

**TORT REFORM, ONE STATE AT A TIME:
RECENT DEVELOPMENTS IN CLASS
ACTIONS AND COMPLEX LITIGATION IN
NEW YORK, ILLINOIS, TEXAS, AND FLORIDA**

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I. INTRODUCTION

The tort reform movement is part of a continuing debate between corporate and insurance interests on one side and consumer groups and plaintiffs' lawyers on the other.¹ In the 1970s and early 1980s, various corporate interests began to attack the tort system at the state level and advocate for what they termed "tort reform": legislative measures aimed at limiting the availability and amount of relief in personal injury actions.² Arguing that these measures were needed to reduce frivolous lawsuits and decrease insurance premiums, proponents of the movement lobbied state legislatures to limit non-economic and punitive damages, abolish joint and several liability, and raise pleading requirements.³ Consumer interests and plaintiffs' lawyers responded, with mixed success, by challenging the constitutionality of these reforms in state courts. The opposition utilized various state constitutional provisions such as due process, equal protection, separation of powers, right to a jury trial, and access to open courts.⁴

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1. Rachel M. Janutis, *The Struggle over Tort Reform and the Overlooked Legacy of the Progressives*, 39 AKRON L. REV. 943, 943 (2006).

2. *See id.* at 944.

3. *See id.*

4. *See id.* at 944–95.

During this early part of the “tort reform” era, federal courts were not seen as a focal point for tort cases; instead, state courts saw most of the action.⁵ But as mass tort litigation like asbestos began to rise, the federal courts became a player in the tort arena.⁶ The Federal Multidistrict Litigation Panel transferred mass torts for pretrial purposes, and many perceived state courts to lack the resources and procedures for resolving complex, multiparty, multijurisdictional litigation.⁷ By the mid-1980s, federal courts were considered a more appropriate place to resolve mass tort claims, and plaintiffs’ lawyers preferred federal suits because of the potential class recovery with huge attorney’s fees.⁸

However, after the Supreme Court decided *Amchem Products, Inc. v. Windsor*,⁹ along with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁰ and the summary judgment “trilogy,”¹¹ it became harder to obtain class certification in federal courts.¹² Thus, plaintiffs’ lawyers returned to the states, seeking out specific state courts that appeared more receptive to class certification and jury trials.¹³ Counties in certain states—particularly Illinois, Florida, and Texas—became magnets for plaintiffs in certain forms of litigation.¹⁴

5. See Georgene M. Vairo, *Judicial v. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort Cases and Other Complex Litigation*, 33 LOY. L.A. L. REV. 1559, 1563 (2000).

6. See *id.*

7. See *id.*

8. See Georgene M. Vairo, *Georgine, The Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims Resolution*, 31 LOY. L.A. L. REV. 79, 82 (1997).

9. 521 U.S. 591 (1997). *Amchem* establishes guidelines for when a class action can be certified for settlement purposes only, and also questions the propriety of federal court class resolution of mass tort litigation. *Id.* at 620, 629.

10. 509 U.S. 579 (1993). *Daubert* increases the power of federal judges to exclude relevant expert testimony by investing them with a “gatekeeping” function to determine whether scientific proof is reliable enough to be considered by the jury. *Id.* at 597.

11. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). These three decisions advocate more liberal use of summary judgment motions. “Overall they tend to prevent plaintiffs in certain kinds of cases, often tort actions based on state law,” from getting to a jury to prove liability. JoEllen Lind, “Procedural Swift:” *Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717, 769 (2004).

12. See Vairo, *Judicial v. Congressional Federalism*, *supra* note 5, at 1563–64.

13. See Georgene M. Vairo, *Foreword: Developments in the Law, The Class Action Fairness Act of 2005*, 39 LOY. L.A. L. REV. 979, 981 (2006).

14. See *id.* at 982 n.11 (citing AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 2004, at 8–9 (2004), available at <http://www.atra.org/reports/hellholes/2004/hellholes2004.pdf>).

This led to brutal forum selection battles between plaintiffs seeking to keep cases in state court and defendants trying to remove them to federal court.¹⁵ Plaintiffs learned to defeat the right to removal by naming non-diverse parties as defendants to destroy complete diversity, and defendants learned to shed light on lawsuit abuse by crowning certain counties as “judicial hellholes.”¹⁶

In response to this dynamic, Congress enacted the Class Action Fairness Act (“CAFA”).¹⁷ States got the message and realized they needed to clean up their acts, i.e., enact tort reform in response to real or imagined lawsuit abuse. Thus, the tort reform movement that began in the late 1970s and early 1980s is still alive and kicking. With the Democrats in control of Congress as of this writing, further national reforms with such broad impact as CAFA appear unlikely. Accordingly, ardent advocates of tort reform from the business community are returning to the states, where the tort reform movement first took root. For example, groups like the American Tort Reform Association,¹⁸ a leading advocate for reining in class action lawsuits, have turned their lobbying efforts away from Congress and are now focused on lobbying state legislatures and educating voters through sensationalist billboards.¹⁹

The stakes are high for states that fail to enact legislation to limit the promulgation of lawsuits. They risk an exodus of national companies and businesses that could move their headquarters to greener pastures across state lines. Savvy businesses are reluctant to base their operations in states where local laws do not protect them

15. *Id.* at 979.

16. *See id.* at 981–82.

17. Pub. L. No. 109-2, 119 Stat. 4 (2007) (codified in scattered sections of 28 U.S.C.). CAFA broadens federal diversity jurisdiction and makes it easier for out-of-state defendants to remove their cases to the federal courts, which many in the business community perceive to be more sympathetic to their defenses. However, CAFA may not be helpful, depending on class composition and other factors, when class actions are brought against businesses that are incorporated or have their principal place of business in the state. Moreover, cases are only assured of being removed when more than two-thirds of the plaintiffs are from out-of-state. For a more detailed perspective on CAFA and pleading strategies, see Nicole Ochi, Developments, *Are Consumer Class and Mass Actions Dead? Complex Litigation Strategies After CAFA and MMTJA*, 41 LOY. L.A. L. REV. 965 (2008).

18. The American Tort Reform Association is a national organization dedicated to reforming the civil justice system through public education and the enactment of legislation. *See* Am. Tort Reform Ass’n, *About ATRA*, <http://www.atra.org/about>.

19. Steve Lash, *National ‘Tort Reform’ Group Shifting Efforts to States*, CHI. DAILY L. BULL., Jan. 5, 2007, at 1.

from what they perceive to be frivolous lawsuits and unduly high punitive damage awards.²⁰ Corporate CEOs do not want their companies to be located in so-called “judicial hellholes,” where judges supposedly favor plaintiffs and will certify any class that walks in their courtroom.²¹ Accordingly, businesses may prefer to relocate to so-called “business friendly” states that have special forums for complex litigation such as business courts, which are perceived to expediently handle business versus business litigation.²²

In light of these considerations and the issues they raise, this Article looks beyond California to present a brief snapshot of the “climate” of class and complex litigation in four distinct states: New York, Illinois, Texas, and Florida. These states were chosen for analysis because they follow California as the next four most populous states in the nation. In addition, the approach to tort litigation and reform taken in these states plays an important role in setting national standards and trends that are later mimicked by other states. Before discussing the pertinent developments in each of the chosen states, this Article briefly lays out some of the standards and procedures for class actions and complex litigation in each specific jurisdiction. This Article then discusses some of the latest developments in the local legal landscape of each of these states and the impact and implications of these developments on state court litigation.

Part II introduces New York’s approach to class and complex litigation and explores how New York’s business courts are used for complex commercial litigation, considering whether they are a viable alternative for complex commercial matters or just a hidden form of tort reform. Part III discusses Illinois’s standards for class and complex litigation and focuses on the merits of the tort reform battle against Illinois’s perceived “judicial hellholes.” Part IV summarizes Texas’s rigorous standards for class and complex litigation and discusses how recent legislative reforms and runaway juries shape class and complex litigation in the Lone Star State. Finally, Part V explores Florida’s efforts to undo its reputation as a “judicial

20. *Id.*

21. *See infra* Part III.C.

22. *See infra* Part II.C.1.

hellhole” and to create a litigation environment friendlier to the domestic and international business communities.

II. NEW YORK

A. *New York’s Class Action Standards: Providing “Therapeutic Benefits” to Consumers*

New York’s modern class action rules,²³ adopted in 1975, are derived from and are substantially similar to the federal standards.²⁴ Emulating the federal policies of the 1970s that favored class actions and liberal interpretations of their rules, New York intended their modern class action standards to be more liberal and flexible than the narrow class action legislation that preceded them.²⁵ New York followed the expansive federal attitude of that time because class actions could play a desirable role in society by providing “therapeutic benefits” and “due process.”²⁶

The “therapeutic benefit” theory holds that collateral public benefits flow from allowing class actions.²⁷ A class action is perceived as a way to induce businesses and corporations to act in both a socially and ethically responsible manor and to deter them from implementing potentially harmful courses of action affecting large numbers of individuals.²⁸ Without the availability of class actions, so the theory holds, these institutions operate virtually unchecked, engaging in a form of “legalized theft” that occurs when consumers are harmed but each consumer’s damage is worth less than \$100.²⁹ Since attorneys’ fees effectively inhibit the filing of individual suits based upon such small claims, class actions are seen as the preferred deterrence for this “legalized theft.”³⁰

23. N.Y. C.P.L.R. 901 (McKinney 2007).

24. *Huebner v. Caldwell & Cook, Inc.*, 526 N.Y.S.2d 356, 359–60 (Sup. Ct. 1988). Federal class action rules derive from FED. R. CIV. P. 23.

25. *Friar v. Vanguard Holding Co.*, 434 N.Y.S.2d 698, 703 (N.Y. App. Div. 1980) (“Under earlier laws . . . class actions were viewed as requiring a sort of unity among class members bordering on the nebulous concepts of ‘privity’ or ‘joint tenancy.’” (citations omitted)).

26. *Id.* at 705.

27. *Id.*

28. *See id.*

29. *Id.*

30. Ironically, defendants sometimes characterize a plaintiff’s efforts to certify a class action as “legalized blackmail.” *See Clayton v. Skelly Oil Co.*, No. 77 Civ. 1355-CSH, 1979 U.S. Dist. LEXIS 9408, at *4 (S.D.N.Y. Oct. 2, 1979). For a discussion of “negative-value” consumer

The other theory persuasive in developing New York's class action standards was the notion that class actions provide "due process" by allowing many individuals a quasi-constitutional right to litigate and participate meaningfully in the legal process.³¹ Individuals might not exercise this right otherwise. If judges construe these rules too narrowly, they basically deny access to the courts for thousands of individuals whose minimal damages would be greatly outweighed by the prohibitive costs needed to sue a wealthy and powerful opponent.³² The New York legislature believed judges were too restrictive and so adopted the modern rules in 1975.

The New York legislature had both theories in mind while drafting their modern class action rules in the 1970s.³³ The legislature understood that the future of the class action and its role in society would depend on the judges who construed the rules governing them.³⁴ Class action certification requirements are so flexible that reasonable minds can flex them to embrace or reject certification.³⁵ The New York legislature hoped its judges would flex these requirements and embrace the once-broad federal approach of allowing class actions.³⁶ It is unclear if this hope was realized.

1. Requirements for Class Certification in New York Courts

In order to have a class action certified in a New York state court, the plaintiff bears the burden of proving five requirements, known as numerosity, commonality, typicality, adequacy, and efficiency.³⁷ Numerosity means that the proposed plaintiffs are so numerous that it would be impracticable to use traditional joinder

claims, see Alec Johnson, Developments, *Vioxx and Consumer Product Pain Relief: The Policy Implications of Limiting Courts' Regulatory Influence over Mass Consumer Product Claims*, 41 LOY. L.A. L. REV. 1039 (2008).

31. *Friar*, 434 N.Y.S.2d at 705.

32. *See id.* at 706.

33. *See id.* at 705.

34. *See id.* at 706.

35. *Id.*

36. *See id.*

37. N.Y. C.P.L.R. 901(a) (McKinney 2007).

rules to join them each individually.³⁸ Commonality, considered the “most troublesome” of the requirements in New York,³⁹ refers to whether the case involves common questions of law or fact that predominate over questions affecting only individual plaintiffs.⁴⁰ If these common questions of law or fact predominate over those affecting only individuals, then it makes sense to combine all plaintiffs into one class to hear their cases together. This does not require that all proposed plaintiffs be identical, share a substantive unity in a common interest, or that individual issues be nonexistent.⁴¹ Nor do New York courts have a mechanical test for determining commonality but instead consider the nebulous concept of “whether the use of a class action would achieve economies of time, effort, and expense and promote uniformity of decision as to persons similarly situated.”⁴² Commonality can be a hard requirement to meet, especially in product liability cases where damages or the proximate causation of each individual’s injuries may have to be determined on a case-by-case basis.⁴³

Typicality and adequacy, the next two requirements, contemplate the relationship between the named class representative and the individual class members. Typicality is satisfied if the claims of the class representative are typical of the claims of all the class members.⁴⁴ To that end, it is easily satisfied when all the plaintiffs’ claims are due to the same legal theory, but not when the extent of damages for each individual has to be separately

38. *Id.* There is no set rule for the number of prospective class members which must exist to certify a class. *Friar*, 434 N.Y.S.2d at 706.

39. 434 N.Y.S.2d at 706.

40. N.Y. C.P.L.R. 901(a) (McKinney 2007). Commonality is also referred to as the predominance requirement by some New York courts. *See, e.g., Ackerman v. Price Waterhouse*, 683 N.Y.S.2d 179, 188 (N.Y. App. Div. 1998).

41. *See Freeman v. Great Lakes Energy Partners*, 785 N.Y.S.2d 640, 641 (N.Y. App. Div. 2004).

42. *Friar*, 434 N.Y.S.2d at 707 (citation omitted).

43. *See, e.g., Geiger v. Am. Tobacco Co.*, 716 N.Y.S.2d 108, 109–10 (N.Y. App. Div. 2000) (denying certification in a suit against tobacco companies because individual issues of addition, causation, and damages cannot be resolved on a common basis); *Hurtado v. Purdue Pharm. Co.*, No. 12648/03, slip op. at 6 (N.Y. Jan 24, 2005) (denying certification in suit against manufacturers and distributors of a pharmaceutical drug because of the predominance of individual issues regarding the patient’s dosage, reason for prescription, past history of narcotic abuse and specific injury sustained).

44. N.Y. C.P.L.R. 901(a)(3) (McKinney 2007).

established and investigated.⁴⁵ Since the rules are designed to be flexible, it is not necessary that the claims of the class representative be identical to those of the class.⁴⁶ Typicality can even be satisfied in New York when the class representative cannot personally assert all the claims made on behalf of the class.⁴⁷

Next, the adequacy requirement inquires whether the named class representative will fairly and adequately protect the interests of the class members.⁴⁸ New York courts consider three factors in determining whether the proposed class representative meets this standard: (1) whether conflicts of interest exist between the representative and the class members; (2) the representative's familiarity with the lawsuit and her financial resources; and (3) the competence and experience of the class counsel.⁴⁹ For example, a class cannot be certified in New York if the representative is not willing to bear the expenses of the class action,⁵⁰ or if the representative's interests are antagonistic or in conflict with those of other class members.⁵¹

Finally, the requirement of efficiency considers whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy.⁵² This requirement considers the public benefits society derives from class actions.⁵³ These include inducing wealthy institutions to engage in socially and ethically responsible behavior, and deterring institutions from acting with impunity since the realities of our legal system make it cost prohibitive for plaintiffs who suffer relatively insignificant amounts of damages to have their claims addressed.⁵⁴ New York courts realize that a class action is not only superior but is indeed the only economically viable means of redressing circumstances in which

45. *Hurtado*, No. 12648/03, slip op. at 7.

46. *Pruitt v. Rockefeller Ctr. Props., Inc.*, 574 N.Y.S.2d 672, 676 (N.Y. App. Div. 1991).

47. *Id.*

48. N.Y. C.P.L.R. 901(a)(4) (McKinney 2007).

49. *Ackerman v. Price Waterhouse*, 683 N.Y.S.2d 179, 194–95 (App. Div. 1998).

50. *See Pruitt*, 574 N.Y.S.2d at 678.

51. *See, e.g., Rivkin v. Kulzer GmbH*, 734 N.Y.S.2d 31, 33 (App. Div. 2001) (reversing class certification because the plaintiffs representing the class lacked damages).

52. N.Y. C.P.L.R. 901(a)(5) (McKinney 2007).

53. *Pruitt*, 574 N.Y.S.2d at 677.

54. *Id.*

numerous plaintiffs suffered relatively small economic injuries.⁵⁵ However, a class action is not considered the superior method of adjudication in New York for cases involving individual proof of addiction,⁵⁶ individual inquiries into reliance,⁵⁷ or adjudication of a controversy against a governmental body.⁵⁸

2. Appellate Review of Class Certification

New York courts “liberally construe” the five requirements for class certification.⁵⁹ The trial courts have sound discretion to grant or deny class certification, and any errors are generally resolved in favor of allowing the class action to proceed.⁶⁰ However, an order granting certification should not be considered immutable.⁶¹ The trial judge has discretion to sever certain issues from class status, to divide the class into subclasses, or even to decertify the entire class.⁶²

Many businesses and corporations are located within the state, and New York courts often hear nationwide class actions against locally based defendants on behalf of plaintiffs from across the country. Despite the liberal approach towards certification requirements, there are a number of inhibitors to the hearing of nationwide class actions in New York courts. For example, defendants may successfully avoid certification by making a motion to dismiss the action on the grounds of *forum non conveniens*,⁶³ a forum selection clause,⁶⁴ or a choice of law issue.⁶⁵ Additionally, if

55. See, e.g., *Jim & Phil’s Family Pharmacy v. Aetna U.S. Healthcare, Inc.*, 707 N.Y.S.2d 58, 59 (N.Y. App. Div. 2000).

56. See *Small v. Lorillard Tobacco Co.*, 720 N.E.2d 892, 898 (N.Y. 1999).

57. See *id.*

58. *LaCarruba v. Legis. of Suffolk*, 640 N.Y.S.2d 130, 131 (N.Y. App. Div. 1996). A class action against a governmental body fails to meet the “efficiency” requirement because consolidation is simply not necessary. A successful individual challenge to a governmental body changes the government practice at issue. All similarly situated individuals should then be protected from the government practice at issue under the doctrine of *stare decisis* and because government policies should apply equally to all citizens. See Jack E. Pace III, Note, *Automatic Stays and Governmental Operations: How New York State Protects the Government from the Poor*, 24 *FORDHAM URB. L.J.* 137, 146–48 (1996).

59. *Kidd v. Delta Funding Corp.*, 734 N.Y.S.2d 848, 848 (N.Y. App. Div. 2001).

60. *Id.*

61. *Lauer v. N.Y. Tel. Co.*, 659 N.Y.S.2d 359, 362 (N.Y. App. Div. 1997).

62. *Id.*

63. N.Y. C.P.L.R. 327 (McKinney 2008).

64. See, e.g., *Brower v. Gateway 2000*, 676 N.Y.S.2d 569, 575 (N.Y. App. Div. 1998) (enforcing arbitration and choice of law clause, although arbitration before International Chamber of Commerce is substantively unconscionable); *Gates v. AOL Time Warner, Inc.*, No. 604141/02,

the size of a proposed multistate class is too large, New York courts may consider limiting the class to New York residents in order to conserve judicial resources.⁶⁶

Once the trial court has issued its order granting or denying class certification, the order is immediately appealable by an interlocutory appeal.⁶⁷ Unlike the federal system and most other states, New York gives parties the right to appeal almost any civil interlocutory order.⁶⁸ By contrast, a federal court of appeals has discretion under Federal Rule 23(f) to hear the interlocutory appeal of orders granting or denying class certification.⁶⁹

Also unique to New York is the almost nonexistent role that New York's highest court plays in shaping the rules and standards of class action litigation.⁷⁰ The New York Court of Appeals, the state's highest court, only reviews questions of law, except when the Appellate Division of the State Supreme Court has reversed or modified a judgment and made new findings of fact.⁷¹ Therefore, if the appellate division affirms the trial court's ruling on class certification and does not adopt new facts, the court of appeals has no jurisdiction to review the class certification decision.⁷² Accordingly, the appellate division plays a far more significant role

2003 N.Y. Misc. LEXIS 751 (Sup. Ct. May 15, 2003) (enforcing Virginia forum selection clause despite plaintiffs' assertion that Virginia law bars class actions).

65. See, e.g., *Boss v. Am. Express Fin. Advisors, Inc.*, 844 N.E.2d 1142, 1144 (N.Y. 2006) (dismissing class action because contract contains a Minnesota choice of law clause); *Goshen v. Mut. Life Ins. Co.*, 774 N.E.2d 1190, 1196 (N.Y. 2002) (dismissing claims by out-of-state plaintiffs).

66. See, e.g., *Drizin v. Sprint Corp.*, 785 N.Y.S.2d 428, 430 (N.Y. App. Div. 2004) (limiting class certification to New York residents because the maintenance of a nationwide class would require the unmanageable task of distilling the laws of the 50 states); *Ackerman v. Price Waterhouse*, 683 N.Y.S.2d 179, 194 (N.Y. App. Div. 1998) (limiting class certification to New York residents because plaintiffs have not met their burden of proving that choice of law principles will not ultimately require the application of widely divergent laws of multiple jurisdictions).

67. N.Y. C.P.L.R. 5701 (McKinney 2007).

68. David Scheffel, Note, *Interlocutory Appeals in New York—Time Has Come for a More Efficient Approach*, 16 PACE L. REV. 607, 607 (1996).

69. FED. R. CIV. P. 23(f).

70. The only recent and noteworthy court of appeals decision interpreting the standards for class certification is *Small v. Lorillard Tobacco Co.*, 720 N.E.2d 892, 896–97 (N.Y. 1999).

71. N.Y. C.P.L.R. 5501(b) (McKinney 2007).

72. See *id.*

in developing the case law that interprets and modifies New York's class action standards.⁷³

B. An Overview of New York's Procedures for Handling Complex Litigation

Though there is no exact definition for complex litigation, the term broadly encompasses difficult or protracted actions that may involve complex issues, related actions pending in different districts or court systems, multiple parties, difficult legal questions, or unusual proof problems.⁷⁴ As a result of their difficult and demanding nature, complex cases need increased judicial supervision and special mechanisms to handle the consolidation of related cases.⁷⁵ New York has promulgated various programs and procedures in response to these unique demands. These efforts include a mechanism for coordinating related actions pending in more than one judicial district, the implementation of an inactive docket to administer the congestion of asbestos claims, and the establishment of a specialized commercial court.

A common situation in complex litigation is one where related cases are pending in more than one jurisdiction.⁷⁶ The transfer and consolidation of such cases into one action for pretrial proceedings gives a single judge the potential to expeditiously review similar claims in an efficient manner.⁷⁷ New York handles such situations with a coordination mechanism analogous to the Federal Multidistrict Litigation Statute ("MDL Statute").⁷⁸ When related cases require judicial management in New York, the Chief Administrator of the Courts creates a Litigation Coordinating Panel composed of one justice of the Supreme Court from each judicial department.⁷⁹ This panel can coordinate related pending actions

73. See, e.g., *Friar v. Vanguard Holding Corp.*, 434 N.Y.S.2d 698 (N.Y. App. Div. 1980).

74. See MANUAL FOR COMPLEX LITIGATION (FOURTH) §§ 10.1, 10.11 (2004); see also Scott Paetty, Developments, *Classless Not Clueless: A Comparison of Case Management Mechanisms for Non-Class-Based Complex Litigation in California and Federal Courts*, 41 LOY. L.A. L. REV. 845 (2008).

75. See MANUAL FOR COMPLEX LITIGATION (FOURTH) §§ 10.1, 10.123.

76. See *id.* § 10.123.

77. See Mark C. Weber, *Managing Complex Litigation in the Illinois Courts*, 27 LOY. U. CHI. L.J. 959, 967 (1996).

78. The Federal Multidistrict Litigation Statute, 28 U.S.C. § 1407, permits the transfer and consolidation of related cases pending in federal districts throughout the United States.

79. N.Y. COMP. CODES R. & REGS. TIT. 22, § 202.69(b)(1) (2007).

before one or more individual coordinating justices to handle all pretrial proceedings, including dispositive motions.⁸⁰ This panel has been praised for smoothly and successfully managing mass tort cases in New York.⁸¹

Uniquely, New York's coordination mechanism also attempts to address the common situation of related cases pending in state and federal courts.⁸² If there are such cases pending in federal courts or even in the courts of other states, the panel instructs the coordinating justice to consult with the respective judge(s) from these external jurisdictions, in an effort to further the shared goals of coordination.⁸³ The coordinating justice can even order discovery in New York cases to proceed jointly or in coordination with the discovery in federal or other states' actions.⁸⁴

Another innovation effectively utilized by New York courts to handle complex asbestos litigation is a "first in, first out" system of docket management.⁸⁵ This system defers the claims of unimpaired plaintiffs to a separate deferred docket in order to allow the claims of truly sick plaintiffs to be heard more promptly.⁸⁶ In New York's "first in, first out" system, plaintiffs affected by asbestos who do not yet show signs of actual physical impairment do not lose the right to have their cases heard, as the statute of limitations on their claims is tolled while their case waits in the inactive docket.⁸⁷ Once the plaintiffs show sufficient physical impairment, their cases are removed to the active docket and set for trial.⁸⁸ Such a system enables the efficient and equitable handling of dockets congested with asbestos claims.

80. *Id.*

81. See Paul D. Rheingold, *Prospects for Managing Mass Tort Litigation in the State Courts*, 31 SETON HALL L. REV. 910, 912 (2002).

82. See Yvette Ostolaza & Michelle Hartmann, *Overview of Multidistrict Litigation Rules at the State and Federal Level*, 26 REV. LITIG. 47, 75 (2007).

83. N.Y. COMP. CODES R. & REGS. TIT. 22, § 202.69(c)(3) (2007).

84. *Id.* § 202.69.

85. Order Amending Prior Case Mgmt., *In re N.Y. City Asbestos Litig.*, No. 40000/88, 2002 WL 32151568 (N.Y. Sup. Ct. Dec. 19, 2002).

86. Dominica C. Anderson & Kathryn L. Martin, *The Asbestos Litigation System in the San Francisco Bay Area: A Paradigm of the National Asbestos Litigation Crisis*, 45 SANTA CLARA L. REV. 1, 8-9 (2004).

87. *Id.*

88. *Id.* at 9.

1. The Supreme Court of New York's Commercial Division

Last but not least, New York has created “business courts” in many counties known as the commercial division, to handle complex commercial disputes and commercial class actions. The commercial division was founded because of the perception that business litigants in New York avoided the state courts and preferred to have their claims heard in the federal courts, the courts of Delaware, or through private alternative dispute resolution.⁸⁹ Since its founding as a pilot program in 1993, the commercial division has been widely praised as a success by both the bar and the business community, expanding into several counties throughout the state.⁹⁰ Currently, the commercial division handles cases that will involve significant discovery and many motions because of the complexity of the issues and the sums at stake.⁹¹

The jurisdiction of commercial division courts broadly includes tort claims for fraud and misrepresentation; business torts (e.g., unfair competition); breach of contract or fiduciary duty; statutory and/or common law violations arising out of business dealings (e.g., violations of business agreements, trade secrets, restrictive covenants, and employment agreements); UCC transactions; shareholder derivative actions; commercial class actions; accountant malpractice; legal malpractice in commercial matters; environmental and commercial insurance coverage claims; corporate dissolution matters; and arbitration applications.⁹² A monetary threshold, which varies from \$25,000 to \$100,000 depending on the county in which the court sits, must also be met, except in shareholder derivative actions, commercial class actions, and dissolution claims.⁹³

New York's is considered a model of success. It has demonstrated that it can provide efficient, cost-effective, and timely processing of commercial cases and has improved the quality and

89. Mitchell L. Bach & Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 *BUS. LAW.* 147, 152 (2004).

90. *See id.* at 152–59.

91. *Id.* at 156.

92. *See* R. COMMERCIAL DIV. SUP. CT. § 202.70(b) (2007), available at <http://www.nycourts.gov/rules/trialcourts/202.shtml#70> (setting forth the complete jurisdiction of the commercial division).

93. *Id.*

predictability of judicial decisions.⁹⁴ Overall, the commercial division is perceived as a preferable forum for resolving complex business disputes and arguably has reversed the trend of business litigants avoiding New York courts.⁹⁵ Indeed, other states look to New York's commercial division when contemplating their own experiments in creating a specialized business court.⁹⁶

There are commendable considerations that favor the establishment of business courts like New York's commercial division.⁹⁷ "Complex business cases are known to move at a glacial pace, making it difficult for the businesses involved, and tying up the court system for other litigants."⁹⁸ In theory, such cases can be resolved more efficiently in a separate specialized docket. Having complex cases heard by judges with a higher level of expertise in and sensitivity to commercial matters may lead to more predictable and consistent results.⁹⁹

Nonetheless, hearing commercial claims in a separate docket raises at least one important concern. As Mary Alexander, President of the Consumer Attorneys of California, has said, "[c]ommercial courts establish a two-tiered system of justice—one for the rich and one for the average citizen."¹⁰⁰

2. Business Courts: Panacea for Complex Litigation or Tort Reform in Disguise?

Despite some scholars' praise for New York's commercial division, there is an equal body of criticism against the establishment of state business courts. The chief complaint is that these specialized courts provide an "elite form of justice" by creating a two-tiered system that divides corporate litigants and average citizens.¹⁰¹ A

94. Bach & Applebaum, *supra* note 89, at 158.

95. *Id.*

96. See generally Kimberly A. Ward, *Getting Down to Business—Pennsylvania Must Create a Business Court, or Face the Consequences*, 18 J.L. & COM. 415, 432 (1999) (advocating for the New York model to be considered if a business court is created in Pennsylvania).

97. See Sen. Ember Reichgott Junge, *Business Courts: Efficient Justice or Two-Tiered Elitism?*, 24 WM. MITCHELL L. REV. 315, 319 (1998).

98. *Id.* at 316–17.

99. *Id.* at 317.

100. Elaine R. Friedman, *New Business Courts Gain Acceptance*, NAT'L L.J., Dec. 30, 1996–Jan. 6, 1997, at B1.

101. Junge, *supra* note 97, at 318.

court whose very function is to facilitate the state's commercial enterprise could easily develop a bias in favor of commercial parties or a bias against non-business litigants involved in commercial litigation.¹⁰²

The justice rendered by business courts has the potential to become questionable when these business courts decide claims brought against businesses by individuals, as they are increasingly doing in some states.¹⁰³ Arguably, this scenario can readily happen in a claim from an aggrieved employee, a claim of fraud or misrepresentation, a consumer class action, or an insurance coverage claim. The action itself may be "complex" and would benefit from the managerial resources of a business court. Nonetheless, non-business litigants may suffer prejudice in the hands of an elected judge whose focus is to facilitate robust commercial activity in his own community.

From the perspective of plaintiffs' attorneys, states like New York created business courts to benefit or attract businesses, not to benefit consumers or communities.¹⁰⁴ States do in fact scheme for new ways to attract businesses to locate, incorporate within, and remain within their state.¹⁰⁵ Lately, these schemes often involve legislative tort reform. Business courts could be viewed as one such scheme. As proponents of New York's business courts argued, establishing the commercial division fostered a more favorable environment for attracting and maintaining business in New York, which in turn enhances the economic wellbeing of the state.¹⁰⁶ Such an outcome is clearly attractive to both the State and the business community, but perhaps at the expense of individual litigants' rights.

It is interesting to note the approach to business courts taken by California. After years of study and analysis, California decided against the creation of business courts.¹⁰⁷ California Court of Appeal

102. *Id.*

103. See Gary W. Jackson, *Do Business Courts Really Mean Business?*, TRIAL, June 2006, at 50–51.

104. *See id.*

105. *But see* Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 683 (2002) (arguing against the notion that states compete amongst themselves for businesses' incorporations).

106. See Robert L. Haig, *Can New York's New Commercial Division Resolve Business Disputes as Well as Anyone?*, 13 TOURO L. REV. 191, 196 (1996).

107. Bach & Applebaum, *supra* note 89, at 206.

Justice Richard Aldrich, who chaired a task force looking into such courts, noted “the only place we found support [for business courts] was within the business community.”¹⁰⁸ California also found that business courts are “elitist,” taking the best judges and other resources away from other courts and potentially favoring business interests.¹⁰⁹ As an alternative, California established a complex court system, which is probably the best alternative to a business court.¹¹⁰ As California’s approach demonstrates, the ideal approach to complex litigation should fairly balance the interests of both consumer and corporate litigants, without a bias in favor of either group.

If the stated goal of a business court is to allow businesses to operate successfully in a state in order to attract other businesses, then suits by consumers, employees, and other individually aggrieved plaintiffs challenging the conduct of a business should not be assigned to a business court.¹¹¹ But this potential conflict can occur in New York because the jurisdiction of the commercial division is so broad. Business courts should adjudicate disputes arising between businesses, but claims brought by an individual against a business inevitably create a potential for bias since the court itself is specially designed to favor business activity. Further, business court judges are selected for their backgrounds and expertise in the field. In light of such circumstances, a non-business litigant cannot fairly challenge the actions of a business in a court specially designed to favor businesses.

III. ILLINOIS

A. *An Overview of Illinois’s Class Action Standards: “The Last Barricade of Consumer Protection”*

Like New York, Illinois acknowledges the utility of the class action as a method of litigating complex common questions brought by numerous claimants.¹¹² Illinois courts perceive the class action as

108. Jackson, *supra* note 103, at 50.

109. Bach & Applebaum, *supra* note 89, at 207.

110. *See generally* Paetty, *supra* note 74.

111. *See* Jackson, *supra* note 103, at 54.

112. *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 881 (Ill. 2005) (Freeman, J., dissenting) (citing *Steinberg v. Chicago Med. Sch.*, 371 N.E.2d 634, 641 (Ill. 1977)).

a potent procedural vehicle that adjudicates claims by multiple persons without requiring individual court appearances.¹¹³ Even before Illinois adopted class action procedural statutes in 1977, its courts allowed class actions and relied on common law to determine the correct standards.¹¹⁴

Illinois courts appear to welcome class actions even when the size of the claim(s) or class is small.¹¹⁵ For example, no defined rules exist requiring a set number of putative plaintiffs.¹¹⁶ Instead, courts demand only that the potential number of class members be great enough to render separate litigation impractical.¹¹⁷ Illinois case law also makes the class action available in cases involving small claims because it benefits people whose claims are so small as to discourage the filing of individual actions.¹¹⁸ However, there are limits, and courts deny class treatment where the recovery sought is “too trivial to justify an imposition upon the administration of civil justice.”¹¹⁹

Illinois also permits partial class actions.¹²⁰ A partial class action is useful in mass tort claims when common issues like individual damages do not predominate over individual issues. Thus, Illinois achieves a modicum of judicial economy by certifying a class as to only a few issues, preserving other aspects of the plaintiffs’ autonomy.¹²¹ In essence, this rule works as a partial consolidation mechanism.¹²² It is helpful when individual plaintiffs fear losing

113. *Steinberg*, 371 N.E.2d at 641.

114. *Id.* at 642. Under Illinois common law, a class action was only proper when there existed a community of interest in the subject matter and a community of interest in the remedy among all who made up the purported class. *Moseid v. McDonough*, 243 N.E.2d 394, 396 (Ill. App. Ct. 1968).

115. *See, e.g.*, *Kulins v. Malco, a Microdot Co.*, 459 N.E.2d 1038, 1046–47 (Ill. App. Ct. 1984) (affirming certification of class consisting of only nineteen members).

116. STUART T. ROSSMAN ET AL., *CONSUMER CLASS ACTIONS* 118–19 (National Consumer Law Ctr. ed., Supp. 2007).

117. *See McCabe v. Burgess*, 373 N.E.2d 327, 330 (Ill. App. Ct. 1978).

118. ROSSMAN, *supra* note 116, at 122; *see also Smyth v. Kaspar Am. State Bank*, 136 N.E.2d 796, 805 (Ill. 1956) (allowing class action instituted by owners of certificates of beneficial interest against a bank).

119. *Hayman v. Autohaus on Edens, Inc.*, 734 N.E.2d 1012, 1014 (Ill. App. Ct. 2000) (dismissing class action where class representative’s damages amounted to three days’ interest on \$299).

120. 735 ILL. COMP. STAT. ANN. 5/2-802(b) (West 2003) (allowing the maintenance of class actions with respect to particular issues, or divided into sub-classes where each sub-class is treated as a class).

121. Weber, *supra* note 77, at 984.

122. *Id.*

complete control over the litigation by joining a class and placing their case exclusively in the hands of the lead class counsel.¹²³

Nonetheless, tort reformers have raised concerns about the possibility of abuse of the class action vehicle, particularly in Illinois.¹²⁴ The Illinois Supreme Court recognizes that some of these allegations are leveled at its own courts,¹²⁵ and that these reformers call parts of Illinois “judicial hellholes.”¹²⁶ Though the class action held an important position for Illinois’s judiciary for over 100 years, recent decisions by the Illinois Supreme Court appear to show a new hostility toward the virtues of class-based litigation. For example, the court has made certification requirements more difficult for nationwide class actions.¹²⁷ However, one Illinois appellate court recently reaffirmed its view that class actions are often the last barricade of consumer protection.¹²⁸ In particular, this court noted that consumer class actions provide restitution to the injured and deterrence to the wrongdoer, thus attaining goals of equity and justice.¹²⁹ Nonetheless, the role that class actions will have in Illinois, even as vehicles for consumer protection, will ultimately be decided by the Illinois Supreme Court with some implicit direction from Congress. It is an open question whether Congress’s passing of the Class Action Fairness Act of 2005¹³⁰ and the Illinois Supreme Court’s three decisions (that same year) limiting the availability of Illinois courts to nationwide class actions are a mere coincidence.¹³¹

123. *See id.*

124. *See infra* Part III.C.3 (discussing Illinois’s so-called “judicial hellholes,” which are widely considered friendly to certifying and hearing nationwide consumer class actions).

125. *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 881 (Ill. 2005) (Freeman, J., dissenting).

126. *See supra* note 124.

127. *See, e.g., Avery*, 835 N.E.2d at 863–64 (reversing certification of a nationwide contract class action on numerous grounds, and limiting class actions brought under the Illinois Consumer Fraud Act to fraudulent transactions that take place within Illinois); *Gridley v. State Farm Mut. Auto. Ins. Co.*, 840 N.E.2d 269, 272 (Ill. 2005) (dismissing class action on forum non conveniens grounds since named plaintiff was a citizen of Louisiana, events giving rise to the claim occurred in Louisiana, and claim involved a violation of Louisiana law); *Price v. Philip Morris, Inc.*, 848 N.E.2d 1, 32 (Ill. 2005) (dismissing class action and reversing a \$10 billion verdict against a tobacco maker because the deceptive conduct at issue was authorized by a federal regulatory body).

128. *Walczak v. Onyx Acceptance Corp.*, 850 N.E.2d 357, 371 (Ill. App. Ct. 2006).

129. *Id.*

130. Pub. L. 109–2, 119 Stat. 4 (2005) (codified as amended in scattered sections of 28 U.S.C.).

131. *See supra* note 127 and accompanying text.

Perhaps the Illinois Supreme Court understood the message from Congress: rein in your courts, or we will do it for you.

1. Requirements for Class Certification in Illinois Courts

Illinois's class action statute essentially codified prior Illinois case law.¹³² A class may be certified if the plaintiff establishes the four requirements of numerosity, commonality, adequacy of representation, and appropriateness.¹³³ The numerosity requirement—whether the putative plaintiffs are so numerous that joinder would be impracticable—depends on the particular facts of each case.¹³⁴ Illinois courts have construed the state numerosity requirement to follow federal practice in interpreting the rule because of its similar language.¹³⁵

The commonality requirement¹³⁶ is determined in Illinois by the “successful adjudication” test.¹³⁷ This test inquires whether the successful adjudication of the named plaintiff's claim establishes a right to recovery for the class members.¹³⁸ The mere existence of some ancillary individual issues—such as separate determinations of damages, multiple theories of recovery, or even the inability of some class members to obtain relief because of a particular individual factor—will generally not prevent the establishment of commonality so long as these individual issues do not predominate over the shared questions.¹³⁹

The adequacy of representation requirement¹⁴⁰ ensures that all class members receive proper, efficient, and appropriate protection of their interests in the litigation.¹⁴¹ This requirement is met if the

132. *Gordon v. Boden*, 586 N.E.2d 461, 464 (Ill. App. Ct. 1991). Class certification is governed by 735 ILL. COMP. STAT. ANN. 5/2-801 (West 2003).

133. 735 ILL. COMP. STAT. ANN. 5/2-801 (West 2003).

134. *In re Rosewell*, 603 N.E.2d 681, 686 (Ill. App. Ct. 1992).

135. *Id.*; FED. R. CIV. P. 23(a)(1).

136. 735 ILL. COMP. STAT. ANN. 5/2-801(2) (West 2003) (“There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members.”).

137. *See Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 821 (Ill. 2005).

138. *Id.*

139. *Purcell & Wardrope Chartered v. Hertz Corp.*, 530 N.E.2d 994, 998 (Ill. App. Ct. 1988).

140. 735 ILL. COMP. STAT. ANN. 5/2-801(3) (West 2003) (“The representative parties will fairly and adequately protect the interest of the class.”).

141. *Gordon v. Boden*, 586 N.E.2d 461, 466 (Ill. App. Ct. 1991).

named plaintiff's attorney is qualified, experienced, and able to conduct the case. Further, the named plaintiff's interests cannot be antagonistic to the interests of the class, and the case cannot be collusive.¹⁴²

The final appropriateness requirement¹⁴³ considers whether a class action best promotes uniformity and secures economies of time, effort, and expense, or otherwise accomplishes ends of equity and justice.¹⁴⁴ Class actions are particularly appropriate when separate suits could result in inconsistent standards of conduct for the defendants or when a separate suit could affect the rights of the other class members.¹⁴⁵ A controlling factor in many evaluations of appropriateness is whether a class action is the only practical means for class members to have their claims redressed, especially if their individual claims are small.¹⁴⁶

Taken together, Illinois's class certification requirements do not appear stringent. To survive a motion to dismiss, plaintiffs do not have to conclusively establish all of the statutory requirements. A complaint's factual allegations must only be sufficiently broad to plead the possible existence of a class action claim.¹⁴⁷ When there is doubt, Illinois courts are directed to err in favor of certifying a class action.¹⁴⁸ These lenient standards likely contribute to the perceived abuse of class actions in Illinois.¹⁴⁹

2. Appellate Review of Class Certification

Illinois trial courts have discretion to certify a class action, and the state's appellate courts only reverse upon a showing that the trial court clearly abused its discretion or applied impermissible legal criteria.¹⁵⁰ Similar to the federal system, Illinois allows the interlocutory appeal of a trial court order granting or denying class

142. *See Spirek v. State Farm Mut. Auto. Ins. Co.*, 382 N.E.2d 111, 119 (Ill. App. Ct. 1978).

143. 735 ILL. COMP. STAT. ANN. 5/2-801(4) (West 2003) ("The class action is an appropriate method for the fair and efficient adjudication of the controversy.").

144. *Gordon*, 586 N.E.2d at 467.

145. *Rodriguez v. Credit Sys. Specialists, Inc.*, 308 N.E.2d 342, 347 (Ill. App. Ct. 1974).

146. *Gordon*, 586 N.E.2d at 467.

147. *Weiss v. Waterhouse Secs., Inc.*, 804 N.E.2d 536, 543-44 (Ill. 2004).

148. *Walczak v. Onyx Acceptance Corp.*, 850 N.E.2d 357, 366 (Ill. App. Ct. 2006).

149. *See infra* Part III.C (discussing the proliferation of class action filings in Illinois's "judicial hellholes").

150. *Walczak*, 850 N.E.2d at 366.

certification.¹⁵¹ However, this certification decision is not reviewed *de novo*; rather, it is reviewed for abuse of discretion by the trial court.¹⁵²

*B. A Brief Overview of Illinois's Handling of
Complex Litigation*

“Illinois has been the forum for a great deal of complex litigation, and it is likely to continue to have this role in the future.”¹⁵³ A variety of factors explain why Illinois courts hear a large amount of complex litigation and class actions. First, there is the presence of sophisticated plaintiffs’ firms in the state, especially in Chicago where these firms tend to be headquartered.¹⁵⁴ Second, certain counties, so called “judicial hellholes,” award some of the highest jury verdicts in the country.¹⁵⁵ Finally, Illinois has a liberal long-arm statute.¹⁵⁶ Even if the events that led to suit did not occur within Illinois, the presence of many national corporate and industrial entities in the state minimizes personal jurisdiction problems.¹⁵⁷

Illinois courts take a proactive approach to complex litigation known as “affirmative case management.”¹⁵⁸ Under this approach, judges become active managers in order to keep costs and delays to a minimum and shape the litigation into a form capable of resolution.¹⁵⁹ When confronted with the difficult demands of complex litigation, judges are instructed not to respond by modifying case law doctrine or to press for the adoption of revolutionary statutes or court rules.¹⁶⁰ Instead, Illinois judges are urged to recognize the concept of affirmative case management as a matter of

151. ILL. SUP. CT. R. 306(a)(8) (2007); FED. R. CIV. P. 23(f).

152. *Weiss*, 804 N.E.2d at 544.

153. Weber, *supra* note 77, at 962 (“Illinois was one of the first states to adjudicate a class action in which many members of the plaintiff class did not reside in the state.”). *Miner v. Gillette Co.*, 428 N.E.2d 478 (Ill. 1981), *cert. dismissed*, 459 U.S. 86 (1982).

154. Weber, *supra* note 77, at 963.

155. *See infra* Part III.C.

156. 735 ILL. COMP. STAT. ANN. 5/2-209(c) (West 2003) (“A court may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States.”).

157. Weber, *supra* note 77, at 963.

158. *Id.* at 966.

159. *Id.*

160. *Id.*

attitude and sound practice, “a science more practical than doctrinal.”¹⁶¹

1. Case Consolidation

Illinois provides a consolidation mechanism that allows the court or litigants to take initiative and secure the advantages of simplified, consolidated proceedings before a single Illinois court.¹⁶² Under this mechanism, transfer and consolidation of cases is appropriate when cases involving one or more common questions of fact or law are pending in different judicial circuits within Illinois, where transfer and consolidation would serve the convenience of the parties and witnesses, and where such action would promote justice and efficiency.¹⁶³ The Illinois Supreme Court, which plays a supervisory role in reviewing and approving consolidations, may act on its own motion or that of any party.¹⁶⁴ An order of transfer and consolidation may include pretrial, trial, or post-trial proceedings.¹⁶⁵

Like New York, Illinois allows for limited coordinated discovery when there are similar cases pending in state and federal court.¹⁶⁶ Illinois judges are free to contact judges in the federal or other state systems, so long as they do not delegate any authority over the case to a non-Illinois judge.¹⁶⁷

2. The Circuit Court of Cook County’s Commercial Calendar

Cook County, the home of Chicago, has its own business court to handle complex business disputes.¹⁶⁸ Known officially as the Circuit Court of Cook County Commercial Calendar, the court was designed to enhance the commercial climate of Cook County by providing special expertise in the area of commercial litigation and priority scheduling for the disposition of commercial disputes.¹⁶⁹ The commercial calendar hears cases—whether based upon theories of

161. *Id.*

162. ILL. SUP. CT. R. 384 (2007).

163. *Id.*

164. Weber, *supra* note 77, at 965.

165. *Id.*

166. *See id.* at 975–76.

167. *Id.* at 976.

168. Bach & Applebaum, *supra* note 89, at 160.

169. *Id.*

tort, contract, or otherwise—that involve a commercial relationship between the parties.¹⁷⁰ The amount of monetary damages sought must be in excess of \$30,000.¹⁷¹ The commercial calendar’s approach to cases differs from that of other Cook County courts. The other courts use a master calendar system in which certain judges address various pretrial matters and different judges handle the trials.¹⁷² In contrast, an individual judge presides over every phase of cases in the commercial calendar, from start to finish.¹⁷³

According to former Presiding Judge Judith N. Cohen, the commercial calendar has been tremendously well received by commercial litigators.¹⁷⁴ The court’s eight-judge contingent hears roughly 4,500 new cases a year.¹⁷⁵ By regularly handling commercial disputes, the judges “have learned and developed an expertise in commercial law.”¹⁷⁶ Presumably, this creates more expeditious and fair results.

C. New Developments in Illinois Class Action Law: Judicial Hellholes and the Campaign for Tort Reform

Illinois presents a prime example of an interesting development in the movement for tort reform. Advocates for reform, like the U.S. Chamber of Commerce and the American Tort Reform Association (“ATRA”), want to limit class action lawsuits, rein in exorbitant punitive damage awards, and educate voters about electing state legislators, attorneys general, and judges “who endorse a free-enterprise system that lets companies operate without fear of large punitive awards or excessive government restraint.”¹⁷⁷ With Democrats in control of Congress, chances are slim for passing more national tort reforms like CAFA. Thus, corporations and businesses

170. Circuit Court of Cook County Commercial Calendar, <http://www.cookcountycourt.org/divisions/law/CommercialCalendars.asp> (last visited Oct. 24, 2008).

171. General Order of the Circuit Court of Cook County 2.1(a), http://www.cookcountycourt.org/rules/orders/general_orders.html (last visited Oct. 24, 2008).

172. Bach & Applebaum, *supra* note 89, at 160.

173. *Id.*

174. *Id.* at 161.

175. *Id.* at 164. Cook County also has a Chancery division that often hears class actions and complex business cases. *Id.*

176. *Id.* at 165.

177. Lash, *supra* note 19, at 1.

are compelled to focus their lobbying on state capitals and the courts of public opinion.¹⁷⁸

These attempts to court public opinion and educate voters about the goals of tort reform are tangible in Illinois. For example, ATRA declared war on the use of class actions in Illinois.¹⁷⁹ ATRA deemed Illinois's Cook, Madison, and St. Clair counties as some of the worst jurisdictions in the country for lawsuit abuse.¹⁸⁰ To emphasize its point, ATRA designated these counties "judicial hellholes."¹⁸¹

What is a "judicial hellhole"? According to ATRA, it is a place "where judges systematically apply laws and court procedures in an unfair and unbalanced manner, generally against defendants in civil lawsuits."¹⁸² It is a court system in which weaknesses in evidence are overcome by pretrial and procedural rulings;¹⁸³ where judges proceed even though the plaintiffs, defendants, witnesses, and events in question have no connection to the jurisdiction;¹⁸⁴ where product identification and causation are irrelevant because the jury will undoubtedly return a verdict in favor of the plaintiffs;¹⁸⁵ where plaintiffs need not be injured to receive damages;¹⁸⁶ and where class actions are certified without meeting the rigors of commonality.¹⁸⁷ In other words, a "judicial hellhole" is a jurisdiction perceived as unfair

178. *Id.*

179. See AM. TORT REFORM ASS'N, JUDICIAL HELLHOLES 2006 (2006), available at <http://www.atra.org/reports/hellholes/2006/hellholes2006.pdf> [hereinafter JUDICIAL HELLHOLES 2006].

180. American Tort Reform Association, <http://www.atra.org/reports/hellholes/> (last visited Oct. 24, 2008).

181. At the time this Article was written, ATRA's most recent release of its Judicial Hellholes series was from 2006. Recently, ATRA released its 2007 edition, which lowers Madison and St. Clair Counties from "judicial hellhole" to "watch list" status due to a substantial drop in filings of class actions. AM. TORT REFORM ASS'N, JUDICIAL HELLHOLES iv (2007), <http://www.atra.org/reports/hellholes/report.pdf> [hereinafter JUDICIAL HELLHOLES 2007].

182. JUDICIAL HELLHOLES 2007, *supra* note 180, at ii.

183. JUDICIAL HELLHOLES 2006, *supra* note 179, at 1.

184. *Id.*

185. See generally, *Price v. Philip Morris, Inc.*, 848 N.E.2d 1, 52 (Ill. 2005), *cert. denied*, 127 S. Ct. 685 (2006). The Illinois Supreme Court questioned the trial court's treatment of the causation issue after vacating a \$10.1 billion judgment against big tobacco, the largest judgment in state history. *Id.*

186. JUDICIAL HELLHOLES 2006, *supra* note 179, at 1.

187. See, e.g., *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 863-64 (Ill. 2005), *cert. denied*, 547 U.S. 1003 (2006) (overturning \$1.2 billion dollar verdict and decertifying nationwide class that included class members whose insurance claim proceedings took place outside of Illinois).

toward business and corporate defendants. When these defendants fall into a “judicial hellhole,” they lose not because they are legally culpable but because they have deep pockets and because the threat of being subject to the jurisdiction of the “judicial hellhole” will force them to settle.

On the other hand, some plaintiffs’ lawyers consider these courts to be “magic jurisdictions” because of their tendency to award large jury verdicts.¹⁸⁸ ATRA believes that “[p]ersonal injury lawyers are drawn to these jurisdictions like magnets and look for any excuse to file lawsuits there.”¹⁸⁹ As one former Madison County judge said, “[w]hen people come from hither and thither to file these cases, there’s gotta be an inducement, doesn’t there? They’re not coming to see beautiful Madison County.”¹⁹⁰ Indeed, Illinois courts do see a fair share of class actions without merit¹⁹¹ and lawsuits that the local media portray as wacky.¹⁹²

Illinois has three “magic jurisdictions” or “judicial hellholes,” depending on one’s perspective.¹⁹³ The rulings of these courts are important because they have national implications beyond the county in which the judge sits. When an Illinois judge sitting in St. Clair County decides a suit involving parties from across the country, the Judge may be regulating an entire national industry.¹⁹⁴ This scenario

188. JUDICIAL HELLHOLES 2006, *supra* note 179, at 1.

189. *Id.*

190. Hon. J. John DeLaurenti, JUDICIAL HELLHOLES 2006, *supra* note 179.

191. *See, e.g.*, *Fisch v. Loews Cineplex Theaters, Inc.*, 850 N.E.2d 815 (Ill. Ct. App. 2005) (class action against movie theater alleging movie previews last too long).

192. *See* Steve Schmadeke, *Woman Drinks Acid, Sues*, CHI. TRIB., Sept. 17, 2007, at 3; Steven Schmadeke, *Woman Says Golf Ball Hit Her, Sues Course, Golfer*, CHI. TRIB., July 27, 2007, at 2; Steve Schmadeke, *Woman Who Hurt Her Ankle Sues Bar*, CHI. TRIB., July 23, 2007, at 9; Carolyn Starks, *2 Counties Sued Over Failure to Locate Dying Motorcyclist*, CHI. TRIB., July 10, 2007, at 5.

193. These are Cook, Madison and St. Clair Counties. *See supra* text accompanying notes 179–81.

194. *See, e.g.*, Ann Knef, *Lakin Files Class Action Against State Farm in St. Clair County*, RECORD, June 7, 2006, available at <http://www.madisonrecord.com/news/180199-lakin-files-class-action-against-state-farm-in-st.-clair-county>. This case involves a class action against State Farm Insurance for wrongfully subrogating medical payment claims instead of allowing individuals to recover from third parties in auto accident claims. The lead plaintiff is an Illinois resident who died in an auto accident in Missouri. Missouri does not allow the medical payments to be subrogated, and State Farm allegedly violated this law when it made a subrogation claim for the plaintiff’s medical payments. The putative class includes all residents of Illinois.

is a serious concern when class actions are filed in Illinois for tactical reasons on behalf of people who do not even live in Illinois.¹⁹⁵

Nonetheless, in a series of decisions from the pre-CAFA era, the U.S. Supreme Court affirmed that state courts, like Illinois's "judicial hellholes," are competent to hear nationwide class actions. Beginning in the late 1960s, the Court first made it harder for federal courts to hear class actions based on diversity jurisdiction, unless a question of federal law was involved.¹⁹⁶ Then, the Court decided in 1985 that state courts can handle class actions involving the nationwide marketing of goods and services and that state courts have jurisdiction over non-resident class members in class actions seeking money damages when an opt-out form of notice is used.¹⁹⁷ More recently, the Court held in 1996 that a state court has the power to approve the settlement of a nationwide class action releasing claims that were never filed and that were solely within the jurisdiction of a federal court.¹⁹⁸ As such, in the pre-CAFA era, the Court approved the filings of class actions with nationwide impact in the small counties of Illinois, though they were probably filed in Illinois for tactical reasons. Congress, on the other hand, does not appear to approve of these filings and hopes that CAFA will end the adjudication of nationwide class actions in small Illinois counties.¹⁹⁹

1. Connecting Class Actions to Illinois's Economic Woes

Regardless of whether one considers the proliferation of class actions in Illinois to be a form of civil justice or judicial abuse, ATRA hopes to convince the local citizens of the need to rein in plaintiffs' lawyers. To achieve this effort, ATRA initiated a

195. See e.g., Ann Knef, *Out-of-State Plaintiffs Take on Bextra in St. Clair County*, RECORD, Jan. 24, 2006, available at <http://www.madisonrecord.com/news/173752-out-of-state-plaintiffs-take-on-bextra-in-st-clair-county>. The Bextra case is a class action against major pharmaceutical manufacturers filed on behalf of Kentucky, Tennessee and Alabama residents. The class contains no Illinois residents. However, venue is proper in St. Clair County, Illinois, because Monsanto, one of the defendants, operates a plant there. *Id.*

196. In *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), the Court held that each class member must individually meet the jurisdictional amount, and in *Snyder v. Harris*, 394 U.S. 332 (1969), the Court disallowed the aggregation of claims for purposes of meeting the requisite dollar amount for federal diversity jurisdiction. Taken together, these decisions effectively relegated class actions involving state law to the state courts.

197. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 820–21 (1985).

198. See *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 369 (1996).

199. See *infra* Part III.C.2.

campaign of sensationalist propaganda aimed directly at the hearts and minds of voters. With this campaign, ATRA hopes to instill in Illinois voters' minds the idea that class actions are to blame for the state's economic woes. For example, there is a billboard outside the minor league ballpark of the Schaumburg Flyers that depicts an injured ballplayer and the words "Lawsuits Outta Leftfield Help Put Illinois' Economy on the Disabled List."²⁰⁰

An interesting aspect of this new campaign for tort reform in Illinois is that ATRA is reaching out to voters and trying to sway public opinion, rather than lobbying the members of the state legislature. To press their claim on the local public, ATRA uses "rolling billboards," trucks with slogans and signs slamming personal-injury lawyers.²⁰¹ One such billboard depicts a vampire's teeth dripping dollar signs along with the words "lawsuit abuse."²⁰² In another, a license plate labels Cook County as the "Land of Lawsuits."²⁰³ Above all, ATRA hopes these billboards will remind Illinois citizens that "as workers, consumers and taxpayers, they continue to foot the bill for the economy-sapping shenanigans of shameless personal injury lawyers."²⁰⁴

According to the presiding judge of the Cook County Law Division, a so-called "judicial hellhole," the billboard campaign is "juvenile."²⁰⁵ "Sensationalism is all they're looking for . . . I'd like to see something rational," says Judge William D. Maddux.²⁰⁶ Most troubling to Judge Maddux is the media's and tort reformers' abuse of the significance of large runaway verdicts.²⁰⁷ In fact, most runaway verdicts get cut down: "down the road when rationality

200. Press Release, Am. Tort Reform Ass'n, ATRA's New Ballpark Billboard Condemns "Lawsuits Outta Leftfield" (May 25, 2007), <http://www.atra.org/show/8124>.

201. Pat Milhizer, *Business Group Revs Up Campaign Criticizing Courts Here*, CHI. DAILY L. BULL., Oct. 24, 2006, at 1.

202. *Id.*

203. *Id.*

204. Press Release, Am. Tort Reform Ass'n, *supra* note 200. For the opinion of a Chicago based litigator who represents pharmaceutical companies and other businesses, see Michael J. Wagner, Impact of Product Liability Issues on Innovation, Address Before the Canada-United States Law Institute (Apr. 7-8, 2006), in CAN.-U.S. L.J., 2006, at 263, 279 (discussing how corporate liability has a negative impact on product innovation). The local companies Michael Wagner represents are reluctant to develop new products or services because of potential liability lawsuits. *Id.*

205. Milhizer, *supra* note 201, at 1.

206. *Id.*

207. *Id.*

prevails . . . something is done to those verdicts to put them back in line.”²⁰⁸ Unfortunately, the media does not accurately convey this.

After Cook County was designated a “judicial hellhole,” Judge Maddux asked the court clerk for some empirical data to determine what was happening in his court system.²⁰⁹ The data showed that in 2004, 51 percent of jury verdicts favored plaintiffs, and 49 percent were for defendants.²¹⁰ In 2005, two out of three motions to transfer a case out of Cook County were granted.²¹¹ These figures seem fair and reasonable, though in 2000 plaintiffs did win 66 percent of verdicts, compared to 34 percent for defendants.²¹² Nonetheless, Judge Maddux is satisfied with the fairness reflected in these figures and thinks groups like ATRA “are just not interested in the truth.”²¹³

2. CAFA and Judicial Hellholes

If the truth is out there, it will not be found in ATRA’s annual reports on “judicial hellholes.”²¹⁴ However, ATRA’s efforts to showcase the negative implications of hearing national class actions in state courts led to the tort reform movement’s greatest recent success, the passing of CAFA. CAFA’s purpose is to shift a portion of class action litigation from state to federal courts,²¹⁵ where there is more opportunity for corporate defendants to resist class

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. ATRA’s Judicial Hellholes Reports are available at <http://www.atra.org/reports/hellholes/>. Although extremely entertaining to read, these annual reports are pure propaganda filled with half-truths and manipulated misconceptions about our justice system. For example, the reports often portray state courts hearing claims by out-of-state plaintiffs to be an absurdity, without explaining that principles of personal jurisdiction require suits to be heard in states where the court has personal jurisdiction over the defendants, not the plaintiffs. Also, the reports often discuss the filings of newsworthy “frivolous” lawsuits, with citations to local newspaper articles as their sources. A minimal amount of further research, such as reading the newspaper articles (not all of them actually exist), often shows that these cases were eventually dismissed, withdrawn, removed to federal court, or reversed. The reports rarely discuss the subsequent history of these newsworthy cases.

215. See generally Barbara L. Jones, *Study Reports Act Serves Its Purpose: Moving Class Actions*, KAN. CITY DAILY REC., Oct. 25, 2006 (summarizing the conclusion of a study conducted by the Federal Judicial Center).

certification.²¹⁶ The certification question is paramount to defeating a class action. As one longtime class action defense attorney put it: “if you win on certification, you win.”²¹⁷ Because it is easier for plaintiffs to certify a class action in state court, defendants often spend a lot of money to remove the case to federal court if they think they can win on certification.²¹⁸ The majority of class actions filed in federal courts are either dismissed or withdrawn.²¹⁹ Furthermore, only 20 to 40 percent of cases filed as class actions are actually certified.²²⁰ Once certified, class actions are settled before trial 90 percent of the time.²²¹

Empirical evidence shows CAFA has successfully brought more state-law diversity class actions into the federal courts.²²² Federal diversity class action filings have increased by more than 300 per year, compared to pre-CAFA levels.²²³ The majority of this increase are state-law contract and fraud claims, types that were heard in state courts in the pre-CAFA era.²²⁴ Still, it will take a few years until we have enough state and federal appellate decisions to see how CAFA reforms the state class action landscape. It is also unclear whether CAFA deters some cases from being filed at all or are instead filed as single-state cases.

CAFA proponents believed that resource-deficient state judges were handling too many class actions and that it made better sense to hear national cases in the federal system.²²⁵ Although these are valid arguments, plaintiffs’ attorneys speculate that there are hidden agendas behind CAFA. One possible motive is to eliminate class

216. See Bob Yates, *Class Action Fairness Act, More Than a Year Later*, CHI. LAWYER, Dec. 2006, at 54.

217. *Id.* at 69 (quoting Anthony Rollo of McGlinchey Stafford, a longtime class action defense attorney).

218. *Id.*

219. BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, *MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES 6* (2005), available at [http://www.fjc.gov/public/pdf.nsf/lookup/ClassGde.pdf/\\$File/ClassGde.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/ClassGde.pdf/$File/ClassGde.pdf).

220. *Id.*

221. *Id.*

222. THOMAS E. WILLGING & EMERY G. LEE III, *THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS 21* (2007), http://www.uscourts.gov/rules/CAFA_Third_Interim.pdf.

223. *Id.*

224. *Id.*

225. *Id.*

actions entirely.²²⁶ If that cannot be accomplished, plaintiffs' attorneys predict that Congress will at least "force them all into one forum which can be managed [more easily] than cases brought in different state courts."²²⁷ Some believe the goal of CAFA is "to blow up the caseload in the federal court system, so that cases [will] move more slowly, if at all."²²⁸ Similarly, civil rights groups are concerned that federal courts will be overwhelmed with class actions that were once handled by state courts and will become too busy to hear federal antidiscrimination lawsuits.²²⁹

Plaintiffs' attorneys, consumer advocacy groups, and skeptics also believe that a movement to grant the business community broad immunity from consumer liability lies behind CAFA and the campaign against "judicial hellholes." Joanne Doroshow, a prominent consumer advocate, has called ATRA's campaign one example of the "tremendous increase in efforts to eviscerate the civil justice system and make sure that corporations do not get sued for anything they do wrong."²³⁰

Nonetheless, one positive result of ATRA's campaign is that it offers the opportunity to learn about important issues that all informed citizens should consider. Citizens should understand the proper role of state courts in their communities. These courts exist to protect individual rights, limit government power, and redress economic and physical injuries. Moreover, citizens should understand that the filing of a class action is much more than an ATM for plaintiffs' lawyers. Rather, class actions can be a vehicle to protect consumer rights, regulate unscrupulous conduct by businesses, and compensate victims for the injuries of a mass tort.

Even CAFA begins with the finding that "[c]lass action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties."²³¹ Class actions eliminate or reduce the threat of repetitive litigation, prevent the inconsistent resolution of similar cases, and provide an effective means of redress for individuals

226. *Id.*

227. *Id.* at 69 (quoting Clinton Krislov, a plaintiff's class action attorney).

228. *Id.* at 55 (quoting James Sturdevant, a plaintiff's class action attorney in San Francisco).

229. Joanne Doroshow, *Speaking Truth to Power*, TRIAL, July 2004, at 20, 22.

230. *Id.* at 20.

231. 28 U.S.C.A. § 1711(a)(1) (2007).

whose claims are too small to make it economically viable to pursue them as independent actions.²³² At their best, class actions help control conduct that threatens to harm society or the marketplace.²³³ For example, securities and consumer class actions enforce regulatory standards designed to control or deter fraudulent marketplace conduct that might otherwise escape regulation.²³⁴ At their worst, however, class actions are a vehicle for plaintiffs' attorneys to obtain hefty paychecks out of corporations that would rather settle than go through the expense and risk of a trial. Such class actions inspire sensationalist tort reform campaigns with the danger to mislead and misinform the public.

Although there have been problems with lawsuit abuse in Illinois, the disproportionate filing of nationwide class actions in Illinois's "judicial hellholes" is not a complete explanation for the loss of manufacturing jobs in Illinois.²³⁵ Many other factors should be considered, such as the importation of cheaper goods from abroad, rising energy costs, the devaluation of the dollar, and the international credit crunch crisis. In light of the many domestic problems the United States now faces, blaming plaintiffs' lawyers for the economic slump of Illinois is misguided. The Achilles heel of tort reformers like ATRA is the self-interest behind their message. Reform groups try to conceal the identities of their financial sponsors, usually tobacco and insurance companies, because they know how much the public distrusts those companies.²³⁶ As their self-interest is uncovered, proponents of tort reform lose the credibility they need to persuade voters and legislators to enact their proposals.

232. AM. LAW INST., PRELIMINARY STUDY OF COMPLEX LITIGATION 35 (1987).

233. ROTHSTEIN & WILLGING, *supra* note 219, at 1.

234. *Id.*

235. Former Illinois State Treasurer Judy Baer Topinka argued that outsized damage awards send a message that Illinois is hostile to business. Topinka told reporters "[w]ith three of the six worst counties for litigation abuse right here in Illinois, it should come as no surprise that companies like Honda are choosing to expand their operations and build new plants in other states." JUDICIAL HELLHOLES 2006, *supra* note 179, at 18.

236. Doroshow, *supra* note 229, at 22.

IV. TEXAS

A. *An Overview of Texas's Class Action Standards:
A "Rigorous Approach"*

Compared to other states like New York and Illinois, Texas courts take an admittedly more "rigorous approach" to the issue of class certification.²³⁷ This rigor is apparent in both attitude and procedural process. Though Texas may consider the class action an "efficient device," its courts do not recognize a right to litigate a claim as a class action.²³⁸

A Texas court *may* certify a class action only if the plaintiffs satisfy all the statutory requirements,²³⁹ but Texas judges will not certify a class action simply on the basis of a well-pleaded petition.²⁴⁰ Instead, a hearing on the issue of certification is always held.²⁴¹ In this hearing, the proponents of a class action have the burden of proving to the court all of the statutory elements of certification.²⁴² Furthermore, the court must perform a "rigorous analysis" when considering whether to certify the class.²⁴³ Thus, a Texas court is required to look beyond the pleadings and understand the parties' claims, defenses, relevant facts, and even the applicable substantive law in order to make a meaningful determination of certification issues.²⁴⁴ This analysis means that in deciding whether to certify a class, a Texas court will consider more than just the petition and answer, instead evaluating the ultimate merit of the claims and defenses.²⁴⁵ Moreover, a court is not bound by the class definitions submitted by the parties. Overall, Texas's trial courts have broad discretion to independently define the class based on the available evidence, and the state's appellate courts can redefine the class to correct any infirmities.²⁴⁶

237. *Stobaugh v. Norwegian Cruise Line Ltd.*, 105 S.W.3d 302, 311 (Tex. App. 2003).

238. *Ford Motor Co. v. Sheldon*, 22 S.W.3d 444, 452–53 (Tex. 2000).

239. *Id.*

240. ROSSMAN, *supra* note 116, at 279.

241. TEX R. CIV. P. 42(c)(1).

242. *Bailey v. Kemper Cas. Ins. Co.*, 83 S.W.3d 840, 848 (Tex. App. 2002).

243. *Schein v. Stromboe*, 102 S.W.3d 675, 689 (Tex. 2002).

244. *See Union Pac. Res. Group, Inc. v. Hankins*, 111 S.W.3d 69, 72 (Tex. 2003).

245. ROSSMAN, *supra* note 116, at 280.

246. *Bailey*, 83 S.W.3d at 848.

Texas imposes even higher certification burdens on proposed nationwide class actions filed in the state. When the laws of other states are implicated, the Texas Supreme Court doubts a trial court's ability to accurately determine the merits of certification.²⁴⁷ This view undermines the viability of nationwide classes filed in the state because a determination of the applicable substantive law is of paramount importance in such actions.²⁴⁸ Class representatives are required to present Texas trial courts with an extensive analysis evaluating differences in the various states' laws.²⁴⁹ Texas courts are then independently responsible to determine whether Texas law conflicts with the laws of another state.²⁵⁰ They must analyze and decide all conflict-of-law issues before granting certification.²⁵¹ Unless the courts conduct a detailed state-by-state analysis of any conflict-of-laws, their certification order will be reversed.²⁵²

Also indicative of their general attitude toward class actions, the Texas Supreme Court expressly rejects a "certify now and worry later approach," instead requiring lower courts to perform a rigorous analysis before allowing a case to proceed as a class action.²⁵³ As such, Texas trial courts must resolve all dispositive issues that impact the viability of the case before even considering certification.²⁵⁴ In addition, courts must include a "trial plan" with their certification order.²⁵⁵ This plan allows reviewing courts another opportunity to assure that all statutory requirements were satisfied and that the trial court fulfilled its obligation to rigorously analyze and understand all of the claims, defenses, relevant facts, and applicable substantive law.²⁵⁶

With all of this skepticism and rigor, Texas does not appear to be as friendly to the class action device as New York and Illinois. In fact, the Texas Supreme Court appears to be far less sympathetic to

247. *See, e.g.*, *Compaq Computer Co. v. Lapray*, 135 S.W.3d 657 (Tex. 2004).

248. *Id.* at 672.

249. *Id.*

250. *Id.* at 673.

251. *Id.* at 680.

252. *See id.* at 672–73.

253. *Tex. Parks & Wildlife Dep't v. Dearing*, 240 S.W.3d 330, 346 (Tex. App. 2007).

254. *Id.*

255. *Id.* The trial plan requirement is codified in TEX. R. CIV. P. 42(c)(1)(D).

256. *Tex. Parks & Wildlife*, 240 S.W.3d at 346.

the general argument that denial of class treatment effectively denies legal redress to numerous plaintiffs because their claims are simply too small to justify the cost of individual litigation. The court's response has simply been that "there is no right to litigate a claim as a class action."²⁵⁷ The Texas Supreme Court's notions of fairness and justice are only predicated on strict compliance with the standards of certification.²⁵⁸ Noticeably absent from Texas Supreme Court opinions is any language demonstrating that the class action device deters wrongful corporate behavior.

1. Requirements for Class Certification in Texas Courts

Texas's class action standards are almost identical to the federal standards,²⁵⁹ and indeed, federal decisions determining class certification serve as "persuasive authority" within Texas courts.²⁶⁰ In order to certify a class in Texas, the plaintiff must establish the requirements of numerosity, commonality, typicality, and adequacy of representation.²⁶¹

The requirement of numerosity is not difficult to meet,²⁶² and Texas law does not require precise proof of the number of putative class members.²⁶³ The standard for commonality²⁶⁴ is also not high in Texas.²⁶⁵ Common questions are questions that when answered as to the named plaintiff, are answered for all the class members.²⁶⁶ The presence of a single common question of either law or fact can warrant class certification.²⁶⁷

257. *Sw. Ref. Co. v. Bernal*, 22 S.W.3d 425, 439 (Tex. 2000) (reversing certification of the class in an action arising from an oil refinery fire that injured nearby residents and exposed them to toxic gases, in an opinion by resigned U.S. Attorney General Alberto Gonzales, formerly of the Texas Supreme Court (quoting *Sun Coast Res., Inc. v. Cooper*, 967 S.W.2d 525, 529 (Tex. App. 1998))).

258. *Id.*

259. The requirements for class certification are found in TEX. R. CIV. P. 42.

260. *Intratex Gas Co. v. Beeson*, 22 S.W.3d 398, 403 n.4 (Tex. 2000).

261. TEX. R. CIV. P. 42(a).

262. *Id.* at 42(a)(1) ("[T]he class is so numerous that joinder of all members is impracticable.").

263. *See Apartment Inv. & Mgmt. Co. v. Suggs & Assoc.*, 129 S.W.3d 250, 254 (Tex. App. 2004).

264. TEX. R. CIV. P. 42(a)(2) ("[T]here are questions of law, or fact common to the class.").

265. *Union Pac. Res. Group, Inc. v. Hankins*, 111 S.W.3d 69, 74 (Tex. 2003).

266. *Health & Tennis Corp. of Am. v. Jackson*, 928 S.W.2d 583, 590 (Tex. App. 1996).

267. *Id.*

The requirement of typicality in Texas²⁶⁸ is met if the named plaintiff's claims have the same essential characteristics as those of the class.²⁶⁹ Moreover, these claims "need not be identical, only substantially similar."²⁷⁰ It is enough if the claims arise from the same pattern of conduct and are based on the same legal theory.²⁷¹

The requirement of adequacy of representation²⁷² is established if there are no conflicts of interest between the named plaintiff and the class members and if the class counsel is sufficiently qualified and experienced to prosecute the action vigorously.²⁷³ If there is any doubt regarding the adequacy of a class representative, the Texas trial court can easily rectify it by requiring additional class representatives.²⁷⁴

In addition to these familiar requirements, plaintiffs must also establish one of the following: (1) that making the plaintiffs bring individual actions would create a risk of inconsistent judgments that would interfere with the interests of other putative plaintiffs or establish incompatible standards of conduct for the defendants; (2) that declaratory or injunctive relief is appropriate because the defendants have acted or refused to act on grounds that generally apply to the class; or (3) that common questions of law or fact predominate over questions affecting individual plaintiffs and a class action is the superior method for the fair and efficient resolution of the controversy.²⁷⁵ If the plaintiff can satisfy at least one of these standards, the court will apply their "rigorous approach" and determine, in their discretion, whether to grant certification of the class.²⁷⁶

268. TEX. R. CIV. P. 42(a)(3) ("[T]he claims or defenses of the representative parties are typical of the claims or defenses of the class.").

269. *Microsoft Corp. v. Manning*, 914 S.W.2d 602, 613 (Tex. App. 1995).

270. *Reserve Life Ins. Co. v. Kirkland*, 917 S.W.2d 836, 842 (Tex. App. 1996).

271. *Manning*, 914 S.W.2d at 613.

272. TEX. R. CIV. P. 42(a)(4) ("[T]he representative parties will fairly and adequately protect the interests of the class.").

273. *Health & Tennis Corp. of Am. v. Jackson*, 928 S.W.2d 583, 589 (Tex. App. 1996).

274. TEX. R. CIV. P. 42(c)(1)(c) ("The court may order the naming of additional parties in order to insure the adequacy of representation.").

275. *Id.* 42(b).

276. *See Stobaugh v. Norwegian Cruise Line Ltd.*, 105 S.W.3d 302, 311–12 (Tex. App. 2003).

2. Appellate Review of Class Certification

A Texas trial court decision that certifies or refuses to certify a class is immediately subject to interlocutory appeal.²⁷⁷ While pending, this appeal stays all other class action proceedings in the trial court, including notice to the class or trial of the claims.²⁷⁸ Also, this interlocutory appeal is strictly limited to the trial court's decision regarding certification, and Texas appellate courts do not have jurisdiction to review anything else, such as orders granting partial summary judgment or the trial plan.²⁷⁹

Interestingly, class certification orders are subject to two levels of appellate review in Texas. In 2003, the Texas legislature decided to grant the state supreme court jurisdiction to conduct interlocutory review of class certification orders.²⁸⁰ Before 2003, a trial court's order certifying a class could not be reviewed by the supreme court until after a final judgment, unless there was a conflict of decisions among the appellate courts or a dissenting opinion filed in the court of appeals.²⁸¹ This limitation made the Texas Courts of Appeals develop class action jurisprudence with little guidance from the state supreme court. Now, however, a disappointed litigant has an unqualified right to an interlocutory appeal of a decision on class certification all the way to the state supreme court.²⁸² This change benefits defendants because it gives them an additional tactic to defeat class certification. An order granting class certification can have staggering economic consequences and often impels a defendant to settle, while a denial of certification usually means that the defendant will only face individual claims.

When reviewing a trial court's order granting certification, the Texas Courts of Appeals and the Texas Supreme Court employ a heightened standard beyond abuse of discretion.²⁸³ The appellate

277. TEX. CIV. PRAC. & REM. CODE ANN § 51.014(3) (Vernon 1997).

278. *Id.* § 51.014(b); ROSSMAN, *supra* note 116, at 286.

279. *See* Bally Total Fitness Corp. v. Jackson, 53 S.W.3d 352, 358–59 (Tex. 2001); Union Pac. Res. Group, Inc. v. Hankins, 51 S.W.3d 738, 740 (Tex. App. 2001).

280. TEX. GOV'T CODE ANN. § 22.225(d) (Vernon 2004).

281. *Hankins*, 51 S.W.3d at 72.

282. TEX. GOV'T CODE ANN. § 22.225(d) (Vernon 2004).

283. *Compaq Computer Co. v. Lapray*, 135 S.W.3d 657, 671 (Tex. 2004) (“Although we review the trial court's order for abuse of discretion, we do not indulge every presumption in its favor, as compliance with class action requirements must be demonstrated rather than presumed.”).

courts expressly refuse to indulge every presumption in favor of the trial court's ruling.²⁸⁴

A trial court has discretion to rule on class certification issues, and some of its determinations—like those based on its assessment of the credibility of witnesses, for example—must be given the benefit of the doubt. But the trial court's exercise of discretion cannot be supported by every presumption that can be made in its favor.²⁸⁵

Instead, compliance with class action requirements must be demonstrated rather than presumed.²⁸⁶ Accordingly, the standards for class certification in Texas are as “rigorous” as the state's own courts proclaim them to be.²⁸⁷ The double layer of appellate review and the heightened standard of review make class certification a higher hurdle for Texas plaintiffs to overcome.

B. An Overview of the Texas Approach to Complex Litigation

Unlike New York, Illinois, and Florida, Texas does not have a business court for the adjudication of major and complex commercial disputes. In addition, until fairly recently, Texas lacked a mechanism to coordinate or consolidate cases pending in different districts throughout the state. For years, Texas courts disfavored multiple suits in order to encourage judicial economy and avoid inconsistent judgments.²⁸⁸ Nonetheless, courts realized that when facing mass tort actions filed throughout the state—such as the breast implant, diet drug, and Firestone tire litigations—the courts detrimentally lacked a mechanism to bring coordinated discovery or other proceedings before a single judge.²⁸⁹ Without such a mechanism, individual courts risked creating duplicative or inconsistent rulings.

284. *Id.*

285. *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 691 (Tex. 2002).

286. *Compaq Computer*, 135 S.W.3d at 671.

287. *Stobaugh v. Norwegian Cruise Line Ltd.*, 105 S.W.3d 302, 311 (Tex. App. 2003).

288. *See* Mark Herrmann et al., *Get Ready for the New Texas MDL Statute*, TEX. LAW., Sept. 1, 2003.

289. *See id.*

In response, the Texas legislature established a Multidistrict Litigation Panel (“MDL”) in 2003.²⁹⁰ Its coordination process closely tracks the federal multidistrict litigation scheme that has existed since 1968.²⁹¹ The Texas MDL panel can transfer related cases pending in trial courts in different counties across the state to a single pretrial court for coordinated pretrial supervision.²⁹² Cases are considered related if they involve one or more common questions of fact.²⁹³ The MDL panel may order transfer of such cases if it: (1) will serve the convenience of the parties and witnesses; and (2) promote the just and efficient conduct of the litigation.²⁹⁴ Once the pretrial court concludes that the cases are ready for trial, it remands them back to the original courts for trial in the parties’ venue of choice.²⁹⁵

Texas courts now recognize the virtues of transferring related cases to a single pretrial judge. One recent situation ripe for coordination involved 453 plaintiffs that had filed 71 lawsuits in 55 different districts against 158 defendants.²⁹⁶ In the pre-MDL days, trial judges were too busy to give complex litigation such as this the deliberate, thoughtful, and consistent pretrial attention that they deserved.²⁹⁷ Also, Texas trial judges traditionally set complex cases for trial on dates before they were truly ready, in hopes that the case would settle under the pressure of an impending trial.²⁹⁸ Now, after implementing the Texas MDL, the pretrial judge will not return complex cases to the trial judges until they are fully ready for trial.²⁹⁹ Thus, the pretrial judge can invest the necessary time and study required by a complex case.

In order to have cases consolidated by the MDL panel, the moving party must “simply” convince the panel “that transfer to a

290. See generally TEX. R. JUD. ADMIN. 13 (discussing multidistrict litigation and the MDL).

291. See 28 U.S.C. § 1407 (2000).

292. See *In re Hurricane Rita Evacuation Bus Fire*, 216 S.W.3d 70, 71 (Tex. J.P.M.L. 2006).

293. *Id.* Cases that share common questions of law do not justify transfer. The task of assuring that uniform legal principles are applied to related cases belongs to the appellate courts. See *In re Ad Valorem Tax Litig.*, 216 S.W.3d 83, 85–86 (Tex. J.P.M.L. 2006).

294. See TEX. R. JUD. ADMIN. 13.3.

295. See *id.* 13.7.

296. *In re Silica Prods. Liab. Litig.*, 166 S.W.3d 3, 5 (Tex. J.P.M.L. 2004).

297. See *id.* at 6.

298. See *id.*

299. See *id.*

pretrial judge would promote . . . convenience and efficiency.”³⁰⁰ According to Justice Mack Kidd, the Texas legislature and Texas Supreme Court originally intended to establish an “extremely onerous burden of proof” to warrant MDL consolidation, since MDL consolidation was viewed as a drastic change from the conventional Texas civil justice system, in which a diverse group of judges across the state brought their collective knowledge and experience to bear on legal issues rather than assigning decisions to a single judge.³⁰¹ Justice Kidd also believes that MDL consolidation should be “an extraordinary remedy,” used only when Texas trial courts fail to handle the caseload efficiently.³⁰²

In 2003, the MDL panel consolidated all asbestos cases to a single, statewide asbestos judge. In his dissent to this order, Justice Kidd reasoned that this was simply wrong.³⁰³ Texas courts had already efficiently disposed of almost 30,000 asbestos cases through the use of a series of agreed-upon standing pretrial orders and the cooperation of counsel on both sides.³⁰⁴ By sharp contrast, Justice Kidd believed that the federal experience with asbestos consolidation had not been as smooth or successful.³⁰⁵ Justice Kidd concluded that after all pretrial matters in federal asbestos cases were assigned to a single federal district court, the docket suffered from “pretrial paralysis” as dying victims had their cases “pretried” to death.³⁰⁶ Based on the Texas courts’ prior success with disposing of asbestos litigation, Justice Kidd found no need for Texas to assign all pretrial matters to a single Texas judge.³⁰⁷ Justice Kidd concluded that consolidation of the asbestos cases simply did not promote the just and efficient result that the MDL panel strives for.³⁰⁸

300. *In re Hurricane Rita Evacuation Bus Fire*, 216 S.W.3d 70, 72 (Tex. J.P.M.L. 2006).

301. *In re Silica*, 166 S.W.3d at 8, (Kidd, J., dissenting).

302. *Id.* at 11.

303. *See Union Carbide v. Adams*, 166 S.W.3d 1, 2 (Tex. J.P.M.L. 2003) (Kidd, J., dissenting).

304. *Id.* at 1.

305. *See, e.g., In re Patenaude*, 210 F.3d 135, 138 (3d Cir. 2000), *cert. denied*, 531 U.S. 1011 (2000) (describing negotiations of a global settlement of all asbestos claims that “fell apart” and a seven year lapse in the global resolution of common questions of law or fact by the transferee court).

306. *Union Carbide*, 166 S.W.3d at 2 (Kidd, J., dissenting).

307. *Id.*

308. *Id.*

Indeed, a better use of the MDL panel is in litigation arising from one common, tragic event, such as the bus carrying elderly Hurricane Rita evacuees that caught fire in 2005.³⁰⁹ Consolidating cases that arise from one common event and involve the same witnesses and investigators better promotes Texas's goals of convenience and efficiency.

*C. New Developments in Class and Complex Litigation in Texas:
Civil Justice or Tort Reform?*

In 2003, the Texas legislature believed that Texas fostered an environment of excessive litigation.³¹⁰ This environment purportedly harmed consumers, caused companies to locate outside of Texas, burdened Texas courts, and even forced some companies into bankruptcy.³¹¹ In order to change Texas's reputation as a "plaintiff-friendly state" and alleviate this perceived crisis, the legislature passed a monumental and comprehensive bill full of "civil justice" and "tort reform."³¹² According to the bill's authors, their intent was to bring more balance to the Texas civil justice system, reduce litigation costs, and address the role of litigation in society.³¹³ In addition to creating the MDL panel and expanding the Texas Supreme Court's jurisdiction to review interlocutory appeals of class certification orders, the bill addressed a large number of issues implicated in class and complex litigation.³¹⁴ Many of the bill's reforms are tremendously advantageous to a corporate litigant defending a class or complex lawsuit in Texas.

1. Eroding the "American Rule"

Among the many noteworthy changes in the law are new rules that allow for the shifting of litigation costs, including attorney's

309. *See In re Hurricane Rita Evacuation Bus Fire*, 216 S.W.3d 70 (Tex. J.P.M.L. 2006).

310. H.R. 4, 78th Reg. Sess. (Tex. 2003).

311. *See id.*

312. *Id.* *See* Ralph Blumenthal, *After Texas Caps Malpractice Awards, Doctors Rush to Practice There*, N.Y. TIMES, Oct. 5, 2007, at A21.

313. S.R. 4, 78th Reg. Sess. at 1 (Tex. 2003).

314. The bill addressed class action lawsuits, offers of settlement, venue and forum non conveniens, proportionate responsibility, products liability, prejudgment and post-judgment interest, appeal bonds, seat belts and child safety seats, medical malpractice, charitable volunteer immunity and liability, admissibility of evidence regarding nursing homes, and liability relating to asbestos claims. *Id.*

fees, when an offeree refuses his opponent's offer to settle and does no better at trial. Under this new procedure, if a settlement offer is made and rejected, and the ultimate judgment rendered by a court or jury is significantly less favorable to the rejecting party than the offer was, the rejecting party must pay the offeror's litigation costs,³¹⁵ including attorney and expert witness fees.³¹⁶ This change can make the rejection of a settlement offer a costly decision and increases the risks inherent in trying complex litigation.

This new procedure is clearly an erosion of the "American Rule"—that parties bear the costs of their own attorney's fees in litigation, regardless of whether they win or lose.³¹⁷ The United States has long rejected the "English Rule," followed in England and most European nations, which makes the losing party pay the winning party's attorney's fees.³¹⁸ A preference for the "American Rule" is premised on the traditional U.S. belief in liberal access to the courts to redress wrongs.³¹⁹ The threat of paying the other side's legal fees if the suit is unsuccessful is considered an unwanted deterrent because of concerns that wrongs may go without redress.³²⁰

The Texas legislature felt it needed this drastic change in the law to encourage settlements and avoid protracted litigation.³²¹ Indeed, this new rule encourages a more serious evaluation of a proposed settlement at an earlier stage than otherwise might occur and can lead to the disposition of cases before the heaviest expenses have been incurred. Fee shifting of some kind is already common in a majority of states and has been allowed in federal practice since 1938.³²²

315. TEX. CIV. PRAC. & REM. CODE ANN. § 42.004(a) (Vernon Supp. 2007). Plaintiff pays defendant's costs if judgment is less than 80 percent of defendant's settlement offer. Defendant pays plaintiff's costs if judgment is more than 120 percent of plaintiff's settlement offer. *Id.* § 42.004(b).

316. "Litigation costs" is defined as money actually spent and obligations actually incurred that are directly related to the case in which a settlement offer was made. It includes court costs, reasonable fees for up to two testifying experts, and reasonable attorney's fees. *Id.* § 42.001(5).

317. See Elaine A. Carlson, *Fee Shifting in Texas: Understanding the New Offer of Settlement Practice*, 7 J. TEX. CONSUMER L. 36, 37 (2003), available at <http://www.jtexconsumerlaw.com/V7N1pdf/V7N1feeshifting.pdf> [hereinafter Carlson, *Fee Shifting*].

318. *Id.*

319. *Id.*

320. *Id.*

321. See *id.*

322. *Id.* at 36. State laws vary with regards to what kinds of costs are recoverable and whether cost-shifting is available to both plaintiffs and defendants. *Id.* Federal Rule of Civil Procedure 68 only allows the recovery of court costs, not attorney's fees, so there is little incentive to use it.

Nonetheless, the need for such a rule is highly questionable. There is no legal duty to settle a case before trial nor an obligation to accurately predict the outcome of a suit. In many cases, especially in class and complex litigation, it can be very difficult to predict a jury verdict. Both sides can have reasonably different valuations of the case and damage models. Thus, it seems illogical to have a procedural rule that punishes parties who reasonably believed that they would fare better at trial than by accepting a pretrial offer.

Since 95 percent of cases already settle before trial,³²³ the new rule seems superfluous if its function is to encourage or promote settlement offers. Alternative dispute resolution, mediation, and sanction rules already exclude the majority of cases from their "day in court." Accordingly, the new rule's actual purpose is probably to give defendants an additional hammer to hold over plaintiffs, and it will likely result in lower settlements. Though the cost-shifting rule does not apply to class actions, it undoubtedly increases the risks inherent in trying complex cases in Texas courts. Although the rule will likely be an effective tool to encourage parties to settle their lawsuits without bothering the courts, this efficiency comes at a high cost to plaintiffs and will disproportionately affect plaintiffs of limited means. It is easy to look back in hindsight and realize that a settlement offer should have been taken, but such clarity is not always apparent in the moment of decision. In a complex case in which both parties reasonably differ as to the value of the case, it is inherently unfair to make the winner pay the legal fees of the loser.

2. Reforming Appeal Bonds

Also of note and extremely advantageous to defendants, especially in class actions where the liability can be astronomical, is a reform in the amount of security needed to stay collection proceedings while a defendant appeals a money judgment. Suppose a jury finds a company liable for \$50 million in compensatory damages and \$100 million in punitive damages. Naturally, the company will want to appeal, especially the punitive damage award. The mere filing of an appeal, however, does not prevent the winning party from collecting the \$150 million judgment. To stay the

It is rarely invoked and is considered ineffective. 12 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 3001 (2d ed. 1997).

323. Carlson, *Fee Shifting*, *supra* note 317, at 38.

collection and protect the company's assets from being seized while the appeal is pending, the company must deposit with the court a security interest called a supersedeas bond (appeal bond) that covers the judgment, plus the interest that will accrue during the appeal.³²⁴ In cases with giant verdicts, purchasing such an appeal bond may put a severe strain on the company's resources, maybe even forcing it into bankruptcy. If the company does not obtain a stay, however, the plaintiff can pursue execution proceedings to collect the judgment even while the appeal is underway.³²⁵

The history of Texas juries granting large damage awards made the traditional requirement that an appeal bond cover the total amount of damages unrealistic.³²⁶ For example, in the famous *Pennzoil v. Texaco*³²⁷ case, a jury awarded a Texas-based oil company over \$10 billion in damages against a New York oil company for tortiously interfering with a contract.³²⁸ The New York company could not afford to buy a \$10 billion appeal bond, and thus, a serious cloud was cast on the company's future.³²⁹

Under the new rules adopted as part of the 2003 tort reforms, an appeal bond must simply cover the compensatory damage award, plus interest and costs.³³⁰ Punitive damage awards, no matter how large, need no longer be bonded.³³¹ In addition, the maximum amount required for an appeal bond is now capped at the lesser of either \$25 million or 50 percent of the defendant's net worth.³³² The new rules are also flexible: if the defendant can prove that

324. Timothy S. Bishop & Jeffrey W. Sarles, *Supersedeas Bonds: A Crushing Burden*, NAT'L L.J., Nov. 1, 1995, <http://www.appellate.net/articles/supersedeas.asp>. A supersedeas bond traditionally serves two functions. First, it preserves the prejudgment status quo pending the outcome of the appeal. Second, it provides security to the non-appealing party by insuring that if the appellate court affirms the judgment, which could occur many years later, the winning party will still have a source of recovery and will not be prevented from successfully collecting the judgment. Kevin W. Liles, Comment, *Supersedeas Bonds: The Ostensible Authority Struggle over Who Gets a Reduction*, 48 BAYLOR L. REV. 469, 470 (1996).

325. See Howard J. Bashman, *The Name's Bond, Supersedeas Bond*, LAW.COM, June 26, 2006, <http://www.law.com/jsp/article.jsp?id=1151053528412>.

326. Bishop & Sarles, *supra* note 324.

327. 481 U.S. 1 (1987) (aff'd on abstention grounds).

328. *Id.* at 4–6.

329. See *id.*

330. TEX. CIV. PRAC. & REM. CODE ANN. § 52.006 (Vernon 2007).

331. Michael S. Hull et al., *House Bill 4 and Proposition 12: An Analysis with Legislative History, Part Two*, 36 TEX. TECH L. REV. 51, 137 (2005).

332. TEX. CIV. PRAC. & REM. CODE ANN. § 52.006(b) (Vernon 2007).

purchasing the bond will cause him or her “substantial economic harm,” the court *must* lower the security to a more agreeable amount.³³³ This change should prevent astronomical *Pennzoil*-like judgments from ever again precluding a defendant from staying a judgment during appeal.

Setting a cap and integrating flexibility into the appeal bond rules was a wise decision by Texas.³³⁴ There are several sound arguments against requiring a defendant to post a bond in the full amount of a judgment to secure an appeal, especially when the judgment is extremely large. Judges and scholars have found that an inflexible rule “denies an appellant’s due process right to an effective appeal”³³⁵ and can amount to confiscation of the defendant’s property without due process.³³⁶ It also generates inequitable situations in cases where the sheer size of the judgment effectively prohibits a defendant from appealing because the defendant either cannot afford the bond or a sufficient bond is simply not available.³³⁷

Limiting the amount of the bond to compensatory damages, however, creates a greater incentive for defendants to appeal damage awards, especially punitive damage awards. Having more appeals climb up the ladder increases the likelihood that large awards will be reduced or overturned by a court of appeals.

3. Concerns over the Role of the Jury in Class and Complex Litigation

Some of the 2003 tort reforms are probably attributable to an outright fear of letting Texas juries decide cases. The fear that these juries will misunderstand the facts and render an exorbitant verdict against a corporate defendant explains why some of the reforms noticeably chip away at a jury’s power to have their say in class or complex litigation. For example, the jury must now be unanimous in

333. *Id.* § 52.006(c).

334. For cases interpreting the new rule, see *LMC Complete Auto., Inc. v. Burke*, 229 S.W.3d 469 (Tex. App. 2007), *EnviroPower L.L.C. v. Bear, Stearns & Co.*, No. 01-04-01111-CV, 2007 Tex. App. LEXIS 3692 (App. May 10, 2007), and *Ramco Oil & Gas, Ltd. v. Anglo Dutch (Tenge) L.L.C.*, 171 S.W.3d 905 (Tex. App. 2005).

335. Elaine A. Carlson, *Mandatory Supersedes Bond Requirements-A Denial of Due Process Rights?*, 39 BAYLOR L. REV. 29, 39 (1987).

336. See *Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1154 (2d Cir. 1986), *rev’d on other grounds*, 481 U.S. 1 (1987).

337. See, e.g., *id.*

both the finding of liability and in the amount to be given in order to award exemplary damages, which include punitive damages.³³⁸ Requiring unanimity makes this accord harder to reach. Also, Texas now limits the awarding of non-economic damages in medical malpractice cases to \$250,000.³³⁹ Further, Texas passed a state constitutional amendment that grants the legislature clear authority to place further limits on non-economic damages in other kinds of cases, if they choose to do so.³⁴⁰ The amendment was needed to preclude expected constitutional challenges because arbitrary damage caps implicate a number of constitutional issues.³⁴¹

Though the legislature has not done so yet, plaintiffs' lawyers fear that one day the Texas legislature will use its new authority to extend damage caps to tort and contract claims.³⁴² Establishing damage caps raises important social questions: What does it mean when a jury can sentence a criminal to death and take away his or her individual life, but cannot decide the amount of damages an injured victim should be awarded?³⁴³ Is the role of the jury in non-criminal

338. TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(d) (Vernon 2007). Also, the jury must be specifically instructed that an award of damages be unanimous. *Id.* § 41.003(e). See generally Patricia F. Miller, Comment, *2003 Texas House Bill 4: Unanimous Exemplary Damage Awards and Texas Civil Jury Instructions*, 37 ST. MARY'S L.J. 515 (2006) (discussing the requirement of jury unanimity).

339. TEX. CIV. PRAC. & REM. CODE ANN. § 74.301 (Vernon 2007). For an interesting look at the local impact of this legislation see Blumenthal, *supra* note 312. California also caps the amount of non-economic damages at \$250,000. CAL. CIV. CODE § 3333.2(b) (West 2008).

340. TEX. CONST. art. III, § 66. The purpose of the amendment is to preclude any constitutional challenges to the legislature's power to establish limits on non-economic damages.

341. Michael D. Johnston, Note, *The Litigation Explosion, Proposed Reforms, and Their Consequences*, 21 BYU J. PUB. L. 179, 192 (2007). Courts in other states have reached inconsistent conclusions as to whether damage caps comport with their respective constitutional doctrines. The Virginia Supreme Court upheld the constitutionality of damage caps. *Etheridge v. Med. Ctr. Hosp.*, 376 S.E.2d 525, 534 (Va. 1989). However, damage caps were found to violate the Florida Constitution because they deprive a plaintiff of the right to a jury trial. *Smith v. Dep't of Ins.*, 507 So. 2d 1080, 1088-89 (Fla. 1987). In Illinois, damage caps were held to be an unconstitutional violation of the separation of powers doctrine because they functioned as a "legislative remittitur" and unduly encroached upon the traditional remittitur power of the judiciary. *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1080 (Ill. 1997). President Clinton called an unsuccessful effort by Senate Republicans to pass a federal damage cap "The Drunk Drivers Protection Act of 1995" and asserted that it would also "protect rapists, child abusers . . . despoilers of the environment and even 'perpetrators of terrorist acts and hate crimes.'" Neil A. Lewis, *Senate Republicans Halt Effort to Redo Civil Legal System*, N.Y. TIMES, May 5, 1995, at A1.

342. See Michael S. Hull et al., *supra* note 331, at 166-67.

343. *Round Table Discussion: Jury Service and the Jury System*, HOUSTON LAW., available at http://www.thehoustonlawyer.com/aa_sep05/page24.htm [hereinafter *Round Table Discussion*].

cases being usurped? Can juries still play a meaningful role in class and complex litigation?

With the threat of the legislature extending damage caps to other causes of action looming in the distance, there is an ongoing debate in Texas about whether damage caps are proper. From a legislative perspective, damage caps and the new unanimity requirement for punitive damages suggest an overall legislative disapproval of jury verdicts. Indeed, the Texas legislature had already limited punitive damage awards.³⁴⁴ Taken together, these damage caps send the message that the Texas legislature believes juries overly punish defendants with presumed deep pockets and that juries are not playing their proper role in the system. Apparently, a jury may determine a defendant's fault but cannot be trusted to determine the entire remedy of this fault. Tort reformers agree with this position and defensibly argue that damage caps serve a greater purpose by lowering insurance costs and reducing litigation.³⁴⁵ Indeed, of the various tort reforms mentioned in this Article, damage caps are probably the single greatest disincentive to filing a lawsuit.³⁴⁶

Even though damage caps are not fair to plaintiffs, some argue they are necessary³⁴⁷ due to the disruption that large verdicts cause within the business community. This line of reasoning is analogous to that underlying workers' compensation law, where damages are similarly cut off completely, except on a schedule, based on the assumption that litigation over work-related injuries disrupts industries and the workplace and is not economically efficient.³⁴⁸ Naturally, consumer advocates strongly oppose the establishment of further damage caps and fear that Texas's adoption of damage caps sets a dangerous precedent for further limiting jury participation in the process.³⁴⁹ Some argue that damage caps are really caps on professional accountability, favoring wrongdoers over their

344. TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (Vernon 2007). Exemplary damage awards may not exceed an amount equal to the greater of: "(1)(A) two times the amount of economic damages; plus (B) an amount equal to any noneconomic damages found by the jury, not to exceed \$750,000; or (2) \$200,000." *Id.*

345. David E. Chamberlain, *Texas Civil Justice Issues: A Look Back and a Look Forward*, 70 TEX. BAR J. 63, 67 (2007).

346. *Id.*

347. *See Round Table Discussion*, *supra* note 343, at 33.

348. *Id.*

349. Chamberlain, *supra* note 345, at 67.

victims.³⁵⁰ One Texas judge fears that establishing damage caps is a slippery slope leading to a system where juries will not be needed at all and all damages will be statutorily established and regulated.³⁵¹

In complex litigation, there may be legitimate concerns that support the need to avoid or circumvent the traditional role of the jury. There is a widely held belief that jurors are not the best people to decide complex technical aspects of cases involving intellectual property issues, patents, or sophisticated business disputes.³⁵² In some cases, the stakes can be so high financially that some companies consciously avoid using juries.³⁵³ They may fear that jurors will decide against their company simply because jurors tend to mistrust insurance or tobacco companies. Also, it may be too financially risky in complex litigation to let twelve random people decide the fate and fortune of a company since a jury decision is a variable whose outcome cannot be predetermined.

The fear of letting juries decide the outcome of complex litigation is exacerbated by the low turnout percentage of those who are called to serve on juries in Texas. According to one complex litigator, “we don’t pick juries.”³⁵⁴ Instead, Texas juries are composed of the first twelve leftovers, after both sides use their strike privileges to dismiss potential jurors from the pool.³⁵⁵ In evaluating these leftovers, commercial litigators fear that too few are businesspeople who will understand the impact of their decision or are citizens with a sufficient stake in the community.³⁵⁶ At the same time, the higher someone is in the socioeconomic scale, the less likely they are to serve on a jury.³⁵⁷

There are various reasons why people elect not to participate on a jury. Some people avoid jury service because of economic reasons,

350. See TEX. WATCH, *THE FALSE CHOICE: DOCTORS OR ACCOUNTABILITY: THE REAL IMPACT OF SO-CALLED TORT “REFORM” IN TEXAS* (2007), http://www.texaswatch.org/temp/ts_4480F718-B0B9_50CE-FE9124F7FA0DAB9D4880F728-BDB9-50CE-FBA23E195A556F63/MedMalUpdate022007.pdf.

351. *Round Table Discussion, supra* note 343.

352. *Id.*

353. Gaynelle Griffin Jones, Litigation Counsel of Hewlett Packard Co., stated that “for a company like HP . . . we don’t take advantage of the jury system for complex litigation. The stakes are often too high financially.” *Round Table Discussion, supra* note 343.

354. *Id.* at 27.

355. *Id.*

356. *Id.*

357. *Id.* at 25.

i.e., they cannot afford to miss work.³⁵⁸ Others never show up because they simply do not care.³⁵⁹ Some litigators even find this apathy acceptable from a “natural selection” perspective: “If they don’t show up, if they don’t care . . . we don’t want them anyway.”³⁶⁰ There is a sense that people who do not want to participate in the process should not be compelled against their will since resentment for being required to participate may cloud their reasoning.

Unfortunately, many people misunderstand the importance of jury duty and how critical it is to citizenship.³⁶¹ “Democracy is not a spectator sport. It’s participatory.”³⁶² Jury duty is one important way people can participate in the process and voice their opinion on issues such as corporate misconduct and the proper role of class and complex litigation in society. The general apathy toward jury service, and even toward voting, is evidence of the fact that most people do not appreciate their individual roles in their own community or the importance of their state and federal citizenship. The Texas legislature’s conscious decision to place caps on non-economic damages, though limited at this time to cases of medical liability, expresses a lack of confidence in the ability of a jury to adequately compensate an injured victim for the harm they may have suffered.

The collapse of confidence in juror discretion demonstrates serious issues that need to be rectified in the future. Like Illinois, Texas needs to take affirmative steps to educate its citizens about the proper role of litigation in their society, in order to counter the threat of miseducation perpetuated by tort reformers. When the Texas jury in a recent Vioxx case awarded a widow \$253.5 million, the jury sent a message to the pharmaceutical company it believed was responsible for her husband’s wrongful death.³⁶³ When Texas’s requirement of proportionate punitive damages immediately reduced the amount to \$26.1 million, the legislature was in effect depriving

358. See Press Release, Sen. Jeff Wentworth, Tex. Senate, Texas Jurors Get Pay Increase After 50 Years (Aug. 5, 2005), available at <http://www.wentworth.senate.state.tx.us/pr05/c080505a.htm> [hereinafter Press Release, Wentworth].

359. *Round Table Discussion*, *supra* note 343.

360. *Id.*

361. *Id.*

362. *Id.*

363. See Alex Berenson, *Plaintiffs Find Payday Elusive in Vioxx Suits*, N.Y. TIMES, Aug. 21, 2007, at A1.

the jurors of their ability to voice their discontent with the corporation's actions.³⁶⁴ Even though class and complex litigation can involve large sums of money and create a risk that twelve random individuals could bring great losses upon a national corporation, excluding or limiting jury participation in the process is inherently undemocratic. Denying jurors a real say in the process will only lead to further juror disenchantment.

As a first step toward addressing this quagmire, Texas recently increased the daily pay for jurors for the first time in 50 years.³⁶⁵ Now, jurors are entitled to not less than \$6 on the first day and \$40 on each additional day, plus reasonable travel expenses.³⁶⁶ In theory, this pay increase will inspire more Texans to participate in the jury process.³⁶⁷ Unfortunately, this change is probably too late. Texas already appears to believe that an arbitrary statute limiting damage awards in medical cases to \$250,000 can determine the correct amount a victim deserves better than twelve human beings capable of empathy and reason.

V. FLORIDA

A. *An Overview of Florida's Class Action Standards: Undoing "Judicial Hellhole" Status with Tougher Standards*

Like Texas, Florida also now requires its trial courts to perform a "rigorous analysis" before certifying a class action.³⁶⁸ This requirement is perhaps a response to the reputation Florida has earned as a "judicial hellhole."³⁶⁹ Through cases like *Liggett v. Engle*,³⁷⁰ Florida became known nationally for large damage awards and plaintiff-friendly rulings that have attracted numerous class action filings.³⁷¹ Aggregating claims into a class action makes it

364. *See id.*

365. *See* TEX. GOV'T. CODE ANN. §61.001(a) (Vernon 2007).

366. *Id.*

367. Press Release, Wentworth, *supra* note 358.

368. *Seminole County v. Tivoli Orlando Assocs. Ltd.*, 920 So. 2d 818, 824 (Fla. Dist. Ct. App. 2006).

369. *See* JUDICIAL HELLHOLES 2007, *supra* note 181, at 5.

370. 853 So. 2d 434 (Fla. Dist. Ct. App. 2003) (reversing a final judgment that awarded \$12.7 million in compensatory damages to three individual plaintiffs and \$145 billion in punitive damages to the entire class).

371. *See* JUDICIAL HELLHOLES 2007, *supra* note 181, at 5.

more likely that a defendant will be found liable and have to pay a significant damage award.³⁷² Some class actions even become a form of “legalized blackmail.”³⁷³ This scenario occurs when the defendant’s potential liability and litigation costs increase to the point where it may be more economically prudent to abandon a meritorious defense and settle.³⁷⁴

To prevent this from happening, Florida courts apply a “rigorous analysis” to class action standards, whereby trial courts look beyond the parties’ pleadings and evaluate how the disputed issues might be addressed on a class-wide basis.³⁷⁵ Even if a class becomes certified, the order granting certification is certainly not definite, and Florida courts are required to reassess their class rulings as the case develops.³⁷⁶ In fact, state judges may alter or amend class certification at any time before entry of a judgment on the merits. This flexibility is understandable because a class is certified early in litigation and often precedes substantial development of the issues and facts.

In general, Florida’s approach to class actions is more concerned with pragmatism than consumer protection. The stated purpose of allowing class actions in Florida is to provide litigants who share common questions of law and fact an economically viable means of addressing their needs in court.³⁷⁷ Unlike New York or Illinois, where class actions are perceived as an effective vehicle of consumer protection, in Florida there is a stronger concern for preventing “legalized blackmail” than for discouraging “legalized theft” in the marketplace.

1. Requirements for Class Certification in Florida Courts

Class certification in Florida requires plaintiffs to plead and prove the four threshold requirements of numerosity, commonality,

372. *Id.*

373. *Id.*

374. *Id.*

375. *Earnest v. Amoco Oil Co.*, 859 So. 2d 1255, 1258 (Fla. Dist. Ct. App. 2003) (citing *Stone v. Composure Interactive Servs., Inc.*, 804 So. 2d 383, 387 (Fla. Dist. Ct. App. 2001)).

376. *Liggett Group v. Engle*, 853 So. 2d 434, 442 (Fla. Dist. Ct. App. 2003).

377. *Colonial Penn Ins. Co. v. Magnetic Imaging Sys.*, 694 So. 2d 852, 854 (Fla. Dist. Ct. App. 1997).

typicality, and adequacy of representation.³⁷⁸ First, the plaintiff must meet the numerosity requirement by demonstrating that “the members of the class are so numerous that separate joinder of each member is impracticable.”³⁷⁹ Florida courts tend to believe that a lawsuit involving more than fifty plaintiffs makes joinder impracticable, but the general test of impracticability is actually whether the names and number of class members will be unstable.³⁸⁰ If the lawsuit involves less than fifty potential plaintiffs, courts must consider additional factors, including the judicial economy achieved by avoiding multiple lawsuits, the geographic dispersion of the plaintiffs, the financial resources of the plaintiffs, plaintiffs’ ability to file individual suits, and how requests for prospective relief may affect the rights of other plaintiffs.³⁸¹

Florida’s primary concern regarding the commonality requirement³⁸² is whether the named plaintiff’s claims arise from the same course of conduct that gives rise to the class members’ claims and whether the claims are all based on the same legal theory.³⁸³ If liability and damages depend on individual factual determinations, then commonality will not be met.³⁸⁴

Florida’s typicality requirement mandates that the named plaintiff’s claims be typical of the class members’ claims.³⁸⁵ Merely pointing to common issues of law is not sufficient if the facts necessary to prove the claims are markedly different.³⁸⁶

The adequacy of representation requirement³⁸⁷ serves to uncover conflicts of interest between the named plaintiff and class

378. *Seminole County v. Tivoli Orlando Ass’n*, 920 So. 2d 818, 822 (Fla. Dist. Ct. App. 2006). FLA. R. CIV. P. 1.220 governs class actions in Florida courts.

379. *Braun v. Campbell*, 827 So. 2d 261, 266 (Fla. Dist. Ct. App. 2002).

380. *See id.*

381. *Id.*

382. FLA. R. CIV. P. 1.220(a)(2) (“[T]he claim or defense of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim or defense of each member of the class.”).

383. *Braun*, 827 So. 2d at 267.

384. *Id.*

385. FLA. R. CIV. P. 1.220(a)(3) (“[T]he claim or defense of the representative party is typical of the claim or defense of each member of the class.”); *Braun*, 827 So. 2d at 267.

386. *Braun*, 827 So. 2d at 267.

387. FLA. R. CIV. P. 1.220(a)(4) (“[T]he representative party can fairly and adequately protect and represent the interests of each member of the class.”).

members.³⁸⁸ The requirement is met when the named plaintiff is a part of the class, possesses the same interest, and suffers the same injury as the other class members.³⁸⁹ Also, the named plaintiff must possess undivided loyalties to the absent class members.³⁹⁰ This requirement ensures that the interests of each class member are fairly and adequately protected.³⁹¹

In addition to these four threshold requirements, Florida class action plaintiffs must also establish that their lawsuit is at least one of three potential types of class actions.³⁹² The first type of class action requires a showing that individual claims would create incompatible standards of conduct or be dispositive toward the interests of other putative plaintiffs not part of the class.³⁹³ The second type of class action, known as “ground certification,” requires a showing that the defendants acted, or refused to act, on grounds generally applicable to all class members, thereby making injunctive or declaratory relief appropriate.³⁹⁴ This type of class action truly depends on homogeneity of claims and interests.³⁹⁵ The third type of class action requires a predominance inquiry, showing that questions of law or fact common to the class predominate over questions that only affect individuals.³⁹⁶ This predominance inquiry is basically a balancing test. The court balances the value of allowing individual actions that protect each person’s own interests against the judicial economy achieved by resolving the issues as a class action.³⁹⁷

This predominance requirement is far more demanding than the commonality requirement.³⁹⁸ For example, in a case against tobacco companies, Florida found that personal smoking behavior is too individualized for common questions to predominate.³⁹⁹ However,

388. *Braun*, 827 So. 2d at 268.

389. *Freedom Life Ins. Co. v. Wallant*, 891 So. 2d 1109, 1115 (Fla. Dist. Ct. App. 2004).

390. *Id.*

391. *Id.*

392. *Braun*, 827 So. 2d at 268.

393. *See* FLA. R. CIV. P. 1.220(b)(1); *Earnest v. Amoco Oil Co.*, 859 So. 2d 1255, 1257 (Fla. Dist. Ct. App. 2003).

394. FLA. R. CIV. P. 1.220(b)(2); *Freedom Life*, 891 So. 2d at 1117.

395. 891 So. 2d at 1117.

396. *See* FLA. R. CIV. P. 1.220(b)(3); *Earnest v. Amoco Oil Co.*, 859 So. 2d 1255, 1257–58 (Fla. Dist. Ct. App. 2003).

397. *See* 859 So. 2d at 1258.

398. *Freedom Life*, 891 So. 2d at 1119.

399. *Philip Morris USA Inc. v. Hines*, 883 So. 2d 292, 295 (Fla. Dist. Ct. App. 2003).

individualized damage issues are considered acceptable and do not prevent a finding of predominance.⁴⁰⁰

Florida's class action standards also require that class representation be superior to other available methods to fairly and efficiently adjudicate the claims presented.⁴⁰¹ If significant individual issues exist, then "little value is gained by proceeding as a class action."⁴⁰² Moreover, it would be considered unjust to continue as a class action because a negative outcome would unfairly bind absent class members with individualized issues.⁴⁰³ In such circumstances, a class action will not meet Florida's standards for superiority.⁴⁰⁴

2. Appellate Review of Class Certification

Florida trial courts may certify a class action only after determining through rigorous analysis that the above elements of a class action have been met.⁴⁰⁵ To achieve certification, a plaintiff must do more than merely plead the language of the statute.⁴⁰⁶ The plaintiff has a heavy burden to prove all the elements of a class action through the presentation of affidavits, testimony, and other evidence in a formal hearing.⁴⁰⁷

Like the other states examined in this Article, Florida also allows immediate interlocutory appeal of an order granting or denying class certification.⁴⁰⁸ The determination of certification is within the trial court's discretion and will only be reversed on appeal if an abuse of discretion is shown.⁴⁰⁹ The Florida Courts of Appeal do not have jurisdiction to review other rulings or orders not listed within their rules, such as a motion to amend the complaint to add

400. *Freedom Life*, 891 So. 2d at 1119.

401. *Liggett Group v. Engle*, 853 So. 2d 434, 445 (Fla. Dist. Ct. App. 2003).

402. *Id.*

403. *Id.*

404. *Id.*

405. *Seminole County v. Tivoli Orlando Assoc.*, 920 So. 2d 818, 823–24 (Fla. Dist. Ct. App. 2006).

406. *Id.* at 822.

407. *See id.* at 824.

408. FLA. R. APP. P. 9.130(a) governs the interlocutory appeals of class certification orders.

409. *Pinellas County Sch. Bd. v. Crowley*, 911 So. 2d 881, 882 (Fla. Dist. Ct. App. 2005).

punitive damages or findings involving the enforcement of a previously approved settlement agreement.⁴¹⁰

B. Florida's Complex Business Litigation Courts

After ten years of lobbying, the Business Law Section of the Florida Bar finally convinced Florida to establish complex business litigation courts.⁴¹¹ These courts specialize in handling complex business cases, such as antitrust suits, intellectual property cases, franchise cases, and unfair competition cases.⁴¹² They generally hear disputes where the amount in controversy exceeds \$75,000 and the case presents contract or tort issues of a business nature.⁴¹³

Florida's complex business litigation courts are widely praised by both the local bar and the business community for their expedient dockets and the specialized attention they provide to high-stakes cases.⁴¹⁴ Cases filed in these courts are generally scheduled for trial within two years.⁴¹⁵ Cases that previously took three to five years to resolve in regular trial courts are now concluded in fourteen to twenty-two months.⁴¹⁶ This efficiency is possible because of the unique features of the complex business litigation courts. For every case filed, the courts enter a scheduling and trial order early in the proceedings, similar to those entered by federal courts.⁴¹⁷ Additionally, each court has a law clerk and case managers to make sure matters are heard and tried effectively in a short time frame.⁴¹⁸

There are now three complex business litigation courts in Florida. The first was established in 2003 in the Ninth Judicial

410. See FLA. R. APP. P. 9.130(a); see, e.g., *Faulk v. Air Prod. & Chem.*, 798 So. 2d 820, 821 (Fla. Dist. Ct. App. 2001); *Phillip Morris v. Jett*, 802 So. 2d 353, 356 (Fla. Dist. Ct. App. 2001).

411. *Section Heralds New Business Litigation Court*, FLA. BAR NEWS, July 15, 2003, at 7, available at <http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/cb53c80c8fabd49d85256b5900678f6c/4b6b79e19f6eff7985256d5f004c8f90?OpenDocument>.

412. Ninth Judicial Circuit Court of Florida, Complex Business Litigation Court Homepage, <http://www.ninjab9.org/Courts/Business/Index-BC.htm> (last visited Oct. 24, 2008).

413. BUS. LAW SECTION OF THE FLA. BAR, BUSINESS COURT NEWS AND INTRODUCTION, <http://flabuslaw.org/index.php?/list.courts=4/1> (last visited Oct. 24, 2008).

414. See *id.*

415. *Id.*

416. Jill Krueger, *Bill Would Expand Local Business Court to 11 More Counties*, ORLANDO BUS. J., Feb. 2, 2007, available at <http://orlando.bizjournals.com/orlando/stories/2007/02/05/story3.html>.

417. BUS. LAW SECTION OF THE FLA. BAR, *supra* note 413.

418. *Id.*

Circuit in Orange County, which includes Orlando.⁴¹⁹ Two more complex business litigation courts took effect in January of 2007, in Miami and Tampa.⁴²⁰ Additional business courts are expected in Jacksonville and Fort Lauderdale in the near future.⁴²¹

Florida hopes these specialized business courts will draw large companies to the state.⁴²² In theory, these courts could make Florida a more attractive place to do business by removing some of the legal uncertainties of complex litigation.⁴²³ A court that hears issues that repeatedly arise in business litigation can develop a predictable body of business law. Litigants and their attorneys can apply these principles of law to their cases and have a better sense of future results.⁴²⁴ With a single judge hearing business cases, local attorneys will learn how the judge is likely to rule on certain issues—which may prevent lawsuits from even being filed.⁴²⁵ Adding certainty and predictability to how the court will rule also helps promote early settlement and reduces the time and costs of complex litigation. Businesses will also likely be attracted to the emphasis Florida's business courts place on alternative dispute resolution, pre-trial settlement, and the proactive role the judges take in managing cases.⁴²⁶

As an additional incentive, litigants in the complex business litigation court in Orange County have at their disposal a state-of-the-art high-tech courtroom.⁴²⁷ This courtroom offers numerous flat-screen monitors strategically placed throughout the courtroom.⁴²⁸ Courtroom participants may view the presentation of evidence,

419. Ninth Judicial Circuit Court of Florida, *supra* note 412.

420. BUS. LAW SECTION OF THE FLA. BAR, *supra* note 413.

421. *Id.*; see also Krueger, *supra* note 416 (discussing the introduction of legislation to further increase the number of business courts in Florida).

422. See Ninth Judicial Circuit Court of Florida, *supra* note 412.

423. NINTH JUDICIAL CIRCUIT COURT OF FLA., BUSINESS COURT INFORMATION BROCHURE 4 (2004), available at <http://www.ninja9.org/Courts/Business/Forms/BCBrochure.pdf> [hereinafter BUSINESS COURT BROCHURE].

424. See *id.*

425. Ken Ibold, *A New Court in Orlando Will Handle Strictly Business Disputes*, FLA. TREND, Sept. 2, 2003, available at <http://www.ninja9.org/Courts/Business/News/FloridaTrend-9-02-2003.PDF>.

426. See BUSINESS COURT BROCHURE, *supra* note 423, at 4.

427. See *id.* at 3–4.

428. Ninth Judicial Circuit Court of Florida, Technology: Courtroom 23+, <http://www.ninja9.org/Courts/Business/Index-BC.htm> (last visited Oct. 24, 2008).

videoconference testimony of remote witnesses, and real-time court reporting on these monitors.⁴²⁹ The jury box alone has ten monitors, to allow for easy viewing.⁴³⁰

Concerns voiced in other states that business courts provide a two-tiered system of justice, one for the rich and one for the average citizen,⁴³¹ have not been adequately addressed in Florida. This situation is unsurprising, since Florida's business courts were created to cater to large corporations, not local small businesses. In fact, after local bar members complained that small businesses were clogging the docket of Orange County's complex business litigation court, the minimum amount in controversy was raised from \$15,000 to \$150,000.⁴³² However, it has since been lowered to its current level of \$75,000.⁴³³

The desire to exclude small-level business disputes from the docket is understandable since Florida's stated purpose in establishing business courts is to provide economic stimulus to the community by drawing big businesses to relocate to Florida.⁴³⁴ Florida wants to present itself as sophisticated enough for the supposedly high-level litigation that large companies need and promote the notion that business cases in Florida will be treated with the same level of sophistication that would be found in New York.⁴³⁵ Nonetheless, Florida has a long way to go if it wants to remake itself as the new Delaware, where businesses are drawn to incorporate in part because of the wealth of corporate case law and opinions from Delaware's Court of Chancery.⁴³⁶

429. *Id.*

430. *Id.*

431. Elaine R. Friedman, *New Business Courts Gain Acceptance*, NAT'L L.J., Jan. 1, 1997, at B1.

432. Jill Krueger, *Big Changes Being Made to Biz Court*, ORLANDO BUS. J., Sept. 30, 2005, available at <http://orlando.bizjournals.com/orlando/stories/2005/10/03/story1.html>.

433. Amended Order Governing Complex Business Litigation Court Procedures and Criteria, No. 2003-17-04, available at <http://www.ninja9.org/Courts/Business/Index-BC.htm>.

434. See Ninth Judicial Circuit Court of Florida, *supra* note 412.

435. Becky Knapp, *Business Court on the Docket*, ORLANDO BUS. J., Mar. 21, 2003, available at <http://orlando.bizjournals.com/orlando/stories/2003/03/24/story2.html>.

436. *See id.*

C. New Developments in Class and Complex Litigation in Florida

1. International Arbitration

One of the alternative methods for resolving complex litigation is through arbitration. Some companies may prefer to resolve complex lawsuits through arbitration because of the perception that arbitration is more efficient and less costly than formal litigation.⁴³⁷ Arbitration is often praised because of its flexible procedures and private proceedings.⁴³⁸ These circumstances are distinct from traditional litigation, where the proceedings become a matter of public record. In addition, an arbitration award in international business cases may in fact be more binding than a state court's judicial ruling since international arbitration relies on widely recognized treaties like the Inter-American Convention on International Commercial Arbitration and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁴³⁹ On the other hand, because arbitration is a contractual method of dispute resolution, international arbitration by definition also has inherent consolidation and joinder issues.⁴⁴⁰ In complex cases involving many parties, not every defendant may be willing to consent to arbitration, which could be troubling.⁴⁴¹

In light of the above considerations, Florida recently revised its laws on multijurisdictional practice to facilitate the state's rising position as a destination for international arbitrations. According to some legal experts, Miami is now second to New York City as the

437. Julia Neyman, *Litigation Alternative Gaining in Popularity*, S. FLA. BUS. J., Mar. 2, 2007, available at <http://southflorida.bizjournals.com/southflorida/stories/2007/03/05/story7.html> [hereinafter Neyman, *Alternative*].

438. Julia Neyman, *Arbitration Transcends International Boundaries*, S. FLA. BUS. J., Oct. 27, 2006, available at <http://southflorida.bizjournals.com/southflorida/stories/2006/10/30/story11.html> [hereinafter Neyman, *Boundaries*].

439. *Id.*; Organization of American States, Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, O.A.S.T.S. No. 42, 1438 U.N.T.S. 245; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

440. For a more in-depth explanation of the issues arising in multiparty disputes in international arbitration, see Winston Stromberg, Recent Development, *Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes*, 40 LOY. L.A. L. REV 1337 (2007).

441. *See id.*

most popular destination for international arbitration.⁴⁴² For many years, Miami has increasingly become a preferred location for arbitration hearings, especially among corporations doing business in Central and South American countries.⁴⁴³ As the political climate in Latin America continues to destabilize, global companies view corrupt courts and leftist regimes as threats to their business interests. Miami is often seen as a neutral and logical place to arbitrate complex disputes.⁴⁴⁴

To facilitate the use of Miami as a destination for international arbitration, the Florida Bar adopted new rules in 2006 that allow out-of-state attorneys to appear in an unlimited number of international arbitrations in Florida.⁴⁴⁵ Before, out-of-state attorneys could only make three pro hac vice appearances in Florida.⁴⁴⁶ Now, out-of-state attorneys can participate in an unlimited number of international arbitrations in Florida. Under the new Florida law, international arbitrations encompass proceedings where the underlying subject matter of the dispute involves property located outside the U.S., relates to a contract that envisages performance outside the U.S., involves international investment, relates to one or more foreign countries, or involves a foreign state.⁴⁴⁷ However, out-of-state attorneys cannot appear in Florida courts to confirm or vacate the awards received in these international arbitrations without following the state's procedures for pro hac vice admission.⁴⁴⁸

These new rules are designed to encourage parties to choose Florida as a location for international arbitrations.⁴⁴⁹ Multijurisdictional practice is now becoming more in demand as businesses expand their operations into other states and require legal advice and services in jurisdictions where their regular attorneys are not admitted to practice law.⁴⁵⁰ Florida hopes its new rules will make

442. Neyman, *Alternative*, *supra* note 437.

443. Neyman, *Boundaries*, *supra* note 438.

444. Neyman, *Alternative*, *supra* note 437.

445. *See* FLA. BAR REG. R. 1-3.11 (2007).

446. Christopher Bopst & Stanley A. Beiley, *Florida's New Rules on Multijurisdictional Practice: A Mixed Bag for Arbitration Attorneys*, DISP. RESOL. J., Aug.–Oct. 2005, at 38.

447. *See* FLA. BAR REG. R. 1-3.11 (2007) (the definition of international arbitration appears in the comment following the Rule).

448. Bopst & Beiley, *supra* note 446, at 38.

449. *See id.*

450. *Id.* at 36.

its multijurisdictional standards more consistent with modern business practices.⁴⁵¹ Illinois and New York already allow out-of-state attorneys to appear in arbitration proceedings without violating their respective rules against the unauthorized practice of law.⁴⁵² Florida has not completely joined these states because appearances by non-Florida attorneys for domestic arbitrations are still limited to three pro hac vice appearances per year.⁴⁵³ Nonetheless, the new openness to appearances by out-of-state attorneys in international arbitrations is an interesting development in Florida law, likely to have an important impact on the local legal community.

2. Class Action Reform

Florida's courts were once open to out-of-state residents in the same way Florida's beaches and theme parks were. However, some recent legislation imposes more stringent restrictions on when out-of-state residents can be members of a class action filed in a Florida court. According to a new law passed in 2006, class membership in any Florida class action is now exclusively limited to Florida residents only, with a few narrow exceptions.⁴⁵⁴ The first exception allows nonresidents to participate in a class action filed in Florida if their claim would be recognized within their own state, the claim is not time-barred, and they would be unable to bring the claim in their own state because their state of residence lacks personal jurisdiction over the defendants.⁴⁵⁵ The second exception allows a class action to include nonresidents if the conduct giving rise to the claim occurred in or emanated from Florida.⁴⁵⁶ The new law also does not affect class action lawsuits involving federal or state civil rights laws.⁴⁵⁷

Nonetheless, the new law will likely achieve its intended effect of precluding Florida courts from hearing nationwide class actions.

451. *Id.*

452. *Id.* at 38. *See, e.g.,* Colmar v. Fremantlemedia N. Am., Inc., 801 N.E.2d 1017 (Ill. App. Ct. 2003) (holding that out-of-state attorney's representation of an out-of-state client during arbitration in Illinois had no effect on the arbitration award); Williamson v. John D. Quinn Constr. Corp, 537 F. Supp. 613 (S.D.N.Y. 1982) (holding that a New Jersey law firm, not licensed in New York, could be paid for legal representation in a New York arbitration).

453. Bopst & Beiley, *supra* note 446, at 36.

454. FLA. STAT. § 768.734 (2008).

455. *See id.* § 768.734(1)(b)(1).

456. *See id.* § 768.734(1)(b)(2).

457. *See id.* § 768.734(3).

This new law certainly complements CAFA and the national trend toward removing cases of national importance to federal courts. Florida lawmakers considered several of CAFA's congressional findings on state courts mishandling class actions as justification for this change in Florida law.⁴⁵⁸ These findings included the perceived bias in national class actions toward out-of-state defendants and the federalism issues implicated when the courts of one state impose their view on the law of another state, binding the rights of another state's residents.⁴⁵⁹

Restricting membership to Florida residents is certainly not unprecedented. In *R.J. Reynolds Tobacco Co. v. Engle*,⁴⁶⁰ a class of more than a million members was restricted to Florida residents because of the unwarranted burden that the case threatened to place on state judicial resources and Florida taxpayers.⁴⁶¹ Although it is too soon to demonstrate its effects empirically, Florida's new restrictions on nonresident membership in class actions may still negatively impact the Florida court system. While the new law will certainly reduce the number of complex class actions involving large numbers of nonresidents, it may also increase the number of suits brought by nonresidents as individual actions.⁴⁶²

Other states contemplating reform of their own laws to exclude nonresidents from class actions should note that Florida's new law may be susceptible to a number of constitutional challenges. First, limiting state courts to resident plaintiffs in a class action implicates the Privileges and Immunities Clause of Article IV of the U.S. Constitution.⁴⁶³ The Privileges and Immunities Clause prohibits discrimination by states against nonresidents when there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other states, unless there are valid reasons for the disparity of treatment.⁴⁶⁴ If Florida's restrictions on nonresidents participating in class actions are challenged on this ground, Florida

458. See HOUSE OF REPRESENTATIVES STAFF ANALYSIS, JUSTICE COUNCIL COMMITTEE, H.R. 7259, at 4 (Fla. 2006) [hereinafter STAFF ANALYSIS].

459. *Id.*

460. 672 So. 2d 39 (Fla. Dist. Ct. App. 1996).

461. *Id.* at 41.

462. See STAFF ANALYSIS, *supra* note 458, at 6.

463. U.S. CONST. art. IV, § 2, c1. 1.

464. Sup. Ct. of Va. v. Friedman, 487 U.S. 59, 67 (1988).

will have to present “substantial reasons” for the difference in treatment and show that the discrimination against nonresidents bears a substantial relationship to the state’s objective.⁴⁶⁵ Florida may be able to point to the policy reasons for adopting CAFA as similar substantial reasons for the difference in treatment, but it is questionable how the Florida Supreme Court will rule on the issue.⁴⁶⁶

The new law also implicates plaintiffs’ fundamental right to access the courts.⁴⁶⁷ This right is protected in both the Florida and Federal Constitutions and limits the ability of legislatures to unduly or unreasonably burden or restrict access to state courts.⁴⁶⁸ However, the new law still allows nonresidents the ability to file individual actions in Florida and does not limit the ability of nonresidents to file separate class actions in their own states.⁴⁶⁹ Moreover, federal courts are now more available to hear class actions involving nonresident members, at least in theory, since CAFA has broadened their jurisdiction. Accordingly, Florida’s new law will likely survive a challenge on this ground.

Lastly, Florida’s new law could implicate the separation of powers doctrine in the Florida Constitution.⁴⁷⁰ The Florida legislature is vested with “legislative power” and the ability to define substantive rights, while the Florida Supreme Court is vested with the power to adopt procedural rules for the courts.⁴⁷¹ Procedural rules, which may be implicated in the new law, include all rules that govern the parties.⁴⁷² If the new limits on class membership are determined to be procedural rather than substantive, the legislature’s

465. *See id.*

466. *See* STAFF ANALYSIS, *supra* note 458, at 7.

467. *Id.*

468. According to Article I, Section 21 of the Florida Constitution: “The courts shall be open to every persons for redress of any injury, and justice shall be administered without sale, denial or delay.” FLA. CONST. art. I, § 21. The U.S. Constitution does not contain a specific clause providing for the right of access to courts, but the Supreme Court has held that there is such a qualified right arising from the Due Process Clause. *See* *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) (“[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.”).

469. STAFF ANALYSIS, *supra* note 458, at 7.

470. *Id.* at 8. Article II, Section 3 of the Florida Constitution provides: “No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.” FLA. CONST. art. II, §3.

471. *See* FLA. CONST. art. III, §1 (stating that legislative power is vested in the legislature).

472. STAFF ANALYSIS, *supra* note 458, at 8.

actions could be viewed as an encroachment on the courts' responsibilities.⁴⁷³ On the other hand, the law's title, "Capacity to Sue," could contemplate the absence of a legal disability. Namely, the law could deprive a party of the right to come into court, which would be considered a substantive right.⁴⁷⁴ It appears arguable whether the new law should be considered procedural or substantive in nature, and it is unclear if the law will survive a separation of powers challenge.

Supporters of the new law claimed it would save taxpayers money by reducing the size and number of class actions filed in Florida.⁴⁷⁵ This claim may be true, but the real impetus for the law is more likely the growing national trend toward narrowing the scope of permissible class action claims.⁴⁷⁶ Like Illinois, Florida is likely troubled by its designation as a "judicial hellhole" and would like to rectify its image as an overly plaintiff-friendly state.⁴⁷⁷ The new limits on class action membership are a major step in this direction.

3. Abolishing Joint and Several Liability

Being perceived as a plaintiff-friendly state is apparently bad for business. A state's legal environment and friendliness to plaintiffs is one of several important criteria in the relocation of large companies.⁴⁷⁸ To make Florida more attractive to the business community, Florida recently abolished the last vestiges of joint and several liability in apportioning negligence damages in favor of a comparative fault approach.⁴⁷⁹ By doing so, Florida now joins its neighbors—Georgia, Mississippi, and Louisiana—which have already abolished joint and several liability as an incentive to attract new businesses to relocate to the region.⁴⁸⁰

473. Francis X. Rappich III & Christopher M. Harne, *Cutting Classes: Florida Tightens its Restrictions on Class Action Lawsuits*, FLA. BAR J., Mar. 2007, at 9, 12.

474. STAFF ANALYSIS, *supra* note 458, at 8.

475. Rappich & Harne, *supra* note 473, at 12.

476. *See id.*

477. *See* JUDICIAL HELLHOLES 2006, *supra* note 179, at 13.

478. Kirstin Dorsch, *Tort Reform Advocates Will Monitor Impact*, JACKSONVILLE BUS. J., Apr. 7, 2006, available at <http://jacksonville.bizjournals.com/jacksonville/stories/2006/04/10/story8.html>.

479. *See* FLA. STAT. ANN. § 768.81 (West 2008).

480. Dorsch, *supra* note 478.

In its purest form, joint and several liability makes each defendant at fault individually liable for the entire judgment awarded to the plaintiff in a negligence action, regardless of each individual defendant's percentage of fault.⁴⁸¹ It effectively makes each defendant a guarantor of all tortfeasors' obligations, allowing the plaintiff to recover from one or any combination of defendants at fault.⁴⁸² Supporters of the rule argue that it is necessary because it upholds the compensatory goal of our tort system by ensuring that plaintiffs are "fully and adequately" compensated.⁴⁸³ According to the theory, the rule is also fair because defendants are considered to be in a better position to spread the costs and risks of an insolvent defendant's liability.⁴⁸⁴

Naturally, the insurance industry strongly opposes these policy arguments. The Florida Association of Insurance Agents maintained that joint and several liability converted lawsuits into quests for financially viable "deep-pocket" defendants.⁴⁸⁵ Even if these defendants were minimally at fault for the underlying injury, they would effectively be forced to settle the lawsuit out of court to avoid being responsible for the entire damage award.⁴⁸⁶ The defense bar believed that there was a longstanding litigation "lottery" mentality prevailing in the Florida courts because plaintiffs' attorneys sought to target defendants with deep pockets.⁴⁸⁷ Resentment over the rule has been brewing in Florida for many years, especially after the oft-cited case of *Walt Disney World Co. v. Wood*.⁴⁸⁸ There, Disney World was found to be 1 percent at fault, the plaintiff 14 percent at fault, and another person 85 percent at fault, yet the plaintiff was entitled to collect the entire award from Disney.⁴⁸⁹

481. STAFF ANALYSIS, *supra* note 458, at 1.

482. *Id.*

483. See Clare Elizabeth Krumlauf, Note, *Ohio's New Modified Joint and Several Liability Laws: A Fair Compromise for Competing Parties and Public Policy Interests*, 53 CLEV. ST. L. REV. 333, 336 (2006).

484. *See id.*

485. Dave Kaiser, *Industry Cheers as Florida Repeals Joint and Several Liability*, INS. J., Mar. 30, 2006, available at <http://www.insurancejournal.com/news/southeast/2006/03/30/66914.htm>.

486. *Id.*

487. *Id.*

488. 515 So. 2d 198 (Fla. 1987).

489. *Id.* at 199.

However, proponents of joint and several liability argue that the ban still hurts taxpayers and the state because unpaid accident costs fall upon the victim and ultimately the state in higher Medicaid costs.⁴⁹⁰ Also, the rule of joint and several liability did not appear to stop companies from relocating to and doing business in Florida prior to the ban.⁴⁹¹ So, there may be some faulty analysis and reasoning supporting Florida's decision in this matter.

Nonetheless, by abolishing joint and several liability, the Florida legislature hoped to send a statement to companies throughout the country that Florida is open for business.⁴⁹² The state legislature is convinced that a state's economic development is closely tied to its litigation environment.⁴⁹³ In hopes of undoing their reputation as a "judicial hellhole," Florida is following the national trend of enacting tort reform. Like Texas, Florida has placed caps on non-economic damages in medical malpractice suits⁴⁹⁴ and the amount necessary to secure an appeal bond.⁴⁹⁵ Every tort reform enacted, from limiting class actions to abolishing joint and several liability, provides an additional arrow in the quiver of economic recruiters.⁴⁹⁶

VI. CONCLUSION

Like many other states, New York, Illinois, Texas, and Florida all find themselves in a difficult predicament. On one hand, states have a duty to protect consumers and discourage businesses from engaging in actions that threaten or harm large groups of people. On the other hand, states are under tremendous pressure from the business community to enact tort reforms that limit business liability and preserve the economic activity that benefits all of society. Each state handles this difficult task of balancing competing interests in its own way.

It is fortunate for the nation that each state has the freedom to adopt its own standards and procedures for handling class and

490. Dorsch, *supra* note 478.

491. *Id.*

492. See *Governor Signs Repeal of Joint and Several Liability Law*, S. FLA. BUS. J., Apr. 27, 2006, available at <http://jacksonville.bizjournals.com/southflorida/stories/2006/04/24/daily48.html>.

493. See Kaiser, *supra* note 485.

494. See FLA. STAT. ANN. § 766.118 (West Supp. 2007).

495. See *id.* § 45.045.

496. See *id.*

complex litigation. Each state can act as a mini-laboratory,⁴⁹⁷ experimenting with different amounts of tort reform, consumer protection, and due process considerations. Each state can examine the results of other states' efforts and consider what standards are most effective for achieving the balancing of interests that state courts struggle with every day when deciding class and complex litigation.

Perhaps the best way to understand the difficult predicament in which states find themselves in is to consider a swinging pendulum. The pendulum can swing either way, toward protecting the due process rights of consumers and discouraging “legalized theft” or in the opposite direction, toward protecting the due process rights of defendant corporations and inhibiting “legalized blackmail.” The underlying message implied in CAFA—that state courts are abusing the class action vehicle—has not gone unnoticed and is encouraging state courts and legislatures to swing the pendulum toward enacting further tort reforms. It remains to be seen how far the pendulum will swing.

497. The metaphor of states as democratic laboratories is not novel. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

