Multistate Consumer Class Actions in Illinois

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During the last decade, the state of Illinois enacted substantive and procedural statutes to effectuate a policy of meaningful consumer protection. In 1973, the legislature enacted the Illinois Consumer Fraud and Deceptive Business Practices Act, known affectionately to consumerists as the "Little FTC Act." This act prohibits all "unfair methods of competition and unfair or deceptive acts or practices" and protects "consumers and borrowers and businessmen against fraud, unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Courts have recognized the Consumer Fraud Act as "a clear mandate from the legislature to the courts to use the Consumer Fraud Act to the utmost degree to eradicate all forms of deceptive and unfair business practices." The Consumer Fraud Act gave, for the first time, a private right of action to consumers to remedy a broad range of deceptive, fraudulent and unfair acts committed by those who do business in the state of Illinois.

Four years later, with the enactment of the Illinois class action statute, the legislature gave the Consumer Fraud Act procedural teeth. In essence, the statute did away with some archaic procedural stumbling blocks inherent in class actions brought under Illinois common law. Gone were the old requirements of a "common fund" and a

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2. Id. § 262. See Fitzgerald v. Chicago Title & Trust Co., 72 Ill. 2d 179, 380 N.E.2d 790 (1978).
5. ILL. REV. STAT. ch. 121½, § 270a(a) (1979) provides:
Any person who suffers damage as a result of a violation of Section 2 through 2N of this Act [ILL. REV. STAT. ch. 121½, §§ 262-262N (1979)] committed by any other person may bring an action against such person. The court in its discretion may award actual damages or any other relief which the court deems proper.
6. ILL. REV. STAT. ch. 110, §§ 57.2-57.7 (1979).
“community of interest.” The statute also eradicated confusing variations among the cases which provided the common law basis for the action. In the words of the late Justice Dooley, “[w]ith the advent of the statute many of the prior decisions have become corpses.” The Illinois class action statute has been called a procedural device superior to its federal counterpart.

The legal community finds the plaintiff class action the single most important procedural device for the protection of consumers. In the context of consumer protection, the class action serves at least two primary interests. First, a class action has the obvious effect of reducing the costs of litigation in relation to the potential recovery to the class and of the individual class member. As the class gets larger in number, the pro rata share of the costs of bringing the action diminishes for each member of the plaintiff class. Second, the threat of recoveries by large classes of disgruntled customers acts as a strong deterrent to fraudulent conduct by manufacturers, distributors and retailers.

While injured consumers have a potent weapon in the class action,
there is a question whether they have any viable forum in which to exercise the device. For all practical purposes, the consumer class action is shut out of federal court: "The promise of the federal class action was nipped in the bud by the unfortunate decision in Snyder v. Harris."14 In Snyder,15 the Supreme Court held that class members could not aggregate their separate and distinct claims in order to satisfy the $10,000 amount in controversy requirement of federal law.16 In Zahn v. International Paper Co.,17 the Court expanded the holding in Snyder by requiring each member of a plaintiff class to have a separate and distinct claim for the requisite jurisdictional amount.

Consumers' claims would rarely exceed $10,000 for each member of a putative plaintiff class. Hence, "if the great majority of consumer classes are to find a forum, it must be the state courts."18 Despite its holding, the Snyder Court left a ray of hope to litigants involved in consumer class claims. Specifically addressing class actions, the Court itself suggested that "[s]uits involving issues of state law and brought on the basis of diversity of citizenship can often be most appropriately tried in state courts."19

Illinois courts have shown their willingness to entertain the typically small claim of an individual consumer in a class action. In the recent case of Miner v. Gillette Co.,20 the court rejected the defendant's argument that the $7.95 claims of the individual class members were de minimus and not appropriate for class treatment. The court noted "[a]ll section 57.2(a)(4) of the Civil Practice Act requires is that 'the class action is an appropriate method for the fair and efficient adjudication of the controversy.'"21 Many classes in Illinois have been approved where the amounts to be recovered by individual class members are small. In Moseid v. McDonough,22 for example, the court affirmed a class certification where the plaintiff challenged the authority of the Clerk of the Circuit Court to charge a one-dollar county law library fee to each defendant filing an appearance in civil cases.23

19. 394 U.S. at 341.
21. Id. at 320, 411 N.E.2d at 1097.
23. More recent Illinois cases, decided under the new class action statute, have also allowed classes to be certified where individual recoveries were relatively small. See Barliant v. Follett
Since the enactment of the class action statute the trial courts of
the state of Illinois became an ideal forum in which to bring the type of
suit contemplated by Snyder. Nevertheless, since the enactment of
the statute, the lower appellate courts of Illinois have split on the ques-
tion of whether to enhance the effectiveness of the consumer class ac-
tion by allowing a plaintiff class to include persons who are not
residents of the state of Illinois. Three reported cases in the last three
years have addressed the question of whether due process or the class
action statute allow multistate plaintiff class actions in the state courts
of Illinois.

This article will contend that nothing in the due process clause or
the Illinois class action statute prohibits Illinois courts from entertain-
ing a plaintiff class action comprised of both Illinois and non-Illinois
residents. Admittedly, this article takes the particular position of a
plaintiff's counsel, and that position has yet to be tested in the
Supreme Court of Illinois. With that point in mind, this article will
first discuss the multistate plaintiff class actions brought in Illinois
prior and subsequent to the effective date of the Illinois class action
statute. It will then be shown that procedural due process, rather than
notions of territoriality, is the constitutional touchstone by which state
courts may exercise jurisdiction over nonresident members of a plaintiff
class. Finally, it will be shown that the new Illinois class action statute
allows the trial courts of Illinois to hear and resolve multistate con-
sumer class actions.

**History of Multistate Class Action in Illinois**

Prior to the enactment of sections 57.2-.7 of the Civil Practice
Act, multistate class actions were consistently allowed by Illinois

Corp., 74 Ill. 2d 226, 384 N.E.2d 316 (1979) ($15 freight overcharge); Hoover v. May Dep't Stores
Ill. App. 3d 190, 380 N.E.2d 1040 (1978) (claims of class members for value of remainder of
magazine subscriptions were $9 or less); Steinberg v. Chicago Medical School, 69 Ill. 2d 320, 371

24. 394 U.S. at 341.


26. In the interest of full disclosure (see Douglas, Law Reviews and Full Disclosure, 40 WASH.
L. REV. 227 (1965)), the author wishes to point out that he is associated with one of the two law
firms who represent the plaintiff class in Miner.

27. Leave to appeal to the Illinois Supreme Court was filed in Miner on November 26, 1980

28. See note 6 supra.
courts. Kimbrough v. Parker provides an example of the treatment of a multistate class action under the now defunct “community of interest” doctrine, a substantially more restrictive standard than any required by the new statute. In that case, the defendants sponsored a puzzle contest through newspaper advertisements which induced members of the public to enter the contest believing that prizes would be offered. In fact, the defendants had never intended to honor their representations to the public. To enter the contest, the 3,300 resident and nonresident members of the plaintiff class were required to pay up to twelve dollars as a donation. The nonresident composition of the class was never an issue before the Kimbrough court. Regardless, the court sustained the class, noting a predominance of common factual and legal issues:

The inducements were substantially the same for all contestants since there were no personal solicitations. The issues between all contestants and defendants are the same. There are no actual or potential conflicts of interest. The 5 plaintiffs are fairly representative and have fairly presented contestants’ side of the common issues.

Although the actions were brought prior to the effective date of the new class action statute, the courts in Spirek v. State Farm Mutual Automobile Insurance Co. and Hoover v. May Department Stores Co. applied the standards of the statute to deny and grant, respectively, multistate class actions. In Hoover, a class of customers of the defendant, which had stores in both Illinois and Missouri, brought a class action to challenge the department store chain’s policy of denying trading stamps to those customers who neither pay in cash nor pay the entire balance of their charge accounts before the next billing date. The plaintiff class was comprised of both Illinois and Missouri residents.

29. See Van Vactor v. Blue Cross Ass’n, 50 Ill. App. 3d 709, 365 N.E.2d 638 (1977); Frank v. Teachers Ins. & Annuity Ass’n of Am., 47 Ill. App. 3d 821, 365 N.E.2d 28 (1977), rev’d on other grounds, 71 Ill. 2d 583, 376 N.E.2d 1377 (1978); Kimbrough v. Parker, 344 Ill. App. 483, 101 N.E.2d 617 (1951); Weislow v. Packard, No. 78 CH 1906 (Cir. Ct. Cook County); Holstein v. Montgomery Ward & Co., No. 68 CH 275 (Cir. Ct. Cook County 1970). But see Reardon v. Ford Motor Co., 7 Ill. App. 3d 338, 287 N.E.2d 519 (1972). In Reardon, three named plaintiffs filed an action on behalf of approximately 4,000,000 individual present or past owners of certain Ford automobiles. The court, relying on principles since modified by the enactment of section 57.2, found that the plaintiff class lacked a “community of interest.” The court dismissed the entire class action and did not differentiate between the resident and nonresident members. It should be noted, however, that a class of 4,000,000 unknown, unidentified members would likely never meet the standard of section 57.2(a)(4), which requires that a “class action is an appropriate method for the fair and efficient adjudication of the controversy.”

31. Id. at 486, 101 N.E.2d at 618.
Their two-count complaint alleged violations of both the Illinois Retail Installment Sales Act and the Missouri Retail Credit Sales Act. The court noted that the class likely contained hundreds of thousands of members and that the average claim of each member was about twenty dollars. In determining the propriety of a class composed of seventy-five percent non-Illinois residents, the court turned to the new statute to "lend . . . guidance as to what weight should be accorded to the previous case law." The court allowed the action to proceed as a class action, noting: "[I]t becomes apparent that it would be unjust and arbitrary to allow the fortuitous location of a river and a state line through defendants' area of operation and the area from which it draws its customers to dictate which customers, uniformly affected by defendant's policy, can be class members." Conspicuously absent from the 

In contrast, the binding effect of a judgment on nonresident members of a multistate class was the primary concern of the court in Spirek v. State Farm Mutual Automobile Insurance Co. In that case, the two representative plaintiffs brought a class action against the insurance company on behalf of all insureds of State Farm who had received medical payments under their automobile insurance policy and who were required, as a condition to receiving their medical payments, to execute subrogation receipts. Among the three questions certified for appeal by the trial court was: "[D]oes the [trial] court have power in the instant case to include nonresidents of the State of Illinois as residents [sic] of the plaintiff class?"

State Farm also challenged the propriety of the plaintiffs' representation of a class comprised solely of Illinois residents. After a detailed application of each of the four standards set forth in section 57.2 of the Civil Practice Act, the court upheld the trial court's certification of the Illinois class. The court found first that the class was so numerous as to make joinder impracticable. The court noted that the second requirement of the new statute "ends numerous controversies
under Illinois' prior common law approach to the class action," doing away with the earlier "common fund" doctrine and modifying and simplifying the requirement of a "community of interest in both the subject matter and the remedy." Thus, the court focused on the similarity of the insurance policies, rather than the possible dissimilarity in transactions which may have occurred in collecting subrogation for medical payments, to find common questions which predominated over questions affecting only individual members. The court's third determination in considering the propriety of the Illinois class was whether the representative party would fairly and adequately protect the interest of the class. The court found no dispute over the adequacy of the representative party. Finally, the court held that the class action "would best serve the economies of time, effort and expense and promote the uniformity of decision and accomplish the other ends of equity and justice sought to be attained in these actions."

In considering the propriety of the multistate class, however, the Spirek court seemingly abandoned its orderly application of the four statutory requirements and found "[t]hat there is reason to doubt the jurisdiction of an Illinois court to join as plaintiffs in a class action persons residing in numerous other states. . . ." The court reached this conclusion on the basis of three findings: (1) that due process would be offended by, and full faith and credit would not be afforded to, a judgment of an Illinois court binding nonresident plaintiffs; (2) that no common question of law would predominate; and (3) that the task of arguing the law of fifty states would render the representation of plaintiffs' counsel inadequate.

The primary basis upon which the Spirek court rejected the plaintiffs' multistate class action was its conclusion that an Illinois court could not, consistent with due process, bind out-of-state residents to Illinois jurisdiction. In arriving at this conclusion, the court relied on the following observation:

Although the ability of the state to subject nonresidents to its jurisdiction with or without compelling their presence has increased since the decision in Pennoyer, the basic premise of territorial limits remains in the concept of "minimum contacts" espoused in International Shoe Co. v. Washington. . . . The due process clause still "does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which

43. 65 Ill. App. 3d at 450, 382 N.E.2d at 118.
44. ILL. REV. STAT. ch. 110, § 57.2(a)(3) (1979).
45. 65 Ill. App. 3d at 452, 382 N.E.2d at 119.
46. Id. at 454, 382 N.E.2d at 121.
the state has not contacts, ties or relations."

On that basis, the court held that an Illinois court cannot render a binding *in personam* judgment over plaintiffs who have not established "minimum contacts" with the state of Illinois. In addition, the *Spirek* court, apparently to buttress its conclusion that due process provides an absolute bar to any multistate class action, found that the case presented no common question of law between the nonresident members of the plaintiff class:

Accordingly, because the plaintiffs in the case at hand come from numerous other states, numerous other states' laws would have to be applied. Thus, as to non-resident members of the proposed class, the question of law which is the heart of this action would not be in common, and would not predominate, as required by Section 57.2(a)(2) of the Civil Practice Act.48

Less than two years after *Spirek*, the Appellate Court for the First Judicial District was presented with an opportunity to reexamine the position it took in *Spirek*. In *Miner v. Gillette Co.*,49 an interlocutory appeal and cross-appeal were brought from the trial court's order dismissing a multistate class on the authority of *Spirek* and allowing the case to proceed as a class action solely on behalf of Illinois residents.50

The plaintiff in *Miner* brought a class action in the Circuit Court of Cook County on behalf of a class of approximately 180,000 consumers residing throughout the United States, who were allegedly deceived by Gillette in connection with a nationwide campaign to promote sales of its "Cricket" disposable butane lighters. The plaintiff alleged that Gillette fraudulently induced members of the plaintiff class to purchase thousands of Cricket lighters, while knowing its promotional offer of a "free" Accent table lighter with the purchase of two Cricket lighters was deceptive. Miner alleged that Gillette knew and concealed the fact that "it did not have an adequate supply of Accent table lighters available to fill orders."51

48. *Id.* at 453-54, 382 N.E.2d at 121.
50. Order of September 17, 1979, Miner v. Gillette Co., 79 CH 567 (Cir. Ct. Cook County).

In paragraph 4 of his Amended Complaint, the plaintiff alleged:

Commencing in approximately April of 1978, defendant Gillette, for the purpose of increasing sales of its Cricket butane lighter, instituted an extensive sales campaign under which the defendant offered members of the public a "free" Accent table lighter with the purchase of two Cricket lighters; details of the promotional offer set forth below appeared on the reverse side of the display pack; a copy of both sides of the Cricket display pack is attached hereto as Exhibit A:

Mail-in Offer Details:
Having accepted Gillette's offer of a "free" Accent table lighter (which the promotional package acknowledged had a "$7.95 Retail Value"), and having submitted proofs of purchase of two Cricket lighters and payment of fifty cents, the plaintiff, on his own behalf and on behalf of each of the approximately 180,000 members of the plaintiff class, sought compensatory and punitive damages resulting from Gillette's refusal to supply them with their "free" Accent table lighters. The two-count complaint alleged that Gillette's conduct amounted to an "unfair and deceptive act or practice prohibited by the Consumer Fraud and Deceptive Business Practices Act,"\(^5\) and that Gillette's refusal to comply with the terms of its offer and supply members of the plaintiff class with their "free" Accent lighters constituted a breach of contract. In its answer to an interrogatory propounded by the plaintiff, Gillette attested that it had failed to fill 179,580 orders nationwide, and that a total of 11,456 of these orders were received from residents of Illinois.\(^5\) The identity and address of each member of the putative class was apparently known by Gillette.

On appeal, the court allowed the plaintiff to proceed on behalf of the 11,456 members of the class who were residents of Illinois. The court found, among other things, that common questions of law and fact predominated as to the Illinois residents. Specifically, the court found that "[a]ll Illinois plaintiff members allegedly performed in the same manner and suffered the same injury from Gillette's failure to perform."\(^5\)

As to the multistate class, however, the court followed its earlier decision in Spirek and emphasized that the "minimum contacts" standard of \(\text{International Shoe Co. v. Washington}\)\(^5\) precluded the plaintiff's representation of nonresidents:

In \textit{Spirek}, two Illinois residents sought to represent all State Farm policyholders, wherever located, who made defined medical payment claims. We refused to exercise such jurisdiction over all plaintiffs even though we had jurisdiction over defendant. In refusing to exercise jurisdiction, we discussed a number of due process and full faith and credit problems inherent in joining out-of-State plaintiffs: compelling plaintiffs to opt out of the class suit or risk a binding \textit{in personam} judgment; no common question of law would predominate;

"Purchase two Cricket lighters. Send in the words 'Cricket by Gillette' from any two packages as your proof of purchase plus the enclosed certificate and 50¢ for postage and handling. Gillette will mail you a FREE CRICKET ACCENT TABLE LIGHTER."

\(^5\) 89 Ill. App. 3d at 316, 411 N.E.2d at 1094.
\(^5\) \textit{Id.} at 320, 411 N.E.2d at 1096.
\(^5\) 326 U.S. 310 (1945).
numerous other States' laws would have to be applied; and any decision of the court would not be binding on persons beyond its jurisdiction which would subject any judgment rendered to relitigation when enforcement was sought in a sister State's courts.\footnote{56}

Unlike the \textit{Spirek} court, the court in \textit{Miner} had before it three recent decisions\footnote{57} in which multistate class actions were allowed. Although two of those decisions, \textit{Shutts v. Phillips Petroleum Co.}\footnote{58} and \textit{Schlosser v. Allis-Chalmers Corp.},\footnote{59} explicitly rejected the application of a "minimum contacts" analysis to plaintiff classes, and the third, \textit{Hoover v. May Department Stores Co.},\footnote{60} did not even address the question, the \textit{Miner} court distinguished these cases as consistent with the "minimum contacts" doctrine.\footnote{61} Also in contrast to \textit{Spirek}, the court in \textit{Miner} found that a common question of fact predominated over any questions affecting only individual members as to all members of the class.\footnote{62} Nevertheless, the court determined that a multistate class action "would entail the application of the laws of the different states."\footnote{63} The court stated that it was "not persuaded that \textit{Spirek} should be overruled to allow this action to proceed as a multistate class action."

Although \textit{Miner} did not overrule \textit{Spirek}, the decision implied a retreat from the prior case's broad holding prohibiting multistate class actions in any respect. By distinguishing \textit{Shutts} and \textit{Schlosser}, rather than dismissing the authority of those decisions as decisions of foreign courts, the \textit{Miner} court indicated that it would have found "minimum contacts" had the defendant been an Illinois corporation and had at least some of its conduct "emanated from the home office" in Illinois.\footnote{65}

\footnote{56. 89 Ill. App. 3d at 317, 411 N.E.2d at 1095.} \footnote{57. \textit{Hoover v. May Dep't Stores Co.}, 62 Ill. App. 3d 106, 378 N.E.2d 762 (1978); \textit{Schlosser v. Allis-Chalmers Corp.}, 86 Wis. 2d 226, 271 N.W.2d 879 (1978); \textit{Shutts v. Phillips Petroleum Co.}, 222 Kan. 527, 567 P.2d 1292 (1977), \textit{cert. denied}, 434 U.S. 1068 (1978).} \footnote{58. 222 Kan. 527, 567 P.2d 1292 (1977), \textit{cert. denied}, 434 U.S. 1068 (1978).} \footnote{59. 86 Wis. 2d 226, 271 N.W.2d 879 (1978).} \footnote{60. 62 Ill. App. 3d 106, 378 N.E.2d 762 (1978), \textit{rev'd on other grounds}, 77 Ill. 2d 93, 395 N.E.2d 541 (1979).} \footnote{61. 89 Ill. App. 3d at 318, 411 N.E.2d at 1095.} \footnote{62. \textit{Id.} at 319, 411 N.E.2d at 1096} \footnote{63. \textit{Id.}} \footnote{64. \textit{Id.}} \footnote{65. \textit{Id.} at 318, 411 N.E.2d at 1095. It is questionable whether there were, in fact, "minimum contacts" in \textit{Schlosser}. Had the tables been turned in that case, and had Allis-Chalmers been suing its former employees under the same contract, it is doubtful that a Wisconsin court could have asserted long-arm jurisdiction over the nonresident employees simply because of the contract. The \textit{Schlosser} court considered the presence of the defendant in Wisconsin not for "minimum contacts" purposes, but to find a particular interest of Wisconsin courts in protecting residents and nonresidents alike from the conduct of a Wisconsin corporation. 86 Wis. 2d at 239-43, 271 N.W.2d at 885-87.}
In the aftermath of *Miner*, multistate class actions in Illinois are not wholly precluded.

**DUE PROCESS IMPLICATIONS OF MULTISTATE CLASS ACTIONS**

*The "Minimum Contacts" Doctrine*

The primary obstacle to multistate class actions in Illinois, as well as New Jersey and Pennsylvania,\(^66\) is the natural hesitancy of state courts to extend their jurisdiction beyond what they perceive as their territorial limits. This obstacle was expressed well by the *Spirek* court: "There is . . . no dispute that out of state residents could appear and subject themselves to the jurisdiction of Illinois courts. However, we find it beyond this court's authority, consistent with due process, to force them to do so."\(^67\) The court based its finding on *Pennoyer v. Neff*,\(^68\) in which the Supreme Court reiterated its conclusion that "[a]ny attempt to exercise authority beyond [territorial limits of a state] would be deemed in every other forum . . . an illegitimate assumption of power and be resisted as mere abuse."\(^69\) The *Spirek* court noted that state court jurisdiction over absent parties has expanded since *Pennoyer*,\(^70\) but found nevertheless that:

> [T]he basic premise of territorial limits remains in the concept of "minimum contacts" espoused in *International Shoe Co. v. Washington*. . . . The due process clause still "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has not contacts, ties or relations."\(^71\)

With its ruling, the *Spirek* court took a virtually unprecedented position.\(^72\) The *Spirek* court extended the "minimum contacts" test, a standard which has been applied exclusively to cases in which a forum sought to exercise its jurisdiction over a nonresident defendant,\(^73\) to nonresident members of a plaintiff class.

Since *Spirek*, the highest courts of some sister states\(^74\) and a host of

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67. 65 Ill. App. 3d at 452, 382 N.E.2d at 120.
68. 95 U.S. 714 (1877).
69. 720.
70. 65 Ill. App. 3d at 453, 382 N.E.2d at 120.
72. *But see* note 66 supra.
74. *See* note 57 supra.
commentators\textsuperscript{75} have cast considerable doubt on the extension of the "minimum contacts" doctrine to members of a plaintiff class.\textsuperscript{76} The Supreme Court of Kansas recently avoided an extension of the "minimum contacts" test simply by distinguishing \textit{International Shoe} and its progeny as cases which dealt only with nonresident defendants. In \textit{Shuts v. Phillips Petroleum Co.},\textsuperscript{77} the Supreme Court of Kansas was faced with a class action seeking to recover interest on "suspense royalties" attributed to gas produced from leases in a three-state area. The defendant did business in Kansas and the plaintiff class representative and 218 of the approximately 6,400 members of the plaintiff class were Kansas residents. In response to the defendant's objection to inclusion of nonresidents in the plaintiff class, the court stated:

Whether all nonresident plaintiffs in a class action are required to have "minimum contacts" with the forum is a different matter. Because a class action must necessarily proceed in the absence of almost every class member, we hold the residential makeup of the class membership is not controlling. What is important is that the nonresident plaintiffs be given notice and an opportunity to be heard and that their rights be justly protected by adequate representation. These are the essential requirements of due process, and they must be satisfied in any class action by every court, state or federal, regardless of the residences of the absent class members. Therefore, while the essential element necessary to establish jurisdiction over nonresident defendants is some "minimum contacts" between the defendant and the forum state, \textit{the element necessary to the exercise of jurisdiction

\textsuperscript{75} See Comment, Multistate Plaintiff Class Actions: Jurisdiction and Certification, 92 HARV. L. REV. 718 (1979); Comment, Toward a Policy-Based Theory of State Court Jurisdiction Over Class Actions, 56 TEX. L. REV. 1033 (1978); Comment, In Personam Jurisdiction Over Nonresident Plaintiffs in Multistate Class Actions, 17 WASHBURN L.J. 382 (1978); Comment, Consumer Class Actions with a Multistate Class: A Problem of Jurisdiction, 25 HASTINGS L.J. 1411 (1974).

\textsuperscript{76} \textit{Spirek}, barely two years old, has itself been subject to the criticism of the Illinois legal community. Kevin Forde, one of the drafters of the new Illinois class action statute, recently wrote:

\begin{quote}
In \textit{Spirek v. State Farm Mutual Automobile Insurance Co.}, the court held nonresident insureds could not be included as members of the plaintiff class. \textit{Reardon v. Ford Motor Co.}, has also been cited as rejecting a nation-wide class, although jurisdictional problems concerning out-of-state class members were never presented, ruled on or discussed in that case. These decisions ignore the doctrine of class representation as a recognized substitute for in personam jurisdiction and overlook the many precedents permitting nonresident class members to be bound in a proper class action. \textit{Spirek}, for example, relied heavily on the "territorial limitation" rule of \textit{Pennoyer v. Neff}, pronounced outmoded in \textit{Shaffer v. Heitner}, and inapplicable in any event to the facts before the court. Unlike \textit{Spirek}, \textit{Pennoyer} was not a class action. Moreover, \textit{Pennoyer} and modern cases which substituted the "minimum contacts" jurisdictional test (\textit{International Shoe} and \textit{Shaffer, supra}) dealt with nonresident defendants, not nonresident plaintiffs.
\end{quote}


over nonresident plaintiff class members is procedural due process.\textsuperscript{78}

Furthermore, the \textit{Shutts} court found support in \textit{Hansberry v. Lee},\textsuperscript{79} for its conclusion that it is procedural due process, not strict notions of territoriality, which must be satisfied to maintain a multistate class action.\textsuperscript{80}

\textit{Shutts} has been greeted with approval by later courts and commentators.\textsuperscript{81} In \textit{Schlosser v. Allis-Chalmers Corp.},\textsuperscript{82} for example, a class of retired, salaried nonunion employees brought an action against their employer for breach of its contractual obligation to provide noncontributory life insurance benefits to class members over the age of sixty-five. The plaintiff class included members who resided outside the state of Wisconsin, in twenty-one states and two countries. The defendant contended that the maintenance of a class action involving nonresident class members exceeded the constitutional limits of the jurisdiction of a state court and, like the \textit{Spirek} court, sought to apply the “minimum contacts” analysis to nonresident members of the plaintiff class. In response, the Supreme Court of Wisconsin stated:

In a well-reasoned opinion by the Kansas court, the court concluded that, while contacts with the forum are necessary to establish the con-
stitutional predicate for the exercise of judicial power over a defendant, the due process requisites for the exercise of such power over unnamed nonresident plaintiffs are adequate notice and representation. . . . Class actions necessarily proceed in the absence of most class members; therefore, the validity of the judgment as to such members should not depend on their relationship with the state but rather it should depend on whether they had adequate notice and opportunity to decide to submit themselves to the court's jurisdiction and whether their interests were properly represented.83

Important in Schlosser is the manner in which the court disposed of Klemow v. Time, Inc.84 and Feldman v. Bates Manufacturing Co.85 The court did not distinguish Klemow, but rather reiterated its conclusion that "adequate notice and opportunity to 'opt-out' would safeguard against asserting jurisdiction over a plaintiff who does not wish to participate."86 As to Feldman, the court noted that the defendant in that case was not connected in any way with the forum state. The defendant in Schlosser, however, was headquartered in the state of Wisconsin.87 The court also stated that "[t]o the extent that Feldman may be on point, we choose not to follow it."88

The commentators and treatise writers have generally agreed with the Kansas and Wisconsin courts that a blind application of the "minimum contacts" test to nonresident plaintiffs in a class action contravenes the historical purpose and procedural reality of class actions. As one writer has noted: "[A] focus upon artificial concepts such as 'presence,' 'minimum contacts,' or a sufficient 'nexus' is distracting. The due process clause seeks to assure that it is fair for the forum to adjudicate the interests at issue in a particular suit."89 The commentators, like the Shutts and Schlosser courts, have found that due process rights of nonresident plaintiffs are satisfied by adequate notice and adequate representation, the cornerstones of procedural due process. For example, in

84. See note 66 supra.
85. Id.
86. 86 Wis. 2d at 242, 271 N.W.2d at 887.
87. Id.
88. Id. The court also noted that Professor Moore and the reporters for the American Law Institute Restatement of Judgments and a tentative draft of the Restatement (Second) all agree that an otherwise valid judgment obtained in a class action has binding effect as to all members of the class and beyond the territorial limits of the court's jurisdiction. 3B MOORE'S FEDERAL PRACTICE ¶ 23.11(5) (1978); RESTATEMENT OF JUDGMENTS § 26 (1942); RESTATEMENT (SECOND) OF JUDGMENTS § 85 (Tent. Draft No. 2, 1975).
89. Comment, State Court Jurisdiction Over Class Actions, 56 Tex. L. Rev. 1033, 1040 (1978) (footnote omitted).
an article that presaged the Kansas court's decision in *Shutts*, one commentator noted:

A class action must necessarily proceed in the absence of almost every class member. Therefore, ultimately, the residential makeup of a class is unimportant. What is important is that the rights of the absent members be justly protected and that the members be given an opportunity to be heard if they so desire. These are the essential requirements of due process, and they must be satisfied in any class action by every court, state or federal, regardless of the residences of the absent class members. Therefore, whereas the essential element necessary to establish jurisdiction over a nonresident defendant is some tangible connection between him and the forum state, the element necessary to the exercise of jurisdiction over plaintiff classes is procedural due process.  

Those courts and writers who espouse the "minimum contacts" doctrine in plaintiff class actions have claimed support from the Supreme Court's reiteration of that doctrine in *Shaffer v. Heitner*; "We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." However, in two recent cases which reaffirm *International Shoe*, the Supreme Court has apparently limited its reaffirmance to exercises of jurisdiction over defendants. In *World-Wide Volkswagen v. Woodson*, the Court wrote:

The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant. Due process requires that the defendant be given adequate notice of the suit, and be subject to the personal jurisdiction of the court. As has long been settled, and as we reaffirm today, a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist "minimum contacts" between the defendant and the forum State.

In *Rush v. Savchuk*, the Court not only limited its holding to defendants, but explained exactly what it meant by the oft-quoted language from *Shaffer*:

In *Shaffer v. Heitner* we held that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny. That is, a State may exercise

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93. Id. at 212 (emphasis added).
95. Id. at 291 (emphasis added, citations omitted).
96. 444 U.S. 320 (1980).
jurisdiction over an absent defendant only if the defendant has certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.\textsuperscript{97}

The "minimum contacts" doctrine, therefore, although time-tested and convenient to apply, does not rest comfortably in the context of plaintiff class actions. As one writer noted: "[I]f a state court, confronted by a multistate class, mechanically refused to exercise jurisdiction beyond its territorial boundaries, such a refusal would be an abrogation of its duty as an administrator of justice."\textsuperscript{98} Instead of territoriality, due process requires a court to scrutinize the adequacy of notice and adequacy of representation of absent class members when confronted with a multistate plaintiff class. The constitutional guarantees of adequate notice and representation have been firmly incorporated into the Illinois class action statute.\textsuperscript{99} Due process, therefore, does not impose any greater obstacle to multistate class actions than that already imposed by the legislature to protect the interest of all absentee plaintiffs, regardless of their states of residence.

**The Binding Effect of a Judgment in a Multistate Class Action: Res Judicata**

The *Spirek* and *Miner* courts were rightly concerned with the binding effect of an Illinois judgment on nonresident plaintiffs absent the protection of due process. Neither court, however, recognized the distinction between the binding effect of an adverse judgment against a defendant and a judgment adverse to a plaintiff class. The binding effect of a judgment on a defendant is coercive in nature, necessarily depriving a defendant of a liberty or property right recognized by the Constitution and deemed protected by the due process clause.\textsuperscript{100} The binding effect of a judgment entered against a plaintiff class is res judicata, and could, at worst, deny an individual member of the class "access to a court to relitigate a claim previously tried in a class suit in which that person was a member of the plaintiff class."\textsuperscript{101} The Supreme Court has never recognized the right to bring an action *oneself* as a liberty or property right\textsuperscript{102} and has long ago found that reme-
dies afforded by a class action can provide constitutionally sufficient alternative protection of an individual's underlying substantive claim.¹⁰³

The res judicata impact of an adverse judgment on absentee members of a plaintiff class is limited. An adverse judgment would not necessarily bar all the claims of an absentee member, but simply prevent the absentee member from relitigating the issues actually decided in the prior class proceeding. Even then, as already noted, the impact of res judicata would be felt only after the absentee had an opportunity for collateral attack in the court of his or her choice.¹⁰⁴ Professor James Starrs who, with some justification, has referred to Illinois courts as suffering from "due-process-phobia" in class action cases, addressed the issue of res judicata as it relates to absentee members of a plaintiff class:¹⁰⁵

Occasionally, the courts have suffered from an anxiety neurosis stemming from their concern lest they approve a class action and violate due process... Nevertheless, its dangers should not be exaggerated. It is possible, for example, to avoid the due-process dilemma by giving notice of the pendency of the suit to all absentees... Moreover, the due-process issue is too often linked to the res judicata impact upon absentees of a judgment in a class action. It is premature to decide the issue of res judicata at the commencement of a class action. That issue might better be resolved later "if the judgment is thereafter collaterally attacked by an absent party [when] a more careful scrutiny of its representative character may be made in determining whether it is res judicata."¹⁰⁶

Even if the right to bring an individual action is some kind of liberty or property right that may be jeopardized by the res judicata effect of an Illinois judgment and must, therefore, be protected by due process, it should be recognized that the due process protections that must be afforded a nonresident plaintiff need not be as comprehensive as those that must be afforded a nonresident defendant. As the Supreme Court noted, "[i]t has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections the particular situation demands."¹⁰⁷ It is the coercive effect of a judgment entered against a defendant that re-

quires a defendant's minimum contacts with the forum entering the judgment in order to satisfy the "fundamental fairness" demanded by the due process clause. The res judicata effect of an adverse judgment against a plaintiff class simply does not have the same coercive effect against an individual member of a class. Thus, notions of residence and territoriality, which gave rise to the "minimum contacts" test for protection of absent defendants, have no application to the protection of absent plaintiffs who are already protected by notice of a right to be heard, a right to withdraw and adequate representation.

Even opponents of multistate class actions admit that both nonresident plaintiffs and nonresident defendants who affirmatively consent to the jurisdiction of a state court may have their rights validly adjudicated by that court.\textsuperscript{108} There is no dispute that an "opt-in" notice procedure, by which a prospective class member returns a notice indicating to the court that he or she desires to be included in a class action, would sanctify a multistate class action. Pragmatically, there is no difference between an "opt-in" procedure and the widely favored "opt-out" procedure as a device to protect the due process rights of an individual. Federal courts have rightfully observed that "opt-in" type notice does not as satisfactorily protect the rights of small claimants as does the typical "opt-out" notice.\textsuperscript{109} The \textit{Manual for Complex Litigation} suggests that a requirement of an "opt-in" notice would be an abuse of a trial court's discretion under the federal rules, particularly in a class action comprised of small claimants.\textsuperscript{110}

A federal court has no greater in personam jurisdiction than the courts of the state in which it sits.\textsuperscript{111} Nevertheless, federal courts find the "opt-out" provisions of the federal class action rule,\textsuperscript{112} which are similar in language and equal in scope to the Illinois class action statute, sufficient to protect nonresident members of a plaintiff class. In \textit{Appleton Electric Co. v. Advance-United Expressways},\textsuperscript{113} for example, the United States Court of Appeals for the Seventh Circuit held that an option to withdraw and adequate representation of interests afford suf-


\textsuperscript{111} See Royal Lace Paper Works v. Pest-Guard Prods., Inc., 240 F.2d 814, 816 (5th Cir. 1957).

\textsuperscript{112} Fed. R. Civ. P. 23(c)(2).

\textsuperscript{113} 494 F.2d 126 (7th Cir. 1974).
ficient due process protection to nonresident class members.\textsuperscript{114}

In addition to due process problems, the \textit{Miner} court found that "any determination made by an Illinois court would have no binding effect beyond the jurisdiction of the Illinois courts and would be subject to relitigation in other jurisdictions whenever difficulty arose in enforcing the judgment in sister states' courts."\textsuperscript{115} Stated differently, the \textit{Miner} court expressed doubt that any judgment rendered which affected nonresident members of a multistate plaintiff class would be granted full faith and credit by the courts of sister states.

This fear of overstepping jurisdictional bounds by entertaining a multistate class action, however, can be alleviated by looking to cases in which a judgment rendered in favor or against a multistate class was brought for enforcement in a court of a sister state. It is in the context of full faith and credit that the United States Supreme Court and the Supreme Court of Illinois each addressed the propriety of multistate plaintiff classes.

In \textit{Supreme Tribe of Ben-Hur v. Cauble},\textsuperscript{116} for example, the United States Supreme Court allowed a class action brought in federal court on behalf of persons who "resided in many different States of the Union," and held that the judgment rendered therein was binding on all members.\textsuperscript{117} The Court noted: "That a class suit of this nature might have been maintained in a state court, and would have been binding on all of the class, \textit{we can have no doubt}."\textsuperscript{118} Similarly, in \textit{Hartford Life Insurance Co. v. Ibs},\textsuperscript{119} a multistate class action of 12,000 policyholders was brought in a Connecticut state court and resulted in a favorable judgment for the class. An unnamed member of the class from Minnesota challenged the judgment in a court of her own state and asserted that a state court in a class action has no jurisdiction over and cannot bind nonresidents. The United States Supreme Court rejected her argument, holding that the Connecticut court had jurisdiction over the nonresident members of the class and that the courts of sister states must give full faith and credit to the Connecticut judgment.\textsuperscript{120} The Supreme Court of Illinois has followed this lead and has held that Illinois residents who were neither personally served nor per-

\textsuperscript{114} \textit{Id.} at 140.
\textsuperscript{115} 89 Ill. App. 3d at 319, 411 N.E.2d at 1096.
\textsuperscript{116} 255 U.S. 356 (1921).
\textsuperscript{117} \textit{Id.} at 364.
\textsuperscript{118} \textit{Id.} at 366 (emphasis added).
\textsuperscript{119} 237 U.S. 662, 671-74 (1915).
\textsuperscript{120} \textit{See also} Sovereign Camp of the Woodmen v. Bolin, 305 U.S. 66 (1938); Hartford Life Ins. Co. v. Barber, 245 U.S. 146 (1917).
sonally before a state court in California were bound by the judgment entered in the California class action by the "doctrine of class representation."121

Absent territorial considerations, which, as discussed above, play no viable role in determining the due process protections of a nonresident member of a multistate class, there is no reason why an Illinois court should fear that its judgment would be invalid outside its state's boundaries. So long as adequate notice, an opportunity to withdraw, intervene or otherwise assert one's status as a party or non-party in the action and adequate representation are provided by the forum, full faith and credit in sister states is assured. Where, as in Illinois, the statutory procedures for bringing a class action protect these interests of an absent member of the class at every stage of the proceeding, it is both unnatural and unnecessary to impose territorial doctrines to plaintiff class membership that have been historically developed to protect the interests of defendants alone.

MULTISTATE CLASS ACTIONS UNDER THE ILLINOIS CLASS ACTION STATUTE

Until 1977, Illinois was one of seven states that had neither statute nor procedural rule to govern class actions.122 Illinois courts relied exclusively on the common law to determine the propriety of a class action.123 The common law, however, was sharply divided as to the prerequisites of a class action and was substantially confusing to courts and practitioners alike. For example, decisions of the Illinois Supreme Court varied from time to time on whether multiple claims for damages in varying amounts which would have to be separately adjudicated would preclude class treatment.124 Other common law doctrines, such as the "community of interest" test,125 gave trial courts little or no guidance as to the requirements for the maintenance of a class action.126 With the advent of the Illinois class action statute, class actions in Illinois were streamlined significantly and made a more "potent pro-

123. Id.
125. See note 8 supra.
cedural vehicle" to resolve the typically small claims of injured consumers.\textsuperscript{127}

The Illinois class action statute established four prerequisites for class treatment. Simply stated, a class representative must show: (1) that the class is so numerous that joinder of all members is impracticable; (2) that common questions of law or fact predominate over any questions affecting only individual members; (3) that the representative parties will fairly and adequately protect the interests of the class; and (4) that the class action is an appropriate method for the fair and efficient adjudication of the controversy.\textsuperscript{128}

As noted above, \textit{Spirek v. State Farm Mutual Automobile Insurance Co.},\textsuperscript{129} and \textit{Miner v. Gillette Co.}\textsuperscript{130} both found support in the Illinois class action statute for denial of a multistate class. Specifically, both courts expressed doubt that the second and third prerequisites under the statute, predominance of a common question of law or fact and adequate representation, could ever be met in a multistate class action.

Apart from those decisions, there is little reason to believe that the new Illinois class action statute inhibits multistate class actions. Quite the contrary, the provisions of the new statute, particularly the requirements of notice, an opportunity to withdraw and adequate representation, obviate the due process analysis in which the \textit{Spirek} and \textit{Miner} courts engaged. Moreover, the comprehensive procedure outlined by the new statute provides an ease of administration that is necessary to the maintenance of a multistate class action. Because it is incumbent on a trial court faced with a class action to apply each of the four prerequisites to the facts of the particular case,\textsuperscript{131} each of the four prerequisites is analyzed below in the context of a multistate class action.

\textit{Section 57.2(a)(1): Numerosity}

The question of whether a class is so numerous that joinder of each individual member would be impracticable is, for practical reasons, rarely litigated.\textsuperscript{132} Generally, one would not bring a class action where there was not a substantial number of similarly situated claim-
In the context of a multistate class action, the issue of numerosity should never arise. Indeed, one obvious purpose for including nonresidents in a plaintiff class is to increase the size of the class. As the class increases in size, the costs of litigation attributable to each member of a successful plaintiff class is reduced. Thus, attorney's fees and court costs, which are generally subtracted from a judgment for damages in favor of a plaintiff class, become less for each member of the class.

Rather than preclude a multistate class, the numerosity requirement of the class action statute should militate in favor of a multistate class. It is conceivable that a class comprised solely of Illinois residents may be too small for class treatment, where the addition of nonresidents would satisfy the numerosity requirement. In such a case, particularly where the potential individual recovery is minimal, Illinois residents could be deprived of a meaningful forum in which to protect their interests unless a multistate class is certified. On the other hand, the sheer size of a multistate class may render it unmanageable, at least where the location and identity of the individual members is unknown.

Section 57.2(a)(2): Predominance of Common Questions of Law or Fact

Although the Spirek court allowed the plaintiffs to proceed on behalf of the Illinois members of the class, the court rejected the multistate class in part on its finding that the case presented no common question of law among the nonresident members of the class:

Accordingly, because the plaintiffs in the case at hand come from numerous other states, numerous other states' laws would have to be applied. Thus, as to nonresident members of the proposed class, the question of law which is the heart of this action would not be in common, and would not predominate, as required by Section 57.2(a)(2) of the Civil Practice Act.

Spirek was a “common question of law” case and presented no common question of fact among either the nonresident or the Illinois resident members. It was on the basis of the common question of law alone that the appellate court allowed the class to proceed comprised

136. 65 Ill. App. 3d at 453-54, 382 N.E.2d at 121.
solely of Illinois residents. However, the plaintiff in *Spirek* had difficulty establishing a common question of law among the nonresident members of her class. The substantive law of that case varied extensively from state to state and the plaintiff was already facing an adverse decision, arising out of the *same* nucleus of facts, in California.137

In contrast, the class claims in *Miner* presented "a common question of fact [which] predominate[d] over any question affecting only individual members, and as to Illinois residents, a common question of law predominate[d] also."138 Nevertheless, the *Miner* court concluded that no common question of law predominated as to nonresidents "and to allow this action to proceed as a multistate class action would entail the application of the laws of the different states."139

The fault with the *Spirek* and *Miner* analysis of the "predominance" questions emanates from an overly restrictive reading of section 57.2(a)(2). Under this section, a class action would be proper if "[t]here are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members."140 As noted by the late Justice Dooley in *Steinberg v. Chicago Medical School*, "[s]o long as there are questions of fact or law common to the class, and these predominate over questions affecting only individual members of such class, the statutory requisite is met."141

Thus, the clear language of the class action statute, and the language as interpreted by the Illinois Supreme Court, requires a trial court to look to both questions of fact and law to determine whether *either* would predominate over questions affecting only individual members of the plaintiff class.142 A blind application of the *Spirek* ra-

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138. 89 Ill. App. 3d at 319, 411 N.E.2d at 1096.
139. *Id.*
140. ILL. REV. STAT. ch. 110, § 57.2(a)(2) (1979) (emphasis added).
141. 69 Ill. 2d 320, 328, 371 N.E.2d 634, 639 (1977) (emphasis added).
142. It is interesting to note that the Kansas class action statute, KAN. STAT. ANN. § 60-223, upon which the Supreme Court of Kansas relied to certify a multistate class in Shutts v. Phillips Petroleum Co., 222 Kan. 527, 567 P.2d 1292 (1977), *cert. denied*, 434 U.S. 1068 (1978), contains language almost identical to ILL. REV. STAT. ch. 110, §§ 57.2(a)(2) and (4). The Kansas class action statute provides in pertinent part:

> [A]n action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied [requiring: (1) numerosity; (2) common questions of law or fact; (3) typicality of claims; and (4) fair and adequate representation], and in addition:

> [T]he court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

tionale, however, would have a trial court cease its inquiry once it finds that a common question of law does not predominate. Spirek would redraft section 57.2(a)(2) to require both a common question of fact and law to predominate over "any questions affecting only individual members" of a class and harken back to the old "community of interest" standard rejected in Steinberg.

Moreover, the analysis applied by the Appellate Court for the First Judicial District in Spirek and Miner seems to be at odds with an earlier pronouncement of that court. In Brooks v. Midas-International Corp., Justice Linn expressed the bottom line of any inquiry under section 57.2(a)(2): "A class action can properly be prosecuted where a defendant is alleged to have acted wrongfully in the same basic manner to an entire class. In such circumstances, the common class questions . . . dominate the case." 144

There is no denying that the potential application of sister states' laws by an Illinois court presents problems that do not usually arise in a class action restricted to Illinois residents. These problems, however, are neither overwhelming nor insurmountable. Like Miner, a typical consumer class action brought in an Illinois state court would rely on theories based on the Illinois Consumer Fraud and Deceptive Business Practices Act and common law remedies for breach of contract. A theory of common law fraud is difficult to treat in a class manner because of the potential for individual questions of actual reliance. 145 The Consumer Fraud Act, on the other hand, simply requires proof that a misrepresentation or concealment be made "with intent that others rely." 146 Because individual proofs of reliance need not be made, the

144. Id. at 273, 361 N.E.2d at 820.
146. Ill. Rev. Stat. ch. 121 1/2, § 262 (1979). See Brooks v. Midas Int’l Corp., 47 Ill. App. 3d 266, 361 N.E.2d 815 (1977), where the court wrote: Defendant asserts that a class action may not be maintained since the element of reliance is a question which is individual to each class member and thus defeats class action status. Defendant’s contention is based upon the argument that different customers would have individual reactions to defendant’s advertising and that some may have relied on the advertising while others may not have seen it at all. Under the common law reliance was an element which had to be alleged in order to constitute a valid cause of action for misrepresentation or deceit. However, the language employed in the Consumer Fraud Act clearly indicates that it is the intent of the defendant in his conduct, not the reliance or belief of the plaintiff, which is the pivotal point upon which an action arises. Section 2 of the Act specifically provides that the question of whether a person has been misled, deceived or damaged is not an element of an action brought under the Act. If, after trial, it is found that defendant did engage in an unlawful practice in its advertising, then the question common to all class members has been established in favor of plaintiffs.
146. Id. at 272-73, 361 N.E.2d at 819-20 (emphasis added, citation omitted).
Consumer Fraud Act and similar laws provide ideal substantive law for class treatment. In *Miner*, the plaintiff argued that each state of the union, with the exception of Alabama, has legislation, similar in scope to the Illinois Consumer Fraud Act, that would have reached the alleged conduct of the defendant in that case.\(^{147}\) *Miner* also argued that under the facts of his case his common law contract theory was the same in each of the fifty states. The appellate court made no inquiry into the similarity of consumer fraud and contract laws among the states. The failure to make such an inquiry is, in effect, a mandate to the trial courts on a case-by-case basis. Where a plaintiff can establish the similarity of consumer fraud and contract laws among the states facing multistate class actions that there could never be a common question of law when the laws of other states must be considered. In short, both the *Miner* and the *Spirek* courts implied that substantially similar questions of law could never amount to common questions of law under the statute.

It is important to note that these rulings take the threshold question of commonality out of the hands of the trial courts. However, in *Steinberg*\(^{148}\) and, more recently, in *McCabe v. Burgess*,\(^ {149}\) the Illinois Supreme Court implied that such determinations are to be made by trial courts on a case-by-case basis. Where a plaintiff can establish before the trial court that the laws of the states in which nonresident class members reside are the same in scope as the Illinois law under the facts of his case his common law contract theory was the same in each of the fifty states. The appellate court made no inquiry into the similarity of consumer fraud and contract laws among the states.


148. 69 Ill. 2d at 342, 371 N.E.2d at 645.

149. 75 Ill. 2d 457, 389 N.E.2d 565 (1979), cert. denied, 444 U.S. 916 (1980).
which the plaintiff seeks relief, there is no reason to find that a common question of law is not established.

Moreover, there are methods available to a court, other than the application of the law of fifty states, to resolve the potential application of law problems raised by a multistate class action. For example, when it was faced with a multistate class action brought under a breach of contract theory in *Schlosser v. Allis-Chalmers Corp.*, the Supreme Court of Wisconsin applied the "grouping of contracts" approach to determine which state's law would best serve to resolve the contracts question. Under the "grouping of contracts" approach, the law of the state with which the contract has its most significant relationship is applied. The Wisconsin court applied Wisconsin law to all contracts with the Wisconsin defendant.

The "grouping of contracts" approach to similar choice of law problems is not at all foreign to Illinois. Illinois courts have long been equipped to apply the law of a foreign jurisdiction. In 1939, the legislature enacted the Uniform Judicial Notice of Foreign Law Act which allows the trial courts of Illinois to take judicial notice of the common law and statutes of every state, territory, and other jurisdiction of the United States. Thus, in *Miner*, for example, both the "grouping of contracts" approach and the Foreign Law Act could have been utilized to apply the law of Massachusetts, the defendant's headquarter state, to the claims of all class members, Illinois residents and nonresidents alike.

In summary, the possibility of applying the laws of different states in a multistate class action does not necessarily defeat the prerequisite of section 57.2(a)(2). This is particularly true where there are predominating common questions of fact, such as in *Miner*. In addition, courts faced with multistate class actions can be flexible in applying swiftly developing choice of law doctrines to avoid the application of fifty different laws altogether.

Section 57.2(a)(3): Adequate Representation

In the context of multistate class actions, both the *Spirek* and *Miner* courts analyzed adequacy of representation with similar concerns as the problem of commonality among legal issues. In *Spirek*, the court refused to assert jurisdiction over a multistate class action be-

150. *See note 57 supra.*
152. ILL. REV. STAT. ch. 51, §§ 48a-48n (1979).
cause, among other reasons, "the need for plaintiff's counsel to argue the law of numerous other states would make it impractical for them to adequately represent all members of the proposed class."153 In Miner, the court took note of the "difficulty" that an Illinois plaintiff may have "in adequately representing the interests of all the purported class members."154

The fault with these conclusions lies not with the courts' consideration of a prerequisite under section 57.2(a)(2) to preclude the respective plaintiffs from meeting the prerequisite of section 57.2(a)(3). As the court noted, "the several aspects of class actions cannot be neatly compartmentalized and independently resolved."155 A substantial conflict among the laws to be applied to individual members or subclasses of a plaintiff class can undermine the adequacy of a particular plaintiff's representation. It was not, however, the potential for such conflict that concerned the courts in Spirek and Miner, but rather the potential for complex legal problems in applying the laws of different states. This concern, and the analysis derived therefrom, is a departure from the standards traditionally applied to the question of adequacy of representation.

Neither Spirek nor Miner held without qualification that representation by an Illinois plaintiff would necessarily be inadequate to protect the interests of nonresident class members. Spirek simply stated that such representation would be "impractical,"156 while the Miner court found it to be "difficult."157 There was, however, no explanation of how impracticality or difficulty precludes adequate representation. The courts' determinations in this respect seemingly usurp much of the discretion of the trial court.

In neither Spirek nor Miner was there any mention of a trial court determination that laws of sister states differed to such a degree that the respective lawsuits would be too complex for chancery courts to entertain. Because both cases arose from motions to dismiss and not from motions to certify a class, there was no evidentiary record nor finding of facts upon which an appellate court could hold that multistate representation would be inordinately complex. In this respect, the rather broad conclusions of Spirek and Miner are contrary to the policy of

153. 65 Ill. App. 3d at 454, 382 N.E.2d at 121.
154. 89 Ill. App. 3d at 319, 411 N.E.2d at 1096.
156. 65 Ill. App. 3d at 454, 382 N.E.2d at 121.
157. See note 154 supra.
trial courts applying the statutory prerequisites on a case by case basis. 158

*Spirek* and *Miner* also deviated from the traditional analysis of adequacy of representation by focusing on the role of the plaintiffs' counsel rather than the interests of the representative plaintiff. As Kevin M. Forde pointed out in his article leading to the enactment of the Illinois class action statute, "the determination [of whether representation is adequate] involves a consideration of whether the representative interests are compatible with, and not antagonistic to, those of the class and whether the representative parties will put up a real fight." 159 In essence, adequacy of representation is established when it can be shown that the named plaintiffs share a common interest in proving the essential elements sought to be litigated on behalf of the class. 160 Therefore, so long as the essential elements of the representative plaintiff's claims are the same as those to be established under the law of a nonresident's state, the representative plaintiff should be able to adequately protect the interests of the nonresident class member.

The interest of a class representative in increasing the size of his or her class by joining nonresidents as class members is obvious and has already been noted. In neither *Spirek* nor *Miner* did the appellate court weigh the interests of a plaintiff reducing his or her pro rata share of costs against the apparent interests of the courts in avoiding complex lawsuits. Indeed, it was simply the potential complexity of legal issues that caused those courts to doubt the adequacy of the plaintiffs' representation of nonresident members. In this respect, *Spirek* and *Miner* stand apart from any other case decided under section 57.2(a)(3). In no other case was jurisdiction denied simply because a legal issue was too complex. As stated by the Fifth District: "[W]e find absolutely no authority to thwart a class action merely because a complete resolution of the dispute requires examination of a sister state's law as well as our own." 161

The question of adequacy of representation is a question best left to the trial court facing a multistate class action. Like any element of class certification, the burden should be placed on the representative plaintiff to show that he or she can adequately represent the interests

158. See note 131 supra.
of nonresident members despite the application of law of the different states. One must also remember that trial courts can deal with the problem of different states' laws with a great degree of flexibility. For example, residents of states in which the law is fatally different from the law under which the representative seeks relief can be dismissed from the case, or, if circumstances permit, relegated to subclasses without seriously disturbing the class action. Again, the "difficulty" of applying the law of fifty states can be surmounted with an appropriate choice of law method that would provide for the application of the law of one state.

Section 57.2(a)(4): Appropriateness of a Class Action

Section 57.2(a)(4), which requires that a trial court find a class action to be an appropriate method for adjudication of the substantive claim, focuses on the questions of manageability, practicality and efficiency. The Illinois prerequisite differs from that of the federal rule, under which a court must find that a class action would be superior to other available methods of adjudication.\textsuperscript{162} In \textit{Steinberg}, the Illinois Supreme Court stated that meeting the first three prerequisites "make[s] manifest that the final requirement of the statute . . . is fulfilled."\textsuperscript{163}

There is nothing about a multistate class action that makes it intrinsically more unmanageable or impractical than any other class action comprised wholly of resident plaintiffs. As discussed above,\textsuperscript{164} the economy of scale favors a class action that settles as many potential claims as possible. Thus, the purpose of a class action as a device to settle numerous controversies while conserving judicial resources is enhanced when all claimants are joined in the class. When determining the manageability of a class action, the key inquiry usually revolves around the problem of notice and disbursement of damages.\textsuperscript{165} Where the identity and location of the individual class members is known, such as in \textit{Miner}, the nonresident location of certain class members should make little difference.

In \textit{Spirek} and \textit{Miner} the focus of the inquiry under section 57.2(a)(4) was not restricted to the problems faced by the particular trial courts before which the class actions were brought. Rather, both courts were concerned that judicial effort would be wasted if Illinois

\textsuperscript{162} \textit{FED. R. CIV. P. 23(b)(3)}.  
\textsuperscript{163} 69 Ill. 2d at 339, 371 N.E.2d at 644.  
\textsuperscript{164} \textit{See} text accompanying notes 153-161 \textit{supra}.  
judgments could be collaterally attacked in the courts of sister states.\textsuperscript{166} This concern, however, was reached without any discussion of the fact that such judgments should be granted full faith and credit.\textsuperscript{167} As discussed above, so long as due process has been satisfied through notice, an opportunity to withdraw and adequate representation, sister states could have no cognizable objection to a decision by the court of another state affecting citizens of their state. Indeed, if any of these due process requirements is disregarded in even a single state class action, a class judgment is subject to collateral attack by a class member in the courts of that same state.

When considering the manageability and practicality of a particular class action, one must always balance burdens imposed by a class action with the factors in favor of a class. Both the members of a plaintiff class and the defendant in a class action share an interest in resolving a multitude of controversies in one action before one forum. It is this interest that gave rise to the class action as a procedural device in the first place. The federal system attempts to meet this interest through its rules on multidistrict litigation.\textsuperscript{168} The simple fact that prosecution of a multistate class action is potentially more difficult for courts and attorneys and judges than an action restricted to one state should not preclude a multistate class action altogether: "It is obvious that the only manner in which the plaintiff class can ever prosecute their claims is by a . . . class action and the Court cannot simply close the doors to these litigants because their actions present novel and difficult questions."\textsuperscript{169}

\textbf{CONCLUSION}

With the enactments of the Consumer Fraud and Deceptive Business Practices Act and the Illinois class action statute, the state of Illinois has issued a stern warning to manufacturers, distributors, services and retailers who bring their business into this state to refrain from fraud, unfair competition and otherwise unfair or deceptive conduct. So far, the courts of Illinois have utilized this legislation to inhibit such conduct and to make Illinois a better place for consumers and businesses alike. Although Illinois courts have greeted the new class action

\textsuperscript{166} 65 Ill. App. 3d at 454, 382 N.E.2d at 121; 89 Ill. App. 3d at 319, 411 N.E.2d at 1096.
\textsuperscript{167} See text accompanying notes 115-121 \textit{supra}.
statute as a sound procedural basis for consumer protection, the Appellate Court for the First Judicial District, the district in which most consumer class actions are brought in this state, has balked at enhancing the class action device by allowing a multistate class.

A court serves the ends of justice when it provides an expedient and inexpensive forum for one resolution of multiple claims. Historically, these ends have not been restrained by territorial boundaries. Those courts which restrict their jurisdiction over multistate plaintiff classes by applying a "minimum contacts" standard fail to recognize that the standard was developed to protect defendants from the substantive burden and expense of resisting a claim in a distant and conceivably hostile forum. The extension of the "minimum contacts" doctrine to plaintiff classes, however, throws the substantive baby out of court with the procedural bathwater. The nonresident plaintiff who is excluded by an Illinois court presiding over a class action incurs the burden and expense of bringing his own lawsuit or suffering the injury that may be remedied only for Illinois residents. In an effort to protect nonresidents from an overextension of its powers, the court that summarily rejects a multistate class on the basis of "minimum contacts" robs those persons of an effective forum. In addition, the court foresees the interests of the residents of its own state, who seek the most expedient and inexpensive resolution of their claims possible.

Due process does not forbid a multistate class action where the courts of the forum state are statutorily bound to protect the interests of absentee class members. Due process calls for "fundamental fairness," which, in the context of a plaintiff class action, requires notice, an opportunity to withdraw and adequate representation. Given the underlying notions of fundamental fairness in due process and full faith and credit considerations, it is indeed ironic that the interests of Illinois consumers can be protected through representative actions filed in the state courts of Kansas, Wisconsin or California, but that Illinois courts may not reciprocate.