UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

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| IN RE:<br>METROPOLITAN LIFE INSURANCE<br>SALES PRACTICES LITIGATION<br>Plaintiffs,<br><br>v.<br><br>This Document relates to:<br>ALL CASES FILED BY BEHREND &<br>ERNSBERGER, PC | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | MISC. DOCKET NO. 96-179<br>MDL NO. 1091<br><br><br><br>Judge Donetta Ambrose<br>Magistrate Judge Benson |

**PLAINTIFFS' BRIEF IN SUPPORT OF OBJECTIONS TO THE MAGISTRATE JUDGE'S RECOMMENDATION THAT DEFENDANT'S MOTION FOR A PRELIMINARY INJUNCTION BE GRANTED**


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## Introduction

These objections are submitted on behalf of 392 individual litigants who opted out of the national class action settlement approved by this Court and now are in the midst of pursuing 255 individual lawsuits against MetLife. Some of these litigants have individual cases before this Court; others are pursuing individual cases in state courts in Pennsylvania and federal courts in Massachusetts and Florida. Even though all of these individuals – hereafter, the "Opt-Out Litigants" – excluded *all* of their claims from the national class action settlement, MetLife is now asking this Court to enjoin them from "asserting or maintaining any claims based on or encompassing, in whole or in part, alleged sales practices and patterns that were the subject of the Scheme Claims or Released Transactions" in the class action. *See* Proposed Order at 5. As explained in the annexed declaration of Kenneth R. Behrend, Esq., such an order would effectively extinguish the Opt-Out Litigants' ability to pursue their claims against MetLife, notwithstanding

their conscious decision to exclude themselves from the class action.

Despite this radical infringement on the Opt-Out Litigants' ability to pursue their individual claims, the Magistrate Judge recommended that the requested injunction be entered in order "to preserve the integrity of [the] nationwide settlement and to ensure the proper administration of justice . . ." Order at 6. In so ruling, the Magistrate Judge relied on the Third Circuit's recent decision in *In re Prudential Insurance Co. of America Sales Practices Litigation*, 261 F.3d 355 (3d Cir. 2001), which held that class members who excluded some, but not all, of their claims from a class action settlement could be enjoined from "engaging in motion practice, pursuing discovery, presenting evidence or undertaking any action in furtherance [of their state court action] that is based on, relates to or involves facts and circumstances underlying the Released Transactions in the Class Action." *See* Order at 4. Although the Magistrate Judge recognized that the Opt-Out Litigants "are not in the same position" as those in *Prudential* because "the individual plaintiffs represented by the Behrend firm have opted all of their policies out of the settlement class" and, therefore, "have never entered into any 'agreement' with MetLife concerning the release of any national claims," *id*, he nonetheless recommended that an injunction be entered in order to "grant[ ] MetLife the benefit of the bargain it struck in settling the nationwide class action." *Id*. at 6.

As explained below, any such injunction would plainly be illegal. The reasoning of the *Prudential* Court does not and cannot apply in a case where, as here, the individual litigants *opted all of their claims out of the class.* As non-parties to the litigation, the Opt-Out Litigants simply cannot be bound in the manner requested by MetLife. Such a result would violate the class notice, Rule 23, the due process clause of the U.S. Constitution, and the Anti-Injunction Act.

Before setting forth our objections in further detail, we note that the Opt-Out Litigants have

retained additional counsel – Trial Lawyers for Public Justice ("TLPJ") – to assist in representing them for the limited purpose of objecting to the requested injunction. By way of introduction, TLPJ is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation. It is the only national public interest law firm that both prosecutes class actions *and* has a special project dedicated to fighting class action abuse. TLPJ has become involved in this case because, in its view, the requested injunction is a radical and unprecedented infringement on victims' rights that is wholly contrary to law. It is thankfully rare that a single pretrial motion presents such an astonishing threat to both federalism and individual rights. If MetLife succeeds in its effort here, however, the right to opt out of Rule 23(b)(3) class actions will essentially be rendered meaningless. The impact on state courts' ability to manage their own dockets will also be devastating.[1]

In short, nothing special about this case warrants unprecedented interference with the legitimate interests of plaintiffs *who have opted out of class actions* in a timely manner, federal superintendence of state judicial systems, and usurpation of Congress's limited conferral of injunctive authority. We submit this brief to explain why, under our Constitution, laws, and federal system of government, this Court cannot and should not issue the requested injunction.

**STATEMENT OF THE CASE**

The 255 individual cases filed by the 392 Opt-Out Litigants all allege deceptive sales tactics by MetLife that were carried out through the training and supervision of the company's sales agents. These individuals all excluded themselves from the consolidated class action settlement filed in

[1] Attached hereto is a copy of a recent article from the January 26, 2001, issue of the Bureau of National Affairs' *Class Action Litigation Reports* describing some of TLPJ's other efforts in fighting class action abuse.

MDL 1091 by opting out of the settlement class.[2] They did not participate in the benefits of the class settlement, nor were they permitted to object to its terms.

**The Class Notice and Release**

All of the Opt-Out Litigants received a notice of the proposed settlement from MetLife that described in exhaustive detail the rights of individuals to exclude themselves from the MDL settlements (the Class Notice).[3] Nowhere did the Class Notice contain any suggestion that class members' rights would ever be restricted in the manner now requested by MetLife.

Page 1 of the Notice advised class members that they had a right to exclude themselves from the case with respect to "each Policy or Annuity you own or owned." It further stated that, "for each Policy or Annuity you do not exclude from the class, you will be bound by all of the terms of the proposed settlement if the Court approves it." Page 1 of the Notice further stated that:

> IF YOU DO NOT EXCLUDE YOURSELF FROM THE CLASS, THE PROPOSED SETTLEMENT (IF APPROVED) MAY AFFECT YOUR RIGHT TO START OR CONTINUE ANY OTHER LAWSUIT OR PROCEEDING INVOLVING YOUR POLICY OR ANNUITY. IN ADDITION, YOU WILL GIVE UP ANY CLAIMS, ARISING FROM THE SALE AND PAST SERVICING OR ADMINISTRATION OF YOUR POLICY OR ANNUITY. THE RELEASE OF CLAIMS, WHICH ADDRESSES THIS ISSUE, IS REPRINTED IN FULL AS AN APPENDIX TO THIS NOTICE.

Notably absent from this statement is any suggestion that individuals who elected exclusion would

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[2] In his Order, Magistrate Judge Benson noted that, according to MetLife, one or more of the Opt-Out Litigants may not have opted all of their policies out of the MDL settlement. *See* Order at 4-5 n.1. He added, however, that "no specific facts [regarding these litigants] have been presented to the court . . .." *Id*. To the best of our knowledge, all of the Opt-Out Litigants have in fact opted all of their policies and annuities out of the MDL settlement. However, to the extent that any litigant inadvertently failed to opt all of his or her claims out of the MDL settlement, MetLife is free to make an appropriate motion, with supporting evidence, in the court in which the individual litigation is pending.

[3] A copy of the Class Notice is attached to the Behrend Declaration as Exhibit 7.

ultimately be restricted in their ability "to start or continue any other lawsuit or proceeding involving [their] policy or annuity."

The body of the Notice contains numerous other references to the exclusion option, again without ever mentioning that individuals who opt out of the class might be subject to future restrictions from the MDL court. For example, in response to the question, "Am I a member of the class?," the Notice stated:

> the proposed class does **not** include persons or entities (unless such persons or entities are Class Members by virtue of their ownership interest in another Policy or Annuity) who have or had an ownership interest in policies or annuities that [are excluded from the Class] . . .

Notice at 6 (emphasis in original). On the following page, the Notice advised class members that, for any policy or annuity they elect to exclude from the case:

* you will not be eligible for General Relief, Claim Evaluation, or DAC Tax Relief for that Policy or Annuity.

* You will not be able to object to the proposed settlement.

* **You will not be bound, for the purposes of the Policy or Annuity you opt out of the proposed settlement, by any Orders or judgments entered in this case** if the proposed settlement is approved.

Notice at 7 (emphasis added). Then, in response to the question, "What are the consequences of excluding myself from the class," the Notice stated:

**If you request exclusion from the Class:**

* **you will <u>not</u> be eligible for any of the settlement benefits; and**

* **you will <u>not</u> be allowed to object to the terms of the settlement; and**

* **you will <u>not</u> be bound by any subsequent rulings entered in this case.**

Notice at 20 (emphasis in original).

The Notice then described the injunction that would be entered by this Court upon approval of the MDL settlement, again without any reference to any future restrictions on the rights of opting-out class members to litigate their individual cases against the defendant:

> The Court has preliminarily enjoined all Class Members from starting, continuing or participating in, or receiving any benefits or other relief from, any other lawsuit, arbitration, or administrative, regulatory or other proceeding or order based on or relating to the claims, facts or circumstances in this case and/or the Released Transactions (as that term is defined in the Release, reprinted in Appendix A). *If you do not ask to be excluded from the Class, you will be bound by this preliminary injunction.*
>
> * * * * *
>
> Upon final approval of the settlement, Plaintiffs and MetLife will ask the Court to enter a permanent injunction enjoining all Class Members from engaging in the activities described above. *All Class Members will be bound by the permanent injunction.*
>
> If you do not submit a written request to be excluded from the Class, so that it is RECEIVED by November 2, 1999, you will be bound by all proceedings, Orders and Judgments in this Action, even if you previously began or later begin litigation or other proceedings against the Company relating to your Policies or Annuities. The Court may enforce its injunction through contempt orders or other judicial proceedings.

Class Notice at 23 (emphasis in original).

The Release and Waiver set forth at the end of the Class Notice also made clear that a policyholder who timely excluded him or herself from the class would not be bound by the terms of the Release, the Settlement, or the Injunction:

> Notwithstanding the foregoing, **the Class shall not include** . . . the following:(I) **any persons or entities who make a timely election to be excluded from the proposed class with respect to a particular Policy or Annuity.**

Class Notice at 25 (emphasis added).

The remaining language in the Release and Waiver addresses the extent of the release with respect to policyholders who do not exclude themselves from the class. As defined therein, the "Released Transactions" relate to every type of claim that could be made based upon deceptive sale tactics used to sell the policies or annuities. In other words, if a policyholder does not exclude his or her policy and/or annuity, and remains a class member and receives the benefits of the class settlement, there are no claims remaining to be made by that class member based upon the deceptive sale of the policy or annuity.

**Status of the Individual Cases**:

The 392 Opt-Out Litigants are pursuing 255 individual lawsuits against MetLife. The majority of these cases – 220 – are pending in various state courts in Pennsylvania. Of the remaining cases, 20 are before this Court; 25 are pending in federal court in the Middle District of Florida; and one is in federal court in the District of Massachusetts. The cases were filed over a period of time from 1993 to 2000. Over one-half were filed before the amended consolidated class action complaint was filed in 1999. All of these cases include allegations that the sale or sales of policies to the Opt-Out Litigants were conducted pursuant to deceptive corporate "patterns and practices." These are the same allegations that formed the basis for the claims asserted in, and ultimately released by, the individuals who participated in the national class action settlement approved by this Court. *See* Behrend Declaration ¶ 10.

MetLife has tried and failed to convince the Pennsylvania courts presiding over these cases to forbid the Opt-Out Litigants from introducing evidence relating to the "patterns and practices" at issue in the MDL national class action. MetLife has filed and lost preliminary objections to the introduction of "pattern and practice" allegations in six different counties in Pennsylvania. *See id*.

at ¶ 12. In every case, the state court rejected MetLife's objections and ruled that the Opt-Out Litigants' "pattern and practice" claims are permissible notwithstanding the settlement of the national class action. *Id*. at ¶ 12-13.

In the wake of these favorable decisions, the Opt-Out Litigants have been attempting to proceed with discovery relating to the "pattern and practice" allegations. MetLife has objected to this discovery in various courts, again claiming that the Opt-Out Litigants should not be permitted access to this information. *Id*. at ¶ 15. An Allegheny County judge who is considered to be an authority on discovery issues in Pennsylvania has rejected this argument, ruling that MetLife must produce documents relating to the "pattern and practice" allegations. *Id*. at ¶ 15-20. Notwithstanding this ruling, MetLife has continued to resist disclosing the requested information. *Id*. at ¶ 21-22.

Having failed to obtain any relief from the state courts, MetLife is now asking this Court to enjoin the Opt-Out Litigants from discovering and introducing into evidence any information relating to the nationwide "patterns and practices" at issue in the national class action. If this request is granted, the Opt-Out Litigants will not be able to prove any of their claims against MetLife. *All* of the claims asserted by the Opt-Out Litigants are based upon the sale of a policy or annuity pursuant to one or more deceptive sales practices. *All* of these deceptive practices are included among the "Released Transactions" set forth in the settlement release in the national class action. *Id*. at ¶ 26. Thus, if the requested injunction is granted, the Opt-Out Litigants will be stripped of their ability to obtain any relief from MetLife, notwithstanding the fact that they opted all of their claims out of the class action settlement approved by this Court.

## ARGUMENT

## THE REQUESTED INJUNCTION IS ILLEGAL AND SHOULD BE DENIED.

### I. *Prudential* Has No Bearing Here, Because the Opt-Out Litigants Opted *All* of their Claims Out of the National Class Action Settlement.

Before setting forth the specific reasons why the requested injunction is unlawful, it is important to understand that the Magistrate's recommendation is not supported by – and, in fact, is wholly at odds with – the Third Circuit's decision in *Prudential*, *supra.* As we now explain, *Prudential* actually makes clear that class members who opt all of their claims out of a class action settlement – as is the case with the Opt Out Litigants here – are entirely free to pursue their individual cases against the defendant without any interference from the approving court.

The appellants in *Prudential* (hereafter, the "Lowes") were members of a nationwide class action against the Prudential Insurance Company that culminated in a settlement. The class notice regarding the settlement advised class members that they could exclude themselves from the settlement, and further explained that class members who owned more than one policy could "choose to remain a Class Member with respect to some Policies, but . . . exclude [themselves] from the Class with respect to other policies." *Id*. at 360. However, the release accompanying the class notice warned class members that those who remained in the class "shall . . . not institute, maintain or assert . . . any and all causes of action, claims that have been, [or] could have been asserted by Plaintiffs or any Class Member against [Prudential] in any other court action . . . connected with . . . The Released Transactions." *Id*.

In keeping with the class notice, the Lowes elected to exclude two of their policies from the settlement, but they remained class members as to two other policies. *Id*. at 361. They then filed

a lawsuit in state court seeking relief with respect to their two excluded claims. In that case, they sought to discover and introduce evidence relating to the schemes and business practices that were at issue in the nationwide class action. *Id*. at 362. Prudential objected, arguing that, by seeking to introduce evidence relating to the released claims, the Lowes were effectively attempting to "force Prudential to defend the very matters covered by the Class Release." *Id*. at 363 (footnote omitted).

The Third Circuit agreed, holding that, *because the Lowes had remained class members* with respect to two of their policies, they were subject to the terms of the class release, which precluded them from relying on any evidence relating to the allegations at issue in the nationwide settlement. *See id*. The Court reasoned that, "[w]hen the Lowes reviewed the Release and the Class Notice, they surely must have realized that, even though the notice advised the Lowes that they could exclude some policies from the settlement while including others, doing so would jeopardize their ability to prove claims relating to the Excluded Policies. The district court was not willing to exclude them from their bargain; neither are we." *Id*. at 369.

That reasoning is wholly inapposite here, for the simple reason that the Opt-Out Litigants, unlike the Lowes, *opted all of their claims out of the MDL settlement.* This being the case, they cannot be made subject to *any* of the terms of the class release in the MDL proceeding. Unlike the Lowes, the Opt-Out Litigants did not "release" *anything*; unlike the Lowes, the Opt-Out Litigants did not accept *any* of the benefits of the MDL settlement; and, unlike the Lowes, they had no notice whatsoever that they would be affected in any way by the settlement. Under these circumstances, permitting the Opt-Out Litigants to proceed in an unimpeded fashion would not somehow "exclude them from their bargain" with MetLife; as class members who opted all of their claims out of the settlement, they had no "bargain" with MetLife *at all*. Because they released nothing, there is no

basis for this or any other Court to interfere with their individual claims against the defendant insurance company.

*Prudential*'s holding is particularly inapplicable here because, unlike the situation with the Lowes, the requested injunction in this case would effectively destroy the Opt-Out Litigants' ability to obtain any relief from MetLife. In *Prudential*, the Lowes argued that the injunction against them "render[ed] meaningless the opt-out provisions upon which [they] and all others who chose to exclude their Policies from the Class Settlement relied." *Id*. at 368. While recognizing that "[t]his argument is not without force," the Third Circuit ultimately held that the infringement on the Lowes' opt-out rights was acceptable because they would still be able to prove certain substantive causes of action alleged in their complaint. *Id*. at 368. In this case, in contrast, the requested injunction would make it impossible for the Opt-Out Litigants to prove *any* of their claims against MetLife. *See* Behrend Declaration at ¶ 26, 36. Given this distinction, *Prudential* in no way supports entry of the requested injunction; in fact, the Third Circuit's ruling compels an opposite result.

Finally, we note that the class notices at issue in this case and in *Prudential* differ in a crucial respect that also mandates a different outcome here. The class notice here specifically provided that, "[i]f you exclude yourself from the class with respect to a particular Policy or Annuity, you will not be bound, for purposes of the Policy or Annuity you opt out of the proposed settlement, by *any* orders or judgments entered in this case if the settlement if approved." Notice Part B (emphasis added); *see also id*. at 20 ("If you request exclusion from the Class . . . you will not be bound by *any* subsequent rulings entered in this case.") (emphasis added). The *Prudential* notice, in contrast, contained no such language; to the contrary, it merely stated that "you may choose to remain a Class Member with respect to some Policies, but to exclude yourself from the Class with respect to other

Policies[,]" (Notice at § 9), and there was no accompanying promise that class members who opted for exclusion "w[ould] not be bound by any subsequent rulings." Thus, even if the Opt-Out Litigants had (like the Lowes) remained class members with respect to some of their MetLife policies (which they did not), the differences in the class notices would warrant a different result here than in *Prudential*. (A copy of the *Prudential* notice is annexed to the Behrend Declaration, Exhibit 6).

The Magistrate Judge was well aware that *Prudential* is not on all fours with this case. He recognized, for example, that, unlike the Lowes, the Opt-Out Litigants "have opted *all* of their policies out of the settlement class . . . [and] have never entered into an 'agreement' with MetLife concerning the national claims." Order at 4-5 (emphasis added). He nonetheless recommended that an injunction be entered on the ground that permitting the Opt-Out Litigants to proceed in an unimpeded fashion would undermine "the integrity of [the] nationwide settlement" and "the proper administration of justice . . ." *Id*. at 6. On this point, the Magistrate Judge reasoned that, absent an injunction, "MetLife will have been denied the benefit of the settlement *and the accompanying release*." *Id.* (emphasis added). This theory, however, ignores the crucial distinction between *Prudential* and this case: the Opt-Out Litigants here were never subject to the "accompanying release." As class members who excluded themselves from the class, any "benefits" that MetLife obtained from the settlement and the accompanying release have no relationship to the Opt-Out Litigants at all[4]. The Magistrate Judge's conclusion to the contrary has no basis in fact or law.

[4] We note that MetLife did not, at any time, bargain for the benefit of settling any of the opted-out claims. Prior to the fairness hearing, MetLife was well aware of the number of opt-outs, including the Opt-Out Litigants, having received exclusion requests for the same. MetLife was aware that claims of the opt-outs were not being settled in the class action. In fact, mention was made at the fairness hearing as to the small number of opt-outs – a fact which MetLife

## II. This Court's Lacks Authority to Enter the Requested Injunction.

*Prudential* aside, the Magistrate Judge further reasoned that, as a matter of public policy, "permitting each and every opt-out plaintiff to retry the entire theory of the nationwide class complaint would work an injustice in this case, and would make settlement of class claims in the future much less likely if the settling party must try the settled case for each opt out in any event." *Id*. at 6-7. We agree that it would be unfair to force MetLife to try "the settled case" again. But the individuals at issue here did not "settle" any claims at all. They opted *all* of their claims out of the settlement, thereby fully preserving their rights to proceed against MetLife on an individual basis. In short, the class action "settled" only the cases of those who stayed *in* the class. What *would* "work an injustice" in this case would be to allow that settlement to affect the prosecution of claims that were opted out of the class.[5]

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believed made the settlement advantageous and fair. *See* Behrend Declaration at ¶ 4. Thus MetLife understood, prior to the fairness hearing and final settlement, that it had not bargained for, nor was it receiving, the benefit of settlement of the claims of the Opt-Out Litigants. MetLife was not obligated to proceed with the MDL settlement prior to the final hearing. Had MetLife wished to do so, MetLife could have withdrawn from the settlement and renegotiated in an attempt to reach an agreement with all of the opt-outs, including the Opt-Out Litigants.

[5] The Magistrate Judge also stated that interference with the Opt-Out Litigants' cases was permissible because "federal law is clear that MetLife, having paid to settle claims for punitive damages with respect to allegations of a nationwide scheme to defraud its customers, may not be subject to a second award of punitive damages from any plaintiff who alleges that MetLife engaged in such nationwide practices." Order at 5 (citing *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986)). *School Asbestos* does not, however, support this proposition. There, the Third Circuit *reversed* a district court's certification of a mandatory class for punitive damages because there was insufficient evidence to justify mandatory class certification and because the class itself was under-inclusive and would prevent some injured parties from recovering through the punitive damages fund. *Id.* at 998, 1005. In response to the defendant's arguments about the possibility of multiple punitive damages recoveries, the Third Circuit stated that "we will assume, *without deciding*, that these arguments *might* provide a threshold justification for the exercise of discretion in certifying a nationwide (mandatory) Rule 23(b)(1)(B) class for punitive damages." *Id*. at 1005 (emphasis added). *School Asbestos* thus

Moreover, the Magistrate Judge's solution to the perceived "injustice" against MetLife – enjoining the Opt-Out Litigants from introducing crucial evidence against MetLife – is wholly contrary to law. Not only would the requested injunction violate the plain terms of the class notice, but it would run afoul of Rule 23, the due process clause, fundamental principles of res judicata and collateral estoppel, and the Anti-Injunction Act.

### A. The Requested Injunction Would Violate the Terms of the Class Notice.

First, there is no question that the requested injunction would violate the terms of the class notice, which repeatedly and unequivocally promised class members that, if they opted out of the settlement, they would *not* be included in the class and would *not* be bound "by *any* Orders or judgments entered in this case." Notice at 7; *see also id.* at 20. It is hard to imagine a clearer statement of class members' rights than this specific promise. Yet MetLife now claims that the notice should be disregarded in order to give it the benefit of a bargain that it never struck. Plainly, this will not do. If the right to notice in the class action context means anything – and both Rule 23 and due process dictate that it must[6] – then MetLife's attempt to restrict the rights of the Opt-Out

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did not decide whether a court has the authority to prevent opt-out litigants from seeking punitive damages in their individual cases. Other authorities make clear, moreover, that any such restriction would be invalid. *See, e.g.* Herbert Newberg & Alba Conte, 1 *Newberg on Class Actions* § 17.31, at 17-98 (3d ed. 1992 (any award of punitive damages "*would not properly include the opt-out parties who possess independent rights to pursue punitive damages relief associated with their underlying claims*) (emphasis added). *See also Steans v. Combined Ins. Co. of America*, 148 F.3d 1266, 1271 (11th Cir. 1998) ("we readily conclude that a district court cannot rely on the 'necessary to protect its judgments' exception to the Anti-Injunction Act to justify its injunctions prohibiting [non-class members] from pursuing their punitive damages claims").

[6] *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise

Litigants must be rejected outright.

### B. The Requested Injunction Would Violate Rule 23 and the Due Process Clause of the U.S. Constitution.

Issuance of the requested injunction would also violate Rule 23 and the due process clause of the United States Constitution, both of which prohibit a court from restricting the rights of class members who have opted out of a class action from pursuing their individual claims in an unfettered fashion. In this case, the Opt-Out Litigants were supposedly given the right to opt out of the class, but MetLife's requested injunction would strip that right of any meaning. In this sense, the requested injunction would represent an even more egregious violation of the class members' rights than certification of a mandatory class in the first place. *See Ortiz v. Fibreboard,* 527 U.S. 815 (1999) (rejecting proposed mandatory class action settlement of individual damages claims). If this case merely involved an illegal mandatory class, then our clients would at least be entitled to recover *something* from the settlement. As the situation stands, however, the Opt-Out Litigants are not entitled to any relief from the MDL settlement and, if the requested injunction is permitted, would be stripped of their ability to obtain *any* relief outside the class. Not only does this result offend basic notions of fundamental fairness, but it is clearly unlawful.

To begin with, this result would violate the plain terms of Rule 23. When Federal Rule 23 was revised and restructured in 1966, the Rules Advisory Committee recognized that class members with tort claims for monetary damages have a much more compelling due process interest in having

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interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably calculated to convey the required information . . .") (citations omitted); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-74 (1974) (holding that Rule 23(c)(2) incorporates due process standards set out in *Mullane* for notice in Rule 23(b)(3) damages actions)).

individual control over their claims than do class members with claims for injunctive or declaratory relief. With this distinction in mind, the Committee established separate subdivisions of Rule 23 to deal with cases seeking different types of relief. To accommodate claims for tort damages and other monetary claims, which necessarily implicate the individual interests of each class member, the drafters created Rule 23(b)(3), which requires that absent class members be given notice and the opportunity to opt out, in addition to the other procedural protections of Rule 23(a). The committee noted that, in damages cases,

> the interests of individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b)(3), this individual interest is respected. ***Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request.***

*Notes of Rules Advisory Committee to 1966 Amendments to Rule 23*, 39 F.R.D. 69, 105 (emphasis added).

It is well-settled that adequacy of representation alone is insufficient to preserve the due process rights of individuals with particularized damages claims; rather, the opt-out right provided by Rule 23(b)(3) is an essential, additional safeguard that must be provided to absent class members. As the leading commentator on class actions states:

> Whenever unliquidated damages are sought for individual injuries suffered, whether sought as the primary or ancillary relief, then such claims are necessarily uncommon with the class representative's claims. As a matter of procedural due process, the class representatives cannot litigate to a judgment binding on class members for unliquidated damages, over objection. Accordingly, when unliquidated damages are involved, the exclusion right must be afforded as a constitutional matter.

Alba Conte, 3 Newberg on Class Actions § 17.16 at 17-44-45 (3d ed. 1992); s*ee also In re Glenn W. Turner Enterprises Litig.*, 521 F.2d 775, 781 (3d Cir. 1975) ("[m]embers of the class in (b)(3) actions must be given the option of excluding themselves from the class *and from any ensuing*

*judgment* . . . Rule 23 by its own terms creates a mechanism leaving parties in a (b)(3) action free to continue with any state proceedings") (emphasis added).

In 1985, nearly 20 years after Rule 23 was adopted in its current form, the United States Supreme Court confirmed that the Constitution requires exactly what Rule 23 provides: that absent class members must have the right to opt out with respect to their tort claims for substantial, individualized money damages. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the Court established that a court wishing "to bind an absent plaintiff concerning a claim for money damages or similar relief at law . . . must provide minimal procedural due process protection." *Id*. at 810. Such minimal protection must include "notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel . . . [and] an opportunity [for the absent plaintiff] to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Id. See also In re Telectronics Pacing Systems, Inc.*, 221 F.3d 870, 881 (6th Cir. 2000) (discussing due process underpinnings of the right to opt-out of damages class actions); *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992) (noting that due process requires that plaintiffs with money damages be given the right to opt out of class action settlement; construing *Shutts*), *cert. dismissed as improv. granted*, 511 U.S. 117 (1994).[7]

More recently, the Supreme Court held in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), that Rule 23(b)(3)'s procedural protections represent a careful balance between systemic concerns and individual due process rights. The Supreme Court took some care to note that Rule

[7] Although *Shutts* arose in the state court system, and thus involved the due process clause of the Fourteenth Amendment to the U.S. Constitution, the Third Circuit has held that the standard of *Shutts* also applies to the due process guarantee of the Fifth Amendment, which applies to this Court. *See In re Real Estate Title and Settlement Services Antitrust Litig.*, 869 F.2d 760, 766 n.6 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989).

23(b)(3) imposes stricter procedural requirements upon would-be class action plaintiffs than those imposed by the other subsections of Rule 23(b), and explained that this rigor was necessary to protect individual class members. The Court concluded that the framers of the Rule had been "sensitive to the competing tugs of individual autonomy for those who might prefer to go it alone or in a smaller unit, on the one hand, and systems efficiency on the other." *Id*. at 615. Rule 23(b)(3) thus reflects a careful balance between systemic concerns and the right of an individual to have his or her day in court, and the opt-out right accorded to members of Rule 23(b)(3) classes is a central part of that balance.

The requested injunction flies in the face of these precepts. MetLife seeks a radically broad injunction that would prohibit the Opt-Out Litigants from introducing any evidence relating to the "patterns and practices" at issue in the class action settlement. This restriction would violate Rule 23 and due process even if it merely encroached upon, rather than destroyed, the ability of the Opt-Out Litigants to obtain relief from MetLife. However, as explained above, the requested injunction would go one step further and essentially eliminate the Opt-Out Litigants' ability to prove their claims against MetLife, rendering the opt-out right completely meaningless[8]. Neither Rule 23 nor the U.S. Constitution permit this result.

This proposition is amply demonstrated by a recent decision of the Sixth Circuit in *Becherer, et al., v. Merrill Lynch*, 193 F.3d 415 (6th Cir. 1999) (*en banc)*, rejecting an attempt to enjoin claims filed by individuals who had opted out of a federal class action and filed individual cases in Florida state court against the same defendant. The federal court dismissed on summary judgment the

[8]Additionally, the requested injunction would prevent the Opt-Out Litigants from rebutting defenses raised by Metropolitan Life. (See Declaration of Kenneth R. Behrend, ¶31-35.)

class's claims against the defendant and enjoined the opt-out litigants from pursuing their individual actions in state court. The Sixth Circuit overturned the injunction, holding that restricting the rights of opt-out litigants to pursue their own actions against the defendant would violate both Rule 23 and the due process clause of the U.S. Constitution. "Rule 23," the Court wrote, "mandates that these putative plaintiffs be allowed . . . to expressly exclude themselves or 'opt out' of the class. Binding the Florida plaintiffs to the [class action] judgment would surely defeat the purposes, if not the letter of Rule 23" (*id.* at 425), as well as the due process clause of the U.S. Constitution. *See id*. at 426 (citing *Shutts*).

The Sixth Circuit drove this point home in language highly relevant to this case:

> when a class is certified, Rule 23 implicitly discourages members from filing claims, by allowing those dissatisfied with the representation of the named plaintiffs to opt out by a specified date. In other words, despite the identity of interests, facts, and legal theories that make a class possible in the first place, a plaintiff has the right to pursue his or her separate action. This right remains intact even after a plaintiff initially acquiesces in representation by others. As long as effected before the cutoff date promulgated by the court, opt out is available to class members even though they may have benefitted from the economies of scale inherent in the representation up to that point by class counsel. ***As a result, it would defeat the clear purposes of Rule 23 to bar a group of plaintiffs, who were putative members of a class but either opted out or retained their right to opt out, from litigating separately.***
>
> * * *
>
> ***If they were subsequently held to the judgment against the Becherer plaintiffs, their due process-based right to timely opt out of the settlement under the rule and their timely reservation of that right would be meaningless. Indeed, contrary to the rule's opt-out provision, the Florida plaintiffs would be held hostage to litigation that they could not control.***

*Id*. at 426 (emphasis added). Because this result was inimical to both Rule 23 and the due process clause, the Court concluded that the injunction against the opt-out litigants could not stand.[9]

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[9] *See also In re Transocean Tender Offer Securities Litigation*, 427 F. Supp. 1211, 1217 (N.D. Ill. 1977) (holding that Delaware court class action judgment for defendant cannot

A similar result is mandated here. As in *Becherer,* entering an injunction with respect to the Opt-Out Litigants would render them "hostage to litigation" from which they chose to exclude themselves and "could not control." Neither Rule 23 nor due process can tolerate this result, which effectively would render the right to opt-out procedurally meaningless. We therefore urge this Court to follow the Sixth Circuit's reasoning in *Becherer* and reject the requested injunction.

### C. The Requested Injunction Would Violate Basic Principles of Res Judicata and Collateral Estoppel.

Even without the strictures of Rule 23 and the due process clause, the requested injunction would still run afoul of basic principles of res judicata and collateral estoppel. Court after court has held that class members who opted out of a class action settlement cannot be precluded from litigating their individual claims based on the judgment entered in the class action. *See, e.g., Becherer*, 193 F.3d at 415 (holding that individuals who had opted out of class action settlement could not be estopped from litigating their individual claims against the class defendant); *In re Brand Name Prescription Drugs Antitrust Litigation*, 115 F.3d 456, 457 (7th Cir. 1997) (Posner,

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preclude class members who opted out of the Delaware class action from litigating claims against the same defendants in federal court) ("[t]here can be no bar to the common law claims of the opt outs as these individuals have never had a right to litigate in a prior proceeding. This interpretation preserves the opt outs' right to a jury trial under the seventh amendment and, more importantly, protects their right to a day in court, a fundamental element of due process."); *id*. at 1218 (defendants' attempt to bar all shareholders' claims "clearly would violate the due process rights of those shareholders who excluded themselves from the Delaware litigation"); *id*. n.10 ("Moreover, such a result would permit defendants to circumvent principles of res judicata, collateral estoppel and the opt out provisions of the Delaware class action rules, which are identical to Rule 23 of the Federal Rules of Civil Procedure."). *Cf. In re Telectronics Pacing Systems, Inc.*, 221 F.3d 870, 881 (6th Cir. 2000) (vacating certification of mandatory class action under Rule 23(b)(1)(B) on ground, *inter alia*, that depriving class members of the right to opt out of the class and pursue individual damages actions against the defendant would violate Rule 23 and due process).

C.J.) ("[w]e begin with the opt-outs. Having opted out of the class action, they were no longer members of the class and so in no sense were parties . . . The judgment [in favor of the defendants] will not have a preclusive effect on them, because they are neither parties, nor in privity with any parties, to the class action."); *Lynch v. Merrell-Nat'l Laboratories*, 830 F.2d 1190, 1192-93 (1st Cir. 1987) ("[e]stoppel should not be applied unless the plaintiffs had a fair and full opportunity to litigate. But the plaintiffs were allowed to think they could withdraw from [the MDL] and lose nothing. They did not have a fair opportunity when they understood that their withdrawal would not prejudice them. If they were now bound, the multi-district litigation would in effect have been a class action leaving the Lynches no true option.") (citations omitted) (holding that opt-outs were not estopped from litigating negligence, breach and other claims against manufacturer that had prevailed in MDL trial); *In re Corrugated Container Antitrust Litigation*, 756 F.2d 411, 418-19 (5th Cir. 1985) ("[a] class action judgment cannot be used to collaterally estop an opt-out plaintiffs' action against a defendant in a separate action. An opt-out plaintiff is not a party to the class action and is not bound by the class action judgment. The doctrine of collateral estoppel cannot bind a person who was neither a party nor privy to a prior suit."); *In re Bendectin Products Liability Litigation*, 732 F. Supp. 744, 748 (E.D. Mich. 1990) (holding individuals who elected not to join a federal MDL proceeding that resulted in a defense verdict were not estopped from litigating their individual cases against the same defendant); *In re Transocean Tender Offer Securities Litig.*, 427 F. Supp. 1211, 1217 (N.D. Ill. 1977) (holding that Delaware court class action judgment for defendant does not preclude class members who opted out of Delaware class action from litigating claims against the same defendant in federal court; any other result "would permit defendants to circumvent principles of res judicata, collateral estoppel and the opt-out provisions of the Delaware

class action rules, which are identical to Rule 23 of the Federal Rules of Civil Procedure."); *Rebney v. Wells Fargo Bank*, 220 Cal. App. 3d 1117, 269 Cal. Rptr. 844, 854 (Cal. Ct. App. 1990) ("[t]he settlement agreement permitted class members to opt-out of the settlement as to claims for monetary relief. CGA did so and is suing [the defendant] separately. CGA is therefore not even a party, much less aggrieved, with regard to the monetary relief aspects of the settlement.").[10]

All these cases make clear that the requested injunction would violate the most basic principles of res judicata and collateral estoppel. Simply put, as non-parties to the class action, they cannot be bound by any of the terms of the class settlement or release.

### D. The Requested Injunction is Barred by the Plain Terms of the Anti-Injunction Act.

The requested injunctive relief is beyond this Court's authority for an additional, and equally compelling, reason: this Court has no authority to superintend state judiciaries in the manner requested by MetLife.[11] Both Congress and the Constitution provide for a dual system of state and federal courts, with substantial obligations on the part of the latter to steer clear of the former. To be sure, Congress has permitted similar *federal* lawsuits to be consolidated during pretrial proceedings for the sake of efficiency. *See* 28 U.S.C. § 1407; *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). But it has never permitted a federal court to thwart

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[10] *Cf. Taylor v. Shiley Inc.*, 714 A.2d 1064 (Pa. Super. Ct. 1998) (individual litigants who were given several opportunities to opt-out of a national class action settlement, but decided to stay in the class and object to the proposed settlement, were barred by doctrine of res judicata from litigating their state court actions against the same defendant); *Wesch v. Folsom*, 6 F.3d 1465 (11th Cir. 1993) (state court litigants who were also parties to federal class action were properly subject to injunction); *In re Corrugated Container Antitrust Litig.,* 659 F.2d 1332 (5th Cir. 1981) (same).

[11] As explained above, 200 of the Opt-Out Litigants' cases are proceeding in state court.

the progress of pending *state* suits in the manner advocated by MetLife. Under these circumstances, injunctive relief would be an unprecedented intrusion on the integrity of state courts and the rights of the parties before them.

### 1. The Anti-Injunction Act Generally Bars Interference by Federal Courts with Pending State Judicial Proceedings.

Congress has expressly forbidden the federal judiciary from interfering with ongoing state court proceedings almost since the creation of the lower federal courts. *See* Act of March 2, 1793, ch. 22, § 5, 1 Stat. 335. As currently written, the Anti-Injunction Act begins with a broad and general prohibition – "A court of the United States may not grant an injunction to stay proceedings in a State court" – followed by a carefully drawn and narrowly interpreted set of three exceptions – "except [1] as expressly authorized by Act of Congress, or [2] where necessary in aid of its jurisdiction, or [3] to protect or effectuate its judgments." 28 U.S.C. § 2283. The statute has remained in this form since 1948, continuing a longstanding policy of judicial federalism.[12]

If none of the three enumerated exceptions applies, then the statute absolutely prohibits federal equitable intervention in pending state court proceedings, "regardless of how extraordinary the particular circumstances may be." *Mitchum v. Foster*, 407 U.S. 225, 229 (1972). In other words, the current version of the Anti-Injunction Act "made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation." *Amalgamated Clothing Workers of America v. Richman Brothers*, 348 U.S. 511, 514 (1955); *see also Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988); *Total Plan Servs. v. Texas Retailers' Ass'n*, 925 F.2d 142, 144 (5th Cir. 1991).

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[12] The fact that the requested injunction does not seek to stay the entire "proceedings" of the Opt-Out Litigants is irrelevant because the Anti-Injunction Act also applies to interference with state-court discovery proceedings. *See Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1201 (7th Cir. 1996).

Any doubt about the propriety of a federal injunction against state court proceedings must be resolved in favor of permitting the state courts to move forward without delay. *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 291, 297 (1970). "The explicit wording of § 2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion." *Id.*

**2. None of the Exceptions to the Anti-Injunction Act Applies Here.**

In its brief filed in support of the requested injunction, MetLife relied exclusively on the third exception to the Act, which permits entry of an injunction "to protect or effectuate" a federal court's judgments. *See* MetLife Brief at 12. The Magistrate Judge's Order appears exclusively to rely on this exception, as well. *See* Order at 6. For purposes of these objections, however, we explain why none of the three exceptions to the Act could possibly apply to this case.

**a. The "Expressly Authorized by Congress" Exception Does Not Apply Here.**

The first exception to the Act permits injunctions "expressly authorized by Congress." In determining the scope of this exception, "'[t]he test . . . is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding.'" *Glenn Turner*, 521 F.2d at 780-81 (quoting *Mitchum v. Foster*, 407 U.S. 225, 238 (1972)). There is no such Act of Congress at issue in this case, and MetLife does not contend otherwise.

Nor could there be any claim that Rule 23 of the Federal Rules of Civil Procedure itself falls within the meaning of exception one; that issue was laid to rest by the Third Circuit in *Glenn Turner*, which held that "Rule 23 [cannot] constitute an exception to the [Anti-Injunction] Act, at

least for actions such as this one brought under Rule 23(b)(3)." *Id*. at 781. To the contrary, in language highly relevant to the instant case, the Third Circuit stated that, under Rule 23, "*[m]embers of the class in (b)(3) actions must be given the option of excluding themselves from the class and from any ensuing judgment*." *Id*. at 781 (emphasis added). *See also id*. ("Rule 23 by its own terms creates a mechanism leaving parties in a (b)(3) action free to continue with any state proceedings . . .."). Not only does this language demonstrate the inapplicability of the Act's first exception to this case, but it proves our bottom line position here: because the Opt-Out Litigants excluded themselves from the MDL settlement, they simply cannot be enjoined from proceeding in their individual cases.

**b. The "Necessary in Aid of Jurisdiction" Exception Does Not Apply Here.**

Nor could there be any reasonable claim that the requested injunction falls within the second exception to the Act, which authorizes district courts to issue an injunction "necessary in aid of its jurisdiction." *Glenn Turner* also made clear that, for the "necessary in aid of jurisdiction" exception to apply, "it is not enough that the requested injunction is related to that jurisdiction, but it must be '*necessary in aid of*' that jurisdiction." *Id*. at 780 (citing *Atlantic Coast*, 398 U.S. at 295) (emphasis in original). This exception is only available "'to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Id*. On its face, this standard cannot apply here, given that MDL settlement has already been finalized and would not be disrupted in any respect by permitting the Opt-Out Litigants to proceed in an unimpeded fashion."[13]

[13] Thus, this case is in a far different procedural posture than when this Court entered its order in *In re Metropolitan Life Ins. Co. Sales Prac. Litig*., MDL No. 1091, Docket No. 96-179

The holding of *Glenn Turner* confirms the inapplicability of the "necessary in aid of jurisdiction" exception to this case. *Glenn Turner* held that a district court presiding over multiple consolidated class actions lacked the authority to enjoin an ongoing state court proceeding that, if successful, might have rendered the defendants unable to pay any judgment subsequently entered in the pending federal class actions. *Id*. at 780. Despite this radical potential interference with the federal cases, the Third Circuit reversed an injunction entered by the district court, holding that

> the inability of the federal defendants to pay a judgment, assuming it exists, still would not be sufficient justification to issue the federal injunction. The fundament of the rule forbidding federal courts from enjoining parallel in personam state proceedings is a recognition of the principle that absent statutory or constitutional directive, the state and lower federal courts are independent, and that a federal action is not superior to a state proceeding merely because of its federal character. . . . As a corollary to this principle, judgments resulting from federal actions are not preferred to judgments resulting from state actions because of their federal character.

*Id*. at 780. Given that an injunction was deemed unwarranted in *Glenn Turner*, where the federal actions were *still pending* before the district court and could have been rendered moot, financially speaking, by the parallel state proceedings, there is no conceivable basis for entering an injunction to protect this Court's "jurisdiction" over the MDL settlement, which was concluded years ago and is not in the least imperiled by the individual actions brought by the Opt-Out Litigants. *See also Atlantic Coastline,* 398 U.S. at 294 (threat of parallel litigation and conflicting state and federal judgments is insufficient to warrant entry of an injunction under the "necessary-in-aid" exception

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(W.D. Pa. Sept. 4, 1999) ("*Youngblood*"), enjoining two individual litigants from pursuing a parallel state court class action against MetLife. As this Court's *Youngblood* order made clear, that injunction was necessary to protect the Court's jurisdiction over the pending settlement, which could have been disrupted by the state-court class action. As explained below, however, the fact that the national class action settlement has been completed and would not in any sense be disrupted by the Opt-Out Litigants' cases renders the "necessary in aid of jurisdiction" exception inapplicable to the injunction that has now been requested by MetLife.

to the Anti-Injunction Act).

The Third Circuit's decision in *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189 (3d Cir. 1993), which affirmed an injunction of state-court litigation brought by members of a ongoing federal MDL class action that was pending before the district court, is not to the contrary. To begin with, *Carlough* confirmed that "even simultaneous federal and state adjudications of the same in personam cause of action do not in and of themselves trigger the necessary-in-aid exception." *Id*. at 202. That exception was held to apply in *Carlough* only because, there, the state-court plaintiffs were "not requesting relief strictly parallel to that sought in the federal forum." To the contrary, "the stated purpose of the [state-court] lawsuit [was] to challenge the propriety of the federal class action, which the district court characterized as a preemptive strike against the viability of the federal suit . . ." *Id.* at 203. In language highly relevant to this case, moreover, the Third Circuit noted that the federal MDL at issue in *Carlough* "*is an opt out federal class action posing no impediment to the [state-court] plaintiffs' individual exercise of their opt out right and option to commence their own respective lawsuits in the forum of their choice*." *Id*. (citations omitted; emphasis added). The Court ultimately held that, "given the establishment of an opt-out period and the *Gore* plaintiffs' ability to opt-out, it is within the sound discretion of the district court to enjoin their action in state court." *Id*. at 204.

Thus, *Carlough*'s holding regarding the "necessary-in-aid" exception to the Anti-Injunction Act is limited to cases where (1) there is a pending settlement before a federal court; (2) the state court litigation is expressly designed to derail the federal case; and, perhaps most importantly, (3) the would-be state court litigants will be given a full right to opt-out of the class and pursue their individual damage actions against the defendant. Obviously, none of these criteria is present here

– quite the opposite. Thus, if anything, *Carlough* demonstrates the *illegality* of the requested injunction, not its legitimacy.[14]

**c. The "Relitigation" Exception Does Not Apply Here.**

Finally, there is no basis for MetLife's claim that this case falls within the third, "relitigation" exception to the act. In *Chick Kam Choo*, 486 U.S. at 147, the Supreme Court held that:

> The relitigation exception was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal

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[14] In a subsequent decision interpreting *Carlough*, the Third Circuit made it clear that *Carlough* merely "fashioned a third, and narrow, application of the 'necessary in aid of its jurisdiction' exception in the context of a complex class action which was also an MDL case [1] where a settlement was imminent; [2] where the federal court had already expended considerable time and resources; and [3] where the pending state action threatened to derail the provisional settlement. There, we upheld an injunction that prevented absentee members from seeking a declaratory judgment in state court that would have declared that all putative West Virginia members had opted-out of the federal class." *In re General Motors Corp. Prods. Liab. Litig.*, 134 F.3d 133, 145 (3d Cir. 1998). The *General Motors* court went on to deny injunctive relief in advance of class certification or provisional settlement. *Id.* Other cases upholding injunctions against state court litigation to protect class actions in federal court are similarly distinguishable. *See*, *e.g.*, *In re Baldwin-United Corp. Single Premium Deferred Annuities Ins. Litig.*, 770 F.2d 328, 336–38 (2d Cir. 1985) (federal court presiding over consolidated MDL class action proceeding may protect a preliminarily approved settlement by preventing states from filing new and derivative suits that threatened to "seriously impair" the court's ability to craft a settlement in the federal MDL); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1024–25 (9th Cir. 1998) (federal court may protect a provisionally approved class settlement from a new state court class action designed to opt out an entire state); *James v. Bellotti*, 733 F.2d 989, 994 (1st Cir. 1984 (provisionally approved settlement may justify protective injunction against state court suits). An MDL court in Ohio recently attempted to halt state litigation after conditional class certification and pending a decision on a proposed settlement. *See In re Inter-Op Hip Prosthesis Prod. Liab. Litig.*, MDL No. 1401 (N.D. Ohio Sept. 17 & 26, 2001). But the Sixth Circuit stayed the injunction pending appeal. It characterized the district court's injunctive authority as "questionable" because putative class members have not yet had an opportunity to opt-out, and the court expressed "serious doubts" about the settlement's legitimacy in light of significant financial disincentives on the right to opt-out. *Drummer v. Sulzer Orthopedics, Inc.*, No. 01-4039, at 3 (6th Cir. Oct. 29, 2001). (A copy of the order in *Drummer* is annexed hereto.)

> court. It is founded on the well-recognized concepts of res judicata and collateral estoppel.

This exception "is essentially a res judicata concept designed to prevent issues that have already been tried in federal court from being relitigated in state court." *Wesch v. Folsom*, 6 F.3d 1465, 1470 (11th Cir. 1993); *see also General Motors*, 134 F.3d at 146 (relitigation exception involves an inquiry into whether the "judgment" at issue would have res judicata or collateral estoppel effect.") To evaluate whether the exception has been met in any given case, "[f]ederal courts apply the law of the state in which they sit with respect to the doctrine of res judicata." *Wesch,* 6 F.3d at 1470. Thus, for purposes of this case, the question is whether the Opt-Out Litigants' claims would be barred by the Pennsylvania doctrine of res judicata and collateral estoppel.

The answer to this question is plainly "no." In Pennsylvania, for the doctrine of res judicata to apply, there must be a concurrence of four conditions: (1) identity of issues; (2) identity of causes of action; (3) identity of persons and parties to the action; and (4) identity of the quality or capacity of the parties suing or being sued. *Bearoff v. Bearoff Brothers, Inc.*, 458 Pa. 494, 497, 327 A.2d 72, 74 (1974). The doctrine of collateral estoppel (also known as "issue preclusion") requires that: (1) the issue decided in the prior adjudication was identical with the one presented in the later action; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party to or in privity with a party to the prior adjudication; and (4) the party against whom it is asserted has had a full and fair opportunity to litigate the issue in question in a prior action. *Safeguard Mutual Ins. Co*., 463 Pa. 567, 574, 345 A.2d 664, 668 (1975).

Neither doctrine is even remotely applicable here because the Opt-Out Litigants, having excluded themselves from the class action settlement, were neither parties to nor "in privity with" the parties to that litigation. Rather, as former class members who excluded themselves from the

litigation, the Opt-Out Litigants lack sufficient identity of interest with the class representatives to permit the application of any doctrine of issue preclusion. *See supra* at Point II(c) (citing cases holding that individuals who exclude themselves from class settlements are not subject to either res judicata or collateral estoppel in their individual cases). This conclusion is entirely consistent with – and, indeed, compelled by – the fact that every state court judge to consider the issue has *denied* MetLife's preliminary objections to the "pattern and practice" claims in the Opt-Out Litigants' individual cases, as well as, permitted discovery of the same. Clearly, none of these courts are of the view that the Opt-Out Litigants are bound by the judgment in the class settlement, and any contrary conclusion by this Court would be clear error.

The Third Circuit's decision in *Prudential* does not suggest otherwise. There, the Court applied the relitigation exception as the basis for its decision to enjoin the claims of the litigants who had opted some of their claims out of the class settlement. In so doing, the Third Circuit relied heavily on the fact that, because the Lowes had not opted out all their claims from the class action settlement, they were subject to the extremely broad release of all allegations relating to the class claims. In light of this release, *Prudential* reasoned that permitting introduction of evidence relating to the class allegations in the Lowes' individual action would amount to "relitigation of the released claims." *See* 261 F.3d at 367. The Court concluded that "[a] district court has the power to enforce an ongoing order against relitigation so as to protect the integrity of a complex class settlement over which it retained jurisdiction." *Id.*

That reasoning does not apply here for the simple reason that the Opt-Out Litigants *are not subject to the terms of the class release*. Because the release does not apply to them, permitting introduction of the "pattern and practice" evidence at issue in the MDL class settlement will not

constitute "relitigation" of *anything* with respect to these individuals. To conclude otherwise would be to nullify the constitutionally mandated rights of absent class members to opt out of Rule 23(b)(3) settlements and pursue their individual claims outside the class. *Prudential* does not mandate or permit such a result, which would turn the Anti-Injunction Act on its head and convert the "relitigation" exception into a free pass for class action defendants to evade the constitutionally-mandated opt-out right enshrined in Rule 23.

## CONCLUSION

For the foregoing reasons, we respectfully request that MetLife's request for an injunction be denied.

Respectfully submitted,

by:_____


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