SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 53 | Issue 4 Article 16

2003

Full Faith and Credit Clause: A Defense to Nationwide Class Action Certification ?

Michele Connell

COMMENTS

FULL FAITH AND CREDIT CLAUSE: A DEFENSE TO NATIONWIDE CLASS ACTION CERTIFICATION?

INTRODUCTION

Class action litigation addresses the need for plaintiffs who do not have large monetary damages to aggregate their claims into one court proceeding in order to make the case economically feasible.[1] Class actions also create more efficiency within the judiciary by allowing for adjudication of similar cases under the rubric of one proceeding.[2] As case law in the class action arena has developed, plaintiffs and their attorneys have benefited greatly while defendants have been forced to litigate simultaneous class actions in various states. For example, plaintiffs increasingly seek to certify nationwide class actions that encompass all members in the fifty states.[3] These types of nationwide suits have the potential to bankrupt companies if they lose in court, so defendants often are forced to settle. The increase in simultaneous, duplicative, and nationwide class actions has tipped the scales in favor of the plaintiffs beyond what is necessary or fair. Rather than simply leveling the playing field, concurrent class actions have become a means to harass and agitate defendants into costly settlements. The case example employed in this Comment, though limited to certain fact scenarios, is indicative of the problems faced by those defending against class action litigation.

This Comment offers class action defendants a manner, within existing common law and statutes, to take a denial of a nationwide class action certification from one state into another state where it

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[1] Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980).

[2] Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 156 (1982); *see also* 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.02 (3d ed. 1997).

[3] For a discussion of the implications of this trend, see Rory Ryam, Comment, *Uncertifiable? The Current Status of Nationwide State Law Class Action*, 54 BAYLOR L. REV. 467 (2002).

will be enforceable against another similar certification motion in accordance with the Full Faith and Credit Clause.[4]

The hypothetical employed throughout this Comment begins in Ohio state court. Since the great majority of state class action statutes mirror Federal Rule of Civil Procedure 23 (Rule 23), an analogous argument would apply to actions brought in most states.[5] A plaintiff representative filed a motion to certify a nationwide class in Ohio state court alleging breach of contract claims against a national corporation. The plaintiff met the representational requirements as well as the other prerequisites of a class action in Ohio.[6] However, the Ohio court denied certification of the class because common questions of law or fact did not predominate.[7] This is an important defect in a class action because a case that is denied for lack of predominant common questions is not "curable."[8] Essentially, the denial was based on the nature of the claims that the representative was hoping to pursue and could not be amended to correct the defect. Therefore, substitution of a new class representative would not change the judge's decision.

Subsequently, a new plaintiff representative filed for certification of the same class for the same breach of contract claims in Florida state court. In light of the policies underlying class action statutes, the prevailing Ohio defendant should be able to carry the Ohio order into Florida court and argue that the principles of *res judicata* and full faith and credit preclude the Florida court from certifying the class. This is the result that accomplishes "economies of time, effort, and expense, and promote[s] uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."[9] This is the result that accomplishes the purposes of class action litigation.

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[4] U.S. CONST. art. IV, § 1.

[5] There are some exceptions. Two states' statutes are based on the Field Code. CAL. CIV. PROC. CODE § 382 (West 1973 & Supp. 2002); NEB. REV. STAT. § 25-319 (1995). New Hampshire, North Carolina, and Wisconsin have statutes that do not follow federal Rule 23. *See* N.H. REV. STAT. ANN. § 358A:10-a (1995); N.C. GEN. STAT. § 1A-1 (1999); WIS. STAT. ANN. § 803.08 (West 1994). Virginia and Mississippi do not have class action statutes.

[6] OHIO R. CIV. P. 23(A). The Ohio class action statute is identical to the federal statute. *See* Part I *infra* for the prerequisites to Rule 23.

[7] Ohio Rule 23(B)(3) requires that questions of law or fact common to the members of the class must predominate over individualized questions affecting members. OHIO R. CIV. PRO. 23(B)(3); *see also* Warner v. Waste Mgmt, Inc., 521 N.E.2d 1091 (Ohio 1988); Schmidt v. Avco Corp., 473 N.E.2d 822 (Ohio 1984) ("Where the circumstances of each proposed class member need to be analyzed to prove the elements of the claim or defense, then individual issues would predominate and class certification would be inappropriate.").

[8] 5 Moore et. al., *supra* note 2, § 23.61.

[9] OHIO R. CIV. P. 23 advisory committee's notes.

This Comment explores the path that a defendant would take to carry a nationwide class certification denial from one state into another. Part I provides an outline of the Rule 23 certification process and the prerequisites required. Part II analyzes the Full Faith and Credit Clause and argues that the hypothetical defendant can meet the Clause's requirements of finality and personal as well as subject matter jurisdiction. Part III explores the *res judicata* principle as applied between Florida and Ohio and determines that its prerequisites are satisfied. Finally, Part IV maintains that all due process requirements for the Florida plaintiff are met by his inclusion in the action that was denied in Ohio.

I. OVERVIEW OF CERTIFICATION PROCESS

Rule 23(a) establishes four prerequisites for a class action: the class must be so numerous that joinder is impractical, it must present common questions of law or fact, the representative plaintiff must have claims or defenses that are typical to the class, and the representative must be able to fairly and adequately protect those interests. Once these four elements are met, the class must then fit into one of the three categories of Rule 23(b).[10] This Comment focuses on those cases in which "class action treatment is not as clearly called for . . . but it may nevertheless be convenient and desirable depending on the particular facts."[11] Under subdivision (b)(3), the court must determine that "the questions of law or fact common to the members . . . predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[12]

Based on the criteria indicated, the judge will either grant or deny class certification. If a (b)(3) class is certified, notice of the pending class action must be provided to all potential members of the class.[13] This notice provision is meant to address due process concerns.[14] The potential members can be included in the class action, or they may take affirmative steps to "opt out" of the litiga-

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[10] Federal Rule 23(b) provides three categories of class actions. Subdivision (b)(1) provides for class actions in cases when the prosecution of separate actions would create a risk of inconsistent verdicts or would impede the ability of other members to protect their interests. Subdivision (b)(2) applies in cases where final injunctive or declaratory relief is appropriate with respect to the entire class. Subdivision (b)(3) is utilized when the class form is superior to individual suits. This Comment focuses on (b)(3) class actions.

[11] FED. R. CIV. P. 23 advisory committee's notes.

[12] *Id.* at (b)(3). There are four factors to consider when making a superiority determination. The factors are outlined in Rule 23(b)(3)(A) - (D).

[13] *Id.* at (c)(2).

[14] 5 MOORE ET AL., *supra* note 2, § 23.62.

tion.[15] If the member does not "opt out," then the decision in the class action litigation is binding on that person.[16] If the class certification is denied, the case is ended unless the plaintiff appeals.[17] The fact that class certification was denied does not, under present law, prevent a new representative from filing for the same class certification.

II. FULL FAITH AND CREDIT AS A FRAMEWORK

If a state court makes a final judgment in a case over which it has personal and subject matter jurisdiction, that judgment is entitled to full faith and credit in any other state court, even if the judgment is based on a mistake of law or fact.[18] Article Four, Section 1 of the Constitution states that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other state."[19] Federal courts must also give full faith and credit to state court decisions.[20]

In order for the Full Faith and Credit Clause to apply, two conditions must be met. First, there must be a final and appealable order.[21] Second, the order must be a valid exercise of personal and subject matter jurisdiction.[22] In the hypothetical, then, Florida would be required to give full faith and credit to the Ohio order only if the Ohio court had exercised proper jurisdiction and the order was final and appealable under Ohio law.

A. "Final and Appealable"

The Ohio class certification denial meets the appealability prong of the Full Faith and Credit Clause because both Ohio and Florida have statutes that make the denial of class certification appealable.[23] Similarly, Rule 23(f) gives the court of appeals discre-

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[15] FED. R. CIV. P. 23(C)(2). The rule also permits a member to enter an appearance through counsel. *Id.*

[16] *Id.*

[17] Federal Rule 23(f) allows appeal of the certification order at the discretion of the appellate court.

[18] Estin v. Estin, 334 U.S. 541, 544 (1948).

[19] U.S. CONST. art. IV, § 1.

[20] Full Faith and Credit Act, 28 U.S.C. § 1738 (2002) ("[a]cts, records and judicial proceedings" of any state "shall have the same full faith and credit in every court within the United States ... . as they have by law or usage in the courts of such State, Territory, or Possession from which they are taken.").

[21] U.S. CONST. art. IV, § 1.

[22] D'Arcy v. Ketchum, 52 U.S. (11 How.) 165, 175-76 (1851).

[23] *See* OHIO REV. CODE ANN. § 2505.02 (Anderson 2002); Roemisch v. Mutual of Omaha Ins. Co., 314 N.E.2d 386, syllabus (Ohio 1974); *In re* Amendments to Fla. R. of App. P., 609 So. 2d 516 (Fla. 1992).

tion to grant a permissive interlocutory appeal from an order granting or denying certification.[24]

Determining whether a class certification denial is "final" is more difficult. A judgment that is not final under the law of the state in which it is rendered is not entitled to full faith and credit.[25] Traditionally, a final judgment has been defined as the decision that "ends all litigation on the merits and leaves nothing for the court to do but execute the judgment."[26] However, the Supreme Court has noted the ambiguous nature of "finality" determinations. In a decision discussing whether a class certification decision is a "final" order, the Supreme Court stated that "[n]o verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future."[27] The Court stated that finality should be interpreted practically, rather than technically.[28]

As a practical matter, a denial of class certification is a final decision for the class and its representative. The Ohio representative has a final decision as to her position – her motion is denied. For example, in *In re Piper Aircraft Distribution System Antiturst Litigation*,[29] an aircraft dealer filed six antitrust actions against the airplane manufacturer and sought to represent a class.[30] The district court in Florida denied certification of the class. Subsequently, the district court in Missouri relied on the Florida decision and denied certification for the same reason. The district judge in the second case stated that "I have decided that it would be entirely unjust and inequitable to allow plaintiff to renew its request for class action in six (6) other district courts after having been denied in the Florida action. . . . Our system of justice does not permit this type of action."[31]

The Eighth Circuit Court of Appeals affirmed the decision. It noted that a typical Rule 23 order refusing to certify a class "by its nature, fails to meet the tests" for a final determination.[32] How-

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[24] FED. R. CIV. P. 23(f). This provision was enacted in 1998.

[25] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 107 (1969).

[26] Caitlin v. United States, 324 U.S. 229, 233 (1945). For the historical development of this rule as well as federal exceptions, see Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Court of Appeals Under Rule 23(f)*, WM. & MARY L. REV. 1531 (2000).

[27] Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 171 (1974).

[28] *Id.*

[29] 551 F.2d 213 (8th Cir. 1977).

[30] There were cases filed in district courts in Florida, Missouri, Arkansas, Illinois, Connecticut, and South Carolina simultaneously. *Id.* at 215 n.1.

[31] *Id.* at 218.

[32] *Id.* The U.S. Supreme Court laid out a test for finality in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). It stated that an order is appealable if "it is a final disposition

ever, the court of appeals noted that this denial was not based on Rule 23, but rather on the "determination that the result in the Florida proceeding barred it from even considering the granting of class status."[33] Similarly, the Ohio decision should bar another state court from reconsidering the certification of the same class for the same claims for which there was already a final and appealable order in Ohio.

The Florida court does not have the prerogative nor the discretion to ignore the Ohio denial. In fact, the Florida court can only refuse to enforce the Ohio judgment if it determines that the Ohio order is constitutionally infirm.[34] The Florida court is required to abide by a sister state's judgment whether or not it conflicts with the forum state's public policy.[35] The Supreme Court has stated that there is no "roving public policy exception" to the Full Faith and Credit Clause.[36] Therefore, under federal, Florida, and Ohio state law the denial of class certification is considered final and therefore is entitled to full faith and credit.

B. Jurisdictional Requirements

Foreign courts give full faith and credit to judgments when the issuing state had both personal jurisdiction over the plaintiff and subject matter jurisdiction over the case.[37] Although subject matter jurisdiction is not at issue, personal jurisdiction raises questions under full faith and credit analysis. The concept of personal jurisdiction is a more fluid concept under class action litigation than it is under individual litigation. For example, neither Ohio nor Florida case law addresses whether a state court has personal jurisdiction over *all* potential class members or whether a denial of class certification is binding on all putative class members. While plenty of cases address personal jurisdiction over defendants and the "minimum contacts" test,[38] personal jurisdiction over plaintiffs is not normally a question because the plaintiff himself has chosen

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of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." *Id.* at 547.

[33] *Piper Aircraft*, 551 F.2d at 218.

[34] Estin v. Estin, 334 U.S. 541, 544 (1948) (holding that a state may not refuse to enforce judgment of a siste state's decision on the grounds that it would violate the forum state's public policy); Miller v. Dahlgren, 230 N.W.2d 472, 473 (Neb. 1975). *See* Part IV *infra* for a discussion of due process concerns.

[35] *Estin*, 334 U.S. at 546.

[36] Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998).

[37] Int'l Shoe Co. v. Washington, 326 U.S. 310 (1954). For a discussion of personal jurisdiction in the class action context, see Shutts v. Phillips Petroleum Co., 222 P.2d 1292 (Kan. 1977).

[38] *Int'l Shoe*, 326 U.S. at 310.

the court in which to bring the action. In contrast, in a class action suit, only the plaintiff representative has placed himself under the court's jurisdiction, and the personal jurisdiction of the court over putative class members is uncertain.

As a general rule, courts are reluctant to expand an order's binding effect beyond the parties directly involved in the litigation. For example, in *Baker v. General Motors Corp.*,[39] the Supreme Court determined that an order issued by a Michigan court could not prevent a witness's testimony in all U.S. courts.[40] In *Baker*, the plaintiffs brought a wrongful death action against General Motors (GM) in Missouri. The plaintiffs obtained the testimony of a former GM engineer despite a Michigan injunction that prohibited the engineer from testifying against GM in any court proceedings unless under subpoena.[41]

The court of appeals held that the engineer's testimony should not have been admitted because the Missouri court should have given full faith and credit to the Michigan injunction.[42] The Supreme Court reversed and held that although the injunction was entitled to full faith and credit as between the engineer and GM, it was not entitled to full faith and credit as between GM and nonparties to the Michigan litigation.[43] The Supreme Court reasoned that the Michigan court could not reach beyond the instant controversy to control proceedings in other states brought by different parties asserting claims that Michigan had not considered.[44] Since the Missouri plaintiffs were not parties to the Michigan action, and since a wrongful death claim was not at issue in the engineer's employment action, Michigan could not interfere with Missouri's "control of litigation brought by parties who were not before the Michigan court."[45] The Supreme Court noted that it was not creating an exception to the full faith and credit command, it was only recognizing the limits of enforcing a judgment.[46]

Baker can be distinguished from the hypothetical in a few very important ways. First, *Baker* involved different underlying claims – an employment dispute and a wrongful death claim – and different plaintiffs. The underlying claims, while related on the evidentiary level, did not legally or substantively relate. In con-

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39 522 U.S. 222 (1998).
40 *Id.* at 225.
41 *Id.* at 229-30.
42 *Id.* at 230.
43 *Id.* at 238.
44 *Id.* at 239.
45 *Id.* at 239 n.12.
46 *Id.*

trast, the potential class member in Florida would be making the same underlying claims that were already rejected in Ohio.

In addition, the Michigan court clearly did not have jurisdiction over the Missouri wrongful death plaintiffs and did not have authority to be involved in that action. The Court held that Michigan "cannot command obedience elsewhere on a matter the Michigan court lacks authority to resolve."[47] There is no dispute, however, that Ohio had the authority to deny the class certification at issue in this Comment. The question that remains to be resolved by the Florida court is whether the Ohio court had jurisdiction over every potential class member so as to bind each of them with the certification denial.

"[I]t is a basic rule of law that for a person to be bound by a state court's judgment . . . he must be subject to the adjudicating court's jurisdiction."[48] However, class actions approach personal jurisdiction differently. Particularly in the case of nationwide class actions, the class members are rarely located in the same state. "Because a class action must necessarily proceed in the absence of almost every class member, . . . the residential makeup of the nonresident plaintiffs is not controlling."[49] Therefore, personal jurisdiction is a malleable concept in a class action. If the concept encompasses all members who do not "opt out" of a maintained action, then it is not a large leap to stretch the concept to extend personal jurisdiction to those who would have been included had the class been certified.

III. *RES JUDICATA* APPLIED

Usual principles of *res judicata* apply in class actions.[50] Therefore, once Florida decides to give full faith and credit to the Ohio order, it will apply Ohio principles of *res judicata* to the case before it.[51] If the Florida class would have been precluded from litigating its claims in Ohio, then it will be precluded from litigating its claims in Florida. If the Ohio case law indicates that the order meets the standards of *res judicata*, then the Florida court

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[47] *Id.* at 241.

[48] Shutts v. Phillips Petroleum Co., 222 P.2d 1292, 1305 (Kan. 1977).

[49] *Id.*

[50] Barney v. Holzer Clinic, Ltd., 110 F.3d 1207 (6th Cir. 1997).

[51] *Baker*, 522 U.S. at 247 (Kennedy, J., concurring) ("The beginning point of full faith and credit analysis requires a determination of the effect the judgment has in the courts of the issuing State."). Similarly, federal courts give state court judgments the same preclusive effect that the states would give the judgments. Federal courts cannot employ their own rules of *res judicata* in determining the effect of state court judgments. *Id. See also* Rankin v. Florida, 418 F.2d 482 (5th Cir. 1969) (holding that a previous state court determination of a class action case barred the same plaintiffs from litigating further in federal court).

would deny certification on that basis. Similarly, if Ohio would not have given preclusive effect under the circumstances, then neither will Florida.

For a judgment to be given preclusive effect in Ohio, it must be a final decision *on the merits* by a court of competent jurisdiction. It will be binding *as to the parties and their privies* and is a complete bar to any subsequent action upon the same cause between the parties or those in privity with them.[52] Therefore, in order for the defendant to succeed in precluding the Florida action, the defendant must argue that the Ohio denial was on the merits and that the new Florida representative was a party to the Ohio order.

A. "On the Merits"

As noted earlier, Ohio considers a denial of class certification to be a final appealable order, so that the first requirement of *res judicata* is satisfied.[53] However, in order to have preclusive effect under *res judicata*, a class denial must also be "on the merits."[54] A class certification falls somewhere between a judgment on the merits and a technical decision based on procedural considerations. When a court makes a class certification decision, it is not basing its decision on the underlying merits of the action. Rather, the decision is driven by whether the class meets the requirements of the applicable class action rule.[55] What is meant by judgment *not* on the merits varies from state to state, but it generally relates to decisions that do not address the substantive validity of the plaintiff's case, such as improper venue or nonjoinder of parties issues.[56]

Class certification denials for manageability problems or for individualized fact questions are decisions on the merits of the class; the court decided that the class proposed did not meet the requirements of Rule 23.[57] Often, the judge's order states explicitly the reason for the denial and indicates that the judge examined the "merit" of the case proceeding as a class action. The advisory committee notes to Rule 23 lend credence to the idea that the more

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[52] Federated Mgmt. Co. v. Latham & Watkins, 742 N.E.2d 684, 688-89 (Ohio 2000); Whitehead v. Gen. Tel. Co., 254 N.E.2d 10, syllabus (Ohio 1943).

[53] OHIO REV. CODE ANN. § 2505.02 (Anderson 2002).

[54] *Whitehead*, 254 N.E.2d at syllabus.

[55] *See* Part II *supra*.

[56] *See* RESTATEMENT (SECOND) ON CONFLICTS OF LAWS § 110 (1969). For further discussion, see William Reynolds, *The Iron Law of Full Faith and Credit*, 53 MD. L. REV. 412 (1994).

[57] Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974) (overruling an attempt by the lower court to examine the underlying merits of the case in a class action certification decision).

well reasoned the opinion for denying or granting class certification, the more likely *res judicata* will apply. The comment states:

> Although thus declaring that the judgment in a class action includes the class, . . . subdivision (c)(3) does not disturb the recognized principle that the court conducting the action cannot predetermine the res judicata effect of the judgment; this can be tested only on a subsequent action. . . . *The court, however, in framing the judgment in any suit brought as a class action, must decide what its extent or coverage shall be, and if the matter is carefully considered, questions of* res judicata *are less likely to be raised at a later time and if raised will be more satisfactorily answered.*[58]

The quoted language indicates that if the court ruling on certification of a class carefully writes a reasoned opinion, the "on the merits" requirement of *res judicata* will be satisfied.[59]

The class certification process outlined in Rule 23 does not examine the merits of the underlying claim.[60] Rather, the certification process determines whether a class action is the best manner by which to proceed with litigation. As such, the determination by the court is a decision on the merits of certifying the class. In fact, the judge's opinion explains the basis for the denial of certification. The judge is stating that, on the basis of the class composition or the questions of law or the stated representative, the proposed form of class is without merit. Therefore, a denial of class certification meets the "on the merits" element of *res judicata*.

B. "Parties and their Privies"

"While it is true that a person cannot ordinarily be bound . . . by the results of any judicial proceeding to which he is not a party, . . . class actions are a recognized exception to the general rule."[61] In a certified class action, the judgment is binding on all class members; it either extinguishes claims or grants relief and bars subsequent action.[62] A denial of certification should also be binding on putative class members because if the class had been certified, they would have been party to the proceeding if they did not

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[58] FED. R. CIV. P. 23 advisory committee's notes (emphasis added).

[59] *But cf.* Vaccariello v. Smith & Nephew Richards, Inc., 763 N.E.2d 160, 163 (Ohio 2002) (stating that a federal class action had failed "otherwise than on the merits" because it was not certified).

[60] See Part II *supra*.

[61] Annotation, Res Judicata *Effect of Judgment in Class Action upon Subsequent Action in Federal Court*, 48 A.L.R. FED. 675, 679 (2002).

[62] Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867 (1984).

"opt out." The fact that the class was not certified should not swing the pendulum entirely in the opposite direction and remove those same people from the binding order. This result would simply allow litigants to change a class representative, "repackage" the action rejected by one court, and file it in another.[63] This result runs directly counter to ideas of judicial economy and efficiency.

The Supreme Court will not bind class members to a judgment if their individual claims were not litigated.[64] "In no event, we have observed, can issue preclusion be invoked against one who did not participate in the prior adjudication."[65] For example, in *Cooper v. Federal Reserve Bank of Richmond*,[66] the defendant had already lost a class action employment discrimination case under Title VII. Later, four class members who did not recover in the class suit brought a case under Section 1981. The Court rejected the many policy reasons that the defendant put forth as to why *res judicata* should preclude more lawsuits, such as duplicative litigation and excessive exposure to liability.[67] The Bank argued that allowing the individual claims to go forward would encourage duplicative litigation and subject defendants to "risks of liability without the offsetting benefit of a favorable termination of exposure through a final judgment."[68] These are persuasive arguments that should be considered when determining the reach of "parties and their privies." While the facts in *Cooper* were such that the new class was alleging a "new" cause of action, the clear underlying claim of discrimination was the same.

Under certain circumstances, Ohio has been willing to include putative class members as part of a class prior to certification. For example, in Ohio the filing of a class action in Ohio or federal court tolls the statute of limitations as to all asserted members of the class *who would have been parties had the suit been permitted to continue as a class action*.[69] The potential class members are considered to be in the pending class during the time between when the class motion is filed and when it is denied.[70] The statute is tolled for all asserted members who could potentially form a class, whether or not the certification is granted.[71] The Ohio Supreme Court stated:

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[63] Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 484-87 (2000).
[64] *Cooper*, 467 U.S. at 881.
[65] Baker v. Gen. Motors Corp., 522 U.S. 222, 238 n.11 (1998).
[66] 467 U.S. 867 (1984).
[67] *Id.* at 881.
[68] *Id.*
[69] Vaccariello v. Smith & Nephew Richards, Inc., 763 N.E.2d 160, syllabus (Ohio 2002).
[70] *Id.* at 162.
[71] *Id.* at 163.

> Our holding today merely allows a plaintiff who could have filed in Ohio irrespective of the class action filed in federal court . . . to rely on that class action to protect her rights in Ohio. To do otherwise would encourage all potential plaintiffs in Ohio who might be part of a class to file suit individually in Ohio courts to preserve their Ohio claims should the certification be denied.[72]

This holding indicates a willingness to extend class benefits to putative class members and could be used by analogy to extend the class certification denial. If the potential class members are included for tolling purposes, then they should be included as parties for *res judicata* purposes. While the majority opinion did not address *res judicata*, the dissent focused on duplicative class actions and stated that "Ohio will become the new dumping ground for any rejected claims of a potential class member in Ohio."[73] Clearly, the dissent is the stronger position for a defendant and for the judicial system in general. As noted in *In Re Piper Aircraft Distribution System Antitrust Litigation*,[74] simultaneous or subsequent litigation of the same issue consumes a great deal of judicial time, is "wasteful and runs counter to the sound administration of multidistrict cases," and provides the plaintiff with "unlimited bites at the apple until he can convince a single district court."[75]

IV. THE FINAL THRESHOLD: DUE PROCESS

If the Florida court determines that the Ohio denial is entitled to full faith and credit and meets all of the elements of *res judicata* as to a new class representative, then the only remaining question is whether enforcement of the Ohio order violates the new representative's due process rights. A state may not give preclusive effect to a judgment that violates the plaintiff's due process rights.[76] The class action lawsuit presents unique due process considerations because one plaintiff is the legal representative for a large group of people. Because one person can bind other individuals, due process case law in relation to class actions establishes that notice and adequate representation are the touchstones to satisfying the due process rights of the class members.[77]

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[72] *Id.*

[73] *Id.* at 169 (Lundberg Stratton, J., dissenting).

[74] 551 F.2d 213 (8th Cir. 1977).

[75] *Id.* at 219.

[76] Kremer v. Chem. Constr. Corp., 456 U.S. 461, 482 (1982).

[77] Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974); Archbold Health Servs., Inc., v. Future Tech Business Sys., Inc., 659 So.2d 1204, 1206 (Fla. 1995).

Rule 23 addressed the due process concern by requiring notice of the class proceeding to subdivision (b)(3) class members.[78] The notice is provided, however, after the court has decided that the class action can be maintained pursuant to Rule 23. In contrast, a plaintiff attempting to certify a class is not required to give any type of national notice at the certification stage. Since the putative class members in Florida were never given any notice concerning the Ohio class certification motion, there are due process concerns about binding those proposed members to an order about which they were not aware. However, since Rule 23 has already weakened the due process standard by allowing notice to substitute for a day in court, the proposition that due process can be met even earlier at the certification stage is not inconsistent with the Constitution.

Under Rule 23 currently, a person in Florida with the same claims as the Ohio representative can wait out the Ohio certification proceeding to see if the nationwide class is certified. If the class is certified, the Floridian can join the class and reap the benefits of a class action. If the class is denied, the Floridian can try to form another class based on the same claims and does not suffer any adverse consequences as a result of the Ohio decision. In the meantime, the defendant again faces litigation on the same claims despite having prevailed in Ohio. It is unfair to allow putative class members to benefit from positive class formation decisions but not to also have to suffer the adverse consequences related to class denial.

In addition to the foundational fairness argument, there are two points to be made in relation to due process at this early stage of litigation. First, if the Florida court determined that *res judicata* applied, then the court decided that the new class representative was party to the Ohio proceedings. By deciding that the Florida representative was party to the Ohio certification, the Florida court has already addressed the due process argument. As such, that new plaintiff has been afforded a day in court already. "Due process does not give the parties the right to litigate the same question twice."[79]

Second, an individual remains free, even after a denial of class certification, to bring his own claim before the court.[80] A denial of class certification does not eliminate all remedies for the

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[78] FED. R. CIV. P. 23(c)(2).

[79] Wayside Transp. Co., Inc. v. Marcell's Motor Express, Inc., 284 F.2d 868, 871 (1st Cir. 1960).

[80] Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867 (1984).

plaintiff. In fact, the Supreme Court has gone to great lengths to preserve an individual's right to bring suit even after an adjudicated class action. *Cooper v. Federal Reserve Bank of Richmond*[81] illustrates the Supreme Court's commitment to due process in class action lawsuits. *Cooper* was an individual race discrimination case brought on the heels of an adjudicated class action lawsuit. Four former class members brought suit after the district court determined that, although the Bank was guilty of discrimination, these four particular class members were not discriminated against because they were in a higher pay grade.[82]

In response, the plaintiffs filed individual Section 1981 claims against the Bank for discrimination.[83] The Bank moved for summary judgment based on the *res judicata* of the class action decision. The court of appeals accepted an interlocutory appeal and stated that the *Cooper* claim was barred by *res judicata* stemming from the class action.[84] The Supreme Court reversed, holding that the prior judgment in favor of the lower pay grade plaintiffs "(1) bars . . . class members from bringing another class action against the Bank alleging a pattern or practice of discrimination for the relevant time period and (2) precludes the class members in any litigation with the Bank from relitigating the question whether the Bank engaged in a pattern and practice of discrimination."[85] The class action judgment was not dispositive of individual claims that were not addressed in the class action judgment.

Thus, the due process concern of certification applies to a narrow set of issues and does not prevent the individual in Florida from filing an individual claim against the company. Rather, the argument presented simply prevents the Floridian from "shopping around for the forum which would be the most receptive to [the] plaintiff's views."[86] The defendant can still be taken to court. The defendant will still have to defend against the same claims, but the defendant will not be forced to defend against the same class action, a more onerous burden, in fifty different states.

CONCLUSION

"The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of inju-

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[81] *Id.*
[82] *Id.* at 872.
[83] *Id.*
[84] *Id.* at 873.
[85] *Id.*
[86] *In re* Piper Aircraft Distrib. Sys. Antitrust Litig., 551 F.2d 213, 218 (8th Cir. 1977).

ries unremedied by the regulatory action of government."[87] The development of class action litigation demonstrates its usefulness "as a procedural vehicle in those areas of law where private litigation is contemplated as a means of vindicating substantive policies."[88] These underlying policy reasons for class actions have been lost as both cases and awards have grown larger. The viability of plaintiffs' claims has increased, as intended, but defendants have not reaped any concomitant benefits from defending against class suits.

The strategy proposed in this Comment requires the defendant to make a complicated set of arguments to reach a simple result. However, unless the case law changes or Rule 23 is amended, this strategy appears to be the best solution to defending against simultaneous or duplicative nationwide class action certification motions throughout the United States.

MICHELE CONNELL[†]

[87] Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 338-39 (1980).

[88] 5 MOORE ET. AL., *supra* note 2, § 23 Appendix.

[†] J.D. Candidate, 2003, Case Western Reserve School of Law. I would like to thank my husband Christopher for his patience and the staff of the Law Review for its support.