendant as in *Lamarque*, was filed in federal district court in Massachusetts.[58] In accordance with the notice procedures in *Curry*, the defendant was to use its "readily searchable computer media" to prepare a list of class members, all of whom would be mailed individual notice.[59] Although the *Lamarque* plaintiff fell "squarely within the class as defined and certified" by the *Curry* court, she was inexplicably not sent individual notice of the class action suit.[60]

In May 2004, after approving a settlement agreement, the *Curry* court entered a final judgment dismissing the claims of all class members with prejudice.[61] Four months later, the defendant moved for summary judgment in *Lamarque* on the grounds that as member of the class in *Curry*, the plaintiff's claim was barred by res judicata and release.[62] The court granted summary judgment in favor of the defendants, and the plaintiff appealed claiming among other things that she was not bound by the judgment in the *Curry* suit because she had never received notice of the suit or the settlement.[63]

The Rhode Island Supreme Court was thus presented with the question of what the proper scope of review is when reviewing collateral attack upon a class action judgment entered by a foreign court.[64] The grounds upon which the collateral attack was based,

57. *Lamarque*, 927 A.2d at 755.
58. *Id.* at 755, 757 n.12.
59. *Id.* at 765 n.22.
60. *Id.* at 758, 766 n.26. In expressing its "grave concerns" over why she was not sent individual notice, the court noted that "[s]he was listed as a borrower on the same mortgage as Andre Lamarque, and it [was] undisputed that he was mailed individual notice." *Id.* The court does not explain why Andre apparently did not mention the notice he received to his ex-wife Kathy.
61. *Id.* at 755-56.
62. *Id.* at 756.
63. *Lamarque*, 927 A.2d at 756.
64. *Id.* at 760.

however, differed from the cases discussed above. The plaintiff in *Lamarque* did not attack the prior judgment on inadequacy of representation grounds, nor was her dispute with the adequacy of the contents of the notice. [65] Rather, her challenge was that the notice distribution method described below was inadequate because she was never mailed notice or otherwise notified.[66]

After examining the decisions in *Epstein*, *Hospitality Management*, and *Stephenson*,[67] the Rhode Island Supreme Court found the reasoning of the *Epstein* and *Hospitality Management* courts more persuasive and thus adopted the more limited scope of collateral review.[68] The court agreed with the Ninth Circuit and South Carolina Supreme Court that "[a]llowing broad collateral attacks on final judgments entered in class action suits would . . . undermine the important goals of efficiency and finality in which the class action law suit finds its genesis."[69]

The court therefore limited its review to whether there were "safeguards in place to guarantee sufficient notice" and "whether such safeguards were, in fact, applied."[70] The notice method prescribed by the *Curry* court order mandated that the defendant compile a list of class members from its databank and check the list against the National Change of Address database.[71] In addition, Class Counsel was responsible for mailing the notice to the individuals on the list and re-mailing it to any forward address provided the first mailing was returned.[72] Summary notice was also published twice in USA Today.[73] The *Lamarque* court recited these procedures, noted that the "notices were appropriately drafted and adequately notified class members of the existence of the suit and settlement, the types of claims covered by it, and the right to opt out of the suit, including instructions and deadline" and thus decided that there were "adequate safeguards in place" in *Curry* "to guarantee sufficient

65. *Id.* at 765 n.21.
66. *Id.* at 759-60, 760 n.16.
67. The court did not discuss or reference *Homeside Lending*.
68. *Id.* at 765.
69. *Lamarque*, 972 A.2d. at 765.
70. *Id.*
71. *Id.* at 765 n.22.
72. *Id.*
73. *Id.*

notice to all class members."[74] In addition, the *Lamarque* court concluded that that the "propriety of the notice procedures . . . was fully and fairly litigated" by the *Curry* court and the notice was adequate because after a fairness hearing in *Curry*[75] that court "held that the notice procedure it had ordered had been complied with and that [it] was the best notice practicable under the circumstances and satisfie[d] the requirements of due process." [76]

The court's holding in *Lamarque* highlights two problems with the limited scope of review for collateral attacks upon a class action judgment. The first is that there is no clear standard for determining either what constitutes adequate safeguards or compliance therewith. For instance, as noted above, it is unclear what standards the court was applying when it concluded that the *Curry* court "had adequate safeguards in place"; after stating this legal conclusion, the court simply recited all of the procedures that the *Curry* court employed.[77] The court neither referred to objective criteria nor cited any authority that found similar procedures adequate and there was thus no indication of when, if ever, a court reviewing the notice procedure employed by a foreign court would find it inadequate.[78]

Determination of whether adequacy of notice was fully and fairly litigated in the court rendering judgment in the class action suit also does not provide an objective standard. On the one hand, the *Homeside Lending* court stated that full and fair litigation means that the adequacy of notice issue has been exposed to the

74. *Id.* at 765-66.

75. The *Lamarque* court did not have the transcript from the fairness hearing. 972 A.2d. at 766.

76. *Id.* at 765-66.

77. *Id.*

78. The court did note that "plaintiff might have been able to avoid the effect of the *Curry* judgment if she had demonstrated either that the order itself was defective because it was inadequately drafted to insure that due process would be afforded to all class members, or that [defendant] failed to appropriately follow the instructions of the [*Curry*] court, thus undercutting the protections embodied in the order." *Id.* at 766 n.25. However, the plaintiff's grievance was not with the drafting of the notice because she never received it. Rather, her grievance was with the adequacy of the distribution of the notice, and it seems curious that despite the fact that according to the court ordered procedures the plaintiff should have been mailed notice, the fact that she was not was not evidence that defendant "failed to appropriately follow the instructions of the [*Curry*] court." *Id.*

adversarial process, rather than addressed by a judge's conclusory statement "[w]ithout any analysis or specificity" that the notice "complied with all requirements of due process."[79] On the other hand, despite not knowing what actually transpired at the fairness hearing, the *Lamarque* court was satisfied that such a hearing had been held and was comfortable relying on the fact that the *Curry* court had summarily held, without analysis, that the notice procedure had been complied with and satisfied due process.[80]

Thus, the limited scope of review does not provide clear standards by which a defendant can ensure a foreign court reviewing a collateral attack upon a class action judgment will find that the notice procedure was adequate and that it was complied with, nor does the limited scope of review provide clear standards to plaintiffs as to what they must show in order to mount a successful collateral attack.

The second problem with the limited scope of review that the *LaMarque* decision highlights is the seemingly unjust and unsettling results such a limited review may lead to. As discussed above in the Introduction, the court expressed "very grave concerns about why [plaintiff] was not sent individual notice in the Curry suit."[81] It noted that rather than moving to dismiss the *Lamarque* suit immediately after the granting of the preliminary injunction enjoining actions by class members, which would have notified the plaintiff of the class action and her right to opt out, defense counsel "instead waited until . . . long after the opt-out deadline . . . to move for summary judgment based on *res judicata*."[82] Despite recognizing the "harsh result of its decision," and finding "defendant's, and defense counsel's, actions questionable if not odious," the court stated that inquiry into the merits of the plaintiff's claim were "well beyond the bounds of the narrow scope of review" it found proper.[83] The court thus proclaimed its hands tied and referred the plaintiff to the court that rendered the *Curry* judgment.[84]

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79. *Homeside Lending*, 826 A.2d at 1018-19.
80. *Lamarque*, 927 A.2d at 766.
81. *Id.* at 766 n.26.
82. *Id.* at 767 n.27.
83. *Id.* at 766-67 n.27.
84. *Id.* at 766-67.

I propose that these two problems are rooted in, and symptoms of, the flawed standards for determining what constitutes adequate notice being applied by the courts rendering the class action judgments. A collateral review of these determinations highlights this problem because it gives us a "Monday morning quarterback" view of the injustice resulting from inadequate, but court sanctioned, notice procedures. The resulting tension between courts that emphasize the importance of finality and full faith and credit, and those that cannot stand to see such injustice go uncorrected, would not exist were it not for the underlying flaws in adequate notice standards.

III. THE DEVELOPMENT OF THE STANDARD FOR ADEQUATE NOTICE, THE QUESTIONS THE BROAD LANGUAGE LEFT OPEN, AND THE LENIENT INTERPRETATIONS RESULTING.

There are very few Rhode Island state court cases discussing notice in the context of class actions. The few cases there are were decided when the Rhode Island Rule of Civil Procedure 23 differed substantially from Federal Rule of Civil Procedure 23 in not requiring individual notice and a right to opt out, which is no longer the case [85] Thus, when certification was at issue rather than due process, the courts applied a standard that is now not applicable. In addition, each time a Rhode Island court has discussed notice to class members in the context of due process requirements, the court has referenced standards laid down by the United States Supreme Court or a Federal District Court.[86] For

85. *See* Testa v. City of Providence, 572 A.2d 1336, 1338 n.2 (R.I. 1990); Guadagno v. Hertz Corp., No. C.A. 79-398, 1983 WL 481447, *1 (R.I. Super. Ct. Mar. 1, 1983); Holmes v. Citizens Bank, No. C.A. 81-2625, 1983 WL 486830, *5-6 (R.I. Super. Ct. Mar. 9, 1983); Rhode Island Rule 23(c)(2) now requires, as Federal Rule 23(c)(2)(B) does, that for class actions maintained under 23(b)(3) the court must "direct to the members of the class the best notice practicable under the circumstances, including individual notice the all members who can be identified through reasonable effort" and that the notice shall advise that "the court will exclude the member from the class if the member so requests by a specified date." R.I. SUPER. CT. R. CIV. P. 23(c)(2).

86. *See Guadagno*, 1983 WL 481447, at *5 ("The Court must ensure that due process obligations to absent members are fulfilled. The United States Supreme Court has held that personal service by mail is required where names and addresses of members of the class are ascertainable"); *Holmes*, 1983 WL 486830, at *10 ("we also agree fully with the [Unite States Supreme] [C]ourt's ruling in *Eisen* that due process requires decent notice.").

these reasons, the discussion of the establishment of adequate notice standards and their subsequent application will reference decisions from the United States Supreme Court and courts outside of Rhode Island.

The standard for what constitutes adequate notice as required by due process was established by the United States Supreme Court and later incorporated in the Federal Rules of Civil Procedure.

Almost sixty years ago, in *Mullane v. Hanover Bank & Trust Co.*, the Supreme Court discussed the standards for the notice a party is entitled to receive under the Due Process Clause, which required "at a minimum . . . notice and [an] opportunity for [a] hearing."[87] The Court recognized that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[88] The Court further held that notice by mail was required for individuals whose name and address was known, but notice by publication was sufficient for individuals who were unknown.[89]

Rule 23(c)(2), which echoed *Mullane*'s notice standards, emerged from the 1966 Amendments to the Federal Rules of Civil Procedure. The Rule provided that for actions maintained under 23(b)(3), "the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[90]

Eight years later the United States Supreme Court discussed the individual notice requirement of 23(c)(2)(B) in *Eisen v. Carlisle & Jacquelin*.[91] The Court reaffirmed that "individual notice to

87. 339 U.S. 306, 313 (1950). *Mullane* involved the defendant bank's settlement of a fund comprised of 113 trusts and the question of whether the notice provided to the trust beneficiaries in accordance with state statutory provisions satisfied due process guarantees. *Id.* at 309-11. Although it was not a class action suit, it raised similar issues with regards to adequacy of notice.

88. *Id.* at 315.

89. *Id.*

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

91. 417 U.S. 156 (1974).

identifiable class members [was] not a discretionary consideration," and that "each class member who [could] be identified through reasonable effort must be notified that he may request exclusion from the action and thereby preserve his opportunity to press his claim separately."[92]

Under *Mullane*, Rule 23(c)(2), and *Eisen* therefore, notice must be reasonably calculated to notify class members, and such reasonably calculated notice includes individual notice to reasonably identifiable class members. Such broad language, however, leaves substantial room for interpreting what satisfies due process. The least demanding and least protective of absentee class members' right to notice standard has since generally prevailed.

For instance, one question resulting from the broad language of *Mullane*, *Eisen*, and Rule 23(c)(2)(B) is whether individual notice must be given or merely attempted. On the one hand, *Mullane* found that the notice is not inadequate "because in fact it fail[ed] to reach everyone," and must be only that "reasonably calculated" to apprise the parties of the litigation and "afford them an opportunity to present their objections."[93] On the other hand, there are indications that actual notice might be important. For instance, in *Shutts*, 1,500 class members were excluded even though individual notice was sent to them, "because the notice and opt out form was undeliverable."[94] If all that were required was to mail notice to these class members then it would seem that it was unnecessary to exclude them from the class. Also, the *Eisen* Court referred to individual notice as mandatory and repeated the mantra that it "must" be "given" or "provided."[95] However, in reference to the identifiable class members in that case, the Court noted that "there [was] nothing to show that individual notice [could] not be *mailed* to each," suggesting that it was the sending and not the receipt of the notices that was the crucial factor.[96]

Ultimately, despite the recitation of the individual notice mantra, the "best practicable notice" principle has controlled the standard for adequate notice, which now requires that individual

92. *Id.* at 176.
93. 339 U.S. at 315.
94. 472 U.S. at 813.
95. 417 U.S. at 176.
96. *Id.* Emphasis added.

notice be attempted rather than given.[97] Courts have held that notice was adequate even when it was known that class members received individual notice after the opt out deadline or not at all.[98] And rather than excluding from the class those identifiable class members that were known not to have received notice, as was done in *Shutts*, these individuals were included in the class and thus bound by the class action judgment.

Another question, and one which has not been so clearly settled after *Mullane*, Rule 23(c)(2), and *Eisen*, is what constitutes a reasonable effort to identify class members. If only class members that are identifiable by reasonable efforts are due at least an attempt at individual notice, how is this group of class members identified? Although the *Mullane* Court referred to a due diligence standard for ascertaining the name and whereabouts of persons affected by a proceeding, it left open the question of what investigative "searches might be required in another situation" than the one involved there.[99] Rule 23(c)(2) added no further clues, and in *Eisen*, although the trial court found that 2,250,000 class members could be identified with reasonable effort, it was unclear what standard of reasonable effort was applied to reach this determination or why the remaining 3,750,000 class members were not reasonably

97. *See, e.g.*, Rigat v. GAF Materials Corp., No. CV010095029, 2002 WL 237339, at *3 (Conn. Super. Jan. 25, 2002) ("The Supreme Court says that the plaintiff 'must receive notice.' But, 'must receive notice' does not mean or require the plaintiff gets actual notice'"); Silber v. Mabon, 18 F.3d 1449, 1454 (9th Cir. 1994) (noting that the court "[did] not believe that "*Shutts* changes the traditional standard for class notice from 'best practicable' to 'actually received' notice); *In re* Agent Orange Product Liability Litigation, 818 F.2d 145, 168 (2d Cir. 1987) (disagreeing with the contention that Rule 23(c)(2) requires actual notice to every class member).

98. *See, e.g.*, *Silber*, 18 F.3d at 1451 (due process rights not violated even though notice was not sent to at least 1,000 class members until after the opt out deadline); DeJulius v. New England Health Care Employees Pension Fund, 429 F.3d 935, 946 (10th Cir. 2005) (notice satisfied due process requirements even though class members did not receive notice until after the opt out deadline); Bussie v. Allmerica Financial Corp., 50 F.Supp.2d 59, 69 (D. Mass. 1999) (notice adequate even though 21,698 of notice packages were undeliverable); *In re* The Prudential Insurance Company of America Sales Practices Litigation, 177 F.R.D. 216, 223 (D. N.J. 1997) (notice adequate even though after 100,000 notices returned undeliverable or non-forwardable only 25,000 were able to be re-sent with updated addresses).

99. 339 U.S. at 317-18.

identifiable.[100] On this subject, like that of notice given versus notice attempted, subsequent courts have adopted a lenient interpretation where a reasonable effort seems to include nothing beyond retrieving an "easily accessible list."[101]

Mullane, Eisen, and Rule 23(c)(2)(B) also left open the question of what standard should be applied when determining whether notice was reasonably calculated to reach the parties.[102] *Mullane* stated that "the means [of notice] must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of feasible and customary substitutes."[103] Aside from this rather flexible language, *Mullane* provided the narrow decree that notice through ordinary mail is reasonably calculated to notify class members whose identity and addresses are known, while notice by publication is sufficient for unidentifiable class members.[104] The Federal Rules and *Eisen* did not elaborate on the standard.

Even within the rule requiring individual notice by mail to reasonably identifiable class members, however, courts have chosen the more lax standards when determining whether the mailing itself was reasonably calculated to reach its recipient. Mailing to the last known address has been sufficient without regard to whether the notice was returned undeliverable,[105] and

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100. *See* FED. R. CIV. P. 23 (c)(2)(B); 417 U.S. at 176-77.

101. *See, e.g., In re* Agent Orange, 818 F.2d at 169 (disagreeing with contention that all veterans should have been sent notice, in part because although "some records kept by the government would have facilitated individualized notice ... there was no easily accessible list of veterans, as there must have been of royalty holders in [Shutts] and of odd-lot trading customers in [Eisen])"; *In re* The Prudential Insurance Company, 177 F.R.D. at 223 ("Rule 23 does not require the parties to exhaust every conceivable method of identifying the individual class members").

102. There has been more said on the separate issue of determining whether the contents of the notice are reasonably calculated to inform the parties of the suit and their rights. *See, e.g.*, Todd B. Hilsee, Shannon R. Wheatman & Gina M. Intrepido, *Do You Really Want Me To Know My Rights? The Ethics Behind Due Process In Class Action Notice Is More Than Just Plain Language: A Desire To Actually Inform*, 18 GEO. J. LEGAL ETHICS 1359 (2005).

103. 339 U.S. at 315.

104. *Id.* at 317-318.

105. *See In re* Chambers Development Securities Litigation, 912 F. Supp.

individual mailings that were sent out without a zip code or apartment number have been deemed reasonably calculated to reach class members.[106]

In sum, where uncertainty exists in the standards set forth in *Mullane*, *Eisen* and Rule 23(c)(2)(B), courts have chosen the more lenient interpretation of what constitutes adequate notice: reasonably identifiable class members are entitled only to notice attempted rather than received, reasonable efforts to identify class members seems to require only the production of an easily attainable list, and notice is reasonably calculated to reach members even when it displays an incorrect or incomplete address.

IV. THE SYSTEMIC PROBLEMS RESULTING FROM LENIENT NOTICE REQUIREMENTS

The leniency of the current requirements for notice to absentee class members, which require very little for notice to be deemed adequate, skews systemic safeguards that are in place in non class action suits and provides inadequate protection of class members' right to notification of adjudication of their interests.

For instance, one of the systemic safeguards in our judicial system is the adversarial system, which reflects the "need to allow individuals to protect and advance their own personal interests through litigation" and recognizes that the "adjudicatory process is most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed."[107] The determination of the notice methods to be employed in a class action, however, involve class representatives, class counsel, and defendant, none of whom have incentive to

822, 836 (W.D. Pa. 1995).

106. *See* Peters v. National Railroad Passenger Corp., 966 F.2d 1483, 1486-87 (D.C. Cir. 1992) (noting that *Mullane*-"endorsed first class mail as ... notice reasonably calculated to reach reasonably identifiable parties," and notice was adequate despite missing zip code and apartment number because zip codes are optional, the omission was class counsel's not defendant's fault, and it was not foreseeable to the parties responsible for the mailing that the class member's New York City address required an apartment number").

107. *See* Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 549, 572 (2006).

challenge the other party.[108] On the one hand, the defendant would prefer that as few class members as possible receive actual notice because they will be bound, as explained above, with or without actual notice.[109] The defendant will thus exert as little effort as possible in identifying class members and in attempting to reach them with actual notice. On the other hand, because the class size remains the same whether or not actual notice is received by class members, class counsel has little incentive to improve notice methods. Moreover, the more class members actually reached, the more potential objectors there are to any settlement agreement, litigation strategies, or, more importantly, attorney's fees.[110] Thus, there is no party naturally disposed to advocate the interests of the absentee class members in receiving the notice that due process is supposed to guarantee them; the "essential safeguard" of the adversarial system is absent.[111]

Another due process safeguard that is illusory in the context of ensuring adequate notice to absentee class members is the court's role in ensuring the Rules are followed and due process requirements satisfied. It has been argued that "the policy of the federal courts to encourage settlement precludes any true inquiry into the certification and maintenance requirements if a voluntary, negotiated settlement has already been reached. In this intensely pro-settlement environment, the effectiveness of the Rule 23 provisions that rely upon the courts and the parties' attorneys for enforcement is significantly diluted."[112]

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108. Although the *Shutts* court noted that the determination of whether representation is adequate may remain adversarial, as explained below, the same line of reasoning does not hold true in the context of notice procedures. *See* 472 U.S. at 809-10 (noting defendant "has a great interest in ensuring that the absent plaintiffs' claims are properly before the forum" and that the defendant in that case "sought to avoid class certification by alleging that the absent plaintiffs would not be adequately represented").

109. *See* Carter, *supra* note 19, at 126-27 (more broadly suggesting that "the defense attorney, with whom the enforcement responsibility for most of Rule 23's provisions principally lies, has no incentive to object since certification and maintenance are needed to obtain res judicata on the class as a whole").

110. *Id.* at 1133 (suggesting that particularly in large-scale, small-claim litigation, because the class "attorneys are immune from monitoring by their putative clients, they are guided primarily by their own self interest").

111. *See* Redish & Kastanek, *supra* note 107, at 549 (emphasizing the importance of adverseness in group litigation).

112. Carter, *supra* note 109, at 1126-27.

Additionally, one study examined whether courts have been guarding the adequate representation requirement or have simply been "rubber stamping the proposed representatives and class counsel" and found that "the vast majority of courts conduct virtually no gate-keeping function and approve class representatives and class counsel with little or no analysis."[113] Although this study involved approval of adequate representation rather than adequate notice, it seems unlikely that courts are reviewing notice methods with any more scrutiny; as discussed above, the trial courts referenced in both the *Homeside Lending* and *Lamarque* simply listed the notice procedures employed and stated without any further explanation that they were adequate.[114]

The lack of meaningful safeguards for the absentee class members' right to receive adequate notice are highlighted when one such member collaterally attacks a class action settlement or judgment on the basis of inadequate notice. At this point, an individual with the incentive to challenge the adequacy of notice turns up and it becomes apparent that approved notice might have been inadequate after all. However, because of the interests in finality, efficiency, and full faith and credit, courts that adopt the narrow scope of collateral attacks refuse to readdress the issue of adequate notice, leaving the problem of inadequate notice intact. In addition, even if a court subscribes to the more broad scope of review and gets to the merits of the issue, under the lax notice standards described above, it is entirely likely that the notice would again be determined adequate.

Thus, although we have a meaningful standard that requires notice and an opportunity to be heard, adequate representation, and an opportunity to opt out, it is not being meaningfully enforced. At the point when notice procedures are approved, no party has the incentive to actually inform the class, and the people that have the incentive are barred because they turn up after the fact.

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113. Robert H. Klonoff , *The Judiciary's Flawed Application of Rule 23's "Adequacy of Representation" Requirement*, 2004 MICH. ST. L. REV. 671, 673 (2004).

114. *See* 826 A.2d at 1018-19; 927 A.2d at 765-66.

V. RECOMMENDATIONS FOR PROVIDING MORE MEANINGFUL ENFORCEMENT OF REASONABLY IDENTIFIABLE CLASS MEMBERS' RIGHT TO NOTICE

Having recognized the problem, the question then becomes how is it remedied? A solution that would better safeguard the due process rights of absentee class members will both raise the bar that class counsel and defendant must meet before a court approves a notice method and alter the current incentive structure, so that at least one party is advocating on behalf of absentee members' right to receive notice. This can be done in part by establishing clearer and more stringent notice requirements, and in part by not turning away absentee class members who seek to challenge the adequacy of notice after the fact.

One possible solution to the lack of due process safeguards that has been suggested would require that class members affirmatively opt in to be included in the class and thus to be bound by the settlement or judgment.[115] The asserted benefits of this approach, beyond affording greater due process protection to class members, include limiting the class to those members that have a real interest in pursuing the claim and guarding against class actions pursued solely on the basis of an entrepreneurial attorney's desire for substantial attorney fees.[116]

In addition, in terms of altering incentives, requiring a class member to affirmatively opt into a class would restore the adversarial aspect that has been lacking in the context of notice procedures. An opt in requirement would encourage class counsel to get actual notice to as many class members as possible, in order to ensure that the class is sufficiently large to be certified,[117] and, in the case of small individual claims, that the amount of money damages would be sufficient to make litigation worthwhile.[118]

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115. *See, e.g.*, Stephen J. Safranek, *Do Class Action Plaintiffs Lose Their Constitutional Rights?*, 1996 WIS. L. REV. 263 (1996); *Shutts*, 472 U.S. at 812 (absentee class member argued that due process requires absent class plaintiffs to opt in).

116. *See* Safranek, *supra* note 115, at 266-67.

117. FED. R. CIV. P. 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable."

118. *See* Louis W. Hensler III, *Class Counsel, Self-Interest and Other People's Money*, 35 U. MEM. L. REV. 53, 62 (2004) (noting class members have

Moreover, if it is clear that the numerosity requirement will be satisfied, and if opting in were a due process requirement, the defendants might help to ensure that as many class members as possible to receive actual notice so that they might opt in and thus be bound by the judgment.

The United States Supreme Court, however, has soundly rejected an opt in requirement.[119] The Court wrote that "[r]equiring a plaintiff to affirmatively request inclusion would probably impede the prosecution of those class actions involving an aggregation of small individual claims, where a large number of claims are required to make it economical to bring suit."[120] Thus, those that would be happy to have their claims litigated on their behalf would lose the benefit of the class action device because enough class members either do not receive notice or do not make the effort to opt in.

I propose two approaches which, if implemented together, would help remedy the current lack of due process safeguards for absent class members without making class actions impracticable in the way the Supreme Court believes an opt in requirement would. The first, and the less drastic of the two, is for courts to implement more stringent standards for adequate notice procedures. Secondly, in what would be a worthwhile overhaul of the way in which courts have interpreted the notice requirement in class actions, a per se rule should be adopted that provides that, on collateral attack, the test to be applied for determining whether notice was inadequate is whether actual notice was received.

First, there are several requirements courts can implement that would provide more meaningful enforcement the goal of individual and actual notice for as many class members as possible. One simple and straightforward step, and one that United States Supreme Court saw in *Shutts*, is to exclude class members for which there is affirmative evidence that the notice has not been received. In *Shutts* the Court noted that the 1,500

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little incentive to opt out and thus, when the opt out mechanism is used, a large class with correspondingly high potential damages is almost certain). Assuming the incentive to affirmatively opt in would be the same for small claims, the result would be the inverse: a small class with correspondingly low potential damages.

119. *Shutts*, 472 U.S. at 812.

120. *Id.* at 812-13.

class members for whom the notices were undeliverable were excluded from the class.[121] Thus, if any notices are returned undeliverable, the corresponding class members should be excluded. In addition, absentee class members whose notices were mailed too late to be received before the opt out deadline[122] should be excluded unless the opt out period is extended. Besides seeming logically necessary in order to give meaningful value to the goal of actual notice and the absentee class members' due process right to notice, requiring exclusion from the class in these instances would incentivize defendants to ensure that mistakes of address are corrected and that notices are timely sent.

Another more stringent standard courts should apply is a rule that any class member that has litigation pending is "reasonably identifiable" and thus entitled to individual notice. Individuals who value their claims enough to have chosen to independently pursue them should not be barred from doing so because they failed to see a published notification, and it should take little effort on the part of defendants to identify who is suing them. In addition, because defendants have a particularly high interest in binding these class members without actually notifying them, courts could require that these class members opt in in order to be included in the class. It would be important, however, that these class members not be able to opt in after a certain deadline so that they cannot join the class after having lost in their individual suits.[123]

The second approach courts should take is to adopt a black and white rule that if an absent class member collaterally attacks a judgment on the grounds of lack of notice, and if he or she can prove that actual notice was not received, then the class member should not be bound by the first suit. While this would admittedly be a departure from current jurisprudence,[124] the benefits of this

121. *Id.* at 813.

122. *See, e.g.*, *Silber*, 18 F.3d at 1450-52; *DeJulius*, 429 F.3d at 946.

123. *See* Robert H. Klonoff, *Class Action Symposium: the Twentieth Anniversary of Phillips Petroleum Co. v. Shutts*, 74 UMKC L. REV. 487, 497 (2006) (noting the potential problem of class members "wait[ing] and see[ing] how the case was going before deciding whether to opt out").

124. *See, e.g.*, *Silber*, 18 F.3d at 1454 (stating that neither *Mullane* nor *Eisen* requires actual notice and that *Shutts* did not change this); Carlough v. Amchem Prod., 158 F.R.D 314, 325 (E.D.Pa. 1993) ("[r]eceipt of actual notice by all class members is required neither by Rule 23 nor the Constitution").

standard of review would make its adoption worthwhile.

First, releasing class members who did not receive actual notice from a binding decision clearly protects absentee class members' due process rights. If the claim is monetarily substantial then it would seem unfair that a plaintiff be denied this interest without actual notice, and if the claim is monetarily insubstantial then it would seem unlikely, as the *Shutts* court pointed out, that an individual claim would be economically practical or worthwhile.[125]

Second, this approach would remove the temptation for defendants to manipulate the effectiveness of notice procedures that, if applied in good faith, would result in actual notice to class members. Such manipulation was arguably the explanation for defense counsel's actions in *Lamarque*. Not only would defendants reap no benefit from failing to inform a class member whom they know has an interest in independently pursuing his or her claim, but they would also benefit from ensuring that reasonably identifiable class members actually receive notice, thereby binding such a class member to the class action court's decision.

Third, enforcing an actual notice requirement on review would relieve foreign courts facing a collateral attack by an absentee class member from having to choose between second guessing the class action court's decision and barring the plaintiff from bringing his or her claim despite the fact that the notice due was not received. Because a court applying the standards recommended above would have approved notice based on the assumption that those notices sent and not returned as undeliverable were actually received, providing relief for those that did not receive actual notice would be giving effect to the intention of the class action court.

In addition, allowing class members to escape the binding effect of a class action judgment or settlement if they did not receive actual notice also does not raise the same "wait and see" concerns as does an inadequate representation challenge[126]: because the class members never received notice of the suit, they could not have been waiting to see whether they were satisfied

125. *Shutts*, 472 U.S. at 812-13.
126. *See* Klonoff, *supra* note 123, at 497.

with outcome before raising their challenges.

Lastly, the more demanding and clearer standard would provide class action defendants and would-be collateral attackers with greater certainty as to the prospects of any challenge to the adequacy of notice. Currently, defendants and potential plaintiffs are faced with uncertainty as to whether a court reviewing any potential collateral attack will adopt the broad or narrow scope of review. Further, there are no clear standards of application within each scope of review. Under the broad scope of review, the court will examine the merits of the inadequacy of notice claim using the same flexible standards the first court used, only this time with hindsight. Under the narrow scope of review, a court might summarily and deferentially find that adequate procedural safeguards were in place in the class action suit as did the *Lamarque* court,[127] or it could find that the notice issue had not been fully litigated because it was not opposed, as did the *Homeside Lending* court.[128] Simplifying the standard for a successful collateral attack to one requiring a showing of lack of actual notice removes many of these variables.

Thus, by adopting the more demanding standards for establishing the adequacy of notice described above, and requiring reviewing courts to enforce an actual notice requirement, defendants have greater incentives to improve notice procedures, and the due process rights of absentee class members are more meaningfully protected. In addition, the debate over the scope of review of a collateral attack on inadequacy of notice grounds becomes moot, and absentee class members and defendants can better evaluate the prospects of a collateral attack on inadequate notice grounds.

CONCLUSION

The current standards for evaluating whether notice to absentee class members is adequate do not protect the interest of class members in receiving notice of the adjudication of their rights. Neither class counsel nor defendants have any incentive to improve notice programs beyond what courts have been willing to approve. To solve this problem, courts must implement more

127. *See* 927 A.2d at 765-66.
128. *See* 826 A.2d at 1018-19.

demanding requirements for establishing adequate notice in order to better safeguard class members' right to notice and to recalibrate incentives so that notice truly will be the best practicable. In order to reinforce these safeguards, to add additional incentive for improving notice, and to make more consistent the standard for reviewing a collateral attack on the adequacy of notice, a standard requiring actual notice to every reasonably identifiable class member should be adopted. These measures would help to ensure that what was meant to be a meaningful standard is more meaningfully enforced.

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