NOTES

PERSONAL JURISDICTION AND MULTISTATE PLAINTIFF CLASS ACTIONS: THE IMPACT OF WORLD-WIDE VOLKSWAGEN CORP. v. WOODSON

I. INTRODUCTION

The class action, a procedural device for resolving disputes affecting large numbers of persons, has been described as particularly well-suited to vindicate the rights of small claimants.[1] The class action can have special significance for consumers because "numerous consumers are exposed to the same dubious practice by the same seller," yet each "individual recovery would be insufficient to justify bringing a separate action."[2] Such consumer actions, no matter how well-suited to the class action device, often pose special jurisdictional problems.[3] Because the Supreme Court's decisions in *Snyder*,[4] *Zahn*,[5] and *Eisen*[6] have virtually foreclosed the federal courts as a forum for many consumer class actions,[7] those actions must now be brought in

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1. *See* Miller, *Of Frankenstein Monsters and Shining Nights: Myth, Reality and the "Class Action Problem,"* 92 HARV. L. REV. 664 (1979); *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318 (1976).

2. Vasquez v. Superior Court of San Joaquin County, 4 Cal. 3d 800, 808, 484 P.2d 964, 968-69, 94 Cal. Rptr. 796, 800-01 (1971). *See also* Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968). *See generally* Eckhardt, *Consumer Class Actions*, 45 NOTRE DAME LAW. 663 (1970); Comment, *Expanding the Impact of State Court Class Action Adjudications to Provide an Effective Forum for Consumers*, 18 UCLA L. REV. 1002 (1971).

3. *See* Note, *Consumer Class Actions With a Multistate Class: A Problem of Jurisdiction*, 25 HASTINGS L.J. 1411 (1974) [hereinafter cited as *Consumer Class Actions*]; Note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification*, 92 HARV. L. REV. 718 (1979) [hereinafter cited as *Multistate Plaintiff Class Actions*].

4. Snyder v. Harris, 394 U.S. 332 (1969) (class action may not be maintained where members' claims are separate and distinct and did not individually satisfy the jurisdictional amount in controversy requirement).

5. Zahn v. International Paper Co., 414 U.S. 291 (1973) (class action may not be maintained, even by named representatives whose claims do satisfy the jurisdictional amount in controversy requirement, on behalf of persons whose claims were separate and distinct and did not themselves satisfy the amount in controversy requirement).

6. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (in a class action certified under FED. R. CIV. P. 23(b)(3), Rule 23(c)(2) requires that individual notice be sent to all class members who can be identified with reasonable effort).

7. *Multistate Plaintiff Class Actions*, *supra* note 3, at 718; Comment, *Toward a Policy-*

the state courts. The state courts, unlike federal courts, do not face problems of limited subject matter jurisdiction. Furthermore, state class action rules may authorize[8] the state courts in class actions where members' claims are for $100 or less to give notice to class members in a manner different from the more expensive individualized notice required in federal courts by *Eisen*.[9] Whether these actions are brought in federal courts or state courts, personal jurisdiction over class members may become an issue.[10] Specifically, where the plaintiff class includes members who are not residents of the forum state, the question arises whether the state court may acquire personal jurisdiction over the nonresident plaintiffs and bind them by its judgment.[11]

Some courts[12] and several commentators[13] have argued that state courts

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Based Theory of State Court Jurisdiction over Class Actions, 56 TEX. L. REV. 1033 (1978) [hereinafter cited as *Toward a Policy-Based Theory*].

8. In Iowa, members of the class whose claims are "estimated to exceed $100 shall be given personal or mailed notice" if their identities and whereabouts can be ascertained by the exercise of reasonable diligence, while members whose claims are unlikely to exceed that amount may be given notice by other means, *e.g.*, notification by means of newspaper, television, radio and posting in public or other places, as long as the means of notice is "reasonaby calculated to apprise members of the class of the pendency of the action." IOWA R. CIV. P. 42.7(d), (e).

9. The facts in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), illustrate the problem. Individual notice to all identifiable class members would have cost $225,000, not including the additional expense which would have to have been incurred in publishing notice to four million class members whose identities or whereabouts were unknown, while the proposed notification scheme ruled unauthorized by the Court would only have cost $21,720. *Id.* at 167.

10. Problems of jurisdiction faced by state courts in these circumstances would also, of course, be faced by federal courts were such actions brought in federal court. However, in the aftermath of *Snyder*, *Zahn* and *Eisen*, federal courts for purposes of diversity jurisdiction will not hear consumer class actions where individual claims are for $10,000 or less. *See supra* notes 4-6.

11. The question may also arise whether a defendant class may be certified which includes persons who would not individually, apart from the class action, be subject to the court's jurisdiction. That question is beyond the scope of this Note. In 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1757 (1972), it is said that

> [f]ederal courts generally have held that when a Rule 23 action involves a defendant class, all the members of the class, including those not served with process, are bound by the judgment in the action if in personam jurisdiction was acquired over the representative parties, they were properly served with process, and there are no other impediments to doing so.

More recently the authors have noted the emergence of the issue of the jurisdictional power of state courts "to handle multistate controversies." 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1757 (Supp. 1982). *See generally* Note, *Personal Jurisdiction and Rule 23 Defendant Class Actions*, 53 IND. L.J . 841 (1978). Arthur Miller, as co-counsel for the defendant in *Miner v. Gillette Co.*, 87 Ill. 2d 7, 428 N.E.2d 478 (1981), *cert. granted*, 102 S. Ct. 1767 (1982), argues that a state court cannot assert personal jurisdiction over nonresident plaintiffs in a class action who lack minimum contacts with the forum.

12. *E.g.*, In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation, 526 F. Supp. 887, 903-09 (N.D. Cal. 1981), *rev'd on other grounds*, Nos. 81-4648 through 4656 (9th Cir. July 15, 1982) (available Nov. 8, 1982, on LEXIS, Genfed Library, Cir.

may acquire personal jurisdiction over nonresident members of a plaintiff class by satisfying the due process requirements of reasonable notice and adequate representation. In support of this position they have relied on the Supreme Court's opinion in *Hansberry v. Lee*[14] which appeared to establish an exception to the general rule that no court may bind a person by its judgment unless it has acquired personal jurisdiction over that individual. In a class suit, the *Hansberry* Court stated, the judgment may bind undesignated members of the class who are not served with process as long as they receive notice of the litigation and if in fact they were adequately represented by the parties to the case.[15] Recently, in a case which the Supreme Court will review, the Illinois Supreme Court adopted this position.[16] In *Miner v. Gillette Co.*[17] the Illinois Supreme Court held that where the due process requirements of reasonable notice and adequate representation are satisfied, a state court may exercise personal jurisdiction over nonresident members of a plaintiff class, even where those nonresident plaintiffs have had no contacts with the forum state and their individual claims for relief did not arise in Illinois.

The putative class in *Hansberry*, however, did not involve nonresident plaintiffs and the cause of action asserted arose in Illinois.[18] It may well be questioned, therefore, whether *Hansberry* authorizes multistate class actions on behalf of nonresident plaintiffs whose claims for relief arose outside the forum state. Moreover, the United States Supreme Court's recent re-examination in *World-Wide Volkswagen Corp. v. Woodson*[19] of the purpose served by the fourteenth amendment's due process limitations on state court jurisdiction is also relevant to the question presented. The Supreme Court in *Woodson* stated that limits on personal jurisdiction are a require-

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file) (vacating district court order certifying class action); Miner v. Gillette Co., 87 Ill. 2d 7, 428 N.E.2d 478 (1981), *cert. granted*, 102 S. Ct. 1767 (1982); Horst v. Guy, 211 N.W.2d 723 (N.D. 1973); Schlosser v. Allis-Chalmers Corp., 86 Wis. 2d 226, 271 N.W.2d 879 (1978); *Contra* Klemow v. Time, Inc., 466 Pa. 189, 352 A.2d 12, *cert. denied*, 429 U.S. 828 (1976); Spirek v. State Farm Mut. Auto. Ins. Co., 65 Ill. App. 3d 440, 382 N.E.2d 111 (1978); Feldman v. Bates Mfg. Co., Inc., 143 N.J. Super. 84, 362 A.2d 1177 (1976).

13. *E.g.*, Ross, *Multistate Consumer Class Actions in Illinois*, 57 Chi.-Kent L. Rev. 397 (1981); *Toward a Policy-Based Theory*, *supra* note 7; Forde, *Class Actions in Illinois: Toward a More Attractive Forum For This Essential Remedy*, 26 De Paul L. Rev. 211 (1977). *Contra*, Fisch, *Notice, Costs, and the Effect of Judgment in Missouri's New Common-Question Class Action*, 38 Mo. L. Rev. 173, 209 (1973); Comment, *Expanding the Impact of State Court Class Action Adjudication To Provide an Effective Forum for Consumers*, 18 UCLA L. Rev. 1002, 1019 (1971).

14. 311 U.S. 32 (1940).

15. *Id.* at 40-42.

16. Miner v. Gillette Co., 87 Ill. 2d 7, 428 N.E.2d 478 (1981), *cert. granted*, 102 S. Ct. 1767 (1982).

17. *Id.*

18. Hansberry v. Lee, 311 U.S. 32, 37 (1940). *See infra* text accompanying notes 100-08.

19. 444 U.S. 286 (1980).

ment of federalism and that considerations of convenience to the plaintiffs or the absence of inconvenience to the defendants in a state court's hearing of a case does not permit a state court to disregard territorial restrictions on the state court's jurisdiction.[20] This finding arguably constitutes a substantial barrier to multistate plaintiff class actions such as *Miner*.

This Note will examine whether a state court may entertain a class action and adjudicate the rights of nonresident members of the plaintiff class where those nonresident plaintiffs have had no contacts with the forum state and where the nonresidents' claims for relief arose outside the forum state. Part II will focus on the Supreme Court's opinion in *Woodson* and will explore the implications of the Court's rationale for multistate class actions. Part III will discuss and analyze the holding and rationale of *Miner* and cases which it followed, particularly in light of the pronouncements in *Woodson*. Part IV will identify and discuss the interests of parties to class action litigation of this sort, the interests of the several states and the public generally, and suggest ways in which these interests may be reconciled where they diverge.

II. State Sovereignty and Personal Jurisdiction: from Pennoyer to Woodson

In first announcing that the fourteenth amendment's due process clause sets limits on the states' power to exercise jurisdiction over nonresidents, the Supreme Court explained that those limits were a function of state sovereignty.[21] In the landmark case of *Pennoyer v. Neff*[22] Justice Field, speaking for the Court, asserted that every state possessed "exclusive jurisdiction and sovereignty over persons and property within its territory," and that the Constitution prevented any state from exercising "direct jurisdiction and authority over persons and property without its territory."[23] In short, the authority of state courts to exercise jurisdiction over parties to a lawsuit was "necessarily restricted" by the boundaries of the states which established the courts.[24]

In the decades following the Supreme Court's opinion in *Pennoyer* the American economy underwent substantial transformation. Interstate travel increased considerably with the growing popularity of the automobile, and businesses increasingly marketed their products in interstate commerce. In consequence of automobile accidents, injuries attributable to defective products, and breaches of duties created by interstate transactions, there was pressure to expand the permissible bases for personal jurisdiction over non-

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20. *Id.* at 293.
21. Pennoyer v. Neff, 95 U.S. 714 (1877).
22. *Id.*
23. *Id.* at 722.
24. *Id.* at 720.

residents. The Supreme Court responded, and the territorial limits to state court *in personam* jurisdiction slowly eroded.[25]

In so doing, the Supreme Court seemed to minimize the significance of territorial limits as a basis for restricting state court jurisdiction and to emphasize considerations of convenience and fairness to nonresident defendants. Thus, in *International Shoe Co. v. Washington*,[26] the Court announced that the fourteenth amendment would not constitute a bar to the exercise of personal jurisdiction over a nonresident defendant if a defendant had had "certain minimum contacts [with the forum state] such that the maintenance of the suit [did] not offend 'traditional notions of fair play and substantial justice.' "[27] The Supreme Court in subsequent opinions,[28] and state courts[29] interpreting and applying the teachings of the Supreme Court, continued this focus and did not appear to regard as relevant the theory of state sovereignty and the territorial principles elucidated in *Pennoyer*.[30] In *World-Wide Volkswagen Corp. v. Woodson*,[31] however, the Supreme Court re-established state sovereignty as an important purpose being served by the limitations imposed on state court jurisdiction by the fourteenth amendment.[32] Although *Woodson* dealt with an attempt to assert jurisdiction over a nonresident defendant, any effort to bind nonresidents who are putative members of a plaintiff class must reckon with the Court's opinion in that case.

The facts in *Woodson* were relatively simple. The Robinsons, New York residents, purchased an automobile from Seaway Volkswagen, Inc., a New York corporation principally doing business in New York. Seaway obtained the car from World-Wide Volkswagen, also a New York corporation, whose business as a regional distributor of Volkswagen automobiles was restricted to New York, New Jersey and Connecticut. Approximately one year after they purchased the automobile the Robinsons decided to move to Arizona. En route to their new home their automobile was struck in the rear by another car and family members were severely injured as a result of the acci-

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25. *E.g.*, International Shoe Co. v. Washington, 326 U.S. 310 (1945); Milliken v. Meyer, 311 U.S. 457 (1940); Hess v. Pawloski, 274 U.S. 352 (1927). *See* Nordenberg, *State Courts, Personal Jurisdiction and the Evolutionary Process*, 54 NOTRE DAME LAW. 587 (1979); Kurland, *The Supreme Court, The Due Process Clause, and the In Personam Jurisdiction of State Courts—From* PENNOYER *to* DENCKLA: *A Review*, 25 U. CHI. L. REV. 569 (1958).

26. 326 U.S. 310 (1945).

27. *Id.* at 316.

28. McGee v. International Life Ins. Co., 355 U.S. 220 (1957); *but see* Hanson v. Denckla, 357 U.S. 235, 251 (1958) ("But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts.").

29. *E.g.*, Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961); Hoagland v. Springer, 75 N.J. Super. 560, 183 A.2d 678 (1962); Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664 (1951).

30. Pennoyer v. Neff, 95 U.S. 714 (1877).

31. 444 U.S. 286 (1980).

32. *See infra* text accompanying notes 119-30.

dent. Claiming that their injuries resulted from defective design and the placement of the car's gas tank and fuel system, the Robinsons sued Seaway and World-Wide Volkswagen in an Oklahoma state court.[33]

Seaway and World-Wide Volkswagen carried on no activities in Oklahoma. They closed no sales, performed no services, and solicited no business in Oklahoma. The record did not indicate that they regularly sold cars at wholesale or retail to Oklahoma customers or that they sought in any way to serve the Oklahoma market.[34] Accordingly, Seaway and World-Wide Volkswagen moved to dismiss the case against them for want of personal jurisdiction. They argued that Oklahoma's exercise of jurisdiction over them would violate the due process clause of the fourteenth amendment because their contacts with Oklahoma were not sufficient to satisfy the minimum constitutional standard. The Oklahoma courts rejected this argument, however, and sustained the exercise of jurisdiction based on a broad interpretation of foreseeability; namely, foreseeability that the automobile might be operated in Oklahoma and become involved in an accident there.[35]

The Supreme Court reversed. It found in the record before it "a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state court jurisdiction."[36]

The Supreme Court began its analysis by reaffirming its decision in *International Shoe Co. v. Washington.*[37] *International Shoe's* "minimum contacts" approach, the Court explained, "perform[ed] two related, but distinguishable, functions."[38] First, it protected the defendant from the burdens of having to litigate in a distant or inconvenient forum.[39] Second, the "minimum contacts" analysis acted "to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system."[40] The Court recognized that concern not to impose an undue burden on the nonresident defendant had received emphasis in the courts and described it as "a primary concern."[41] But other factors were relevant, e.g., the interest of the forum state in adjudicating the dispute; the interest of the plaintiffs in obtaining convenient and effective relief; the interest of the interstate judicial system that controversies be resolved in the most efficient manner; and "the shared interest of the several States in furthering fundamental substantive social policies."[42]

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33. 444 U.S. at 286-87. The manufacturer and the importer of the automobile were also sued, but they did not challenge the personal jurisdiction of the court over them.
34. *Id.* at 289, 295.
35. 585 P.2d 351 (Okla. 1978), *rev'd*, 444 U.S. 286 (1980).
36. 444 U.S. at 295.
37. 326 U.S. 310 (1945).
38. 444 U.S. at 291.
39. *Id.* at 291-92.
40. *Id.* at 292.
41. *Id.*
42. *Id.*

Nevertheless, the Court stated, state lines were not "irrelevant" to questions of personal jurisdiction and, indeed, were required to be considered by "the principles of interstate federalism embodied in the Constitution."[43] Recalling *Hanson v. Denkla*,[44] the Court reiterated that the trend expanding state court jurisdiction had not signaled the demise of all restrictions on the power of a state court to bind a nonresident defendant by an *in personam* judgment.[45] At a minimum the defendant must have had some contacts, ties, or relations with the forum state.[46]

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.[47]

In short, the nonresident defendant's contact with the forum state must have been such that he should reasonably have anticipated "being haled into court there" before he could be bound *in personam*, and the mere foreseeability that the product he sold locally might be taken to and used in another state was not a sufficient basis to permit a state where the product caused harm to exercise personal jurisdiction over him.[48]

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43. *Id.* at 293.
44. 357 U.S. 235 (1958).
45. 444 U.S. at 294.
46. *Id.*
47. *Id.*
48. *Id.* at 297. The recent case of *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 102 S.Ct. 2099 (1982), raises the question whether, in exceptional circumstances, the fourteenth amendment will permit the exercise of personal jurisdiction over a nonresident who does not have the required minimum contacts with the forum state. The plaintiff in *Ireland* sued foreign insurance companies on a contract for reinsurance, and the defendants moved to dismiss for lack of personal jurisdiction. *Id.* at 2102. The district court allowed the plaintiff to pursue discovery on the jurisdictional issue, but the defendants refused to comply. *Id.* Two and one half years after the action had been commenced, after the court had ordered the defendants to produce records on this issue, the district court found that "no conscientious effort had yet been made to produce the requested information." *Id.* Further noting that the defendants had not objected to its most recent order compelling discovery, the district court gave the defendants an additional sixty days within which to comply; and it stated that if defendants did not comply, it would take personal jurisdiction as established pursuant to Federal Rule of Civil Procedure 37(b)(2). *Id.* The Supreme Court held that the district court could in these circumstances constitutionally impose as a discovery sanction an order establishing that personal jurisdiction existed and that the district court had not abused its discretion in doing so when defendant again failed to comply. *Id.* at 2099.

Although it appeared that minimum contacts between defendants and the forum existed, the rationale offered by the Court—that the defendants' conduct estopped them from arguing that they did not have such contacts and that a presumption that such contacts existed arose from the defendants' refusal to produce the information—would allow the exercise of jurisdic-

The relative importance of this second purpose—maintenance of state sovereignty—has been overshadowed by the focus of the Court in recent cases on the fairness or convenience to the nonresident defendant in exercising jurisdiction over him or her.[49] However, *Woodson*'s articulation of respect for state sovereignty as a purpose served by limits on state court jurisdiction is not inconsistent with earlier opinions of the Court focusing on fairness to the defendant and expanding state court jurisdiction beyond the boundaries of the several states. Opinions of the Court in cases like *Hess v. Pawloski*,[50] *International Shoe Co. v. Washington*,[51] and *McGee v. International Life Insurance Co.*,[52] while stretching the limits of state court jurisdiction, in fact respected the original intention of the Supreme Court in *Pennoyer v. Neff*[53] to establish a territorial rationale for the states' *in personam* jurisdiction: the states' right to regulate conduct occurring within its borders.[54]

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tion where a rational connection between defendants, the forum, and the litigation did not, in fact, exist. Arguing that after *Woodson* personal jurisdiction could not be exercised over a nonresident defendant who lacked minimum contacts with the forum, Justice Powell only concurred in the judgment. *Id.* at 2108-11. He emphasized that a sufficient showing of such contacts had been made. *Id.* The majority, by contrast, stated that *Woodson*'s limits on state court *in personam* jurisdiction "must be seen as *ultimately* a function of the individual liberty interest preserved by the Due Process Clause." *Id.* at 2105 n.10 (emphasis added). Speaking for the majority, Justice White wrote that the due process clause "makes no mention of federalism concerns" and feared that Justice Powell's position would mean that the personal jurisdiction requirement could not be waived. *Id.*

Woodson itself, however, described the due process clause "as an instrument of interstate federalism." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980). Moreover, it should be possible to exercise personal jurisdiction in these circumstances, even if minimum contacts did not, in fact, exist, without offending the interests of other states or disserving the purpose of the fourteenth amendment to limit state court jurisdiction. Plaintiff's claim of personal jurisdiction was not frivolous. Insurance Corp. of Ireland, 102 S.Ct. at 2107. The defendants voluntarily submitted the issue of personal jurisdiction to the district court and for two and a half years made no attempt to comply with the court's orders in respect of that issue. Necessarily defendants must be expected to comply with the rules of procedure and orders of the court to which it voluntarily submits an issue. Presumably every state has an interest in ensuring compliance with court rules and orders; and the concept of federalism should be large enough to include each state's right to enforce those orders. Thus, *Ireland* does not support the exercise of personal jurisdiction over unnamed members of a plaintiff class where the members do not reside within the forum state and their claims arose outside of the forum state. In any event, such unnamed class members differ from the defendants in *Ireland* because they have not appeared in the action and submitted any claim or issue to the court.

49. For an interesting development of the importance of this second purpose and its implications, see Ripple and Murphy, *World-Wide Volkswagen Corp. v. Woodson: Reflections on the Road Ahead*, 56 NOTRE DAME LAW. 65 (1980).

50. 274 U.S. 352 (1927).

51. 326 U.S. 310 (1945).

52. 355 U.S. 220 (1957).

53. 95 U.S. 714 (1877).

54. *Id.* at 723. The Court stated that any direct exercise of power over persons outside the forum would be "an attempt to give ex-territorial operation to its laws, or to enforce an ex-

The Court in *Pennoyer* went out of its way "[t]o prevent any misapplication of the views expressed in [its] opinion,"[55] and it made it clear that a state could acquire personal jurisdiction over a nonresident who entered into a partnership within the state or made a contract enforceable there, so as to provide its aggrieved residents with a remedy.[56] Similarly, the nonresident defendant in *Hess*[57] engaged in conduct within the forum state, namely, driving an automobile on its public highways and negligently causing an accident injuring a resident plaintiff; and the effect of the Court's opinion upholding the state's nonresident motorist act was to permit the state to regulate the conduct involved.[58] Recognizing that motor vehicles were dangerous machines creating substantial risks to the public even when operated carefully, the Court in *Hess* stated that "[i]n the public interest the State may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways."[59]

By the same token the nonresident corporate defendant in *International Shoe*[60] had employed Washington citizens and continuously and systematically engaged in activities within the state, and the Court held that the state of Washington could exercise legislative jurisdiction regulating the affairs of the defendant within the state.[61] The activities conducted within the state by the corporate defendant in *McGee*[62] was more attenuated—the activity was assumed to be an isolated instance of soliciting renewal of a policy from a state resident—but the defendant had knowingly engaged in a business transaction within the state, and the opinion of the Court upholding California's exercise of jurisdiction facilitated the state's regulation of that activity, something in which the Court recognized California had a manifest and legitimate interest.[63] In expanding the state court jurisdiction in each of these cases, the Court's actions were consistent with *Pennoyer*[64] and the principle of state sovereignty underlying the territorial limitations on state court jurisdiction announced therein.

In each of these cases it was either assumed or it was clear that the forum state's law would apply.[65] In other cases courts followed the lead of

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territorial jurisdiction by its tribunals, [and] would be deemed an encroachment upon the independence of the State in which the persons are domiciled or the property is situated, and be resisted as usurpation." *Id.*

55. *Id.* at 734.
56. *Id.* at 734-35.
57. 274 U.S. 352 (1927).
58. *Id.*
59. *Id.* at 356.
60. 326 U.S. 310 (1945).
61. *Id.*
62. 355 U.S. 220 (1957).
63. *Id.*
64. 95 U.S. 714 (1877).
65. Thus, the Court in *International Shoe* held that the State of Washington had constitutional power to levy an unemployment compensation tax upon the defendant corporation;

the Supreme Court and indicated as a very relevant factor that the law of the forum state would apply.[66] Of course, it is not sufficient for personal jurisdiction that a state may have an interest in applying its law or having its law applied,[67] but it is clear (1) that allowing a state to exercise personal jurisdiction over nonresidents ordinarily permits it to apply its law and regulate the conduct involved; and (2) that disallowing a state to exercise personal jurisdiction over nonresidents permits another state with a more manifest interest in the controversy to apply its law and determine the rights and liabilities of the parties involved.[68] Initially, the interests of such other states will be reflected in the expectations of their citizens through the enactment of laws by them and their obedience to them. Hence, the Court in *Woodson*[69] naturally focused on the expectation of the defendant New York corporations and emphasized the role of the due process clause and the limits it imposes on state court jurisdiction, in ensuring "the orderly administration of the laws."[70] Just as the Court's opinion in *Eire Railroad Co. v. Tompkins*[71] is "one of the modern cornerstone of our federalism"[72] insofar as federal-state conflicts are concerned, *Woodson* is a "cornerstone" of federalism insofar as interstate conflicts are concerned. Both cases provide "a degree of predictability to the legal system" allowing citizens "to structure their primary conduct" knowing which law will apply to it.[73] *Woodson*, to be sure, involves personal jurisdiction and knowledge where one might be called to suit, while *Erie Railroad Co. v. Tompkins*[74] involved choice of law

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and in *Hess* the justification for extending the states' *in personam* jurisdiction to reach nonresident motorists was to enable the states to regulate the use of the highways by all, residents and non-residents alike. In *McGee* the Court spoke of California's manifest interest in the regulation of the insurance business. Implicit in that statement is a recognition of the legitimacy of that interest and the state's power to vindicate it.

66. Fisher Governor Co. v. Superior Court, 53 Cal. 2d 222, 347 P.2d 1, 1 Cal. Rptr. 1 (1959); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

67. Kulko v. Superior Court, 436 U.S. 84 (1978); Shaffer v. Heitner, 433 U.S. 186 (1977); Hanson v. Denckla, 357 U.S. 235 (1958).

68. *See World-Wide Volkswagen Corp. v. Woodson: Reflections on the Road Ahead*, 56 NOTRE DAME LAW. 65 (1980).

69. 444 U.S. 286 (1980).

70. *Id.* at 297. "The Due Process Clause, by ensuring the 'orderly administration of the laws,' . . . gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Id.*

71. 304 U.S. 64 (1938).

72. Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring) ("Erie recognized that there should not be two conflicting systems of law controlling the primary activity of citizens, for such alternative governing authority must necessarily give rise to a debilitating uncertainty in the planning of everyday affairs.").

73. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). *See supra* note 70 and accompanying text.

74. 304 U.S. 64 (1938).

and the knowledge of the substantive law applicable to one's conduct, but both represent efforts by the Supreme Court to respect the sovereignty of the states in regulating the affairs of their citizens. Thus, the *Woodson* Court did not permit Oklahoma to regulate conduct which occurred in New York; namely, the sales transaction and the rights and obligations of the parties arising out of that transaction. That was conduct which New York had an interest in regulating which was paramount to that of Oklahoma. The implications of *Woodson* for multistate plaintiff class actions are clear: the question becomes on what basis can a state court adjudicating claims in a class action determine the rights of nonresidents as against another nonresident for conduct which did not occur in the forum state. In both cases conduct is involved which another state may have a paramount interest in regulating or in which the forum state may have no interest.

III. Analysis of Miner v. Gillette Co.

In the recent case of *Miner v. Gillette Co.*,[75] the Illinois Supreme Court considered the question of whether a state court in Illinois can, in accordance with the fourteenth amendment's due process clause, hear and adjudicate the rights of nonresident plaintiffs in a consumer class action where those plaintiffs have had no contacts with the forum state and their claims for relief arose outside of the state of Illinois. The *Miner* case fits squarely into the prototypical multistate consumer class action situation that commentators[76] have repeatedly described as just the sort of action that is now barred from federal court under *Snyder*,[77] *Zahn*,[78] and *Eisen*,[79] and with respect to which they are presently looking to the state courts for relief. This prototypical multistate consumer class action involves a large plaintiff class whose members reside in several states and whose individual claims are often quite small.

Some commentators have argued that if such consumer actions cannot be maintained and adjudicated in state courts, the claimants will have been denied the most effective means for acquiring relief and in some instances, where costs of individual litigation outweigh the potential recovery, they will have been denied entirely the opportunity to redress the wrongs they have sustained.[80] Whether the drastic result of leaving large numbers of consumers with small claims with nowhere to go to obtain relief is really likely in the event that state courts are precluded by due process considerations from hearing such multistate actions is unclear.

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75. 87 Ill. 2d 7, 428 N.E.2d 478 (1981), *cert. granted*, 102 S. Ct. 1767 (1982).
76. *See supra* notes 2-3.
77. Snyder v. Harris, 394 U.S. 332 (1969). *See supra* note 4.
78. Zahn v. International Paper Co., 414 U.S. 291 (1973). *See supra* note 5.
79. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). *See supra* note 6.
80. *See, e.g.*, Ross, *Multistate Consumer Class Actions in Illinois*, 57 Chi.-Kent L. Rev. 397 (1981); *Toward a Policy Based Theory*, *supra* note 7.

First, it may be possible for class actions to be brought in each state in which affected consumers are so numerous as to make joinder impracticable.[81] Moreover, it may occur that there is one state with which all members of the class, including nonresidents, will have had the required minimum contacts.[82] Finally, nonresident class members may always intervene and consent to the court's *in personam* jurisdiction.[83] Nevertheless, it is noteworthy that courts are considering the question under substantial pressure from consumer groups[84] and commentators to provide a forum for just such actions and thus not leave the typical consumer with the *de minimus* claim without a remedy.[85]

Under the terms of a sales promotion Gillette Co. offered to give a free Accent Table Lighter to all persons who remitted to Gillette proof of purchase of two "Cricket" lighters together with fifty cents for postage and handling. At the time of the offer, Gillette had on hand approximately 200,000 Accent Table Lighters from which it expected to satisfy the requests. The response to the offer exceeded Gillette's expectations and even 70,000 more Accent Table Lighters were assembled, Gillette was unable to fill about 180,000 requests. To these 180,000 persons Gillette mailed a letter explaining that their supply of Accent Table Lighters had been exhausted and apologizing for the inconvenience. In addition, Gillette returned to each person the fifty-cent postage-and-handling charge together with a free "Cricket" lighter. Steven Miner was one of the approximately 180,000 persons to receive this letter and refund.[86]

Steven Miner filed a class action against Gillette in Illinois state court on behalf of the nationwide class of some 180,000 consumers who had not received an Accent Table Lighter.[87] Approximately 12,000 of the 180,000

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81. The facts and circumstances of *Miner v. Gillette Co.*, 87 Ill. 2d 7, 428 N.E.2d 478 (1981), *cert. granted*, 102 S. Ct. 1767 (1982), present such a possibility. *See infra* text accompanying notes 114-31 and 149-52.

82. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Hartford Life Ins. Co. v. Ibs, 237 U.S. 662 (1915).

83. *See* Adam v. Saenger, 303 U.S. 59 (1938). *See also* 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1757 (1972) ("Of course, if a nonparty defendant class member intervenes under Rule 12(h)(1) he waives any objections he might have had to the court's exercise of complete personal jurisdiction over him.").

84. The Supreme Court granted leave to file briefs *amicus curiae* in support of plaintiffs to the Consumer Coalition and the Public Citizen. 102 S. Ct. 2926 (1982).

85. *See, e.g.*, Shutts v. Phillips Petroleum Co., 222 Kan. 527, _, 567 P.2d 1292, 1307 (1977) ("If state courts cannot maintain class action suits with nonresident plaintiffs, can the 'small man' find legal redress in our modern society which increasingly exposes people to group injuries for which they are individually unable to get adequate legal redress, either because they do not know enough or because such redress is disproportionately expensive?", *citing* Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 641-643 (1971)).

86. Miner v. Gillette Co., 87 Ill. 2d 7, _, 428 N.E.2d 478, 480 (1981), *cert. granted*, 102 S. Ct. 1767 (1982).

87. Miner v. Gillette Co., 89 Ill. App. 3d 315, 411 N.E.2d 1092 (1980), *rev'd*, 87 Ill. 2d 7, 428 N.E.2d 478 (1981), *cert. granted*, 102 S. Ct. 1767 (1982).

member class resided in Illinois, so that the overwhelming majority of the class were citizens of other states whose claims against the defendant arose outside of the forum state.[88] Gillette was a Delaware corporation with its headquarters in Massachusetts.[89] Each individual class member's claim against Gillette was for $7.95.[90] Miner alleged that Gillette's conduct amounted to an "unfair and deceptive act or practice" within the meaning of the Illinois Consumer Fraud and Deceptive Business Practices Act and that Gillette had breached a contract. Count I of the complaint apparently sought the application of Illinois law to the claims of the nonresident plaintiff class members against Gillette, while Count II evidently sought in the alternative to have the Illinois court apply the laws of each of the several states respectively to the claims of its citizens who were members of the class.[91]

Gillette moved to dismiss the class action. The trial court denied the motion as to the Illinois class but it did dismiss the action as to nonresident class members. However, it found the question of law concerning the propriety of maintaining the class action on behalf of nonresident members to be one "as to which there is substantial ground for difference of opinion" and accordingly, certified the issue for appeal.[92] Initially the appellate court denied the plaintiffs' application for appeal but the supreme court ordered the appellate court to grant the appeal. The appellate court subsequently affirmed the decision of the lower court. Appeal was then taken to the Illinois Supreme Court.[93]

In order to determine whether the Illinois state courts could acquire personal jurisdiction over nonresident plaintiffs in a multistate class action, the Illinois Supreme Court considered whether the fourteenth amendment's due process clause required application of the "minimum contacts" test to nonresident plaintiffs or whether it required merely that nonresident plaintiffs receive reasonable notice and adequate representation.[94]

The defendant Gillette argued that the appropriate test in this situation was the "minimum contacts" test and that the nonresident plaintiffs did not

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88. *Id.* at _ n.2, 411 N.E.2d at 1094 n.2 (1980).

89. 87 Ill. 2d at _, 428 N.E.2d at 486 (dissenting opinion).

90. Ross, *Multistate Consumer Class Actions in Illinois*, 57 CHI.-KENT L. REV. 397, 399 (1981) (the author of this article is counsel to the plaintiff in the *Miner* case).

91. The Appellate Court of Illinois read the complaint as relying only on Illinois law, Miner v. Gillette Co., 89 Ill. App. 3d 315, _, 411 N.E.2d 1092, 1094 (1980), but the supreme court saw the complaint in Count II simply as an allegation of breach of contract. Miner v. Gillette Co., 87 Ill. 2d at _, 428 N.E.2d at 480. The supreme court assumed that the lower court would have to apply the laws of each state in which members of the class resided in order to adjudicate their claims. *Id.* at _, 428 N.E.2d at 483-84.

92. 87 Ill. 2d at _, 428 N.E.2d at 480.

93. *Id.*

94. *Id.* at _, 428 N.E.2d at 481.

have any contacts, let alone "minimum contracts," with the forum state.[95]

The plaintiff Miner conceded that the nonresident plaintiffs did not have the requisite contacts with Illinois but contended that the "minimum contacts" test was inapplicable to plaintiffs in a class action.[96] Relying principally on the opinion of the Supreme Court in *Hansberry v. Lee*[97] and the opinion of the Kansas Supreme Court in *Shutts v. Phillips Petroleum Co.*,[98] the Illinois Supreme Court agreed with Miner and reversed.[99]

Language in the opinions relied upon by the *Miner* court appears to support its position, but the facts and circumstances of those cases do not fairly permit the conclusion that a state may invariably bind nonresident plaintiffs merely by providing them notice and assuring them adequate representation. The United States Supreme Court's opinion in *Hansberry* does assert the general rule that a binding *in personam* judgment may not be entered against one who has not been designated as a party or been made a party by service of process, there was a "recognized exception" for class actions.[100] Under this exception, the Court stated, members of the class or those who were parties could "bind members of the class or those represented" who had not been made parties.[101] Although this language seems to provide support for the *Miner* court, the facts in *Hansberry* are substantially different from those in *Miner*. *Hansberry* did raise the question whether one could be bound by a judgment in an action to which he had not been made a party. The plaintiff in *Hansberry*, a black, claimed that he was not bound by the earlier judgment of the state supreme court finding a racially restrictive covenant valid and binding on all property owners in a particular area, including Hansberry's seller. The Supreme Court of Illinois held that the earlier litigation was a class action—the plaintiff class apparently included all landowners in the area subject to the covenant—and that Hansberry was bound by the judgment even though the earlier court's judgment was in error.[102]

The United States Supreme Court, *in this context*, stated that a class suit was possible which would lead to a judgment binding upon members of the class who had not been designated as parties or who had not been made parties by service of process as long as they were fairly represented in the case.[103] It cannot be ignored, however, that the members of the plaintiff class were all residents of Illinois; that the designated defendants—who were themselves landowners subject to the covenant, enforcement of which

95. *Id.*
96. *Id.*
97. 311 U.S. 32 (1940).
98. 222 Kan. 527, 567 P.2d 1292 (1977).
99. 87 Ill. 2d at _, 428 N.E.2d at 481-82.
100. 311 U.S. at 40-41 (1940).
101. *Id.* at 41.
102. Hansberry v. Lee, 372 Ill. 369, _, 24 N.E. 2d 37, 39 (1939).
103. Hansberry v. Lee, 311 U.S. at 40-42.

they allegedly were resisting—were also residents of Illinois; that the land subject to the covenant was situated in Illinois; and that the covenant would therefore be observed or breached within the territorial boundaries of the state of Illinois. In these circumstances the Illinois state court could unquestionably have obtained personal jurisdiction over all of the landowners had it insisted that they be designated parties plaintiff or made parties by service of process.[104] Allowing the class action to proceed spared the court the need to make all the landowners formal parties to the litigation in a case involving only Illinois law or federal constitutional law binding on Illinois under the supremacy clause.

In contrast the plaintiff class in *Miner* included citizens of every state and indeed, most of the plaintiff class resided outside of Illinois.[105] Moreover, the claims for relief asserted by most of the members of the plaintiff class did not arise in Illinois, and Illinois law could not apply to resolve them.[106] Unlike *Hansberry,* the Illinois Supreme Court could unquestionably *not* have obtained personal jurisdiction over all members of the class had it attempted to do so.[107] *Hansberry,* in short, does not mean that personal jurisdiction, in the sense of power over members of the plaintiff class, is unnecessary in a multistate consumer class action where the class members claims did not arise within the state.[108]

In *Shutts v. Phillips Petroleum Co.,*[109] decided by the Kansas Supreme Court in 1977, a plaintiff class comprised of the owners of royalty interests in natural gas in a gas producing area known as the Hugoton-Anadarko rate-making area, brought suit against Phillips to compel payment of interest on certain temporarily withheld royalties for the period the payments were withheld. The Hugoton-Anadarko area includes all of Kansas and parts of

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104. Milliken v. Meyer, 311 U.S. 457, 462-63 (1940) ("Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service."); Pennoyer v. Neff, 95 U.S. 714 (1877) (state may exercise personal jurisdiction over any within its borders who are properly served).

105. *See supra* note 88 and accompanying text.

106. *See supra* note 91 and accompanying text. *Compare supra* text accompanying notes 65-74.

107. *See supra* text accompanying note 96.

108. Petitioner in *Miner* made substantially the same argument to distinguish *Hansberry.* The petitioner further noted that *Hansberry* was decided five years before *International Shoe Co. v. Washington,* 326 U.S. 310 (1945).

> Even if the *Hansberry* dictum had any jurisdiction-broadening implications, it must be read as pertaining to the strict tests of "presence" and "consent" then in force. It would be wrong to read *Hansberry* as authority for a departure from the more flexible "minimum contacts" test of *International Shoe* that was developed *after* the oblique dicta in *Hansberry.*

Brief for Petitioner at 11, The Gillette Co. v. Miner, 428 N.E. 2d 478 (Ill. 1981), *cert. granted,* 102 S. Ct. 1767 (1982).

109. 222 Kan. 527, 567 P.2d 1292 (1977).

Texas and Oklahoma. Phillips did business in Kansas. The Kansas Supreme Court affirmed certification of a class action even though a majority of the plaintiffs were not residents of Kansas and even though an undetermined number of the plaintiff class had gas leases covering land which was outside the physical boundaries of Kansas.[110] In doing so, the court relied principally on the "recognized exception" language of *Hansberry*.[111] Phillips had treated all royalty owners in the Hugoton-Anadarko area alike, regardless of residency, particular lease provisions or royalty agreements.[112] First the court likened this action to a "common fund"[113] suit. All the gas royalty owners had a common concern in the funds attributable to these royalties withheld by Phillips. Had Phillips deposited the withheld payments in a trust fund separate from its operating funds, the *Shutts* court said the case would have "dovetail[ed] nicely into the 'common fund' cases." The fact that Phillips did not sequester the funds but rather commingled them with its other funds did not preclude application of the "common fund" analysis because "[t]he liability or wrongdoing creates the fund."[114]

The *Shutts* court, however, did not rely exclusively on *Hansberry* but was influenced substantially by the desirability of permitting the class action to proceed. The court stated that Kansas "ha[d] a legitimate interest in adjudicating the common issue herein because Kansas comprise[d] the largest physical area included in the . . . Hugoton-Anadarko area where Phillips [was] doing business and producing gas which it [was selling] in interstate commerce."[115] Further, the court noted the difficulties of gaining access to federal court and questioned whether in the absence of state courts' maintaining class actions, "the 'small man' [could] find legal redress in our mod-

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110. *Id.* at _, 567 P.2d at 1302, 1304.

111. *Id.* at _, 567 P.2d at 1305-06.

112. *Id.* at _, 567 P.2d at 1314.

113. *E.g.*, Hartford Life Ins. Co. v. Ibs, 237 U.S. 662 (1915); Carpenter v. Pacific Mut. Life Ins. Co., 10 Cal. 2d 307, 74 P.2d 761 (1937), *aff'd sub nom.* Neblett v. Carpenter, 305 U.S. 297 (1938). In *Ibs*, the Supreme Court held that a policyholder was bound by a prior state court judgment in an action in which the policyholder had not been made a party because the litigation in that case had involved a common fund. The Supreme Court stated:

> Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would often times prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained.

Hartford Life Ins. Co. v. Ibs, 237 U.S. 662, 672 (1915) (quoting *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 303 (1853)).

114. 222 Kan. at _, 567 P.2d at 1310-12.

115. *Id.* at _, 567 P.2d at 1314-15.

ern society which increasingly exposes people to group injuries for which they are individually unable to get adequate redress . . . ."[116] Moreover, the court was troubled by the fact that the statute of limitations had run in Oklahoma and Texas.[117] Even though a class action ordinarily tolls the statute of limitations as to all members of the class,[118] the court doubted that the present action would toll the statute of limitations in those states if Kansas were found to be without jurisdiction over class plaintiffs.[119]

In these respects the court not only focused on the desirability of permitting the class action, but also seemed to regard the class action as a necessity. The court did not find acceptable the defendant's argument that the action should be brought in several state courts since, that risked inconsistent adjudications for a class that otherwise had been treated alike by the defendant.[120]

Although the *Miner* court relied heavily on language from *Shutts*,[121] comparison of the facts and circumstances of *Miner* with those of *Shutts* makes it readily apparent that the two cases are factually distinguishable and that the rationale of *Shutts*, justifying certification of a class action in that case, cannot be used as a justification for certification of a class action in *Miner*. First, in *Miner*, unlike in *Shutts*, there is no possibility of a "common fund" analysis. In *Miner*, the plaintiffs were seeking damages resulting from Gillette's alleged "unfair and deceptive practices" and alleged breach of contract in the course of its sales promotion of "Cricket" lighters. Second, whereas Kansas had a strong interest in the litigation because most of the Hugoton-Anadarko area was located in Kansas and because the defendant Phillips was doing business in Kansas, Illinois could not show a similar interest in the *Miner* litigation. The defendant Gillette was a Delaware corporation with its headquarters in Massachusetts, and responses to the Accent Table Lighter offer were directed to Spott International, a "fulfillment house" in Minnesota.[122] Although the claims for relief of Illinois residents did arise in Illinois and consequently were subject to regulation by Illinois, the claims for relief of the nonresident plaintiffs arose outside the state of Illinois and as such were subject to regulation by the respective states in which they arose. Finally, there was no indication in *Miner* that the statute of limitations had run in any of the other states, and the size of the class is such that litigation in the other states was a distinct possibility. The fact that the statutes of limitations had run in Oklahoma and Texas would sug-

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116. *Id.* at _, 567 P.2d at 1306-07.

117. *Id.* at 1307.

118. American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 552-56 (1973).

119. 222 Kan. at _, 567 P.2d at 1307.

120. *Id.* at 1307-08.

121. Miner v. Gillette Co., 87 Ill.2d 7, _, 428 N.E.2d 478, 481 (1981), *cert. granted*, 102 S. Ct. 1767 (1982).

122. *Id.* at _, 428 N.E.2d at 486 (dissenting opinion).

gest that neither of those states had any interest in regulating Phillips' conduct which would be frustrated by Kansas' assertion of jurisdiction. The same cannot be said for the other states in *Miner*.

Indeed, the *Shutts* court itself recognized the significance of many of these distinctions when it distinguished the facts of *Shutts* from those in *Feldman v. Bates Manufacturing Co.*,[123] a case which is strikingly similar to *Miner*. *Feldman*, a New Jersey case, involved a class action on behalf of all holders of shares of preferred stock in defendant Bates Manufacturing Co., a Delaware corporation, who had failed to convert their shares into common stock on or before the last day on which the privilege of conversion could be exercised. The plaintiffs sought to compel Bates to convert their shares despite their failure to request conversion before the cutoff date. Only thirty-one of the 295 members of the plaintiff class were residents of New Jersey. Stating that (1) there was no common fund involved in this case, (2) the vast majority of the plaintiffs were not residents of New Jersey and had not had any contacts with New Jersey, and (3) the defendant Bates was not authorized to do business in New Jersey and in fact did not even have any assets in New Jersey, the New Jersey Supreme Court did not certify the class action.[124] The court stated that New Jersey had no special interest in supervising the conduct of Bates's business or in adjudicating this litigation. The court concluded that even if it could exercise personal jurisdiction over the nonresident plaintiffs, the case should not proceed in New Jersey courts due to the lack of state interest in the litigation. It suggested that Delaware, residence of the defendant, was a more convenient and superior forum.[125]

In distinguishing *Feldman* from the case before it and apparently agreeing with the New Jersey Supreme Court, the Kansas Supreme Court in *Shutts* indicated that it would not have exercised personal jurisdiction over nonresident plaintiff class members in a case like *Miner*.[126] *Shutts* therefore does not support the result reached by the Illinois Supreme Court in *Miner*.

The Illinois Supreme Court in *Miner* barely acknowledged *Woodson*'s existence and cited it only as one of the cases relied upon by defendant Gillette to support its argument that the court lacked jurisdiction over the nonresident class members.[127] The court did not stop to analyze its implications but went directly to *Shutts* and *Hansberry*. This was a mistake. The significance of *Woodson*[128] to multistate class actions where some or most of the plaintiff class are nonresidents, and where the claims of the nonresidents did not arise within the forum state, is that it identifies as critical the interest of the several states in having their law applied to regulate the affairs of

123. 143 N.J. Super. 84, 362 A.2d 1177 (1976).
124. *Id.* at _, 362 A.2d at 1181.
125. *Id.* at _, 362 A.2d at 1183.
126. 222 Kan. at _, 567 P.2d at 1310.
127. 87 Ill. 2d at _, 428 N.E.2d at 481.
128. 444 U.S. 286 (1980).

their citizens who have not affirmatively invoked the benefits and protections of the laws of another state.

Woodson cannot be dismissed as a case limited to nonresident defendants.[129] The fourteenth amendment, of course, does not distinguish between persons who are plaintiffs and persons who are defendants; and to the extent that it commands respect for state sovereignty, a state has as much of an interest in regulating the affairs of its citizens who become plaintiffs in litigation as it does in regulating the affairs of its citizens who become defendants. If the due process clause, as an instrument in interstate federalism, is designed to allow persons "to structure their primary conduct with minimum assurance as to where that conduct will and will not render them liable to suit,"[130] that design should hold equally for nonresident plaintiffs and nonresident defendants. The fourteenth amendment should require in either case that the nonresident have "reasonably anticipate[d] being haled into court there,"[131] for the nonresident plaintiff who is made a member of a multistate class action is involuntarily made a party to the proceedings in much the same manner as the defendant.[132] It is no answer to say that nonresident plaintiffs may opt out of the class.[133] First, the class may be certified under provisions similar to Federal Rule of Civil Procedure 23(b)(1) or 23(b)(2), neither of which permit class members to opt out of the class.[134] Second, in some states the plaintiffs may not be entitled to individual notice and may not actually become aware of the right to opt out.[135] Nor is it a sufficient answer that the nonresident defendant bears significantly greater

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129. This argument is made in Ross, *Multistate Consumer Class Actions in Illinois*, 57 CHI.-KENT L. REV. 397, 411 (1981), and was accepted by the Illinois Supreme Court in *Miner*. *See supra* text accompanying notes 95-99.

130. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 297.

131. *Id.*

132. *See Multistate Plaintiff Class Actions*, *supra* note 3, at 726 (analogizing to claimants in interpleader proceedings and proceedings for declaratory relief as well as proceedings determining support rights of absentee divorcees); *Consumer Class Actions*, *supra* note 3, at 1423.

133. It may be argued that the failure of class members to opt out signals their consent to the court's personal jurisdiction, which has been a sufficient basis for the exercise of *in personam* jurisdiction since *Pennoyer v. Neff*, 95 U.S. 714 (1877). It is questionable whether consent may be inferred from putative members' silence, however, since they have no duty to respond and mere notice of suit in a court lacking personal jurisdiction over a nonresident has never been thought enough to obligate the nonresident affirmatively to object to the court's attempt to bind him. *See* Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 524-25 (1931) (rejecting collateral attack on a judgment for want of personal jurisdiction where defendant had unsuccessfully moved in earlier case to dismiss for lack of jurisdiction over it, stating defendant "had the election not to appear at all," in which case collateral attack would have been proper); Pennoyer, 95 U.S. at 714. Furthermore, though a class may be ascertainable and certified, it may not be possible to identify class members until judgment has been entered. *See generally Multistate Plaintiff Class Actions*, *supra* note 3, at 734.

134. FED. R. CIV. P. 23(c)(2) only permits class members to opt out if the action is being maintained under subdivision (b)(3) of the Rule.

135. *See supra* note 8.

burdens, such as the expense and inconvenience of defending a lawsuit. First, the individual nonresident plaintiffs who may have substantial claims, as in products liability or disaster litigation, may not be given the opportunity to opt out and may prefer to litigate in a forum more convenient to them individually.[136] Moreover, the Court in *Woodson* stated unequivocally that the absence of inconvenience, burden or expense to a nonresident could not alone justify a state court in exercising personal jurisdiction over him if he could not reasonably have expected to become involved in litigation there.[137]

In *Miner,* the nonresident plaintiffs' claims individually considered would hardly have justified suit.[138] Moreover, there is no indication that the defendant treated the plaintiffs differently according to the states in which they resided.[139] Nevertheless the *Miner* court quite properly recognized that it could not apply Illinois law to the claims of nonresident members of the class whose claims had not arisen in Illinois, and it remanded the case with instructions to the lower court to investigate "the differing laws of the states" and to determine whether they were "subject to grouping in a manageable number of subclasses."[140] *Miner* does not involve, therefore, an effort by the Illinois courts to apply Illinois law to controversies between nonresidents regarding foreign causes of action. The question arises whether, in the circumstances of *Miner* where personal jurisdiction over nonresidents could not have been obtained, the due process clause and considerations of federalism not only protect a state's interest in having its law applied but in applying that law itself. Quite apart from questions regarding the wisdom of a state court attempting to do so in these circumstances it may be unfair

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136. Petition of Gabel, 350 F. Supp. 624 (N.D. Cal. 1972) (in an action arising out of the mid-air collision of an airliner and military jet, certification of class under FED. R. CIV. P. 23(b)(1)(A) of persons with claims against airline and the United States). However the propriety of a class action to resolve all or part of the claims arising out of a mass tort or disaster must increasingly be doubted. *E.g.*, Ryan v. Eli Lilly & Co., 84 F.R.D. 230 (D.S.C. 1979); Mink v. University of Chicago, 460 F. Supp. 713 (N.D. Ill. 1978); Snyder v. Hooker Chemicals & Plastics Corp., _ N.Y.2d _, _ N.E.2d _, 429 N.Y.S.2d 153 (1980). *See also* McDonnell Douglas Corps. v. U.S. Dist. Ct., 523 F.2d 1083 (9th Cir. 1975), *cert. denied,* 425 U.S. 911 (1976). More recently, the Ninth Circuit Court of Appeals has vacated a district court order certifying a class action in the context of mass torts. In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation, Nos. 81-4648 through 4656 (9th Cir. July 15, 1982) (available Nov. 8, 1982, on LEXIS, Genfed library, Cir fil), *rev'g,* 526 F. Supp. 887 (N.D. Cal. 1981).

137. *See supra* notes 46-48 and accompanying text.

138. *See supra* note 90 and accompanying text.

139. 87 Ill. 2d at _, 428 N.E.2d at 484. Defendants did argue that common questions of fact did not predominate and that individual proof on issues of reliance, satisfaction, waiver and consideration was necessary to establish each member's claim under applicable law. The court rejected this argument and found that the plaintiff's case in *Miner* was based upon essentially identical transactions with thousands of consumers to whom the promotional offer had been made by the defendant. It found that the existence of individual issues was merely hypothetical and held that common questions of fact existed. *Id.* at _, 428 N.E.2d at 484-85.

140. *Id.*, 428 N.E.2d at 484-85.

and unconstitutional to "depriv[e] other jurisdictions of the right to protect their own citizens" in such cases.[141]

IV. Conclusion

One need not argue that a state court may never entertain a multistate class action involving nonresident plaintiffs who have no contacts with the forum state and whose claims arose elsewhere in order to reject the conclusion of the court in *Miner* that class actions are, in all circumstances, an exception to the rule requiring personal jurisdiction for one to be bound. Exceptional situations may be presented, but a far more sophisticated analysis of the circumstances presented than is evident in *Miner* is required. There are many interests at stake which will vary with the case which must candidly be considered before a state court can conclude whether it may constitutionally proceed in these circumstances.

First, obviously, there are the interests of the nonresident plaintiffs who are unnamed members of the class. These interests certainly include access to court, and as in *Miner*, the individual amounts involved may be so *de minimus* that a class action is the only viable means by which they may have their claims heard.[142] Conversely, their claims may be substantial, as in products liability or disaster litigation.[143] In that case each claimant would presumably want to proceed separately, in a forum of his choice, with coun-

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141. *Id.* at _, 428 N.E.2d at 489 (dissenting opinion).

142. *See supra* note 2-7, 76-85 and accompanying text. In some circumstances the nonresident plaintiffs' claims may have sufficient relationship to the forum to allow a nationwide class action to proceed. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Hartford Life Ins. Co. v. Ibs, 237 U.S. 662 (1915). In other circumstances class actions may have to be filed in several states. *See supra* text accompanying notes 80-85. In still other circumstances no class action may be possible and individual consumers may either have to intervene in other suits or forego seeking redress for their claims. In defining limits on personal jurisdiction as an instrument of interstate federalism which must be respected even in the absence of any inconvenience, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980, the Supreme Court seemingly ruled out necessity as a basis for asserting jurisdiction over a person whose claim lacked a rational relationship to the forum. As petitioner in *Miner* stated in its Reply Brief:

> What respondent and his supporters are really saying in their briefs is that the considerations supporting traditional limitations on state court jurisdiction are outweighed by the need to secure adjudication of consumer claims that are of such little consequence that they do not justify state-by-state consideration and are individually so insignificant that claimants will not bother to submit them to a tribunal voluntarily. Such a proposition must be rejected, not only because the concerns of federalism and fairness embodied in the "minimum contacts" rule have far greater importance than respondent attributes to them, but also because the debatable objective of fostering consumer lawsuits involving such claims can, if desired, easily be attained by Illinois or any State by other clearly constitutional means.

Reply Brief for Petitioner at 13, The Gillette Co. v. Miner, 428 N.E.2d 478 (1981), *cert. granted*, 102 S. Ct. 1767 (1982).

143. *See supra* note 136 and accompanying text.

sel of his own choosing, in litigation which he could control and settle.[144] That interest will not be protected by permission to opt out if the class is certified under a provision similar to Federal Rule of Civil Procedure 23(b)(1).[145] A provision that nonresidents will not be bound unless they affirmatively "opt in" would protect the nonresident plaintiffs,[146] but there may be situations where it would be "fair" to bind them whether or not they wanted to be part of the class action, such as a case involving a fund which was insufficient in amount to satisfy the claims of plaintiffs everywhere.[147] Even if their individual claims are not substantial, class actions in several states may be possible, and the nonresident plaintiffs might well have an interest in selecting their own attorney and proceeding in their own courts. In *Miner*, for example, only about 12,000 of approximately 180,000 class members were residents of Illinois. Certainly a class action on behalf of Illinois residents was justified, but class actions in other states on behalf of those states' citizens might similarly have been warranted.

Second, the defendant has an interest in cases of this sort. As to nonresident plaintiffs living in the several states, a defendant in consumer cases may have structured his conduct with class members from the states according to the law in each respective jurisdiction.[148] Controversies between a defendant and nonresident members of a plaintiff class arising elsewhere than the forum state do not necessarily bear a rational relationship to the forum.[149] Even though they do not predominate, critical individual questions

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144. *See* In re Federal Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982); In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation, Nos. 81-4648 through 4656 (9th Cir. July 15, 1982) (available Nov. 8, 1982, on LEXIS, Genfed library, Cir file), *rev'g* 526 F. Supp. 887 (N.D. Cal. 1981). There are many reasons why the choice of forum could be particularly important to a plaintiff. These include how crowded the docket is and how long it would be before plaintiff's claim can be tried; the applicable rules of evidence; whether the forum accepts less than unanimous jury verdicts; the extent of discovery available; and others.

145. *See supra* note 134.

146. *See Multistate Plaintiff Class Actions*, *supra* note 3, at 733-34. The argument that nonresident plaintiffs be required affirmatively to "opt in" in order to be bound was raised and rejected in *Schlosser v. Allis-Chalmers Corp.*, *86 Wis. 2d 226, _, 271 N.W.2d 879, 887 (1978)*.

147. *See* Northern District of California "Dalkon Shield" Products Liability Litigation, 526 F. Supp. 887 (N.D. Cal. 1981); *compare* State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523 (1967) (proceedings under Federal Interpleader Act—authorizing nationwide service of process, 28 U.S.C. § 2361—available to insurer where coverage of defendant insured was insufficient to meet all claims, but only after personal injury claimants had reduced their claims to judgments in forums of their choosing).

148. This is the very intention and expectation of the Court in *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980). *See supra* notes 65-74 and accompanying text.

149. Rush v. Savchuk, 444 U.S. 320 (1980); Shaffer v. Heitner, 433 U.S. 186, 204 (1977) (due process requires a sufficient "relationship among the defendant, the forum, and the litigation."). The evidence on critical factual issues may, of course, be located in other states. That could include the testimony of the nonresident class members, depositions of whom might not be permitted or, if permitted, be unsatisfactory. Courts have disagreed whether discovery is available against unnamed members of the class. *Compare* Brennan v. Midwestern United Life

of fact or law or both may exist which would lead the defendant to prefer that those claims be heard in other states.[150] Certainly the defendant has an overriding interest in litigating the dispute in a forum which can enter a valid judgment. The defendant might otherwise be sued in several states by any nonresident members of the class who are disappointed for one reason or another with the judgment, and the defendant would not have the protection of *res judicata*.[151] On the other hand, the defendant may affirmatively be seeking a plaintiff class. In one case, for example, a defendant facing the allegedly ruinous possibility of punitive damage assessments in 1500 separate actions sought a class action on behalf of nonresident plaintiffs whose claims arose in other states insofar as their prayers for punitive damages were concerned.[152] This, of course, is a situation in which the nonresident plaintiffs' interests in proceeding separately and avoiding the class action are strongest.

Third, there are the interests of the states in which the nonresident plaintiffs reside.[153] Those interests will include the concerns of their citizens discussed above in obtaining a remedy and in selecting the forum in which to proceed where that is feasible. Quite apart from the interests of its individual citizens, the state as sovereign, and as an expression of its citizens' values and choices, has an interest not only in having its law applied but in applying its law itself. When state courts confront issues themselves and develop their own position, the citizens know how to conduct their daily affairs.[154] The pronouncements of other states' courts do not carry the same, if any, weight as the pronouncements of its own courts in the minds of its citizens as they structure their daily conduct; and the court entertaining the class action may erroneously construe the other states' laws. This interest could be served by legislation in the several states allowing their courts to

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Ins. Co., 450 F.2d 999 (7th Cir.), *cert. denied*, 405 U.S. 921 (1971) *with* Wainwright v. Kraftco Corps., 54 F.R.D. 532 (N.D. Ga. 1972). Such discovery is available in states which have adopted the Uniform Class Action Rules. *E.g.*, IOWA R. CIV. P. 42.

150. *See supra* note 139.

151. Defendant Gillette Co. asserted such an interest: The decision below requires Gillette to litigate some 168 000 claims against it in a court that may be unable to render a judgment in Gillette's favor that will be given full faith and credit is a sufficient interest to give Gillette standing to raise the jurisdiction issue. Reply Brief for Petitioner at 15. The Gillette Co. v. Miner, 428 N.E.2d 478 (1981), *cert. granted*, 102 S. Ct. 1767 (1982).

152. In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation, 526 F. Supp. 887 (N. D. Cal. 1981), *rev'd on other grounds*, Nos. 81-4648 through 4656 (9th Cir. July 15, 1982) (available Nov. 8, 1982, on LEXIS, Genfed library, Cir file) (vacating district court order certifying class action). *Compare* In re Federal Skywalk Cases, 680 F.2d 1175, 1181-82 (8th Cir. 1982) (Analogizing to interpleader, plaintiffs sought a mandatory class action, alleging that multiple claims for punitive damages created a limited fund, but the court rejected a mandatory class action where "the class has an uncertain claim for punitive damages against defendants who have not conceded liability.") *Id.*

153. *See supra* notes 65-74 and accompanying text.

154. *See supra* text accompanying notes 65-74.

certify questions of state law to other state courts and allowing courts to answer questions certified to them.[155] If that procedure were available, this particular interest should not constitute a barrier to a multistate class action.

Fourth, there is the interest of the forum state. Expansion of personal jurisdiction has enabled the states to regulate conduct occurring within their borders.[156] Assertions of personal jurisdiction over nonresident unnamed members of a plaintiff class for the purpose of adjudicating claims arising outside the forum state is not necessary for a court to regulate a defendant's in-state conduct. The forum state should have little interest in this situation, yet it may be unfair to say that the forum state never has an interest in adjudicating the rights and liabilities of nonresidents regarding foreign causes of action. If the defendant is a resident of or does business in the forum state, the state has an interest in regulating his conduct to protect its own citizens, though that may be done without a multistate class action. Even if the defendant is a nonresident, the state as a part of a nationwide or interstate judicial system has an interest in the efficient resolution of disputes.[157] As a matter of reciprocal interests[158] one class action may be preferred to several. Not only would several class actions arguably be a waste of judicial resources, but inconsistent judgments might result. Inconsistent judgments might, however, simply reflect differences in state laws. Moreover, a single class action might achieve no economy if one court had to apply the different laws of a number of states since several less complicated class actions might be superior to a single complicated one. Finally there may be other ways to obtain efficiency, for example, through principles of issue preclusion, which are more sensitive to the interests of other states and their citizens.[159]

The court in *Miner* did not consider these interests and did not give sufficient heed to considerations of federalism which *Woodson* requires to be taken into account in adjudicating claims by or against nonresidents. Had it done so, it would have reached a different result.

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155. *E.g.*, IOWA CODE § 684A.1-.10 (1981).

156. *See supra* text accompanying notes 49-64.

157. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980); Kulko v. Superior Court, 436 U.S. 84, 93, 98 (1978).

158. *Compare* IOWA R. CIV. P. 42.6 ("A resident of this state who is a member of a class suing or being sued in another state is subject to the jurisdiction of that state if by similar class action law it extends reciprocal jurisdiction to this state.").

159. Katz v. Carte Blanche, 496 F.2d 747, 762 (3d Cir. 1974).